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Articles

Sovereignty in Silence

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INTRODUCTION

John Austin once complained of the “childish fiction” of conceiving of the law as “a miraculous something made by nobody . . . , existing from eternity, and merely *declared* from time to time by the judges.”¹ The object of Austin’s railing is a central thesis of natural law jurisprudence: that the law shares with morality a timeless, authorless nature—a nature susceptible to human discovery but not constituted by human invention. This thesis is thought to be vindicated by three common judicial practices. First, in the hardest of cases, our courts seek to “find” or “declare” law already existing though never before described by legal institutions.² Second, even in cases in which previous descriptions of “the law” by judicial or other legal institutions exist, our courts sometimes treat these descriptions as mistakes—as inaccurate statements of the law. It has been our courts’ willingness to correct these mistakes by overruling or distinguishing past judicial decisions that has engendered continued faith that the common law will “work itself pure.”³ Third, and most important, courts apply both the “newly discovered law” that emerges from hard cases and the “law purified of mistakes” that emerges from other cases to transactions in the past without violating norms against retroactivity; in such situations, the law is thought to have existed prior to the transactions at issue.⁴

The presupposition that seems to underlie these judicial practices—that common law adjudication is a process of discovery rather than declaration—was rejected by Austin as a childish fiction in favor of an account of the common law that better squared with his positivist jurisprudence.⁵ According to Austin, the common law was to be thought of as a collection of commands issued by judges to litigants and future members of the bench. The legal status of common law rules depended on their being understood as communications by one in authority. Common law rules, that is, were

1. 2 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 655 (4th ed. 1873) (emphasis in original).

2. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that discovery gives title as matter of law despite absence of any traditional legal source for this principle); *Union Pac. R.R. v. Cappier*, 66 Kan. 649, 72 P. 281 (1903) (holding that law provides no duty to aid trespassers despite lack of statute, common law precedent, constitutional provision, or custom so declaring).

3. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958); see also L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940) (judicial reform is part of “the eternal process by which the common law works itself pure and adapts itself to the needs of a new day”); Schauer, *Is The Common Law Law?* (Book Review), 77 CAL. L. REV. 455, 455 (1989) (“[T]he lawmaking power of common law courts is more than interstitial, and extends to modifying or replacing what had previously been thought to be the governing rule when applying that rule would generate a malignant result in the case at hand.”).

4. See L. FULLER, *supra* note 3, at 133; Schauer, *supra* note 3, at 455.

5. See 1 J. AUSTIN, *supra* note 1, at 88–106; J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 281–300 (H.L.A. Hart & J. Burns eds. 1970); Hart, *Bentham’s ‘Of Laws in General’*, 2 RECHSTHEORIE 55 (1971). For further analysis of Austin’s legal positivism, see R. EASTWOOD & G. KEETON, *THE AUSTINIAN THEORIES OF LAW AND SOVEREIGNTY* (1929); J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 5–43 (1970); J. RAZ, *PRACTICAL REASON AND NORMS* 50 (1975); A. ROSS, *DIRECTIVES AND NORMS* 107 (1968); G. VON WRIGHT, *NORM AND ACTION* 70–92 (1963).

posited by sovereign-like authorities: Judges did not discover the law, they invented it.

Yet, as others have observed, our concept of common law rules, like our concept of the rules of customary law, is not best explained by the positivist's communicative thesis. There is great difficulty, in Brian Simpson's view, "in maintaining the thesis that all law is posited . . . when dealing with custom, which common sense would suggest is not laid down; customs, it seems more plausible to say, grow up."⁶ For the same reason, Simpson observes, we do not think of the common law as a set of authoritative judicial pronouncements so much as a construction of professional consensus concerning what that common law is in fact. According to Lon Fuller, "[t]he common law imperceptibly becomes a part of men's common beliefs, and exercises a frictionless control over their activities which derives its sanction not from its source but from a conviction of its essential rightness."⁷ Thus, claims Frederick Schauer, "the common law, for all its *talk* of rules, does not seem to be a rule-bound method of decision-making. Rather, the rules of the common law appear to be but rules of thumb."⁸

Insofar as the common law indeed fails to function as a set of authoritative rules, it resists the positivist's attempt to explain its legal status in terms of the judicial acts which produced it. The best candidate for the sort of institutional act that the legal positivist considers the *sine qua non* of law is a communicative act by one in authority. If, however, the common law is not created by such acts, then the most tempting alternative explanation of its status may well be that of the natural law theorist; namely, that the rules of the common law function as institutional approximations of the canons of morality.⁹

The difficulties involved in explaining the legal status of the common law are of historical concern to those defending a positivist jurisprudence. Jeremy Bentham was so suspicious of the natural law tendencies of com-

6. Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 9, 11 (W. Twining ed. 1986).

7. L. FULLER, *supra* note 3, at 134.

8. Schauer, *supra* note 3, at 455 (emphasis in original).

9. The natural lawyer's view is not the only alternative to the communicative theory of common law. As Simpson himself illustrates, one might think that determining the nature of the common law is solely a question of fact and not of value (i.e., one might be a legal positivist about the common law) and yet reject the idea that the common law is created by communicative acts on the part of judges. In other words, one might believe, as Simpson apparently does, that the common law is a matter of lawyerly consensus which arises rather than being laid down by anyone. Simpson, *supra* note 6, at 18-21. For a similarly positivist view, see Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987) (holdings of common law cases are derived from opinions entrenched in legal profession). See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 40 (1977) (common law principles are validated by "sense of appropriateness" on part of public and legal profession).

A full defense of a natural law view of precedent would reject these positivist views because they fail accurately to account for our common law practices. I mention them here only to suggest that one might find some room within legal positivism for a non-communicative theory of the common law, however unpersuasive such a positivist version of the theory may prove to be.

mon law reasoning that he sought to repudiate the common law tradition entirely, urging statutory codification of all areas then subject to common law adjudication.¹⁰ As Bentham's championship of codification illustrates, legal positivists have long believed that their jurisprudence successfully accounts for the legal pedigree of legislation. For statutory enactments look like paradigms of posited law, their legal status wholly conditioned on the fact of their institutional genesis. In light of the victory seemingly scored by legal positivism in the legislative arena, many defenders of the natural law tradition have reconciled themselves to a theory under which law functions as a web of moral principles that has been broken or torn in places by the intervention of legislative pronouncements. These theorists, like the common law lawyers before them, have understood statutes as alien intrusions into an otherwise uniform system of law. They have thus implicitly endorsed and augmented the old common law maxim that statutes in derogation of the common law should be strictly construed.¹¹

At the heart of the claim so troublesome to natural law theorists—that legislative enactments function as paradigmatic legal positings—is the assumption that legislation is a communicative enterprise. Whatever the problems posed by common law adjudication for Austin's command theory of law, contemporary courts and legal theorists have come to accept without question the view that at least statutes function as orders by a sovereign institution to audiences of citizens and officials.¹² It is their apparent

10. J. BENTHAM, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 95 (J. Burns & H.L.A. Hart eds. 1977); J. BENTHAM, *OF LAWS IN GENERAL* 1-30, 232-46 (H.L.A. Hart ed. 1970); see H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 76 (1982) (Bentham's "enthusiasm for codification had become a passion and his hatred of the uncoded formless 'uncognoscible' common law had become very near a mania"); G. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986).

11. Ronald Dworkin has internalized this maxim in his refusal to give the "gravitational force" to statutes that he gives to common law decisions and principles. R. DWORIN, *supra* note 9, at 111. And Michael Moore has argued that the holistic moral reasoning characteristic of common law adjudication must be replaced by a clause-bound interpretivism when dealing with statutes. Unlike common law rules, statutes are law because they are enacted, not because they are right. Compare Moore, *Precedent, Induction, and Ethical Generalization*, in *PRECEDENT IN LAW* 183 (L. Goldstein ed. 1987) [hereinafter Moore, *Precedent*] (defending holistic view of common law) with Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) [hereinafter Moore, *Interpretation*] (defending clause-bound, interpretive view of statutory law).

12. Lon Fuller has described the process of legislation as follows: "Government says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.'" L. FULLER, *THE MORALITY OF LAW* 39-40 (2d ed. 1969). While H.L.A. Hart rejected this simplistic view of legislation as a series of commands, he nevertheless maintained that "as its hold over the minds of many thinkers suggests, [the command model of legislation] does contain, though in a blurred and misleading form, certain truths about certain important aspects of law." H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961). One such truth, according to Hart, is that among those authoritative criteria for identifying primary rules of obligation provided to citizens and officials by the rule of recognition is a "supreme criterion"—one that makes legislative communications a primary source of law.

Alternatively, Joseph Raz has argued that having "a right to rule" is "correlated with an obligation to obey on the part of those subject to the authority." J. RAZ, *THE MORALITY OF FREEDOM* 23 (1986). In Raz' view, only the communicative model of legislation can account for the supreme authority of the legislature, for only "valid commands or other valid authoritative requirements impose

status as authoritative communications that makes legislative decrees appear to be the product of institutional invention and that imbues them with the apparent power to alter or change existing obligations. And it is their alleged character as communications issued by a sovereign possessing certain authorial intentions that has led courts to assume that statutes, unlike past cases, must be interpreted according to conversational conventions.¹³ As Reed Dickerson has clearly stated, it is assumed that "*as a communication from the legislature to one or more legislative audiences, a statute is subject to the accepted standards of communication in effect in the given environment.*"¹⁴ Indeed, he believes this to be a constitutional assumption: "[A] court seeking to discharge its constitutional duty of deference to the expressions of legislative will made in the constitutionally prescribed way is obliged to ascertain the meaning of those expressions according to *accepted standards of communication.*"¹⁵

In this article, I investigate, and ultimately challenge, the currently entrenched assumption that one must conceive of legislation as a communicative process. In Part I, I set out the necessary conditions for communication.¹⁶ In Part II, I apply these conditions to legislative utterances and

obligations." *Id.* at 37. "Orders and commands," he claims, "are among the expressions typical of practical authority. Only those who claim authority can command." *Id.*

For a further expression of the assumption that legislation functions communicatively, see Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

13. See, e.g., *Town of Menominee v. Skubitz*, 53 Wis. 2d 430, 437, 192 N.W.2d 887, 890 (1972) ("[T]he meaning of some words in a statute may be enlarged or restricted in order to harmonize them with the legislative intent of the entire statute."); see also E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 256 (1940) ("[B]efore the court can resort to any other source for assistance, it must first seek to find the legislative intention from the words, phrases and sentences which make up the statute subject to construction."); Breitel, *The Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 1, 26-27 (M. Paulsen ed. 1959) ("Legislative primacy means . . . that construction must first be effected with full commitment to legislative intent and purpose . . .").

14. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 10 (1975) (emphasis added). Henry Hart and Albert Sacks similarly conceived of the communicative model as constitutionally imposed:

[Courts] cannot permit the legislative process, and all the other processes which depend upon the integrity of language, to be subverted by the misuse of words.

. . . .
 . . . [T]hese policies of clear statement may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally. . . . [T]hey constitute conditions of the effectual exercise of legislative power. But the requirement should be thought of as constitutionally imposed.

H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1412-13 (tent. ed. 1958).

15. R. DICKERSON, *supra* note 14, at 10-11 (emphasis added).

16. This account is drawn largely from the literature on speech act theory—a literature which has received little attention by legal theorists and which has rarely been applied in jurisprudential theory-building. *But see* Guest, *The Scope of the Hearsay Rule*, 101 LAW Q. REV. 385, 389 (1985) (using speech act theory to define what it means to make a statement for purposes of determining what constitutes assertive conduct under hearsay rule); Moore, *Interpretation*, *supra* note 11, at 288-91; Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 247-56 (1981); Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985). Sinclair's approach to speech act analysis, although also based on the work of H.P. Grice, diverges significantly from that which I will undertake. Sinclair's article concentrates on an application of what Grice called "conversational constraints" to legislative speech, assuming from the start that legislative

suggest that, contrary to the assumption common among legal theorists, such utterances cannot and need not be taken to be communications. In Part III, I develop an outline of a new, non-communicative model of legislation—a model under which legislative enactments are taken to function not as communications by a sovereign speaker to an audience, the understanding of which depends upon the audience's success at deciphering authorial intentions, but as empirical descriptions of optimal legal arrangements, the understanding of which depends only upon the discovery of the moral facts that make such legal arrangements optimal.

It is important to recognize from the start the limitations of this project. I do not undertake the construction or defense of the political theory that one would need to endorse in order to adopt the alternative model of legislation that I sketch in Part III.¹⁷ In other words, I do not provide normative reasons to adopt a natural law theory of legislation. The model that I construct in Part III is solely an illustration of what a non-communicative theory of legislation might look like were one prepared to abandon a communicative model for conceptual, rather than normative, reasons.

Despite its limitations in this respect, I expect to derive three fairly hefty pay-offs from this project. First, if the project succeeds in establishing both that statutes fail to qualify as acts of communication and that there exists an alternative theory free of communicative commitments that provides a coherent account of the nature of legislation, then I have armed the natural law theorist for a rematch with the legal positivist over the best means of accounting for the legal pedigree of legislation. For if statutory enactments are not best thought of as communications, then there is less reason to think that their status confirms the legal positivist claim that statutes are paradigmatic examples of posited law.¹⁸ Moreover, if statu-

enactments are, in fact, conversational speech. Sinclair thus assumes what this article challenges, and although his work is of great interest and sophistication, it offers little to the debate concerning the appropriateness of employing speech act analysis in constitutional, legislative, and common law interpretation.

17. The political theory that I have in mind can nonetheless be quickly mapped. Its jurisprudential postulate is that a statute must bind the conscience of citizens and judges to be law, for nothing is law which does not obligate. This was St. Thomas Aquinas' controversial thesis about law. See T. AQUINAS, *SUMMA THEOLOGICA* I-II, question 96, art. 4, at 1019–20 (Fathers of English Dominican Province trans. 1947). The political theory's moral postulate is that the utterances of a legislature—even one democratically selected and possessing every other attribute typically thought to be a virtue in political decisionmaking—cannot by themselves bind the conscience of citizens and judges in the way that a communicative theory of legislation demands. I have defended this second postulate at length in H. Hurd, *Challenging Authority* (July 1989) (unpublished manuscript on file with author). As I argue there, the most that can be justified is that courts and citizens treat statutes as epistemic indicators of the natural law, not as competitors to it. For the initial sketch of this thesis, see *infra* text accompanying notes 125–64.

18. As in the case of the common law, see *supra* note 9, eliminating the communicative theory of statutory law does not rule out other, non-communicative theories that are still positivist in character. In the case of statutes, however, it is even more difficult than in the case of the common law to imagine non-communicative legislative acts that create law. One possibility might be to think of statutes not as *general* commands but as legislatively accepted exemplars (particulars) that courts are to treat like common law precedents as they decide cases. According to this view, determining what the statute provides is arguably a question of fact and not of value, even though the legislature created

tory enactments are plausibly construed as descriptions of legally salient moral facts, then natural law jurisprudence might once again unite statutory and common law rules within a single theory and thus restore to jurisprudential legitimacy the now discredited view that law is a seamless, unbroken web of moral principles.

Second, if we agree that statutes need not and should not be thought of as communications, then we have dealt a significant blow to those who are convinced that legislative interpretation ought to proceed via an inquiry into the authorial intentions of the legislators responsible for drafting or enacting particular statutory provisions.¹⁹ For how citizens and judges interpret statutes depends in large part on whether they conceive of statutes as ordinary conversational utterances. If statutes are indeed best thought of as communications, then an interpreter has every reason to seek their meaning in the intentions of their speaker, that is, in the intentions of the legislature. But if statutes are not best thought of as communications, then an interpreter must find some other means by which to justify inquiring into legislative intent as a necessary or useful interpretive task.

Finally, if legislation is better explained by a non-communicative theory, then jurisprudential debates currently cast in terms of the assumption that statutes function as communications must be recast to reflect the non-communicative nature of legislation. Consider, for example, the debate between Lon Fuller and Meir Dan-Cohen. As Fuller famously proclaimed, there are eight virtues to law-making: generality, prospectivity, publicity, stability, clarity, consistency, possibility of compliance, and congruence of official and lay interpretations.²⁰ Dan-Cohen has recently argued in response that publicity, clarity, consistency, and congruence are not always virtues of law-making, for sometimes a law-maker finds it necessary to send different messages to citizens and officials, and so finds it necessary to curtail the publicity of particular laws or to obscure particular legislative messages.²¹ Both sides in this debate have assumed a communicative model of legislation, for the dispute between Fuller and Dan-Cohen has been about the best way for a law-maker (the speaker) to send messages (communications) to judges and citizens (the audiences). If legislation fails to qualify as an act of communication, then the jurisprudential debate between Fuller and Dan-Cohen is largely beside the point.

Since we reap these pay-offs only if statutes are plausibly conceived of as something other than communications, we must begin by inquiring into

that fact without communicating.

19. E.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (expounding view that legislative interpretation requires understanding legislators' intentions); Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1449-51 (1988) (authored by Heidi M. Hurd) (discussing Bork's views on legislative intent).

20. See L. FULLER, *supra* note 12, at 46-91.

21. See Dan-Cohen, *supra* note 12, at 625-77.

the nature of communication and the extent to which legislation shares in that nature. In Part I, I sketch the conditions of communication.

I. THE COMMUNICATIVE ENTERPRISE

A. *Signs and Signals*

Interactions between persons are both characterized by and dependent upon what David Lewis has termed "signaling"²²—the conveyance of information via conventions that have been either tacitly or explicitly derived from regularities either in human behavior or in the world. A significant amount of signaling in Lewis' model is unintentional, or to be more precise, involuntary. Thus, a sneeze may signal one within hearing range that the afflicted individual is suffering from allergies, though the sneeze may by no means have been intended to so signal this fact. Similarly, the clatter of dishes may signal a listener that supper is being prepared, though the conveyance of such a "message" in no way motivated the particular handling of the dishes involved.²³ Yet even actions which are intentional, or voluntary, may be unintended signals. Persons who talk to themselves as they go about their daily chores may do so intentionally, but they may not intend their soliloquies to signal others of their thoughts or feelings, even though their utterances may do so successfully. Similarly, entries in diaries are intentional but may not be intended as signals to others. Unintentional (involuntary) and unintended signals are best conceived of as "signs," possessing what H.P. Grice termed "natural" meaning.²⁴ They function as symptoms of conditions in the world to which they are causally related. Thus we can say, "Her sneeze *means* that she has allergies"; "The clatter of dishes *means* that dinner will soon be served"; "The entry in the diary to the effect that she was unhappy last week *means* that she was unhappy last week"; and "His spontaneous exclamation *means* that he was surprised." In each case we use the term "means" in its natural sense to capture a causal relation between the sign and a state of affairs in the world. As I will argue in Part III, legislative enact-

22. D. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 122-59 (1969).

23. As Robert Martin has explained, "Signals can be signals *that* something or other is the case or signals *to* do something or other or both." R. MARTIN, THE MEANING OF LANGUAGE 81 (1987) (emphasis in original). Thus, the footstep of an unwanted visitor may be a signal *that* the visitor is approaching and a signal *to* walk the other direction. As Lewis explains, a signal *that* a state of affairs holds is an *indicative signal*, while a signal *to* do something is an *imperative signal*. D. LEWIS, *supra* note 22, at 144.

24. Grice, *Meaning*, in READINGS IN THE PHILOSOPHY OF LANGUAGE 436, 437 (J. Rosenberg & C. Travis eds. 1971). Grice's three examples of the natural sense of the expressions "means," "means something," and "means that" are:

"Those spots mean (meant) measles."

"Those spots didn't mean anything to me, but to the doctor they meant measles."

"The recent budget means that we shall have a hard year."

Id. at 436.

ments, like entries in diaries, may be plausibly conceived of as “signs” possessing natural meaning.

Unlike the above examples, however, much of our signaling is both intentional and intended. We use gestures and verbal acts deliberately to convey messages to those around us. For example, we may attempt to convince another of our displeasure with a particular cup of coffee by “making a face,” by uttering noises of disgust, or by spitting it into a sink. All such actions constitute signals in Lewis’ model, for all function as conventional means by which we may make an observer believe that we are unhappy with our coffee. Of course, in most circumstances, the most reliable means of conveying such a message is simply by using language. Telling others that the coffee is poor stands a good chance of signaling to them such a fact.

When we intend our signals to convey a message to others, those signals have what Grice termed “non-natural” meaning, or “meaning_{NN}.”²⁵ Our success at signaling others—at conveying non-natural meaning—depends upon the success with which we solve what Lewis rightly recognizes as a coordination problem between ourselves and our audiences. Such a problem is generated whenever a speaker seeks to signal an audience and an audience seeks to be signaled. In such instances, the speaker and audience achieve a “coordination equilibrium” only when the speaker produces actions that are in accord with recognized signaling conventions, and the audience, understanding those conventions, takes these actions to be a sign that the speaker wants to signal the audience in a certain way. Communication successfully occurs, then, when (1) a speaker, seeking to signal others, uses conventional actions because he or she reasonably believes that such actions will be taken by the audience in the manner intended; and (2) the audience so takes the actions.

B. *Requirements for Communicative Signaling*

The coordination problems posed by our need to signal and be signaled by others have been largely solved by the development of conventions which have made salient the performance of particular linguistic acts to communicate particular messages in particular circumstances. When one seeks to signal another of an impending danger, one warns; when one seeks to signal the need for a particular object, one requests; when one seeks to signal one’s regret concerning some past act, one apologizes; and when one seeks to signal one’s failure to understand or one’s need for information, one questions. The communicative acts which have developed as means of solving the coordination problems of communication (of which

25. *Id.* at 437. “I include under the head of nonnatural senses of ‘mean’ any senses of ‘mean’ found in sentences of the patterns ‘A means (meant) something by x’ or ‘A means (meant) by x that’” *Id.*

J.L. Austin identified over a thousand, including the above four examples) have come to be referred to as “illocutionary speech acts.” Illocutionary speech acts are performed whenever a sentence is uttered with a particular “conventional force” that indicates what one is intending to convey by so uttering the sentence.²⁶ One must look to a speaker’s illocutionary act to determine just what signal the speaker is attempting to convey by making particular verbal sounds. In other words, it is a speaker’s illocutionary act which gives, in Grice’s terms, the meaning_{NN} of what is spoken. As John Searle has explained:

[I]t is essential to any specimen of linguistic communication that it involve a linguistic act. It is not, as has generally been supposed, . . . the token of the symbol or word or sentence, which is the unit of linguistic communication, but rather it is the *production* of the token in the performance of the speech act that constitutes the basic unit of linguistic communication. To put this point more precisely, the production of the sentence token under certain conditions is the illocutionary act, and the illocutionary act is the minimal unit of linguistic communication.²⁷

As Searle’s comment makes clear, the successful performance of particular illocutionary acts typically depends upon and includes the performance of certain “lesser” acts. In performing the illocutionary act of warning another about the weather, one typically utters a sentence with a certain sense and reference, for example: “It’s surely going to rain.” Yet one can also imagine successfully performing the same illocutionary act without invoking such a sentence, for example, by jumping up and down, pointing furiously in the air, and gasping a good deal. When one invokes a sentence as one’s means of performing an illocutionary act, one performs what has come to be termed a “locutionary act.”²⁸ One performs such a locutionary act whenever one utters a meaningful proposition about anything. But as Searle points out, it is not the uttering of such a proposition, but rather, the uttering of such a proposition *with the particular intent* to warn, promise, comment, describe, approve, welcome, or request, which functions as the basic unit of communication. It is the performance of locutionary acts within the conventionally recognized illocutionary modes that solves communicative coordination problems. In seeking to determine just what it is that a speaker is intending to signal, one is concerned fundamentally not with the locutionary act which he or she performs (that is,

26. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 108–09 (1962); M. DEVITT & K. STERELNY, *LANGUAGE AND REALITY: AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE* 20–21 (1987); Searle, *What is a Speech Act?*, in *READINGS IN THE PHILOSOPHY OF LANGUAGE*, *supra* note 24, at 614, 615.

27. Searle, *supra* note 26, at 615.

28. See sources cited *supra* note 26.

not with the particular proposition which he or she utters) but with the illocutionary act which he or she intends, to which the locutionary act is but a heuristic guide.

Of course, one typically accomplishes a variety of results when one performs illocutionary acts. One's utterances frequently worry, irritate, excite, anger, frustrate, tantalize, or incite fear in one's listeners. Some of the effects that one brings about in performing particular illocutionary acts are expected and intended while others are not. When one warns, one intends and expects that one's audience will be warned; when one berates, one intends and expects that one's audience will be humiliated; and when one requests, one intends and expects that one's audience will be motivated to meet one's reported need. But when one informs another of an impending storm, one may not intend or expect that as a result of one's assertions that audience will close the windows, corral the steers, retreat to a storm cellar, or become hysterical. Insofar as an illocutionary act is distinct from its production of certain effects, it is useful to conceive of the production of those effects as itself a different sort of act. As J.L. Austin maintained, "we must distinguish 'in saying it I was warning him' from 'by saying it I convinced him, or surprised him, or got him to stop,'" and thus we must distinguish illocutionary acts from "perlocutionary acts."²⁹ Perlocutionary acts are those acts which one performs, intentionally or unintentionally, *as a result of* performing certain illocutionary acts.³⁰

Insofar as many perlocutionary acts are entirely unintended—for example, boring, annoying, and surprising—such acts, like the locutionary acts upon which they often depend, cannot be appealed to as a means of detecting what it is that the speaker sought to signal. While a speaker may well have bored his audience, the fact that the audience found itself bored is of little help to its members in their attempt to decipher the content of the message that the speaker sought to convey. The speaker's perlocutionary act of boring was not a conventional means of signaling his audience of particular facts; hence it is not to this act, but rather to the illocutionary act which accomplished this further perlocutionary act that the audience looks for guidance concerning the content of the speaker's intended signal.

Communication or "signaling" is thus uniquely characterized by the performance and recognition of illocutionary acts. An understanding of which illocutionary act a speaker is intending to perform is an under-

29. J.L. AUSTIN, *supra* note 26, at 109.

30. The three types of speech acts reflect three types of intentions that a speaker could have in uttering a proposition. A *locutionary* intention is an intention to utter a sentence having a particular sense and reference; such an intention establishes the voluntariness with which a particular utterance, possessed of particular sense and reference, is made. An *illocutionary* intention is an intention to engage in a performative act—to demand, request, warn, inform, etc. And a *perlocutionary* intention is that further intent with which a locutionary and illocutionary act is performed. Thus, in uttering the sentence "It is raining outside," one may have the locutionary intent to utter a meaningful sentence about the weather, the illocutionary intent to warn listeners of adverse conditions, and the perlocutionary intent to cause listeners to take umbrellas with them.

standing of what Grice called non-natural meaning, or meaning_{NN}. If legislative utterances are properly thought of as communications, it must be by virtue of the fact that they represent the performance of illocutionary acts—that they possess meaning_{NN}. To make out the thesis that legislation is a communicative enterprise, legal theorists must do more than point to the fact that the enactment of statutes clearly involves locutionary acts—that is, the utterance of propositions possessing sense and reference. And they must do more than point to the fact that the enactment of statutes clearly accomplishes a lengthy list of perlocutionary effects, for example, conformity to traffic laws, labelling of toxic chemicals, or payment of taxes. A communicative thesis concerning acts of legislation depends fundamentally on the success with which theorists can make out the claim that legislatures perform the types of illocutionary acts upon which signaling depends.

Just what is involved in making out this claim? The answer to this jurisprudential question depends upon the answer to the more general philosophical question of when a speaker is ever thought to perform an illocutionary act. Recall that David Lewis provided a preliminary answer: Communication occurs when (1) a speaker, seeking to signal others, uses conventional actions (illocutionary acts) just because he or she reasonably believes that such actions will be taken by the audience in the manner intended; and (2) the audience so takes the actions. This answer is a reflection of the rich analysis provided by H.P. Grice.³¹ As Grice has characterized the necessary conditions for communication, a speaker *S* means_{NN} something by an utterance, and so seeks to signal an audience *A* by use of an illocutionary act, if:

- (1) *S* intends to produce by an utterance a certain response in *A*; and
- (2) *S* intends that *A* shall recognize *S*'s intention to produce that certain response; and
- (3) *S* intends that *A*'s recognition of *S*'s intention to produce such a response shall function as the reason, or part of the reason, for *A*'s response.³²

31. Grice, *supra* note 24. Mark Platts has said, "[W]e need not consider the full range of possible intentional theories, for it has been compellingly shown by Grice that one kind of intentional theory is by far the most plausible." M. PLATTS, *WAYS OF MEANING: AN INTRODUCTION TO A PHILOSOPHY OF LANGUAGE* 86 (1979). For an appreciation of the extent to which Grice's analysis of the intentions required for communication has been accepted, see R. MARTIN, *supra* note 23, at 83–95; P. STRAWSON, *LOGICO-LINGUISTIC PAPERS* 155–58 (1971); Searle, *supra* note 26, at 620–22; Ziff, *On H.P. Grice's Account of Meaning*, in *READINGS IN THE PHILOSOPHY OF LANGUAGE*, *supra* note 24, at 444.

32. Grice's own summary of these conditions may help to illuminate the interplay between the elements necessary for successful communication. As Grice stated, for a speaker to mean_{NN} something by an utterance *x*:

A must intend to induce by *x* a belief in an audience, and he must also intend his utterance to be recognized as so intended. But these intentions are not independent; the recognition is intended by *A* to play its part in inducing the belief, and if it does not do so something will have gone wrong with the fulfillment of *A*'s intentions. Moreover, *A*'s intending that the recognition

Communication is complete under these conditions when:

- (1) *A* responds as *S* intended; and
- (2) *A* recognizes *S*'s intention to produce that response in *A*; and
- (3) *A*'s recognition of *S*'s intention to produce that response in *A* functions as the reason, or part of the reason, for *A*'s response.

To test whether the conditions explicated by Grice are both necessary and sufficient conditions of communication, it is useful to review the considerations which prompted them. If upon examining the foundations of the Gricean theory of communication it appears that the above conditions are at least necessary, then those conditions can be legitimately employed to determine whether statutory utterances are appropriately thought of as communicative signals. At stake, then, is the adequacy of the above set of conditions as a model with which to test legislation. The theorist committed to a communicative theory of legislation is entitled to reject this model only if its conditions fail to distinguish signals from signs.

1. *The Uptake Requirement*

Consider, first, the example that prompts Grice's first criterion:

It is no doubt the case that many people have a tendency to put on a tail coat when they think they are about to go to a dance. . . . Does this satisfy us that putting on a tail coat means_{NN} that one is about to go to a dance (or indeed means_{NN} anything at all)? Obviously not.³³

The enterprise of communication is intentional. One must intend to affect the propositional content of another's beliefs in order to signal that individual. One must intend to produce a "certain response" in one's audience. This response has been described by J.L. Austin as "uptake."³⁴ The intent to secure uptake is thus the intent to alter the propositional content of others' beliefs by producing in them an understanding of the locutionary act that one performs with an utterance. For example, a speaker who seeks to warn an audience that an area of ice is thin satisfies the first condition—call it the "uptake requirement"—if, in saying "the ice is thin," she intends her statement to produce on the part of her audience a belief that the ice is thin.

should play this part implies, I think, that he assumes that there is some chance that it will in fact play this part, that he does not regard it as a foregone conclusion that the belief will be induced in the audience whether or not the intention behind the utterance is recognized.

Grice, *supra* note 24, at 441.

33. *Id.* at 438.

34. J.L. AUSTIN, *supra* note 26, at 116.

2. *The Reflexivity Requirement*

The first criterion of uptake cannot, by itself, exhaust the requirements for non-natural meaning. As Grice explains, he might leave *B*'s handkerchief near the scene of a murder in order to prompt a detective to believe that *B* was the murderer; but neither the handkerchief, nor his act of leaving it there, could be said to mean_{NN} anything. For while the first Gricean condition might be satisfied—the detective might well form the belief that *B* was the murderer—the handkerchief would function (and would be intended to function) merely as a *sign* possessing natural meaning; it would not serve as a *signal* possessing meaning_{NN}. For just as a gray thunder cloud naturally means rain, so an item found at the scene of a murder and belonging to a person other than the victim naturally means that its owner was present at or around the time of the killing. Grice concluded that “for *x* [the leaving of the handkerchief] to have meant_{NN} anything, not merely must it have been ‘uttered’ with the intention of inducing a certain belief, but the utterer must also have intended an ‘audience’ to recognize the intention behind the utterance.”³⁵

Communication, then, depends on conveying both propositional content and illocutionary force. A speaker must intend both that an audience form a certain belief and that the audience recognize that the speaker intends the audience to form this belief. The speaker who intends the statement, “The ice is thin,” to be a communication must intend that her audience form the belief that the ice is thin and that the audience recognize her intent to get it to form that belief. The latter is accomplished by intending that the audience recognize that the speaker is engaged in a particular conventionally recognized illocutionary act. The best way of getting audience members to recognize her intention to alter their beliefs about the safety of the lake is by prompting them to realize that her statement, “The ice is thin,” is a warning about the condition of the ice. Thus, the importance of the many illocutionary acts made possible by language is that they facilitate an audience’s recognition of a speaker’s intention to have her communicative intentions recognized.

3. *The Causal Requirement*

The second criterion that requires speakers to possess the reflexive intention that audience members recognize their communicative intention—what I shall call the “reflexivity requirement”—fails to complete the set of conditions for communication, for it fails, as Grice says, to distinguish between “‘getting someone to think’” and “‘telling.’”³⁶ Consider the example of Herod’s presentation to Salome of the head of St.

35. Grice, *supra* note 24, at 440.

36. *Id.*

John the Baptist. By this act, Herod presumably intended to make Salome believe that St. John the Baptist was dead (so the act satisfies the uptake requirement) and intended Salome to recognize that he intended her to believe that St. John the Baptist was dead (so the act satisfies the reflexivity requirement). But Herod's act does not have non-natural meaning, claims Grice, for Salome would have concluded that St. John the Baptist was dead merely by being presented with his head on a charger: Her recognition of Herod's intention to make her believe that St. John was dead would have been irrelevant to her belief. Another way to put this is that the very fact that St. John the Baptist's head was on a charger functioned as a sufficient *sign* of his death such that no further *signal* was needed.

For this reason, claims Grice, a third requirement is necessary to delineate instances of non-natural meaning from those of natural meaning. To capture the nature of this third requirement, Grice asks us to compare the following cases: (1) *A* shows Mr. *X* a photograph of Mr. *Y* displaying undue familiarity with Mrs. *X*; (2) *A* draws a picture of Mr. *Y* behaving in this manner and shows it to Mr. *X*. Grice explains the difference between these cases as follows:

[I]n case (1) Mr. *X*'s recognition of [*A*'s] intention to make him believe that there is something between Mr. *Y* and Mrs. *X* is (more or less) irrelevant to the production of this effect by the photograph. Mr. *X* would be led by the photograph at least to suspect Mrs. *X* even if instead of showing it to him [*A*] had left it in his room by accident But it will make a difference to the effect of [*A*'s] picture on Mr. *X* whether or not he takes [*A*] to be intending to inform him (make him believe something) about Mrs. *X*, and not to be just doodling or trying to produce a work of art.³⁷

The third requirement, then, for an act of communication to convey non-natural meaning is a causal one: A speaker must intend that an audience's recognition of his or her intention to produce a certain response in the audience should function at least in part as a *reason for* this response.³⁸

4. *The Double-Reflexivity Requirement*

The three requirements for non-natural meaning stated above—uptake, reflexivity, and causation—were originally thought by Grice to provide a

37. *Id.*

38. Consider as a final example of this requirement Grice's hypothetical in which *A* attempts to get an avaricious man to leave his room. *A* might, Grice says, throw a pound note out of the window, but such a gesture would lack non-natural meaning since its effectiveness in prompting the departure of the avaricious man would in no way depend on that man's recognition of *A*'s purpose. *A* might, on the other hand, point to the door and give the avaricious man a push in its direction. Such behavior would indeed have non-natural meaning for the recognition of *A*'s intention would be intended by *A* to be effective in speeding the man's departure. *See id.* at 441.

complete account of communication. While the necessity of these three conditions appears incontrovertible, speech act theorists, assisted by Grice himself, have since proposed different versions of a further necessary criterion.³⁹ With the addition of some form of this further criterion, it is "true to say that Grice has managed to amend his definition to meet nearly all objections."⁴⁰

Peter Strawson's version of the fourth condition necessary to complete Grice's account of communication has gained the widest recognition. Strawson has argued that Grice's criteria must include a fourth condition such that a speaker *S* must not only intend his audience *A* to recognize his intention to get *A* to think *p*, but he must also "*intend A to recognize his intention to get A to think that p.*"⁴¹ This fourth condition is required, argues Strawson, to resolve the kind of difficulty for Grice's theory posed by the following example: Suppose that *S* prepares a shopping list and tapes it to the refrigerator door in the house that he shares with *A* in the hope that *A* will take *S*'s actions to indicate that the items on the list should be bought at the local market. Suppose that while doing this, *S* knows that *A* is watching him but that *A* does not know that *S* knows that *A* is watching him. *S* realizes that *A* will not take this evidence as natural evidence (i.e., as a sign) that the items listed are needed but realizes, and indeed intends, that *A* will take his behavior as grounds for thinking that *S* intends to induce in him the belief that such items should be obtained. In this case, the uptake condition is met, for *S* intends by his actions to induce in *A* the belief that the groceries listed should be purchased. The reflexivity condition is satisfied, for *S* intends *A* to recognize his intention to induce in *A* the belief that such groceries are needed. And the causal condition is met, since *S* knows that *A* has grounds for thinking that *S* would not wish him to believe that such groceries are needed unless it were known by *S* to be true; hence *A*'s recognition of *S*'s intention to induce in him the belief that such groceries are needed will in fact seem a sufficient reason for believing that they are needed.⁴²

39. See S. SCHIFFER, *MEANING* 1-16 (1972); P. STRAWSON, *supra* note 31, at 157; Grice, *Utterer's Meaning and Intentions*, 78 *PHIL. REV.* 147 (1969).

40. M. PLATTS, *supra* note 31, at 88.

41. P. STRAWSON, *supra* note 31, at 157 (emphasis in original).

42. To avoid any confusion, I shall quote Strawson's more formal presentation of the same problem:

S intends by a certain action to induce in *A* the belief that *p*; so he satisfies [the condition of uptake]. He arranges convincing-looking 'evidence' that *p*, in a place where *A* is bound to see it. He does this, knowing that *A* is watching him at work, but *knowing also that A does not know that S knows that A is watching him at work*. He realizes that *A* will not take the arranged 'evidence' as genuine or natural evidence that *p* [as a sign that *p*], but realizes, and indeed intends, that *A* will take his arranging of it as grounds for thinking that he, *S*, intends to induce in *A* the belief that *p*. That is, he intends *A* to recognize his . . . intention [to secure uptake]. So *S* satisfies [the reflexivity condition]. He knows that *A* has general grounds for thinking that *S* would not wish to make him, *A*, think that *p* unless it were known to *S* to be

In this example, the speaker *S* satisfies all of the conditions initially spelled out by Grice. Yet this is not a case of attempted *communication* of the sort that Grice was seeking to elucidate. While the audience *A* will indeed take *S* to be trying to bring about a response on the part of *A*, *A* will not take *S* as trying, in the colloquial sense, to “tell *A* something.” Unless *S* at least intends to convey to *A* that *S* is trying to tell him something, he has not succeeded in communicating with *A*. Thus we need a fourth condition—what I will call Strawson’s “double-reflexivity requirement.”

This completes the list of conditions which a speaker must satisfy in order to be engaged in communication.⁴³ A theorist committed to a communicative model of legislation must be prepared to demonstrate that statutory enactment satisfies these four conditions. As I shall argue in Part II, this is a heavy burden.

Before I turn to the application of the conditions of communication to legislative utterances, there is one limitation of the Gricean model which cannot be ignored in the context of the present inquiry. For Grice mistakenly thought that his analysis of the necessary intentions which a speaker must have to communicate provided an account not only of when a *speaker* means_{NN} something, but also of when a *sentence* means something.

C. *Speaker's Meaning and Sentence Meaning*

For a useful insight into the relation between a speaker’s meaning and the meaning of the sentences uttered, consider Paul Ziff’s famous example:

A man suddenly cried out ‘Gleeg gleeg gleeg!’, intending thereby to produce a certain effect in an audience by means of the recognition of his intention. He wished to make his audience believe that it was snowing in Tibet. Of course he did not produce the effect he was after since no one recognized what his intention was.⁴⁴

the case that *p*; and hence that *A*’s recognition of his (*S*’s) intention to induce in *A* the belief that *p* will in fact seem to *A* a sufficient reason for believing that *p*. And he intends that *A*’s recognition of his intention [to secure uptake] should function in just this way. So he satisfies [the causal] condition

Id. at 156.

43. As Strawson’s proposed condition makes apparent, one could, in fact, generate an infinite list of further conditions for communication reflecting an infinite chain of intentions, each requiring recognition of the immediately preceding intention. To curtail the temptation to run this regress with examples even more contorted than Strawson’s, Mark Platts has quite sensibly pointed out that we need only suppose that each intention *not* have a higher intention that it not be recognized. “In this way the possibility is left open that a community of dullards, perhaps incapable of forming highly complex higher level intentions, will still be capable of [communicating] by their utterances.” M. PLATTS, *supra* note 31, at 87–88.

44. Ziff, *supra* note 31, at 447–48.

According to Grice, the madman non-naturally meant something by his exclamation, presumably that it was snowing in Tibet. But the madman's cry did not mean anything at all; it certainly did not mean that it was snowing in Tibet. The exclamation of "Gleeg gleeg gleeg!" might be uttered with any sort of locutionary, illocutionary, and perlocutionary intentions, but such intentions do not succeed in making the exclamation mean anything. It cannot be said in such a case that the speaker's meaning_{NN} tells us anything about the sentence's meaning.

Consider now the slightly different example provided by John Searle.⁴⁵ During World War II, an American soldier was captured by the Italians. The soldier wanted the Italians to believe that he was a German officer so that they would release him. The only German sentence that he could remember was a line of poetry which in German meant, "Do you know the land where the lemon trees bloom?". Knowing that the Italians who captured him knew no German, the soldier delivered this phrase with the intent that they believe him to be saying that he was a German officer and with the further intent that their recognition of this intention would cause them to release him. According to Grice's analysis, the soldier meant_{NN} that he was a German officer. Yet the sentence uttered did not mean that. Indeed, because the officer knew that his sentence did not mean that he was a German officer, it was not even true that he meant_{NN} "I am a German officer" by what he said, even though that was the belief that he hoped to induce in his listeners. This example, like that of Ziff's madman, demonstrates that the speaker's meaning, whatever it is, tells us nothing of the meaning of the sentence uttered.

Ziff's and Searle's examples differ in that the speaker of "Gleeg gleeg gleeg!" presumably thought that the conventions of his language associated this utterance type with the intention to inform an audience that it was snowing in Tibet. He thus non-naturally meant, "It is snowing in Tibet," though his utterance meant nothing. The soldier, however, knew that the conventional sentence meaning of his utterance was not "I am a German officer," and so he did not mean_{NN} this by what he said. In fact, he meant_{NN} nothing at all by his utterance: His utterance might as well have been gibberish as poetry, for all that he intended was to bring about the perlocutionary effect of convincing his captors that he was German, and this required of his utterance no meaning at all.⁴⁶

Grice has certainly recognized the difference between speaker's meaning_{NN} and sentence meaning. But he has attempted to preserve his claim

45. Searle, *supra* note 26, at 621.

46. We might say that the soldier was intending that his gibberish be taken as a *sign* of his nationality, not as a signal of it; that is, the soldier wanted his captors to think he was German by virtue of taking his German-sounding utterances to be causally related to his nationality. For further discussion of instances in which communication fails because speakers intend their utterances not as signals but as signs, see *infra* text accompanying notes 83 & 89.

that the meaning of a speaker's sentences can be unpacked in terms of the signal which the speaker intends such sentences to convey by appealing to a notion of *collective* speakers' meaning. The meaning of a sentence x , he says, "might as a first shot be equated with . . . what 'people' (vague) intend . . . to effect by x ."⁴⁷ In other words, the sentence meaning of a particular utterance can be understood not by reference to the illocutionary intentions of the speaker, but rather by reference to the illocutionary intentions that speakers *in general* have when employing such an utterance. Were a madman to utter the sentence "It is raining today" with the intent to convince his audience that the Phillies were going to win the World Series, Grice would say that his intention would tell us what he meant_{NN} by uttering the statement. But what his utterance would mean is given by the locutionary and illocutionary intentions that people in general have when uttering the statement, namely, to make people believe that it is raining today.

Yet this account of sentence meaning will not do. According to this view, the meaning of a sentence is a statistical matter: We would derive a sentence's meaning by tallying the various intentions with which the sentence is uttered and then assigning to it a meaning corresponding to the intention with which it is most often uttered. It is simple, however, to construct sentences which we are confident have *never* been uttered. Consider, for example, the following: "My aunt wears boneless pickles in her halo and burns seedless toothpaste in her pot-bellied stove." We have no difficulty in determining the meaning of such a sentence, despite the fact that there is nothing in general that people have meant in uttering it, since no one has likely ever uttered it.

Can Gricean speech act theory accommodate this difficulty? Robert Martin has argued that it can, but that this requires the theory to abandon an explanation of sentence meaning based on statistical regularity.⁴⁸ To know a language, argues Martin, is to know a "structure" that enables one to construct and to understand new utterances by combining a large but limited number of words in a large but limited number of grammatical ways. Understanding the meaning of sentences is a matter of knowing the conventions that make the combination of these elements usable to reveal illocutionary intentions. These conventions constitute the rules of what Ludwig Wittgenstein called the "language-game."⁴⁹ We can derive the illocutionary intentions that *would be* associated with any grammatically constructed sentence, despite the fact that no one has ever uttered it, precisely because of our understanding of these conventions.

47. Grice, *supra* note 24, at 442.

48. See R. MARTIN, *supra* note 23, at 91-92.

49. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 5, 26-27 (G. Anscombe trans. 1953).

Martin thus bridges for Grice the seemingly unbridgeable gap between speaker's meaning_{NN} and sentence meaning:

We can say . . . that the sentence meaning of any English sentence is its *conventional illocutionary act potential*, that is, that the conventions of English provide, for each of the possible English sentences, an illocutionary act that (depending on the circumstances) that sentence would perform

. . . .
 . . . The conventions of a language, then, permit utterance of a sentence only when the speaker has the intention to perform the appropriate illocutionary act; thus tokens uttered by a speaker conventionally signal the speaker's illocutionary intentions.⁵⁰

Yet by resorting to the notion of illocutionary act potential—a notion first put forward by William Alston⁵¹—Martin, I think, gives up the Gricean game. If the conventions of language are what provide for the illocutionary acts which may be performed by the use of a particular sentence, then the actual illocutionary act performed by the speaker of a sentence is superfluous to the meaning of the sentence uttered. We need not look to the intentions of a speaker to determine the meaning of a particular sentence uttered by the speaker if that speaker is permitted by the conventions of language to utter the sentence only with particular illocutionary intentions. The upshot of Martin's solution is the conclusion that Grice got it backwards. Contrary to what Grice contended, we must look to the conventions which govern the meaning of sentences to determine what a speaker means_{NN} rather than look to what the speaker means_{NN} to determine what his or her sentences mean.⁵²

50. R. MARTIN, *supra* note 23, at 92–93.

51. See W. ALSTON, *PHILOSOPHY OF LANGUAGE* 36–39 (1964).

52. Reed Dickerson has made the same point:

Because the author's subjective intent is knowable only through inferences drawn from his use of external signs, and because communication through external signs is possible only by virtue of established conventions, actual subjective intent is knowable, if at all, only by inference from those conventions as conditioned by context.

R. DICKERSON, *supra* note 14, at 36. Or, as Learned Hand once put it: "I cannot believe that any of us would say that the 'meaning' of an utterance is exhausted by the specific content of the utterer's mind at the moment." L. HAND, *THE BILL OF RIGHTS* 18–19 (1958). In H.L.A. Hart's words:

If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use . . . must have some standard instance in which no doubts are felt about its application.

Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 607 (1958). It is important to recognize that Grice should never have attempted to construct a theory of meaning out of a theory of communication. Had he been successful, communication would have been impossible. To suggest that meaning should be fixed by the intentions with which sentences are uttered would be to suggest that sentences have, by themselves, no meaning independent of those intentions. Were this the case, no one could express intentions. For to convey intentions—to perform illocutionary acts—one must be able to avail oneself of signals which have meaning to others; but if the meaning of all signals is derived from the intentions which are sought to be expressed through those signals, no communication could occur. Had Grice's theory of meaning been successful, it would have spelled the demise of

The importance of Grice's failure to unpack sentence meaning through an understanding of speaker's meaning is that laws need not be viewed as communicative acts of speech simply because there is no meaningful alternative. For there *is* an alternative source of meaning: sentences and the propositions they express. If sentences can possess meaning without their speaker meaning anything by them, then statutes do not (on pain of being meaningless) have to be considered communicative in nature. Rather, statutes might be like the often-hypothesized novel typed by random chance by the thirteen-thousandth monkey chained to a typewriter: meaningful and maybe even good literature, despite not having been produced as a communication by anyone for anyone. It is this alternative possibility to which I shall turn in Part III. At this point, it is simply important to recognize that this manner of viewing statutes is possible only because the Gricean ambition to reduce sentence meaning to speaker's meaning_{NN} necessarily fails.

That Grice's theory does not provide us with a theory of sentence meaning should not, however, lead us to doubt his account of when a speaker communicates to an audience. As a means to identify when a communication has occurred, Grice's analysis is clearly correct. Those convinced that laws must mean what their drafters meant_{NN} will no doubt be disappointed with the Gricean failure to make possible the derivation of sentence meaning from speaker's meaning_{NN}.⁵³ Yet their disappointment is misplaced. It is precisely because Grice failed to reduce sentence meaning to speaker's intentions that those who wish to appeal to drafters' intent when interpreting statutes may use speakers' intentions to clarify and elucidate sentence meaning.⁵⁴ In other words, it is because sentence

his theory of communication. And we would be left with no way to resolve the coordination problem confronting us whenever we seek to signal others and others seek to be signalled. See *supra* text accompanying note 25. For a good discussion of the need to separate the meaning of legislation from the intentions of legislators, see Moore, *Interpretation, supra* note 11, at 338-49; Moore, *supra* note 16, at 246-56.

53. "Every statute represents an attempt to accomplish an immediate legislative purpose, presumably an intelligible one. This purpose is coextensive with the legislative intent and . . . *corresponds also to its legislative meaning.*" R. DICKERSON, *supra* note 14, at 96-97 (emphasis added) (suggesting views of Llewellyn, Hart, and Sacks). "[T]he revelation of immediate purpose . . . constitutes [a statute's] meaning." *Id.* at 96. As was just concluded in the text, any derivation of sentence meaning from speaker's meaning requires a theory of meaning based upon statistical regularity, such that what a sentence means can be said to be what most people generally intend it to mean when uttering it. As was also just argued, such a theory of meaning is impossible to maintain, for speakers may utter many sentences for which there appears no precedent, and therefore, under the theory, no meaning. That a theory of meaning predicated on statistical regularity runs amok whenever there exists no statistical regularity is particularly problematic in the context of statutory interpretation, for many new statutory provisions (with the exception, perhaps, of their introductory phrases) are without precedent, so their utterance is devoid of statistical regularity. Those convinced that statutory provisions must mean what their drafters meant_{NN} thus operate under a fundamental confusion about the work that can be done by a theory of speaker's meaning.

54. The inability to derive sentence meaning from speaker's meaning—or statute meaning from drafter's meaning—does not thereby defeat the usefulness of appealing to a speaker's meaning where such an appeal is premised on an attempt to gain a greater understanding of the locutionary and illocutionary intentions with which a speaker uttered a sentence and the perlocutionary effects which

meaning is not the same as speaker's intentions that the latter can supplement the former in legal interpretation.

There are a variety of ways in which an understanding of sentence meaning does not exhaust our understanding of how a sentence is used. Speakers may have illocutionary intentions other than those associated with the sentences they utter and may thereby violate the conventions governing ordinary usage; they might not, that is, "play the game" correctly. They might misunderstand the conventions governing the use of particular utterances to convey particular illocutionary intentions (as in Ziff's case of the madman), or they might seek to mislead listeners about their real intentions (as in the case of a person who lies), or they might want to use their listeners' ignorance of those conventions to deceive such listeners (as in Searle's case of the soldier). Alternatively, speakers may simply play the language-game poorly: They may fail to pick out the right words or say the right things and thereby fail to convey fully the illocutionary intentions motivating their utterances. Finally, speakers may be proficient at the language-game but require assistance from their audiences where the phrases they pick to convey their illocutionary intentions are ambiguous. For example, in giving an order or telling a joke, speakers may have to rely on their audiences to decipher accurately the intentions behind their utterances. If our goal is to determine whether speakers are in fact playing the language-game correctly, or to help them play the game where we question their proficiency in its rules, or to decipher which of several messages they intend where their words are susceptible to multiple interpretations, then we will need to know more than the meaning of the sentences uttered. We will need to know the speakers' illocutionary intentions. When sentences are employed as a means of signaling, there remains much work for a theory of communication. I now turn to the question of whether statutes are best thought of as communicative signals.

a speaker hoped to accomplish by such an utterance. Those concerned with statutory interpretation commonly seek to employ legislative intent as a supplement to sentence meanings. As Reed Dickerson has stated,

[T]he legislature calls the main policy turns and the courts must respect its pronouncements. In such a relationship, it would seem clear that so far as the legislature has expressed itself by statute the courts should try to determine as accurately as possible what the legislature *intended to be done*.

R. DICKERSON, *supra* note 14, at 67 (emphasis added). Yet, as Dickerson points out, speakers engaged in daily conversations are not always successful in communicating their thoughts through the words that they choose, and legislators rarely fare better. *Id.* Dickerson's argument suggests that one must attempt to supplement one's understanding of statutes with an understanding of them in terms of their illocutionary force; that is, one should engage not only in syntactic and semantic analysis, but also in an analysis of the speech acts which statutes arguably perform.

II. STATUTES AS COMMUNICATIVE SIGNALS

A. *Meeting the Requirements for Communicative Signaling*

To view the enterprise of law-making as constitutively communicative requires that one understand legislative enactments, like utterances made by speakers in daily conversations, in terms of the intentions of their speakers—namely, in terms of the locutionary and illocutionary acts which legislators intended to perform by their enactment. One must be prepared to establish that understanding a statute's syntax and semantics is insufficient: To understand a statute, one must also grasp the pragmatics of its utterance. According to Peter Strawson, one must know "*how what was said was meant by the speaker, or . . . how the words spoken were used, or . . . how the utterance was to be taken or ought to have been taken . . .*"⁵⁵ For legislation to be conceived of as communicative, it must be capable of sustaining speech act analysis—it must, that is, meet the conditions of communication developed in Part I.

I shall subdivide the question of whether statutes can sustain speech act analysis into three subtopics: (1) Can the legislature be a speaker with the sorts of intentions required for communication when it is in fact a collection of many persons possessed of many intentions? (2) Can citizens and/or officials serve as the audience of legislative utterances? (3) Must statutes function as communications from the legislature to citizens and/or officials in order to serve an action-guiding function? I pursue each of these questions in the sections that follow.

1. *Legislatures as Speakers*

The first challenge facing any attempt to describe statutes as speech acts is the well-known difficulty of conceiving of the legislature as having any intentions at all, let alone the kinds of communicative intentions which Grice and others have demonstrated are necessary. As one critic has stated, "The folly of any attempt to conjure up a legislative intent has been asserted so often that many respectable scholars refuse to recognize the concept."⁵⁶ Scholarly rejection of the concept of legislative intent has

55. P. STRAWSON, *supra* note 31, at 150 (emphasis in original). As Michael Sinclair helpfully explains:

Syntax is the theory of how words relate to each other, apart from their meaning or the purpose of their use. Semantics deals with the relation of words to the extra-linguistic world, that is, with meanings. Pragmatics deals with the relation of words to the context of their use.

It thus includes in its scope the speaker's purpose, and the social effect of the particular use of words, as well as the relation of words used to the physical context.

Sinclair, *The Semantics of Common Law Predicates*, 61 *IND. L.J.* 373, 373-74 (1986) (footnotes omitted).

56. R. DICKERSON, *supra* note 14, at 68; *see, e.g.*, L. FULLER, *supra* note 12, at 86; R. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 81 (1969); Corry, *Administrative Law and the Interpretation of Statutes*, 1 *U. TORONTO L.J.* 286, 290 (1936); Moore, *Interpretation*, *supra* note 11, at 345-52.

resulted largely from the perceived inadequacies of the various models of legislative intent that have been proposed. If critics are indeed correct in thinking that the notion of legislative intent cannot be made intelligible, then any attempt to describe statutes as communications will founder. For, as we have already established, there can be no communication unless there is *a* speaker performing *a* speech act with *an* utterance; whether there is such a speaker and speech act wholly depends upon whether the requisite intentions are possessed.⁵⁷ In what follows, I will briefly reconstruct six models of legislative intent which have been proposed and review the relatively well-known arguments for thinking each of these models inadequate.

a. *The Pure Realist Model*

The first view concerning the nature of the intentions attributed to legislatures has been characterized as “pure realism”—“the rather crazy position that legislatures can have an intention just as a person can have an intention”⁵⁸ Such a model of legislative intent assumes that a legislature has a mind in the literal sense that an individual is said to have a mind. As one critic has pointed out, this position is therefore committed to the view that legislatures experience sensations, moods, and emotions, as well as intentions.⁵⁹ Despite the implausibility of such a commitment, some have nevertheless tried to defend this “rather crazy position.” In psychology, a small school of thinkers has maintained that groups or masses do in fact manifest unique, non-reducible, psychological experiences.

Work with groups has shown that they have characteristics and exhibit features that differ from the aggregate of the characteristics and features of the individual members of the group. For example, when individuals are presented with a problem their individual solutions are “less risky” than those proposed by a group made up of the same individuals. The conclusion has been drawn that this “shift of the risk” is solely a function of the existence of groups.⁶⁰

If one adds to this psychological observation the conclusion of some philosophers that groups with highly organized decisionmaking structures can

57. See *supra* text accompanying notes 31–43.

58. Moore, *Interpretation*, *supra* note 11, at 348.

59. *Id.*; see also Moore, *supra* note 16, at 265–66. But see MacCallum, *Legislative Intent*, 75 *YALE L.J.* 754, 765–66 (1966) (arguing that “legislatures are enough like men in important respects to be counted as having intentions”).

60. R. DICKERSON, *supra* note 14, at 73 n.14 (citations omitted); see also Silving, *A Plea for a Law of Interpretation*, 98 *U. PA. L. REV.* 499, 510 (1950) (“[C]ollective intent’ in the light of modern psychology is not as unrealistic a concept as it is made out to be by jurists” (footnote omitted)). Silving credits Sigmund Freud with having appreciated “the reality of psychological experiences of groups or masses.” *Id.* at 510 n.39.

have agency and rationality in just the same way individuals do,⁶¹ then this "rather crazy" position may seem less crazy.

Still, it is hard to abandon the realist intuition that states of mind can be literally possessed only by entities having the information-processing capacities roughly similar to those of the human brain. This intuition suggests that individuals within a group would have to function with each other in a manner analogous to the way in which neurons function together in a brain before such a group could literally be thought to possess a mental state like an intention.

b. *The Interpretive Model*

The same intuition that prompts the rejection of the "rather crazy" position above should also prompt the rejection of its skeptical counterpart. For at the other extreme from the pure realist who is willing to attribute intentions even to groups is the pure skeptic who is unwilling to attribute intentions even to individuals. Those who are persuaded that intentions are fictional creations generated by the need to interpret others' behavior find the suggestion that groups possess intentions to be unproblematic. According to this skeptical view, intentions are but mythical inventions, and we can apply them to the interpretation of group behavior just as readily as we apply them in our daily interpretation of the behavior of our friends and colleagues.

Notice that according to this second view, there is no fact of the matter as to whether someone is communicating with someone else. To paraphrase a well-known epigram by Wittgenstein: Whether lions are talking or not depends upon how *we* want to view them. Since communication depends upon a speaker's intentions and an audience's beliefs, if there is no fact of the matter about such states of mind, there can be none about communication either. Insofar as the model of communication developed in Part I presupposes that there *is* such a thing as communication, it presupposes that the interpretive theory of intentions is false. And those with realist intuitions about mental states will surely agree.⁶²

The pure realist and the pure skeptic thus both fail to make the case that a group can possess intentions in the same manner that individuals possess intentions. Legislative intent on either of these views thus remains as incredible as John Chipman Gray found it decades ago when he declared that "the psychic transference of the thought of an artificial body must stagger the most advanced of ghost hunters."⁶³

61. See P. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 41-47 (1984).

62. For defenses of such a realist view of mental states, see M. LEVIN, METAPHYSICS AND THE MIND-BODY PROBLEM (1979); B. LOAR, MIND AND MEANING (1981); W. LYCAN, CONSCIOUSNESS (1987).

63. J. GRAY, THE NATURE AND SOURCES OF THE LAW 170 (2d ed. 1921).

c. *The Majoritarian Model*

The natural alternative to the literal model of legislative intent is the majoritarian model. Theorists engaged in the construction and defense of this model make ontological commitments only to intentions possessed by individual legislators, but they seek to analyze the legislature's intent as a summation of the intentions shared by a majority of its members.⁶⁴ According to this account of legislative intent, one need not postulate the existence of a group mind; one need only add up the individual intentions which motivated legislators to vote as they did in order to discover the legislative intent behind a statute. A number of well-worn objections have been made to this view. First, the majoritarian model is most immediately confronted with problems in determining whose intentions should be counted. Are only the intentions of those voting *for* a particular bill to be counted? Or should the intentions of those who voted against the enactment of a statute be counted as a means of determining the possible limits of the intent with which the statute was passed? What should be done in the face of multiple intentions, none of which commands a majority? And what of those legislators who had no intention one way or another concerning the enactment of a statute?⁶⁵

Michael Moore has argued convincingly that even more serious concerns confront the majoritarian intentionalist. First, he points out that only when the intentional objects of the legislators' intentions contradict one another can it make sense to speak of a majority intention, gained by tallying individual intentions. "Much more often one will have intentions whose objects are not contradictory propositions, so that the whole idea of counting minds to make a majority makes no sense."⁶⁶ Where one legislator's intent is different from, but might be thought to be encompassed by, another legislator's intent, should it be counted as identical to the more general intent, or does it function to identify a category of intentions of its own?

Second, the majoritarian must cope with problems which stem not from combination problems but from the nature of the mental states accompanying legislators' intentions.

Suppose some legislator L_1 believes that "manufactured products" as used in ordinary discourse has in its extension, live chickens. Assume further that live chickens are not within the extension of "manufac-

64. Joseph Raz appears to have such a majoritarian model in mind when he urges that "[e]very attribution of an intention to the law is based on an attribution of a real intention to a real person in authority or exerting influence over authority." Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 318 (1985).

65. For further discussion of these sorts of problems, see R. DWORKIN, *A MATTER OF PRINCIPLE* 38-55 (1985); Moore, *supra* note 16, at 266-70; Raz, *Dworkin: A New Link in the Chain* (Book Review), 74 *CAL. L. REV.* 1103, 1113 (1986).

66. Moore, *supra* note 16, at 267.

tured products," as ordinarily used. . . . Contrast L_1 with L_2 . L_2 does not know whether live chickens are usually classified as manufactured products or not, but he *intends* that they be so classified in this statute. Should one allow mistaken beliefs about what words ordinarily mean to be sufficient (L_1), or should one require in addition that the legislator intend that any mistakes he makes of this sort be corrected to conform what he said to what he should have said (L_2)?⁶⁷

Finally, the majoritarian must recognize that most legislators intend the enactment of a statute to accomplish several effects. For tallying purposes, how are such effects to be ranked; that is, how are we to tell which effect a legislator intends "the most"? And even if effectively ordered, how are the various sets of individually ranked intentions to be tallied in the face of the famous Arrow Theorem that has, to date, uncontroversially established the impossibility of accomplishing the combination of individually ordered preferences?⁶⁸

It might be thought that these counting and combination problems plague the majoritarian model of legislative intent only when it is employed in the enterprise of statutory *interpretation*. For while the interpretation of a statute might require that one look beyond its mere words to its intended exemplars, definitions, and statutory effects, it might well be admitted that such additional heuristics are rarely if ever made available by summing the intentions of legislators. Yet the majoritarian might well contend that most legislators at least share the four minimal intentions necessary for *communication* when they vote on bills, and that their collective possession of these intentions is enough to vindicate the majoritarian model as a model of how a legislature communicates. For if a legislative majority possesses the requisite intentions for communication, then the legislature intends to communicate.

One problem for this easy application of the majoritarian model to the communicative intentions of a legislature lies in the psychological assumption that legislators think themselves to be communicating when they vote on a bill. But in the interests of exploring a deeper problem, let us assume that most legislators do conceive of their task as a communicative one. The question is, how do we make sense of collective communication? How do we unpack the meaning of sayings such as, "The voters sent a message to Congress"?

Suppose one were to argue as follows. Voter *A* intended candidate *X* against whom he voted to believe that *A* disliked *X*'s stand on abortion. Voter *B* intended *X* to believe that *B* disliked *X*'s stand on the death penalty. And voter *C* intended *X* to believe that *C* disliked *X*'s stand on the

67. *Id.* at 268 (emphasis in original).

68. *Id.* at 268 & n.250; see K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (2d ed. 1963).

deficit. Each voter therefore intended *X* to come to *some* belief about what voters disliked about *some* of his positions. So, each voter intended to send a message to *X*, and since *A* and *B* and *C* are all the voters that exist, "the voters" intended to send a message to *X*. Hence, the group constituting *the voters* communicated to *X*.

Yet "the voters" neither intended to, nor did, send *a* message to *X* by their votes against him. *A*, *B*, and *C* had the same communicative intentions if we ignore *what* they intended to communicate. But to speak meaningfully of a collectivity of persons sending *a* message, such differences cannot be ignored. Just because each member of a group intends to communicate something does not mean that *the group* intends to communicate some one thing. In short, the standard counting and combination problems that beset the majoritarian model of legislative intent as an interpretive aid also beset that model when used to make sense of how a group communicates.

d. *The Anthropomorphic Model*

In an attempt to avoid the counting and combination difficulties facing a majoritarian model of legislative intent, a number of theorists have proposed what might be thought of as "fictionalized" notions of legislative intent.⁶⁹ For example, Scott Bice has suggested that legislative intent may be discovered by anthropomorphizing the legislature.⁷⁰ This process of anthropomorphization proceeds by treating the differing intentions of individual legislators as though they were evidence of a coherent set of intentions possessed by a single individual. While such intentions might indeed clash, any conflict can be overcome by weighing the pieces of evidence and reconstructing, in light of the resulting balance, a unified account of what is intended—an account which overcomes the counting and combination problems endemic to the majoritarian model.

There are two problems with this fictional model of legislative intention. The first is that it is fictional. There is literally nothing that the "evidence" (the individual intentions of the legislators) evidences, and so there is nothing to guide our resolution of the very real conflict that exists between the pieces of so-called "evidence." Pools of water in the street and dry galoshes worn by one who has recently been out of doors are conflicting evidence about whether it rained recently, but that is because whether it rained recently is a fact independent of (not a fictional construction of) the evidence. It is hard to know what it means to say that one should treat

69. "[A] fiction, however weak it may prove to be upon logical analysis, is created from sheer necessity." MacDonald, *The Position of Statutory Construction in Present Day Law Practice*, 3 VAND. L. REV. 369, 371-72 (1950).

70. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 26-33 (1980).

something as evidence of something else when one knows that there is no something else to be evidenced.

Second, treating the differing intentions of individual legislators as if they were conflicting evidence of the legislature's intention does not finesse the counting and combination problems. When one confronts a real person with differing intentions concerning the same subject, one treats her more like a set of multiple personalities than like a unitary subject. This is so because one realizes that on the subject as to which her intentions differ there is no answer to the question, "What does she intend?" Any attempt to provide an answer would require just the sort of tabulation and combination of intentions that posed such problems for the majoritarian model.

e. *The Delegation Model*

A fifth model of legislative intent has been described by Gerald MacCallum.⁷¹ According to this model, the legislature's intent is constituted of the intentions shared by the small group of persons who actually drafted that statute, either staff attorneys or committee chairpersons. Other legislators are then seen as adopting or acquiescing in the intent of this small group. MacCallum aptly labels this the delegation model of legislative intent, because it must be assumed that legislators have delegated to draftspersons or committee chairpersons the authority to speak (and intend) on their behalf.

As MacCallum himself recognizes, the overwhelming problem for the delegation model is to discover any such delegation by legislators. As a matter of psychological fact, few legislators delegate to drafters the power to determine what they, the legislators, *meant*_{NN} by voting for a bill. Few if any legislators have a second order intention of the delegatory kind, namely, the intention that their intention should be taken to be whatever intention the drafters of the statutory language had in mind.⁷²

Moreover, even if a majority of legislators were to have such delegatory intentions, the *legislature* itself would not have the requisite communicative intentions just because its delegees (its drafters) have such intentions. If I send my husband to talk to my neighbor without knowing or inquiring into what he will say, and he in fact talks to her, I have not communicated with her—he has. Similarly, if my husband sends me to my neighbor to repeat *verbatim* a message that he has given to me, and I do not

71. See MacCallum, *supra* note 59.

72. This is not to be confused with a similar but non-delegatory intention that some legislators may have, namely, an intent that the partial *expressions* of drafters' intent sometimes found in preambles, committee reports, or floor statements should be taken as the legislator's own intent because she has read such expressions and has adopted them as her intent. This is not a delegatory intent; rather, the preamble, committee report, or statement from the floor would represent the legislator's own understanding.

understand its content, I have not communicated with her—he has; I am only a medium of communication very much like a syntactic reproducer (for example, a printing machine or recorder). Similarly, when a legislator delegates to draftspersons the power to mean_{NN} something, without knowing what that something will be, the legislator is not communicating. When a legislator receives the bill from the draftspersons and transmits it by an affirmative vote to the citizenry without knowing what the draftspersons meant_{NN}, the legislator is also not communicating. By hypothesis, someone is communicating (the draftspersons), but the delegation model has no way of transforming that fact into the desired conclusion that the elected body of men and women we call the legislature is communicating.

f. *The Constructive Model*

A sixth model of legislative intent focuses on what is variously labelled the purpose, function, or spirit of a piece of legislation.⁷³ Dworkin refers to this as the “constructive model” of legislative intent.⁷⁴ Whatever the label, the model is explicitly unconcerned with psychological enquiries; what the legislature intends is not a function of what its legislators intend. Rather, the model calls upon those who interpret legislation to construct an intention that makes sense of the legislation as the best that it can be and then to treat that construction as the “legislative intent” behind the statute.

If this sixth model captures what one means by “legislative intent,” then there is no conceptual question to ask about statutes as communications. The question of whether legislatures possess communicative intentions is turned into the question of whether it would be better to regard them as possessing such intentions. Would it make legislation the best it could be if one were to interpret it as if it were a communication? I have pursued this normative inquiry elsewhere.⁷⁵ The question at stake here is a different one: *Are* statutes communicative acts? Non-psychological no-

73. See T. AQUINAS, *supra* note 17, question 96, art. 6, at 1021-22; Fuller, *supra* note 3, at 661-69; see also Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (dismissing majoritarian model of legislative intentions in favor of model of interpretation based upon legislative purpose).

74. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). Joseph Raz has argued that a constructive account of legislative intent is fundamentally incoherent.

I think that [Dworkin's claim that 'legislative intent' does not refer to a psychological intention] is fundamentally confused. Which intentions count is partly determined by the concept of law and partly by technical legal doctrines (to the extent “legislative intention” can be a legal term of art). Either way the determination is of what intentions count for the relevant legal purposes. The intentions that count are real, if you like “psychological” intentions in all but one very common case: where the intention is attributed to a corporation or an institution. But even institutional intentions have psychological intention at their foundations, for we attribute intentions to corporations and institutions on the ground that those who act as organs of those institutions have them.

Raz, *supra* note 65, at 1114 n.31.

75. H. Hurd, *supra* note 17.

tions of legislative intent by their nature cannot answer such a descriptive question.

The criticisms discussed in this section cast serious doubt on the notion that statutes function as classic communications by a sovereign speaker to an obeisant audience. These criticisms demonstrate that we lack a model of how a legislature can be said to possess the intentions necessary for a speaker to be engaged in an act of communication. Unless solved, such problems may alone convince us that legislatures are not engaged in an act of communication when they enact statutes. I now turn to the question of whether there are analogous problems for the communicative model of statutes concerning the beliefs of legislative audiences.

2. *Citizens and Officials as Audiences*

As we concluded in the previous section, a plurality of voices, each intending something different by a common utterance, communicates or means_{NN} nothing. Perhaps, however, the remedy to the problem that this poses for a communicative model of legislation lies in the capacity of audiences to understand common utterances. The law commonly ignores what a speaker means and focuses, instead, on what that speaker's audience understands the speaker to mean. In contract interpretation, for example, judges often ignore a contracting party's subjective intentions in favor of the "objective meaning" that her speech is reasonably understood to express. Similarly, judges interpret defamatory utterances in tort law in light of how a "sizable and respectable" majority of its targeted audience would understand them. Perhaps we could treat statutes analogously, remedying the defects in the notion of legislative intention by a less problematic appeal to audience belief.

So long as statutes cannot be thought to issue from a speaker, however, such a strategy provides no promise of converting legislative enactments into communications. True communication requires *both* a speaker possessed of the requisite intentions *and* an audience that has the necessary corresponding beliefs.⁷⁶ Without a speaker, the most a statute could be is a kind of fictional communication, a sign that would be treated "as if" it were a signal from someone.

It is unclear what one would gain by this fictionalized approach. In constitutional law, where conservatives occasionally replace the problematic search for "framers' intent" with a search for "original understanding," the anticipated pay-off is an interpretive one. The hope is that an inquiry into *who* the audience was and what its members believed will provide clearer answers to interpretive questions than does the equivalent enquiry concerning the beliefs of the framers. Yet any interpretive gain

76. See *supra* text accompanying notes 31-32.

here is surely illusory. Problems analogous to those encountered in attempts to establish the possession of *an* intention by a multi-membered legislature will also haunt attempts to establish the possession of *a* belief by a multi-membered audience. Purely realist, interpretive, majoritarian, anthropomorphic, delegation, and constructive models can be developed to account for composite audience belief as well as for composite speaker intention, but the problems for each of these models will be identical to those raised in the previous section.⁷⁷

Moreover, there is little incentive to adopt a view of statutes that conceives of them “as if” they were communications. Legal positivists are attracted to a communication-based theory of statutes because of some idea that the legislature has the authority to issue commands to citizens and judges. If no literal *commanding* occurs—because no unitary speaker exists—then why pretend that it does just because there appears to be an audience that has beliefs that are identical to those that it would have if it *had* been communicated to? The communicative model of legislation can be of interest to legal theorists only if statutes really are communications by someone to someone.

However, suppose that I am wrong about composite intentions and that legislatures can have the requisite intentions to communicate. To make this plausible, suppose that statutes are passed by a single person—a mayor or governor—so as to eliminate the problems inherent in communications from groups. Does the fact that the intended audience consists of numerous citizens and officials present an independent objection to the communicative model of statutory enactments?

The existence of a multi-membered audience alone does not prevent a single person’s utterances from being communications. Audience members who seek to be communicated to might secure a speaker’s intended uptake, recognize that they are intended to secure such uptake, and do so in large measure because of a recognition of that intention.

Yet if no one is listening, a speaker cannot communicate at all. While she can attempt to do so by forming the requisite communicative intentions, her recognition that no one is listening will render her efforts impossible; for one cannot intend to cause an effect that one knows cannot come about. There must be some audience listening to and seeking to understand a speaker’s utterances, and the speaker must know of this audience, before a speaker’s utterances can be thought of as communications. Thus, even for a single mayor or governor to communicate through legislative enactment, there must be an audience that seeks to be party to such

77. Notice that such problems plague the law of contract or defamation to a significantly lesser degree because the law settles for *a* belief on the part of the other contracting party (in the case of contracts) or *a* belief of a small segment of a targeted audience (in the case of defamation). In neither case does the law require that the majority of citizens believe the same proposition.

communication and the mayor or governor must know of the efforts of this audience.

According to Meir Dan-Cohen, there are two distinct legislative audiences: citizens and officials.⁷⁸ Citizens are the intended audience of statutes that promulgate “conduct rules”—the rules designed to guide daily behavior. Officials function as the intended audience of statutes that provide “decision rules”—those rules intended to guide the adjudication of disputes concerning the behavior of citizens. A statute providing without exception that persons ought not to steal functions as a conduct rule addressed to the audience of citizens. A statute providing that those subject to duress are to be excused for stealing functions, according to Dan-Cohen’s model, as an example of an utterance intended for the audience of officials. Dan-Cohen has argued that the natural “acoustic separation” that exists between officials and citizens prevents citizens from eavesdropping on utterances directed to officials; it ensures both that citizens are given maximal incentives to obey conduct rules and that officials are given maximal leeway to reach fair solutions when those rules are broken.

Yet Dan-Cohen underestimates the extent to which citizens fail to function as audiences to those statutory enactments intended for them—those containing the so-called conduct rules. Few citizens actually read the text of more than a handful of statutes in a lifetime. And given the length, complexity, and formality characteristic of most legislative enactments, the few citizens who try often fail to understand the intentions which motivated the content of the law in question. What knowledge citizens have of conduct rules must therefore come from sources other than legislative communications.

This might prompt one to develop a theory of “indirect communication”—namely, that citizens function as an audience to legislative messages conveyed through the utterances of others. If one can communicate to another via intermediaries, then the defender of a communicative model might argue that citizens are indeed audiences to legislative utterances which are passed along to them through lawyers, television, police, schools, etc. Two factors limit the extent to which conduct rules can be said to be indirectly communicated to citizens by the legislature. First, much of the knowledge that citizens have of the content of conduct rules comes from sources that do not function as agents of the legislature. In particular, citizens know the criminal law—probably our clearest example of a statutory source of conduct rules—in large part because they know the moral norms upon which that law is predicated. They know, for example, that stealing the property of a partnership when they are them-

78. Dan-Cohen, *supra* note 12, at 626.

selves a partner is nonetheless stealing, and they would expect legislatures to have passed statutes prohibiting such conduct.⁷⁹

Second, where the source of a citizen's knowledge of conduct rules stems from intermediaries who pass along the legislative word, it will rarely be the case that such intermediaries reproduce the legislative message so much as provide a new one of their own. It may be possible to employ another to duplicate syntactically one's utterances so as to convey to an audience one's own intentions. However, this possibility does not capture what goes on between legislatures and citizens. For lawyers, school teachers, and journalists are not mere media for the syntactic duplication of legislative utterances. Rather, such sources first interpret legislative pronouncements and then convey their interpretations with the intention that their audiences will recognize *their* intention (*not* that of the legislature) to get their audience to believe that their interpretation is accurate. Communication in such a case is not transitive: Even if reporters are communicating to citizens and legislatures are communicating to reporters, legislatures need not be communicating to citizens.

But if legislative communication fails because citizens do not "listen to" the legislature, perhaps conduct rules nevertheless function as communications because they have *an* audience (though it is not *the* audience intended by the legislature). Perhaps, that is, officials function as an audience not only for decision rules but also for conduct rules. The question is how close a fit there must be between a speaker's intended audience and the audience that actually secures the uptake which the speaker intended to cause. Are we to conclude that there is communication whenever *anyone* secures uptake about the propositional content of a speaker's utterances, so long as she does so because she recognizes the speaker's intentions to communicate to *someone*? It would seem that such a conclusion would make all of us audiences to all those utterances which, while intended as communications to someone, are not intended as communications to us. This would lead to the problematic result that we would be an audience to others' communications even when eavesdropping.

Consider, for example, a scenario in which I make a promise to a friend to meet her for lunch. If my promise is overheard by another, have I promised to meet that other for lunch also? Similarly, if I request of my husband that he pass the salt, have I requested of all those at the table that they pass the salt? And if I order a child to go to her room, have I similarly ordered her brother to do so if he has overheard my directions to his sister? Such inquiries make clear the silliness of supposing that communicative intentions are transitive. One's promises do not extend to anyone other than the intended recipient. One's requests are not made to any

79. See *People v. Sobiek*, 30 Cal. App. 3d 458, 475, 106 Cal. Rptr. 519, 530, *cert. denied*, 414 U.S. 855 (1973) (court noted that "common social duty" told people that such takings were thefts).

and all in earshot. One's orders are not generic as to those who might fulfill them. In short, a speaker's illocutionary intentions are not to be "transferred" to those recognizing them from those who were supposed to recognize them. One might object that since those party to illocutionary acts are fully capable of understanding those acts for what they are—as promises, requests, orders, and so on—such persons constitute genuine audiences to such utterances. But this analysis is confused. Instead of saying that eavesdroppers have been signaled by communications intended for others, one should say that they take the communications to which they have been eavesdroppers as natural *signs* of particular states of affairs. Guests at a party take my request to my husband for the salt as a *sign* that I am in need of the salt. Their passing it to me is therefore a response to recognizing the *natural* meaning of my utterance, namely, my need for salt, just as their passing me a Kleenex after a sneeze would be a response to their recognition of the *natural* meaning of my sneeze, namely, that I need a tissue. Similarly, one who overhears my promise of lunch with another takes my promise not as a communication to himself but as a sign causally related to a natural state of affairs—a sign, that is, of my intention to undertake an obligation to have lunch with my friend.

Eavesdroppers thus cannot be thought to constitute audiences of the sort required for effective communication. For a speaker to engage in communication, it is not enough for there to exist somewhere an unintended party to the speaker's utterances. Communication depends upon there being an *intended* audience that secures uptake vis-a-vis the locutionary content and illocutionary force of the speaker's utterances. A legislature therefore communicates only if the intended audiences to which its utterances are directed in fact secure uptake and do so for the requisite reasons. To defend a communicative theory of legislation, one must prove more than that there are statutory eavesdroppers: One must prove that the intended audiences of the legislature are in fact audiences to its utterances.

But if what I have claimed is correct, then it would appear that statutorily enacted conduct rules fail as communications, for they do not effect uptake on the part of the citizens who constitute the intended audience. To the extent that officials hear and understand such rules, they are like the dinner guests who overhear a request for salt or the brother who overhears an order to his sister: They are mere eavesdroppers. While officials certainly possess the status of citizens during their "off hours," we cannot think of them as the intended audience of legislatively-enacted conduct rules even when acting in their capacity as citizens. For as officials, these individuals know that the conduct rules do not, in fact, reflect the actual state of the law. They listen to the decision rules, because it is the decision rules which in fact inform them of the conduct that is ultimately to be tolerated or sanctioned. To the extent that officials "listen in on" conduct rules, they do so as eavesdroppers; by virtue of their access to decision

rules, they cannot be intended to take such rules as anything more than natural signs of what the legislature would have citizens believe. It thus appears that like citizens (but for different reasons), officials are not an audience to conduct rules.⁸⁰

We are left with the conclusion that a significant set of legislative utterances—those which declare conduct rules—cannot be construed as communications for want of an audience. Ironically, legal theorists have long thought that these legislative utterances constitute the standard instances of legislative communication—paradigmatic examples of commands issued by a sovereign. Granted, decision rules clearly have an audience, for lawyers, judges, bureaucrats, and regulatory officials undoubtedly read and secure uptake about such legislative utterances. But this set of rules functions as a significantly diminished set of those legislative utterances which legal theorists have traditionally thought to be communicative. Those committed to defending a communicative model of legislation must thus resign themselves to defending the significantly less ambitious thesis that *some* legislative utterances appear to function as communications because even if the legislature does function as a speaker, the citizens to whom it speaks do not function as an audience. Only that elite set of judges, lawyers, and bureaucrats appears to function as a genuine audience, and it is an audience only to that discrete set of legislative utterances that conveys decision rules.

If there is no audience to a significant set of legislative utterances, and if the legislature lacks the necessary reflexive intentions to qualify as a speaker to what little audience it has, then one is left with a legitimate quandary: Given the difficulties of applying even the most basic of the criteria for communication to legislation, ought we to abandon the communicative model in the context of legislative jurisprudence? If we do, are we forced to abandon what many find to be the essential aspect of legislative enactments—namely, their action-guiding function? In the final section of this Part, I take up this question.

B. *Fulfilling Legislative Functions Without Communicative Signaling*

In the previous section I suggested that any attempt to apply a communicative model to legislative utterances would be riddled with serious difficulties. Nevertheless, theorists engaged in legislative jurisprudence would have every reason to persevere in their attempts to overcome these difficulties were it the case that the legislature could fulfill its functions only if its

80. This argument suggests a new approach to Kelsen's famous thesis that the law is comprised solely of "primary norms" addressed to officials. See H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 61 (1961) (comparing "primary norm" of law as that "which stipulates the sanction" with "secondary norm" as that "which the legal order endeavors to bring about by stipulating the sanction"); see also H.L.A. HART, *supra* note 12, at 35-38 (discussing and criticizing Kelsen's jurisprudence).

utterances were understood as communications. In this section, I address the question of whether, as a pragmatic matter, legislators *must* be taken to communicate to their prospective audiences in order for their enactments to achieve the purposes that legislation has long been thought to serve.

The imperative in the question to which this section is devoted is a hypothetical one: If legislation is to achieve its end, must it be communicative in nature? We should be clear at the outset about what the general function of legislation is assumed to be.⁸¹ For the purposes of this section, I shall adopt Lon Fuller's presupposition that the function of legislation is to guide action in conformity with legislative will.⁸² Such a function may seem to demand that statutes be communicative, for how else could legislation prompt citizens to do what the legislature wants? Yet, as I shall argue, even this action-guiding goal does not require that legislation be communicative.

The extent to which legislation must resemble communication is a function of the extent to which the requirements for communication outlined in Part I must be satisfied before statutes may guide the actions of some audience. If statutes can further this action-guiding end without functioning as communications, then statutes need not be thought of as communications, and there need be no inquiry into the illocutionary acts which statutory utterances may perform or the perlocutionary effects which such utterances may contemplate. Must a legislature satisfy each of the communicative requirements in order for its utterances to guide the actions of its audience? To facilitate this inquiry, recall that a speaker *S* will be communicating something by an utterance to an audience *A* if:

- (1) *S* intends to produce by an utterance a certain response in *A* (the uptake requirement); and
- (2) *S* intends that *A* shall recognize *S*'s intention (the reflexivity requirement); and

81. Stephen Perry has argued that "[t]he attribution of a function to a social institution which is both purposive and yet shaped by the purposes not of one but of many individuals is problematic, . . . and unfortunately there are few discussions in the jurisprudential literature that address the question of whether such attribution is meaningful, let alone the question of what it means." Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 218-19 (1987). *But see* R. DWORKIN, *supra* note 9, at 347; J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (law is a functional kind whose function is to serve common good); L. FULLER, *supra* note 12, at 55-56; Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORIES* (R. George ed. forthcoming 1990).

82. *See* L. FULLER, *supra* note 12, at 59 ("[o]f all branches of law, the criminal law is most obviously and directly concerned with shaping and controlling human conduct"). Fuller's eight virtues of law are clearly motivated by his conviction that laws should exist to guide behavior. Only if laws are publicized, prospective, general, understandable, consistent, stable, congruent, and able to be complied with will the government achieve what Fuller thought of as "reciprocity" with citizens—that foundation upon which obligation is constructed. *Id.* at 39-40.

- (3) *S* intends that *A*'s recognition of *S*'s intention to produce such a response shall function as the reason, or part of the reason, for *A*'s response (the causal requirement); and
- (4) *S* intends that *A* shall recognize *S*'s intention to get *A* to recognize *S*'s intention to get *A* to produce a certain response (Strawson's double-reflexivity requirement).

1. *Legislative Failure of the Uptake Requirement*

While I shall assume *arguendo* that legislators act purposively, this is not a concession that legislators intend to produce on the part of some audience the certain response that is a necessary condition for statutory utterances to be thought of as communications. Instead, we may think of the utterances of legislators as analogous to the entries by a captain in a ship's log, or to the recordings by an individual in a diary, or to the sentences uttered by a person to him or herself. In each of these cases, the utterances made, though clearly purposive, are not intended as a means of producing uptake in others. Indeed, such utterances are not intended for others at all. In the case of the ship captain, the entries are mere descriptions of the ship's progress and condition from one day to the next. Like the scientist's recorded observations, the logged entries might at a later time be submitted to an audience with an intent to secure uptake (to get the audience to believe that stormy weather caused the ship to capsize, for example); but at the time such entries are made, there exists no intent on the part of the captain to effect a response on the part of some listener. Similarly, entries in diaries and instances of "talking to oneself" cannot be thought of as utterances intended to elicit a certain audience response.

While one might argue that the person who talks to herself intends her statements to elicit in herself a certain response (for example, a reply), or that the person who writes in a diary intends his sentences to produce in himself some future response (for example, a recollection of the events recorded), such an argument would transform all instances in which locutionary acts are performed alone into acts of communication. But recall that the essential feature of communication—that which distinguishes signals from signs—is the performance of an illocutionary act possessing meaning_{NN}. Insofar as the contents of a scientist's recordings, a ship captain's log, or an individual's diary are not intended to possess illocutionary force (that is, are not intended to warn, inform, command, or make a request of an intended audience), they do not function as communicative signals. Yet while these entries cannot be thought of as signals, they might nevertheless function as signs possessing natural rather than non-natural meaning. They might be informative of a state of affairs to which they are causally related. Thus, we might say that the captain's entry in the ship's log that the weather was poor on a particular date constituted a sign of

poor weather by being causally connected to that state of affairs in the world.

Is there any reason to think that the passing of a statute could function as a sign rather than as a signal? Must a statute be like a command issued by a general with the intent that it produce in an audience of soldiers a certain response? Or may it function more like a scientist's recording, a captain's log, or an entry in a diary? While the answer to this question is more fully developed in Part III, it is important to recognize at this point that it is not necessary to conceive of legislators as intending to secure uptake in their audiences for their statutory utterances to be action-guiding. We could conceive of legislators as embarking on a purely descriptive enterprise—an enterprise of describing optimal states of affairs in a manner analogous to the way in which a scientist describes the workings of the physical world. In such a case, the legislature would essentially be talking to itself. While those who become party to legislative descriptions may well reform their beliefs or behavior, the utterances of the legislature would not be intended to elicit such reform.

According to such a model, legislative utterances would fail to conform to the uptake requirement. They would, that is, lack non-natural meaning, and so function as signs rather than signals. Like the Gricean example of the tailcoat that means (but does not mean_{NN}) that its wearer is going to a dance, a statute excluding vehicles from the park could be thought of (and, as I will argue, is perhaps best thought of) as meaning but not meaning_{NN} that the park should be free of vehicles.

2. *Legislative Failure of the Reflexivity Requirement*

Even if legislators were thought to satisfy the requirement of uptake by intending to elicit from an audience a certain response, they would not need to intend their audience to recognize such an intention in order to bring about that response. Laws might function, then, in a manner analogous to deliberately planted clues, the point of which is lost if the intent behind them is in fact discovered. The enactment of legislation could then be compared to the situation described by Grice in which *A* leaves *B*'s handkerchief near the scene of a murder to induce in a detective the belief that *B* was the murderer. In this situation, the requirement of uptake is met, for *A* certainly intends to elicit in the detective a particular response (namely, the belief that *B* was the murderer). But *A* does not intend that the detective recognize his intention; he intends, rather, to prompt the detective to take the handkerchief as a sign rather than as a signal. Indeed, were the detective to recognize *A*'s intention, *A*'s purpose would be frustrated, for the detective would be likely to abandon his initial belief in *B*'s culpability. Just as *A* in planting *B*'s handkerchief intends to elicit in the detective a response *by virtue of the detective taking the clue as a sign*

and not as a signal, so the legislature might intend to guide behavior by virtue of intending that statutes be taken as signs and not as signals—that is, as instances of natural rather than non-natural meaning.

However, one need not suppose that the legislature acts deceptively to understand statutes as clues. A statute might, for instance, function as a clue in just the same way that a message washed ashore in a bottle functions as a clue. The author of such a message might have intended to elicit a certain response on the part of some audience that might discover the message, namely, the securing of uptake concerning the message's propositional contents. But the author might not have intended that the audience recognize his or her intent. Rather, the author might well have intended for a potential reader to interpret the message as though it were a sign and not a signal; that is, the reader would need to interpret the meaning of the sentences in terms of the message's causal relation to some state of affairs in the world. To do this, the reader might employ syntactic and semantic analysis, and so reach a determinate conclusion about the meaning of the letter; but the meaning derived would be of a natural sort. Thus, if a clause of the message stated: "If only I could be rescued from my lonely existence in this desolate place," the reader could interpret the message as a sign of the existence of a deserted individual on some distant island.

Similarly, one might understand a statute as an anonymous sign—its meaning given by the state of affairs in the world to which it is causally related. A statutory provision declaring that no vehicles shall be allowed in the local park might be construed as a natural sign of the desirability of the state of affairs in which no vehicles are allowed in the local park. While the provision might have been intended by its framers to elicit a response on the part of those seeking to interpret it, it may have been drafted without the further intent that those interpreting it recognize the intent to bring about a response on their part. While those interpreting the statute, like those who discovered the message, might employ syntactic and semantic analysis to ascertain the state of affairs to which it is causally related, its meaning would be the natural meaning that it possesses by virtue of being a sign of that state of affairs.

Although imagining statutes to be like clues deliberately left by a speaker clearly commits one to a non-communicative conception of legislation, it nonetheless allows statutes to serve the action-guiding function of law. For clues do change the beliefs and subsequent conduct of the audience for whom they are clues, and so a rational legislator could employ them to influence an audience's behavior.⁸³

83. One might think that lying is another example of the sort of verbal behavior that satisfies the uptake condition but not the reflexivity condition. Like clues, lies might be thought to constitute verbal behavior falling short of communication. This suggestion is indeed tempting, for just as the clue fails to accomplish its intended purpose where that purpose is recognized, so the lie fails to deceive if

3. *Legislative Failure of the Causal Requirement*

Legislators might also alter the propositional content of beliefs, and so guide action, without satisfying the causal condition for communication—the condition that speakers must intend that their audience's recognition of their intent to produce in the audience a certain response should function, at least in part, as a reason for this response. Many instances of behavior fall short of being communicative by virtue of failing this causal condition. Recall, for example, that when Herod presented Salome with the head of St. John the Baptist with the intent that she come to believe that St. John the Baptist was dead, Herod failed to effect a communication because Salome's belief did not in any way depend upon her thinking that Herod's intention was a reason for believing that St. John the Baptist

revealed as a lie. In both cases, it appears that Grice's reflexivity requirement goes unmet, for the agent, while intending to bring about a certain belief on the part of an audience, does *not* intend his audience to recognize this intent.

Were statutes like lies, they would fail as instances of full-blown communication. Since Meir Dan-Cohen has sought to maintain both the novel thesis that some laws function as lies and the now-traditional thesis that all laws function as communications, this conclusion, if true, would render his thesis contradictory. See Dan-Cohen, *supra* note 12.

Recall that Dan-Cohen argues that two sorts of rules dominate our legal system—conduct rules, which are addressed to citizens and are designed to guide behavior, and decision rules, which are directed at officials and designed to guide their application of conduct rules. On his account, both sorts of rules function as communications to their respective audiences. To the extent that conduct rules diverge from decision rules, however, they function as lies to the public. Contrary to what the public is told, in certain cases ignorance of the law *does* excuse; the use of deadly force by private citizens *will* be allowed; and duress *can* exonerate. The public is deceived because it is encouraged to believe otherwise.

If lies, like clues, fall outside of the communicative model by virtue of failing to comport with the reflexivity condition, Dan-Cohen's insistence that conduct rules are *communications* to a public would be irreparably confused. However, Dan-Cohen need not, I think, fear for the coherence of his thesis at this point, for the argument that lies are non-communicative rests on the fundamentally mistaken assumption that the illocutionary intent possessed by a liar is the intent to deceive: Since recognition of *this* intent by an audience is *unintended* by the liar, the reflexivity requirement is thought to be unsatisfied.

Yet the liar's intent to deceive is not an *illocutionary* intent but a *perlocutionary* intent. Deception constitutes a further effect which the liar hopes to achieve which is not part of what he is doing in saying what he says. When stating, "The ice is solid," the liar intends her audience both to form a belief about the safety of the ice and to recognize her intention to get them to form this belief. That the belief, if formed, would be false and that the further intent to deceive, if recognized, would vitiate the belief are both irrelevant to the satisfaction of the first two conditions of communication.

Lying, according to this account, is no more non-communicative than any other speech act performed with some further perlocutionary intent which, if recognized, would defeat satisfaction of that further purpose. One can imagine that if a son recognized his mother's intention to get him to take his umbrella, he would deliberately leave it behind; in such a case, the mother would not intend for him to recognize the further intention with which she warns him of rainy weather. Yet her statement, "It is raining out," would be rendered no less a communication for her intent to keep from her son her further intention. Similarly, the liar's statement, "The ice is solid," or the legislator's statement, "Ignorance of the law is no excuse," is rendered no less communicative for the speaker's intent to deceive. In each of these cases, the requirement of uptake is satisfied, for the speakers intend to bring about a belief on the part of their audiences concerning the propositional content of their utterances (in the case of the mother, that it is raining out; in the case of the liar, that the ice is solid; and in the case of the legislator, that ignorance of the law will not excuse). In all three cases, the speakers each intend that their audience recognize the intent to bring about a belief concerning the propositional content of their utterance. The reflexivity condition is satisfied when the audience recognizes the illocutionary act performed—for example, informing, warning, and threatening.

was dead. While Herod got Salome to think that St. John the Baptist died, he did not "tell her" this.

It might seem odd to think that we could come to believe certain legislative propositions for reasons that do not include our recognition of the legislature's intentions to have us believe these things. Yet legislators can certainly alter our beliefs just as Herod altered those of Salome. Indeed, the sanctions attached to statutory violations function precisely to influence those who do not consider their recognition of legislative intentions an adequate reason for believing legislative pronouncements or for modifying their behavior. Were we all indifferent to the intentions with which the legislature promulgates laws—that is, were we all like Holmes' "bad man"⁸⁴ such that we measured our acts by the likely material consequences that they invite—the legislature would have good reason to regulate our behavior solely through a system of rewards and punishments. We would come to modify our conduct, then, solely because unacceptable behavior would carry with it demonstrable disadvantages. But under such a system, the legislature would not be "telling us" that certain sorts of behavior are to be avoided; it would simply be getting us to believe this.

Alternatively, the legislature could accomplish its action-guiding purposes, at least in a number of cases, through even more devious tactics. To encourage citizens to wear seat belts, for example, the legislature might pay for commercial time on television stations to show graphically gory clips of the sorts of injuries that have resulted from vehicular collisions involving passengers who have not worn seat belts. Such demonstrations might well produce the anticipated belief that wearing a seat belt is prudent, but this belief would not be causally dependent upon any recognition of the legislature's intent to bring it about.

We need not, however, postulate the alteration of our general psychology or the abandonment of statutory prohibitions in favor of regulation by sanctions and manipulative demonstrations in order to accept that the recognition of legislative intentions might be causally inefficacious. For statutes might be analogously thought of as works of art or as oracles of a sort, and so our recognition of their drafters' intentions might be irrelevant to the response that we have to them.

The suggestion that laws might best be thought of as works of art has most recently been proposed by Ronald Dworkin.⁸⁵ Legal interpretation, claims Dworkin, "is like artistic interpretation in this way: both aim to interpret something created by people as an entity distinct from them,

84. In Holmes' famous words: "If you want to know the law and nothing else, you must look at it as a *bad man*, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (emphasis added).

85. R. DWORKIN, *LAW'S EMPIRE* 49–62 (1986).

rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation.”⁸⁶ Legal interpretation, then, ought to be thought of as constructive. And as Dworkin explains, “constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”⁸⁷ While I will return to this model of interpretation in Part III,⁸⁸ it is important to see at this point that Dworkin’s view of statutes as artistic creations suggests that we need not view statutes as communications because we need not conceive of our responses to them as being causally related to our recognition of their drafters’ intent that we so respond. Just as we may judge the content of a painting independently of its artist’s intended message, so we may interpret the content of statutes independently of their drafters’s intended interpretation. Alternatively, we might think of statutes as oracles. On this conception, we might take the propositional content of statutes to be intended for our uptake. And we might recognize that their authors intended our uptake. But our recognition of this intention may not cause us to believe the propositional contents of the statutes, since we may have independent grounds for believing their contents. We might discover that statutes are wise suggestions about how best to arrange particular social institutions so as to serve the interests of justice, fairness, and utility. Our coming to believe such legislative propositions, then, would be the result of factors unrelated to our recognition that their drafters intended us to believe these propositions. We would not, therefore, treat them as communications—as commands from an authority—but as indications of optimal states of affairs which have a certain authoritative status by virtue of their fairly consistent accuracy.

4. *Legislative Failure of the Double-Reflexivity Requirement*

Even if statutes were thought to be more than signs (of the sort represented by the tailcoat) and more than clues (of the sort represented by the planted handkerchief) and more than failed attempts at communication (of the sort represented by Herod’s presentation of St. John’s head), statutes might nevertheless fail to be instances of communication by failing to meet Strawson’s double-reflexivity requirement. Recall that Strawson’s requirement arose out of a rather tortured example of an instance of behavior that satisfied the three conditions of communication identified by Grice

86. *Id.* at 50.

87. *Id.* at 52.

88. See *infra* text accompanying notes 92–104. As I will argue, Dworkin ultimately fails in his attempt to rid his theory of communicative features because he finds himself forced by his “aesthetic hypothesis” to consider authorial intentions when engaging in constructive interpretation. His failure, however, arises from unique features of his general theory of interpretation and does not require abandoning the possibility of finding a theory of law that interprets statutes independently of their authors’ intentions.

but that nevertheless failed to exemplify an instance of a speaker trying to tell an audience something.⁸⁹ As Strawson's example proved, unless a speaker at least intends to convey to his audience members the belief that he is trying to tell them something, he has not communicated to them. Thus, in addition to possessing the intentions which Grice spelled out, speakers must possess a *doubly* reflexive intention—one that when stated without the aid of a modal logic complete with intentionality operators appears as though it were a printing error: Speakers must intend that their audiences recognize their intention that their audiences recognize their intention that their audiences produce a certain response.

This requirement imposes on a communicative theory of statutes the burden of proving that legislators intend to convey to their respective audiences the belief that they are trying to tell those audiences something. This means that legislators must intend the recognition of their intent to get their audiences to recognize their intent to get their audiences to believe the propositions contained in their legislative utterances. Convolved as such a task may seem, failure to complete it successfully would spell the defeat of a communicative theory of legislation.

Yet failure to complete this task would not necessarily devastate the view that statutes can accomplish action-guiding ends. That a legislature can convey to an audience a certain belief about a legal proposition without conveying to that audience the belief that the legislature is trying to tell its members something is, I take it, fairly clear. Like the person who watches his roommate list and post the groceries needed while unaware that his roommate knows of this observation, members of the public may, and certainly do, monitor the behavior of their elected representatives while being quite unaware that their attention is in any sense noticed, and perhaps exploited, by those representatives. Indeed, such monitoring constitutes the bulk of what many lawyers, law professors, and law students do when keeping up with developments in a particular area of law. Most of these individuals are likely to be entirely oblivious of the fact that they could be the subjects of the sort of stealthy manipulation suggested by Strawson's example. Their continued monitoring provides legislators with many opportunities to engage in behavior that will be taken as evidence of particular legal states of affairs in the world. Thus, legislators might strategically debate about, draft, and pass a statute prohibiting vehicles from state parks with the intent that such behavior will: (1) induce in those monitoring their doings the belief that vehicles will be barred from state parks; (2) prompt those monitoring their actions to form a belief about the prohibition of vehicles in state parks on the basis of their recognition that the legislature intends them to believe this; and (3) be taken by this audience to be a good reason for thinking that vehicles will be barred from

89. See *supra* text accompanying notes 39–43.

state parks. Under this scenario, those observing these legislative actions may indeed form the belief that no vehicles will be allowed in state parks without forming the belief that the legislature was trying to tell them anything. The legislature will have accomplished its action-guiding purpose without communicating to its audience.

This section has demonstrated that statutes may fail each of the four conditions necessary for communication without sacrificing their capacity to guide behavior. When we take this result together with the conclusions reached in the preceding two sections of this Part, we can make two claims against a communicative model of legislation. First, legislation does not appear to be best explained as communication because the legislature lacks the intentions required of a speaker and because citizens and officials lack the beliefs required of an audience (at least concerning the conduct rules traditionally construed as paradigmatic commands). Second, legislation need not be construed as communication to conceive of the legislature as capable of accomplishing its action-guiding function. In light of these two claims, one should be tempted to abandon the communicative theory of legislation *if* there exists an alternative non-communicative theory which could plausibly account for the status and content of legislation within our legal system. In the next Part, I begin to develop an example of such an alternative model of legislation.

III. STATUTES AS NON-COMMUNICATIVE SIGNS

A. *From Metaphor to Model*

1. *Choosing the Metaphor*

In the last section we saw the emergence of four potential models of legislation, each corresponding to one of the four sources of communicative failure. It became clear that statutes might be characterized in any one of the following ways: (1) as *signs* analogous to entries in diaries or scientific logs, intentionally produced to describe states of affairs but not intended to evoke uptake in any audience; (2) as *clues* produced by an author to evoke uptake in an audience but not through the audience's recognition of the author's intentions; (3) as *showings* which do not depend for their causal powers on recognition by an audience of their speaker's intentions; or (4) as *manipulative demonstrations* to audience members who are known to the speaker but who do not know that they are so known, and who thus are exploited by the speaker's successful strategy of inducing them to take the speaker's behavior as a clue about some state of affairs. Each of these four models provides a basis for constructing a new, non-communicative theory of legislation. We must therefore begin by choosing from among these competing conceptions the one which will best serve as our model of non-communicative legislation.

In their application, the four models are only subtly distinct. All of

them force us to take legislation as a natural sign possessing meaning, but not meaning_{NN}. Under the first model (the model that conceives of statutes as signs, such as entries in a ship captain's or scientist's log), statutes are not communications at all, since there are no authorial intentions that they be taken as communications. Under the second and fourth models (the model that conceives of statutes as simple clues and the model that conceives of statutes as akin to manipulative demonstrations), statutes are very much like communications, for they are attempts to change the propositional content of others' beliefs. They function as concealed communications, since they are deliberately designed to appear as though they are not communications at all. Under the third model (the model that conceives of statutes like showings akin to Herod's presentation to Salome of St. John the Baptist's head), statutes are failed attempts at communication, since the intentions to make them signals are made causally inefficacious by their functioning as signs.

Despite the similarity among the models, there is good reason to prefer the first to the others. Recall that my project is ultimately to carve out the possibility of a natural law theory of legislation. Only the first model clearly preserves that possibility because the other three models, although non-communicative, give way to the assumption that the content of statutory law is a function of the content of some speaker's propositional attitudes. This assumption, in turn, inclines one toward the view central to legal positivism that the (statutory) law is actually a function of historical fact and not moral correctness.

Precisely because this first model is most compatible with natural law theory, it presents a harder and more interesting case for the theorist defending a non-communicative model than do any of the other three models. As I argue in the second section of this Part, the first model raises most dramatically the central problems for a non-communicative model of legislation: How can it provide an account of legislative authority, a theory of statutory interpretation, a theory of rights and obligations, and an account of legislatively imposed sanctions? If statutes are mere descriptions like the scientist's entries in a log, then what gives them authority? How are we to interpret them in light of the lack of any implicit illocutionary intentions? Why are citizens obligated by them? And how can we know when they are wrong?

These problems have less force if statutes are akin to clues, showings, or manipulative demonstrations. If they are like clues or manipulative demonstrations, then there exists a "speaker," however deliberately disguised, possessing illocutionary intentions whose clues or demonstrations might be profitably interpreted in light of these intentions (despite the lack of intent that they be so interpreted). If statutes are like showings, then they are just failed communications, and there is no doubt that a speaker both exists and "gets us to believe" certain statutory propositions. Like

Herod who fails to tell Salome of St. John's death but manages to get her to believe it, the legislative speaker in this model fails to communicate to us only by failing actually to "tell us" of the propositions that it both intends and gets us to believe. Under each of these three models, a speaker attempts to convey a message to an audience, even if communication is not his or her means. The presence of a speaker makes it possible to defend theories of authority and obligation that depend upon a sovereign's power to impose sanctions⁹⁰ or to provide exclusionary reasons.⁹¹ It makes possible a conversational theory of statutory interpretation under which a search for authorial intentions remains legitimate. It also makes possible an account of legislative error based on speaker ambiguity, vagueness, and misstatement.

These three non-communicative models are attractive because they look more like communicative ones. In light of the residual communicative elements present in the second, third, and fourth models, I propose to abandon these models in favor of a model that is unabashedly non-communicative. Only by foreclosing all possibility of appealing to a speaker's meaning_{NN} or illocutionary intentions is it possible to develop a *fully* non-communicative theory of statutory law that is compatible with natural law theory.

Before I take up the task of constructing a wholly non-communicative theory of legislation, let me pause to explain why I am *not* pursuing the well-known attempt by Ronald Dworkin to construct a theory of law that escapes the implications of the communicative model.⁹² In short, my claim is that Dworkin's model retains elements of a communicative thesis, just like the models under which legislation is made analogous to clues, showings, or manipulative demonstrations, and it therefore fails to function as a paradigm of a robust non-communicative theory.

Dworkin maintains that law is like literature in that it is inherently interpretive. Legal analysis, like literary interpretation, should proceed according to what Dworkin terms the "aesthetic hypothesis." That is, we should endeavor to interpret the text in question by imposing on it purpose "in order to make of it the best possible example of the form or genre to which it is taken to belong."⁹³ In the case of legislative and constitutional texts, the purpose with which we imbue the text is a result of political choice. Yet Dworkin repeatedly insists that this choice must take account of some conception of legislative or Framers' intentions.⁹⁴ Admittedly, his conception of an intention is, as he describes it, construc-

90. See *supra* note 5 and accompanying text.

91. See J. RAZ, *supra* note 12, at 38-69.

92. R. DWORKIN, *supra* note 65, at 33-71, 146-66; R. DWORKIN, *supra* note 9, at 14-45; see also Raz, *supra* note 65, at 1118 (describing Dworkin's failure in *A Matter of Principle* to "subdu[e] the force of the communication model").

93. R. DWORKIN, *supra* note 85, at 52.

94. See, e.g., R. DWORKIN, *supra* note 65, at 57.

tive. In the case of constitutional interpretation, Dworkin claims, there is “no such thing as the intention of the Framers waiting to be discovered. . . . There is only some such thing waiting to be invented.”⁹⁵ A legislative or constitutional intention, he claims, “has no natural fixed interpretation that makes the content of the Framers’ intention just a matter of historical, psychological, or other fact. The idea calls for a construction which different lawyers and judges will build differently.”⁹⁶

Yet as Dworkin explains, we cannot sensibly state just any interpretive conclusion we choose in the language of intentions, “so that if we think the delegates to the original constitutional convention should have outlawed slavery, for example, we can say that they intended to do so”⁹⁷ Rather, he claims that the concept of constitutional intention is bounded by “the general and uncontested concept of intention.”

We share the assumptions that when controversy breaks out [about] whether the equal protection clause forbids segregated schools, for example, then it is relevant to ask about the purposes or beliefs that were in some sense ‘in the mind’ of some group of people who were in some manner connected with the adoption of the Fourteenth Amendment, because these beliefs and purposes should be influential in some way in deciding what force the equal protection clause now has. We agree on that general proposition, and this agreement gives us what we might call the *concept* of a constitutional intention.⁹⁸

For Dworkin, interpretation must proceed with at least one eye to authorial intention, conceived of in its “general and uncontested sense,” that is, in what clearly appears to be its traditional psychological sense.

Dworkin maintains, however, that his reliance on authorial intention does not commit him to a conversational theory of legal interpretation.⁹⁹ His disclaimer is indeed a prudent one, since the application of a conversational theory to legislative utterances would present the same problems that plague other appeals to legislative intentions.¹⁰⁰ Yet despite his attempt to avoid a conversational theory of interpretation, Dworkin contends that “interpretation must *apply* an intention.”¹⁰¹ For Dworkin, the intention to be applied in interpretation must reflect or accommodate the actual psychological intention with which the interpreted piece was authored:

95. *Id.* at 39.

96. *Id.* at 55.

97. *Id.* at 40.

98. *Id.* at 39 (emphasis in original).

99. R. DWORKIN, *supra* note 85, at 50 (interpretation of social practice is distinct from conversational interpretation because former aims “to interpret something created by people as an entity distinct from them” while latter aims to interpret “what people say”).

100. See *supra* text accompanying notes 56–75.

101. R. DWORKIN, *supra* note 85, at 55 (emphasis in original).

Someone who produces *The Merchant of Venice* today must find a conception of Shylock that will evoke for a contemporary audience the complex sense that the figure of a Jew had for Shakespeare and his audience, so his interpretation must in some way unite two periods of 'consciousness' by *bringing Shakespeare's intentions forward* into a very different culture located at the end of a very different history.¹⁰²

On this example, one interpreting Shakespeare's plays must accommodate a conception of Shakespeare's intentions in order to make the plays the best examples they can be of Shakespearean drama. To succeed in making a constitutional prohibition or a legislative enactment the best possible example of law-making that it can be, the interpreter must seek out and incorporate the intentions of its authors. Yet to accomplish this interpretive task in a manner that takes seriously the constraints posed by the general and uncontested sense of authorial intention—that is, in a manner which accommodates the *actual* or *psychological* intentions of Shakespeare, the Framers of the Constitution, or a group of legislators—one must inquire into the illocutionary acts which Shakespeare or these law-makers intended to perform. As Dworkin admits, "[w]hen a statute or constitution or other legal document is part of the doctrinal history [to be interpreted], speaker's meaning will play a role."¹⁰³ So despite Dworkin's professed ability to avoid it, he too must engage in speech act analysis.

If one adopts Dworkin's view that law is like literature, and if one finds Dworkin's theory of creative interpretation compelling, then it follows that rather than escaping speech act analysis in the case of legislative interpretation, one is forced to return to it. By recognizing that we must engage in speech act analysis in order to accommodate the relevant intentions of the artist, we complete the circle from Dworkin's so-called non-communicative model back to a fully communicative one. To the extent that Dworkin's theory of statutory law returns us in this round-about way to the inevitability of speech act analysis, and therefore to a theory of legislation inseparably wedded to communication theory, Dworkin's theory is legitimately subject to the criticisms that have been directed against it for two full decades, namely, that it is only a disguised form of positivism.¹⁰⁴

102. *Id.* at 55–56 (emphasis added).

103. R. DWORKIN, *supra* note 65, at 160.

104. Recognizing Dworkin's failure to abandon all appeals to speaker's meaning, Joseph Raz summarizes Dworkin's success at founding a non-communicative theory: "The communication model is not so much discarded as subdued and humbled. It is relegated to a secondary role within the general coherence-based theory of law." Raz, *supra* note 65, at 1118. Yet as Raz argues, it is not at all clear that the communication model can be made to play second fiddle to a coherence model under which interpretation proceeds in accordance with the aesthetic hypothesis. Raz' very interesting argument can be summarized as follows. Since Dworkin seeks to maintain a distinction between interpreting legal history and inventing legal history, he must require that a judge make coherent the set of legal materials which she interprets. To disregard a substantial amount of legal material would be to

2. *Constructing the Model*

It is now time for the reader to collect on all the promissory notes issued throughout the earlier sections of this article to the effect that statutes might be plausibly construed as non-communicative descriptions analogous to those recorded by a scientist in a daily log. Let me first crudely outline the model of legislation that is captured by the metaphor and then fine-tune it by resolving some initial objections that might be made concerning its admittedly unconventional features.

Statutes, I want to suggest, might be legitimately construed as signs, rather than signals. Recall that signs function as symptoms of conditions in the world to which they are causally related. As such they possess what Grice called “natural meaning,”¹⁰⁵ which is captured by those instances in which we say, for example, that another’s sneeze *means* that the person has allergies; that the clatter of dishes *means* that dinner will soon be served; that a child’s entry in a diary to the effect that he is unhappy *means* that he is unhappy; and that the scientist’s logged descriptions of phenomena observed *means* that the phenomena possessed the characteristics recorded. In each case, “means” is used in its natural sense to capture a causal relation between the sign and a state of affairs in the world.¹⁰⁶ Accordingly, statutes can be said to be signs possessing natural meaning only insofar as they are evidence of states of affairs to which they are causally related.

In order to construct a model under which statutes possess natural meaning and so function as signs of states of affairs, let us return to the metaphor of the scientist. I have in mind a scientist engrossed in the process of discovery. Her logged descriptions of the natural phenomena that she observes are not intended to produce uptake on the part of others; they are not, in fact, intended for others at all. Just so that one is not tempted to think that she intends her own uptake at a later date, let us also assume that she writes her observations down only to cement her perceptions, discarding her recordings as she writes them. Were we to find the scientist’s discarded logs, their contents would function as signs of the phenomena that she observed *so long as* we were able to give good reasons for think-

invent rather than to interpret existing history. Yet legal materials are not sets of meaningless inscriptions on paper. If they were, one could make of them anything one wished. To preserve the distinction between interpretation and invention, legal documents must be given their plain meaning. As Raz claims, “[s]peaker’s meaning is presupposed by the coherence doctrine. . . . [D]octrinal history will be understood in accordance with the communication model to generate the material which sets the limits to what the coherence model can do.” *Id.* at 1119.

105. *See supra* text accompanying note 24.

106. Recall that this sense of meaning is to be contrasted with what Grice termed non-natural meaning or meaning_{NN}. When one intends by one’s actions to convey a message to another, one’s actions have meaning_{NN} and are thus not signs but signals. *See supra* text accompanying note 25. To determine the meaning_{NN} of an utterance, for example, one looks not to any natural state of affairs to which the utterance might be causally related but to the illocutionary intentions of the speaker. *See supra* text accompanying notes 25-27.

ing that there existed an unbroken causal chain between the data that she observed, the perceptions that she had of the data, her beliefs about these perceptions, and her recordings.

Both the philosophy of science and the philosophy of mind have forced us to be considerably more sophisticated about an observer's contributions to what is observed. One convinced of the theory-ladenness of observation, or of the lack of any inference-free perceptions, or of the lack of any pure observation language with which to express perceptions will deny that there is any observational situation so ideal that the beliefs of the observer must be true because they are caused only by the reality observed. Despite these many sources of skepticism concerning the strength of the causal chain between observation and description, few would deny that such a chain exists or that the perceptual beliefs forming the end of such a chain are not often reliable evidence for the truth of the matter believed. We do think that whenever we identify or describe a table there exists a causal chain, however numerous and intricate its links, between the properties of the table, our perceptions of those properties, and our description of the table as an object having such properties. Under ordinary circumstances, others would be entitled to take our description of the table's color, composition, and dimensions as a sign of its actual color, composition, and dimensions precisely *because* they think our description causally related to the possession of these properties.

Similarly, we may be entitled to take legislative utterances as signs of legal properties or phenomena to which such utterances are causally related. Just as a scientist's descriptions made under the appropriate observational circumstances function as signs of the existence and nature of certain physical phenomena, so legislative utterances describe legal states of affairs in a manner which, if made under appropriate circumstances, may function as signs of the existence and nature of those phenomena. These legal phenomena are facts about the manner in which legal arrangements ought to be made; as such, they are moral facts which become legally relevant when they help to guide behavior among citizens in particular circumstances.¹⁰⁷

The legislature, under this view, is like the scientist. Its task is one of discovery; its goal is that of describing optimal legal arrangements. To the extent that the legislature proceeds under adequate observational conditions, its utterances may be taken to function as signs of these optimal legal arrangements. Thus, under the non-communicative model of legislation that is generated by the failure of the uptake condition, statutes issued by the legislature are not to be thought of as commands, orders, requests, threats, promises, or any other kind of communication whereby a speaker

107. For a discussion of the nature of moral facts, see *infra* text accompanying notes 111-24. For a discussion of what gives moral facts legal significance, see *infra* text accompanying notes 166-73.

indicates what he or she wants done. Rather, statutes are to be thought of as descriptions—*not* as communications by a speaker to an audience with the illocutionary intent to inform but, instead, as results of inquiries recorded by a uniquely situated observer.

This depiction of statutes as signs of optimal legal arrangements provides the skeleton of the non-communicative theory of legislation that I propose to develop. The task is now to put legal meat on its rather spare philosophical bones. As a helpful means of doing this, I want to address two general objections that one might raise about the model itself and about its *prima facie* incomparability with the metaphor which initially motivated it. The first such objection rests on the claim that as a matter of simple fact, legislators, unlike scientists, are not engaged in a descriptive enterprise. The second general objection rests on the claim that unlike scientists, legislators have nothing to describe.

The first objection might be put categorically: Since the legislature issues prescriptions, and since prescriptions *cannot* be descriptions, the legislature is not issuing descriptions. Alternatively, this objection might be put as an observation about actual legislative behavior: Even if prescriptions *can* be descriptions, we cannot take the legislature's prescriptions descriptively since the legislature does not intend its prescriptions as descriptions. A last interpretation of this objection would be that since the legislature does not intend to be describing, we cannot take its prescriptions as *reliable* descriptions (even if we *could* take them as descriptions).

The second general objection to the model of legislation that I have thus far sketched is that "optimal legal arrangements" are not like the color and shape of a table, and thus legislators, unlike scientists, cannot be engaged in observation. This objection, motivated by moral skepticism, can take several alternative forms. First, one can deny that there are any moral facts for a legislature to describe. Second, one can deny that moral facts, even if they exist, are knowable. Finally, one can deny that there is a causal connection between moral facts and legislative utterances—implying that legislative utterances cannot be signs of such facts.

In what follows, I shall respond to the various versions of these two objections, and in so doing, I will fill out the non-communicative model of legislation that I have outlined.

a. *Legislation as a Descriptive Enterprise*

One might object that statutes are unlike reports of scientific observations because statutes are prescriptive, and prescriptive utterances cannot be descriptive. If this objection means only that legislative utterances are commands, it simply begs the question raised by this article. In Part II, I gave reasons to think that there is nothing inherent in legislating that makes it a speech act. In light of this, there is no fact of the matter that

makes legislative utterances commands. The question we must answer is a normative one: How ought we to conceive of statutes? I have suggested that statutes ought to be taken as descriptions of optimal legal arrangements. To object that they cannot be descriptions because they are commands is simply to assume what must be proven.

However, if the basis of the objection is that statutes consist of "ought" statements, then the assertion that legislative utterances are prescriptive is not question-begging. The objection then runs as follows: Since the legislature issues statements about what people ought to do, it is not engaged in description. One initial problem with this form of the objection is that many statutes simply do not look like ought statements. Many statutory utterances neither prescribe nor proscribe; instead, they describe the relationship between certain sorts of behavior and certain legal consequences. Moreover, such an "ought/is" objection presupposes that ought statements are not descriptions. But this assumption is quite false. The statement that "one ought not to kill" both presupposes a description of an optimal state of affairs—one in which there are no killings—and is itself a description of a moral fact—the fact that one ought not to kill.¹⁰⁸ Without some reason to believe that statements of what one ought to do are not statements of fact, this objection fails to defeat the claim that legislative utterances are descriptive.

The second version of the objection that legislators are not engaged in a descriptive enterprise is as follows: Since legislators do not in fact intend to describe optimal legal arrangements, we are not entitled to take their utterances as descriptive. Even if we assume that legislators do not in fact intend to be describing states of affairs, this objection once again begs the question of how legislative utterances *ought* to be taken. To say that they ought to be taken as commands because that is how they are intended by

108. For a discussion of the reducibility of imperative statements to indicative or descriptive statements, see Bohnert, *The Semiotic Status of Commands*, 12 PHIL. SCI. 302 (1945).

A so-called "ordinary language prescriptivist" might well be inclined to argue that one cannot accomplish both description and prescription with the same speech act. I take it that the implicit acceptance of some version of ordinary language prescriptivism largely accounts for the internalization of the communicative model of law by many contemporary legal theorists. Taking instances of imperative utterances as paradigmatic uses of legal language, contemporary theorists conclude that the use of legal language has nothing to do with stating facts. Since laws look like imperatives, they must be imperatives; therefore, they cannot be descriptions.

Yet such a conclusion rests on what has been termed the "speech act fallacy." See Lycan, *Moral Facts and Moral Knowledge*, 24 S.J. PHIL. 79, 83 (Supp. 1986). From the indisputable contention that legal judgments are used to convey "ought" statements, the theorist committing the speech act fallacy infers that legal judgments are not also used to state facts. Since one and the same utterance can be used to perform any number of acts simultaneously, this inference is simply invalid. The mother who instructs her son to take his umbrella with him when he goes to school can certainly be taken to be describing expected weather conditions or the desirability of staying dry. Similarly, an ordinance barring vehicles from a local park, while appearing to function as a statement of what park visitors ought not to do, may well be understood as a description of an optimal legal world—that is, a world in which there are no vehicles in the local park. And the command "Do not steal" can be translated into the descriptive claims that "It is wrong to steal" or "The optimal legal world is one in which there is no stealing."

legislators is to presuppose that we ought to take legislation as it is intended; but this is exactly what I wish to challenge. To examine whether the communicative model is an appropriate model of legislation, we cannot simply assume that it is.

According to the third and most interesting version of this first objection, legislators cannot be taken to be *reliable* describers of moral facts unless they intend to describe such facts, because unless legislators intend to describe particular facts, it is unlikely that they will do so accurately. After all, novelists writing fiction are rarely treated as good historians. Since it is more likely that legislators conceive of themselves as commanders or tribunes of their constituents than as scientists, they probably do not intend their utterances to be descriptive. Accordingly, even if we *could* take their utterances as descriptive, we *should* not do so, for we have no reason to trust their reliability.

The potency of this objection depends entirely upon the kind of non-descriptive speech act one assumes legislators to be doing when they vote on legislation. If legislators see themselves as writing creative fiction, then (absent an unconscious reproduction of something else) their creations are unlikely to be accurate descriptions of anything. But this is implausible; legislators are far more likely to think of themselves as ordering, commanding, or requesting. And these acts, although not themselves assertorial, presuppose a describable state of affairs—namely, the one commanded, ordered, or requested. As such, they rest upon “observations” of optimal legal arrangements. Just as the well-motivated mother would not command her son to take an umbrella unless she made the observation that it is better to stay dry, so well-motivated legislators would not command, for example, that vehicles not be driven in a park unless they made the observation that this was a desirable state of affairs. Thus, even if legislators intend to command rather than to describe, their utterances can be taken to be reliable descriptions of optimal legal arrangements so long as the legislators themselves are motivated to issue commands that are in the best interests of those who must follow them.¹⁰⁹

109. One might think that my appeal to the motivations of legislators returns us to the search for elusive collective mental states. Since one of the reasons for abandoning the communicative model of legislation is to rid oneself of the need to seek out legislative intentions, an alternative model that makes the authority of the legislature depend on good motivations will not immediately appear to be an attractive alternative. I believe that this is an unavoidable feature of the model. Just as we must be able to trust that the scientists whose descriptions we rely upon will not falsify data in the interest of promoting their careers, so we must be able to trust that legislators whose descriptions we act upon will not describe less-than-optimal legal arrangements in the interest of promoting their careers. Yet as I will argue in the next section, just as there are institutional reasons for trusting the integrity of observations recorded by scientists, so there are institutional reasons for trusting the accuracy of legislative appraisals. See *infra* text accompanying notes 133-51. In other words, there are institutional constraints which prevent legislators from enacting statutory provisions that reflect undesirable states of affairs. In light of these constraints, we are entitled to assume that the legislature functions as a reliable observer of optimal legal arrangements. We may therefore forego an investigation of the complex set of motivations that inevitably operate on legislators when drafting and voting on particular

It may well be that some legislators are not motivated to act in the public interest but are, instead, motivated by a desire to do whatever it takes to stay in office, please fellow legislators, or satisfy powerful constituents. Such legislators will not likely issue commands that presuppose judgments about the most desirable legal institutions. As I will argue in the next section, we should give authority to legislative descriptions only to the extent that they are reliably grounded in the states of affairs that they implicitly describe. Legislation that is backed only by log-rolling, political compromises, or self-interest on the part of legislators will thus be entitled to little authority. I shall defer until this later discussion the argument that legislatures are designed so that "public interest" motivations dominate "public choice" motivations.¹¹⁰

b. *Legislation as a Description of Moral Facts*

The second set of objections to the non-communicative model of legislation that I have outlined challenges the claim that legislative descriptions are statements about, or statements causally related to, *knowable moral facts*. The challenge on this front can be put in terms of a set of alternative worries: (1) the ontological worry: While physical facts exist to be observed and described, moral facts do not exist, and so legislative descriptions cannot be signs of such phenomena; (2) the epistemological worry: Even if there are moral facts, such facts cannot be reliably known, and so legislative descriptions cannot be reliable signs of such facts; (3) the causal worry: Even if there are knowable moral facts, they do not cause events in the world such as the enactment of statutes, and so legislative descriptions cannot be reliable signs of such facts.

These challenges raise issues that are currently matters of heated debate in the contemporary literature on moral metaphysics and epistemology. To provide a satisfactory answer to each challenge would require that we delve deep into this very extensive literature and so embark upon a project that would undoubtedly land us far afield. Accordingly, I shall only briefly indicate how one might meet these three challenges.

Skepticism about the existence of moral facts is a fashionable twentieth-century position in meta-ethics. As one contemporary legal philosopher has quaintly put it, "Moral facts are right up there with Cartesian egos, moxibustion, and the Easter Bunny in the ranks of items uncordially despised by most contemporary philosophers."¹¹¹ If well-founded, such skepticism would devastate the model of legislation that I have constructed, for legislative descriptions could no longer be defended as natural signs of empirical phenomena. While I have elsewhere begun a defense of my

statutes.

110. See *infra* text accompanying notes 133-51.

111. Lycan, *supra* note 108, at 79 (emphasis omitted).

non-skeptical meta-ethics,¹¹² it should suffice, for present purposes, simply to offer several meta-ethical positions, any one of which, if adopted, would adequately put to rest the skeptical worries outlined above.

Perhaps the most easily acceptable alternative to moral skepticism is the theory of reductionist conventionalism represented by the work of Gilbert Harman. According to Harman, there exist moral facts of the sort identified by Bertrand Russell when he observed that “bull-fighting is wrong,” but such facts are constituted by the conventions of a particular society. What it means in England to say, “bull-fighting is wrong,” is that there is some fact of English culture (an agreement or convention, for example) which makes that proposition appropriate.

According to this explicitly relativistic view, a moral fact is a kind of sociological fact—a fact constituted by the belief patterns in a given society. If sociological facts constitute morality, then none of the three skeptical challenges enumerated above are particularly worrisome. As instances of social facts, moral facts are no more “queer,” to use John Mackie’s famous phrase,¹¹³ than are facts about current fashion; such facts are no more unknowable than are any other facts concerning what people believe; and the causal relation between such facts and the beliefs of individual legislators is no more mysterious than the causal relation between an individual’s acculturation and his or her behavior in that culture. Under a conventionalist account of moral facts, there should be no meta-ethical worries about odd and unknowable moral facts mysteriously causing the beliefs and behavior of legislators.

Yet for a host of reasons that I have developed elsewhere,¹¹⁴ reductionist conventionalism leaves much to be philosophically desired. There are, however, at least two non-conventionalist meta-ethical theories that would also defeat the worries generated by moral skepticism. One would be a theory of reductionist naturalism that reduces moral properties to non-conventional natural properties. Just as water *is in fact* H₂O and heat *is in fact* the kinetic energy of molecules, so, some have urged, goodness *is in fact* what a person would approve of in certain specified circumstances; wrongness *is in fact* cruelty; and culpability *is in fact* voluntariness and intentionality in the commission of a prohibited harm.¹¹⁵ This kind of naturalism is reductionist because it asserts that there is a type-identity between moral qualities—such as goodness, wrongness, and culpability—and certain natural properties.

There are two epistemic routes by which one could justify the type-identities distinctive of this kind of naturalism. The older route was to

112. Note, *supra* note 19.

113. J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 38–42 (1977).

114. Note, *supra* note 19, at 1459–1506.

115. For a discussion of this possibility, see Harman, *Moral Explanations of Natural Facts—Can Moral Claims be Tested Against Moral Reality?*, 24 S.J. PHIL. 57 (Supp. 1986).

maintain that one discovered such identities by examining language: One found such identities when one found analytic truths about the meaning of moral terms such as "good," "just," or "wrong." Such "analytic naturalism" is no longer popular, for few think that we discovered that water was H₂O by investigating the meaning of the word "water"; rather, we discovered this and other identities by engaging in scientific research. Accordingly, this kind of naturalism is more typically defended on non-analytic grounds: Just as it is our best physical theory that tells us whether a vapor trail is caused by a proton, so it is our best moral theory that tells us whether wrongness is identical to cruelty or to any other natural fact or set of natural facts.

On this naturalistic view of moral facts, there also can be no meta-ethical worries that would defeat my claim that statutes can be construed as signs caused by underlying states of affairs. For on this view, moral facts are no more mysterious than natural facts (like cruelty or intentionality) for the simple and sufficient reason that they *are* natural facts. There can be no problem about knowing moral facts, because if one knows the natural facts with which they are identical one has good grounds on which to infer the moral facts (just as one has no problem inferring the existence of water from the presence of H₂O). And if natural facts like cruelty cause certain beliefs in us—as they do when we watch boys cruelly dowsing a cat with gasoline and igniting it, to use Harman's example¹¹⁶—then, by Leibniz' law,¹¹⁷ the identical moral facts must cause the same beliefs in us.

The third meta-ethical view to which one might appeal as a means of responding to the challenge of moral skepticism is the most popular among contemporary non-conventionalists. This is the theory of "supervenience" or "consequential" naturalism. According to this view, moral properties are not type-identical to natural properties. Wrongness, for example, is not always identical to cruelty; sometimes it consists of deception, manipulation, or inattention. Yet the view is a naturalist one because it assumes an intimate relation between moral properties and natural properties. This relation is usually termed one of "supervenience." One property supervenes upon another when there is systematic covariation between the two properties. Properties systematically covary when there can be no change in the supervening property without an accompanying change in the property supervened upon.

Examples speak louder than abstract descriptions here. If cowardice is a moral property, a supervenience naturalist will assert that it supervenes upon certain natural properties such as the propensity to feel fear in the

116. G. HARMAN, *THE NATURE OF MORALITY* 4 (1977).

117. One way of stating Leibniz' law is the following: If *X* is identical to *Y*, then anything that is true of *X* is also true of *Y*. See generally 4 *THE ENCYCLOPEDIA OF PHILOSOPHY* 47 (P. Edwards ed. 1967) (discussing implications of Leibniz' "identity of indiscernibles").

face of danger; the propensity to abandon friends in "It's either them or me!" situations; and the propensity to flee rather than to fight. Cowardice is not *identical* to any of these natural properties, nor even to all of them together; this feature of the account is what distinguishes a supervenience naturalist from a reductionist naturalist. Still, cowardice is intimately related to these natural properties in the sense that it supervenes upon them.

Supervenience naturalists recognize the need to supply an explanation of why moral properties and certain natural properties systematically covary. The most obvious explanation is that each moral property is identical to some set of natural properties. Under such circumstances, the moral and the natural are one and the same, so it is no surprise that they covary. Yet such an explanation reduces supervenience naturalism to reductionist naturalism. Supervenience naturalists resist such a collapse, proposing instead a "token-identity" between moral properties and natural properties. Token-identities do not require that cowardice *as such* (everywhere and always) be identical to the propensity to feel fear. One can think that an individual's cowardice at time *t* is identical to her propensity to feel fear without believing that cowardice is always (type-) identical to such a propensity. To think this, as the supervenience naturalist typically does, is to assert a token-identity between a moral property and a natural property while denying the existence of any type-identities between them.

The three skeptical worries concerning the status of moral facts are no more troublesome to this meta-ethical view than they were to the previous theories. Natural properties such as cruelty or intentionality are no more *metaphysically odd* than are other sociological facts, so if the ontological queerness objection is to be raised against supervenience naturalism it must be directed at the supervenience *relation* between natural properties and moral properties. Some skeptics such as John Mackie have indeed raised precisely this objection:

What is the connection between the natural fact that an action is a piece of deliberate cruelty—say, causing pain just for fun—and the moral fact that it is wrong? . . . The wrongness must somehow be 'consequential' or 'supervenient'; it is wrong because it is a piece of deliberate cruelty. But just what *in the world* is signified by this 'because'?¹¹⁸

Yet contemporary theorists do not share Mackie's doubts about the oddness of the supervenience relation, finding it to be *the* relation that exists between different levels of explanation in the natural and social sciences.¹¹⁹ Thus, for example, painfulness is thought to supervene upon C-

118. J. MACKIE, *supra* note 113, at 41 (emphasis in original).

119. See Kim, *Causality, Identity, and Supervenience in the Mind-Body Problem*, in 4 MIDWEST STUDIES IN PHILOSOPHY 31 (P. French, T. Uehling, & H. Wettstein eds. 1979) (arguing that mental processes supervene on micro-processes of brain physiology) [hereinafter Kim, *Causality*]; Kim, *Su-*

fiber stimulation in the central cortex of the brain, and national sentiment is thought to supervene upon the mental states of individual citizens.

The *knowability* of moral properties is also not a problem on this meta-ethical view, though skeptics like Mackie have tried to make it one. As Mackie states: "It is not even sufficient to postulate a faculty which 'sees' the wrongness: something must be postulated which can see at once the natural features that constitute the cruelty, and the wrongness, and the mysterious consequential link between the two."¹²⁰ But if one can detect natural qualities like cruelty or intentionality by making inferences from what one observes with the five senses (if one can, for example, infer cruelty from the act of setting a cat on fire), there is no need for the sort of extravagant faculties that Mackie pretends there to be. If wrongness supervenes on cruelty, one infers the wrongness from the cruelty in a manner no more mysterious than that which is employed when one infers the cruelty from some other natural fact, such as the manifestation of a sadistic desire.

Nor does the third skeptical worry concerning the inability of moral qualities to *cause* real events like legislative action trouble a defender of this meta-ethical view. As Peter Railton, a supervenience naturalist, has concluded recently, "there need be nothing odd about causal mechanisms for learning moral facts if these facts are constituted by natural facts"¹²¹ If, for example, natural properties like cruelty can cause beliefs and action, then the moral properties that supervene upon them, such as the property of wrongness, can also cause those beliefs and actions—for remember that according to the meta-ethical view here considered, the wrongness (token) is identical to the cruelty (token), and so, with a little help from Leibniz, we can conclude that if one causes beliefs and actions, then the other causes beliefs and actions.

On any of the three meta-ethical views outlined above, the second objection to the non-communicative model of legislation fails. For on each of the theories surveyed, there is nothing mysterious about moral truths causing legislators to legislate as they do. There is thus nothing metaphysically mysterious or epistemologically worrisome about taking statutes to be signs of underlying moral facts. The various forms of the second

pervenience and Nomological Incommensurables, 15 AM. PHIL. Q. 149 (1978) (explaining and broadening principle of supervenience) [hereinafter Kim, *Nomological Incommensurables*]; Kim, *Supervenience and Supervenient Causation*, 22 S.J. PHIL. 45 (Supp. 1984) (finding that supervening properties like moral qualities are not mere epiphenomena, i.e., that such properties *are* causes of real world effects) [hereinafter Kim, *Supervenient Causation*]; Lycan, *supra* note 108; Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); Sturgeon, *Harman on Moral Explanations of Natural Facts*, 24 S.J. PHIL. 69 (Supp. 1986) [hereinafter Sturgeon, *Harman*]; Sturgeon, *Moral Explanations*, in MORALITY, REASON AND TRUTH 47 (D. Copp & D. Zimmerman eds. 1985); Tolhurst, *Supervenience, Externalism and Moral Knowledge*, 24 S.J. PHIL. 43 (Supp. 1986); M. Moore, *Moral Realism as the Best Explanation* (rev. ed. Nov. 1988) (unpublished manuscript on file with author).

120. J. MACKIE, *supra* note 113, at 41.

121. Railton, *supra* note 119, at 171.

objection *appear* convincing only because they *are* convincing criticisms of what many have taken to be the only alternative to moral skepticism: the moral intuitionism of G.E. Moore.¹²²

Moore supposed that the meaning of moral predicates could not be analyzed in naturalistic terms, and he thus concluded that since such predicates are not meaningless, they must describe non-natural properties. Moreover, since at least some moral predicates, such as “goodness,” cannot be analyzed in terms of other moral predicates, they must be primitives—non-natural counterparts to such natural qualities as “redness.” Just as redness must be known directly, so must goodness; therefore, just as the knowledge of redness requires a faculty of visual perception, so the knowledge of goodness must require a special faculty of moral perception. Moore’s metaphysical notion that moral properties are non-natural properties thus gave rise to the epistemological theory that moral facts are accessed through a special faculty of moral intuition.

Moore’s non-natural metaphysics and intuitionist epistemology are what most people think of when they express the three skeptical worries that I have been considering. For what is a non-natural property, and how do we make sense of this special moral intuition? As Mackie put these problems:

If there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe. Correspondingly, if we were aware of them, it would have to be by some special faculty of moral perception or intuition, utterly different from our ordinary ways of knowing everything else.¹²³

Moreover, the third skeptical worry persists: How could a non-natural property *cause* a real happening in the natural world? Without being identical to, or in some other way intimately connected to, any natural properties, how could these ghostly moral creatures cause something as palpable and real as an act of legislation? As Peter Railton concedes, “the idea of causal interaction with moral reality certainly would be intolerably odd if moral facts were held to be *sui generis* [i.e., non-natural properties].”¹²⁴ If one shares G.E. Moore’s conception of moral facts, then it is understandable that one would be drawn to the three skeptical worries which I have addressed in this section. The burden of my argument has been to show that if one does not adopt Moorean non-naturalism but adopts instead any of the several alternative conventionalist or naturalist meta-ethical positions that I have outlined, then there are no serious meta-

122. See G. MOORE, *PRINCIPIA ETHICA* 1–36 (1903).

123. J. MACKIE, *supra* note 113, at 38.

124. Railton, *supra* note 119, at 171.

physical or epistemological objections to be advanced against the non-communicative model of statutes that I have constructed.

B. *From Model to Concept of Law*

In the previous section I outlined a non-communicative model of legislation—a model under which statutory utterances are to be understood, not as commands by a sovereign to an audience, but as natural signs of moral facts. The development of this model was motivated by the conclusion reached in Part II that a communicative theory of legislation is indefensible, because legislative enactments are not utterances that sustain speech act analysis. This model constitutes an attempt to demonstrate one way in which the jurisprudence of legislation might develop if stripped of its communicative elements. Yet this new model will not succeed as a satisfactory concept of statutory law, robust enough to rival the current communicative favorites, if it cannot yield defensible answers to questions of the following sort. Does the model support an adequate theory of legislative authority? How can we account for legislative error and statutory change? What constitutes the difference, if any, between law and morality according to this model? Are statutes that inaccurately reflect morality part of the law? How are we to account for legal rights and legal obligations of citizens under this model? Can the model provide us with a justification for the imposition of sanctions? Finally, can the model yield a satisfactory theory of statutory interpretation?

To attempt a comprehensive answer to any one of these questions, let alone to all of them, would take us well beyond the scope of this article. Yet it would be equally irresponsible to sell a model without some set of instructions as to how to make it fly. In the remaining pages, then, I propose to share some preliminary thoughts about why the theoretical tasks posed by some of the previous questions are not insurmountable to one tempted to defend the sort of non-communicative model of legislation that I have outlined. In particular, I will take up four of the most pressing questions traditionally asked of a concept of law: (1) Can the model account for the authority of law (in this case, of legislation)? (2) Can the model justify the imposition of sanctions for breaches of legally imposed (statutory) duties? (3) Can the model account for the relationship between (statutory) law and morality? (4) And finally, can the model provide us with an adequate theory of (statutory) interpretation? The answers to these questions go some way toward answering questions concerning how we account for traditional legislative functions, how we explain legislative error, and how we explain the existence of obligations on the part of citizens and officials under a non-communicative model of law.

1. *A Compatible Concept of Authority*

The claims that an authority makes for itself are part of what makes it an authority. We must thus ask what claims the legislature under a non-communicative model of law is entitled to make in order to determine what sort of authority it can be thought to be. The most prevalent view among contemporary jurisprudential theorists is that governmental authorities are entitled to claim *practical* authority. A person has practical authority, according to Joseph Raz, "only if his authoritative utterances are themselves reasons for action."¹²⁵ A practical authority is thus authoritative not because her utterances give persons *better reasons to believe* that particular actions are good ones to perform, but rather because her utterances give *new reasons to perform* actions. A mother is thus typically a practical authority to her children for that she has ordered the performance of some act is often, by itself, a new (and perhaps the only) reason to perform the act. A weatherman, on the other hand, typically does not function as a practical authority, for his admonitions to the members of his listening audience to take their umbrellas typically give them only a good evidentiary reason to believe that they have a reason to take their umbrellas. Thus, practical authorities give us new reasons for *action*, while "theoretical authorities" give us new reasons for *belief*.

Under the generally accepted analysis of practical authority that has been developed by H.L.A. Hart and Joseph Raz, an institution functions as a practical authority by giving new reasons for action only if it provides "content-independent reasons"¹²⁶ These are reasons for action that arise not from the internal rationale for the action, but from the external act of one in authority. As Raz explains:

A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently 'extraneous' fact that someone in authority *has said so*, and within certain limits his saying so would be reason for any number of actions. . . . A certain authority may command me to leave the room or to stay in it. Either way, its command will be a reason.¹²⁷

Yet it seems clear that only communications—only authoritative acts accomplished with the full set of intentions necessary for communicative signaling—give content-independent reasons for action. For only when one intends both to effect a response (for example, obedience) on the part of another and to do so via the other's recognition of one's intention does one give that person a reason to act as one intends that is independent of

125. J. RAZ, *supra* note 12, at 35.

126. H.L.A. HART, *supra* note 10, at 261; J. RAZ, *supra* note 12, at 35.

127. J. RAZ, *supra* note 12, at 35 (emphasis added).

the reasons that he or she already has for so acting. Consider, for example, the reasons for action that are given to others by a request for aid. It is possible to communicate one's need for help without requesting aid. When one in fact makes a request for help, this request is intended to function as a reason for others' action over and above that provided by their recognition of one's need and desire to be helped. As Raz explains: "[T]he specific quality of requests is that they are acts *intended to communicate* to their addressee the speaker's intention that the addressee shall regard the act of communication as a reason for certain action."¹²⁸

Content-independent reasons for action are just those reasons that are given to us when others intend to bring about in us a certain response (via the uptake condition) and when we take their intentions to be a reason for responding (the reflexivity, double-reflexivity and causal conditions). Recall the example of the man who leaves another's handkerchief at the scene of a murder intending that a detective think its owner the killer. Since the man does not intend the detective to recognize his intention to bring about this response, he does not intend that the detective have a content-independent reason for believing the owner of the handkerchief to be the murderer. He does not intend, that is, to function for the detective as a practical authority. Similarly, when Herod presents Salome with the head of St. John the Baptist, he fails to give Salome content-independent reasons to believe in St. John's death, for he fails to cause her belief by getting her to recognize his intention to do so. Herod thus fails to function as a practical authority, for Salome's reasons for forming the belief that St. John is dead are dependent upon the "content" of Herod's presentation of a severed head; they are not affected by any attempt on his part to communicate something.

Content-independent reasons, then, are reasons that are given to us only by those acts of others that are complete communications.¹²⁹ A theory of practical authority may thus be described as a "because I said so" theory of authority. It becomes apparent from this analysis that legislative utterances would give content-independent reasons for action and so possess practical authority only if they, like requests, functioned as acts of communication. For the legislature could give a content-independent reason for action only if it intended to effect a response on the part of an audience and further intended that the audience's recognition of its intention would function, by itself, as a reason for the response. Thus, only if the

128. *Id.* at 37 (emphasis added).

129. They are also those reasons that we give ourselves when we make, for example, promises or vows. One can plausibly argue that the making of a promise or vow gives us a content-independent reason for action, for it involves all the Gricean intentions. We intend to affect in ourselves a certain response (namely, compliance with the oath or vow), and we intend to do so via the recognition of our intent. We have a content-independent reason for compliance, (namely, that we intend ourselves to comply), and thus we are our own practical authorities. While Raz considers such an analysis metaphorical, *see id.* at 36, I think it is only pragmatically odd.

legislature is thought of as communicating—only if it is construed as “saying so”—can it be thought of as a practical authority.

Since the legislature does not communicate under the model that I have outlined, it cannot be thought of as a practical authority. This result may be a bit jarring, for many believe that the essential feature of a governmental institution is its possession of, or at least its claim to possess, practical authority. After all, why are we bound by legislative decrees if they do not give us authoritative reasons for action? There is, however, an alternative theory which can do all the work that must be done by a theory of authority.

This alternative theory is referred to above as one of “theoretical authority.” Raz has called this conception “the recognitional conception” of authority. Under this conception, “the utterances of legitimate authorities do not affect the balance of reasons. They are not themselves reasons for action, nor do they create any such reasons. They merely provide information about the balance of reasons as they exist separately and independently of such utterances.”¹³⁰ To accept an utterance as theoretically authoritative is to regard it as providing a reason to believe that one has a reason to act as described.¹³¹ To use Raz’ example, if the legislature were to decree that all contracts must be made in writing, the conception of the legislature as a theoretical authority would deny that this would give us a reason for making only written contracts.¹³² Rather, we would say that this decree gives us a reason for believing that there are *other* reasons for making only written contracts. Theoretically authoritative utterances, then, do not affect the balance of reasons on the main issue of what the citizen ought to do; rather, they affect the balance of reasons on the subsidiary issue of the evidence available concerning the main issue; they give us reasons to believe in reasons for action. Theoretically authoritative utterances are, that is, entirely content-dependent.

If we construe the legislature as a theoretical authority rather than as a practical authority, and if we have as our model of legislation the non-communicative one outlined earlier, then we commit ourselves to thinking of statutory utterances as authoritative reasons for belief in particular deontic descriptions. The legislature’s descriptions, to the extent that they are authoritative at all, provide us with evidentiary reasons to believe that we ought to act so as to bring about those states of affairs described. Legislative utterances thus become heuristic guides to antecedently existing reasons for action generated by antecedently existing moral facts. When the legislature passes a statute requiring the payment of new taxes, we

130. *Id.* at 29.

131. “On this account authoritative utterances are reasons, but they are reasons for belief, not for action. Therefore, regarding someone as an authority does not entail a belief that one has a reason to obey him, since reasons for obedience are reasons for action.” *Id.*

132. *Id.*

take its utterance as a description of an optimal state of affairs—the state of affairs in which everyone pays the taxes in question—that has been generated by an antecedently existing obligation to contribute sums that are equivalent to fair taxes. Similarly, when the legislature passes a conscription law, this law should be taken to describe an antecedently existing obligation to serve in the armed forces that arises from the optimal state of affairs in which everyone assists in the defense of the country. In each of these cases, the legislative utterances in question give us reasons to believe that we ought to act so as to bring about the state of affairs described by the legislature. But these reasons merely supplement antecedently existing reasons to believe that there are reasons to do what is decreed, for under the non-communicative model, the legislative decree is only a description of a set of antecedently existing optimal legal arrangements for which there are antecedently existing reasons for action. Simply put, the legislature has authority for us only if it functions as a heuristic guide to antecedently existing moral facts. To the extent that the legislature mistakenly describes or distorts the optimal state of affairs or its attendant obligations, the legislature will fail to have (theoretical) authority for us.

The necessity of construing the legislature as a theoretical rather than as a practical authority under a non-communicative model raises two fundamental and thorny problems. First, what reason do we have to believe that legislatures are or can be good at what theoretical authorities are supposed to be good at, *viz.*, deciphering the reasons for action that we possess better than we ourselves can do? Second, what reasons do we have to think that an institution possessing only theoretical authority can perform the tasks that a legislature is supposed to perform, such as solving coordination problems and defusing prisoners' dilemmas?

a. *The Legislature as a Reliable Theoretical Authority*

Why should we think that the legislature functions as a reliable describer of those moral facts that themselves generate reasons for action? Why look to the legislature's utterances rather than to the utterances of the Mormon Church, the local PTA, the Sierra Club, or IBM? There are two assumptions which must be defended if we are to make out why a democratically elected legislature may function as a theoretical authority about the antecedently existing obligations of its citizens. One is a motivational assumption (which we briefly considered when exploring the possibility that reliable descriptions are presupposed by illocutionary acts of commanding, requesting, and so on¹³³), namely, that enough legislators are trying to organize society in the optimal way that there is some chance they will succeed. A second is a capacity assumption, namely that legisla-

133. See *supra* text accompanying note 109.

tors *can* accurately describe citizens' obligations if they try to do so. If legislators are both more motivated to promote the general good and more able to do so than IBM, the Mormon Church, or individual citizens themselves, then such legislators may genuinely function as theoretical authorities about the nature of that good which all citizens antecedently have reasons to promote.

The motivational question is usually treated as a question of psychological fact about individual legislators, and that is indeed where one should start. The conventional position on this question of individual psychology suggests that legislators may well serve as theoretical authorities. As Dwight Lee explains, "Most academics (including most economists) whose work concerns government policy and practice tend to assume, if only implicitly, that political decision-makers are motivated by the desire to promote the interest of the general community."¹³⁴ Admittedly, however, there is a large literature that eschews the "public interest model" of legislative motivations in favor of a very different motivational assumption. For example, public choice theorists assume that individual legislators are narrowly self-interested when they vote on legislation; hence, the last thing that we should expect from legislators is legislation that actually promotes public interests.¹³⁵ Traditional defenders of democratic theory have responded by claiming that not only are the public choice theorists' motivational assumptions pernicious, but they are also *just* assumptions. Public choice theory proceeds *from* the assumption that legislators do not

134. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 191 (1988).

135. Those persuaded by the literature in public choice theory take it to support the opposite view of the one that I have proposed, namely, that the legislature is uniquely *ill-situated* to reach results that are optimal for the community as a whole. By applying the private interest assumption long-employed by economists, public choice theorists have cast doubt on the extent to which those engaged in political activities can be thought to act in and for the sake of the best interests of others. For a survey of the sort of criticisms levied by public choice theorists against the view of legislation that I have articulated, see Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE—II*, at 11 (J. Buchanan & R. Tollison eds. 1984) (arguing that public choice theory replaces romantic ideals with realistic appraisals); Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571 (1959) (articulating theory of log-rolling or vote-trading that suggests that democratic structures will tend to exhibit overly expansive public spending); see also J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962) (discussing range of topics from log-rolling to bases of representation, each purportedly proving pervasiveness of private interest strategies); W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (presenting economic analysis of partisan bureaucratic domination over legislative behavior); W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962) (defending his now-famous minimum winning coalition principle); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (formalizing interest-group or capture theory of regulation).

However, the literature is now rich with counter-arguments to the public choice model which favor the public interest conception of legislation which I have here invoked. See J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979) (contesting view of private preferences adopted by public choice theorists); S. KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987); Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INTEREST 80 (1987).

aim to promote the public good; it does not use its methods to sustain this empirical assumption.

We cannot hope to resolve this psychological question here. We can, however, point to those institutional features of the legislative process which make it likely that the existence of self-interested motivations does not appreciably lessen the theoretical authority of the legislature as a whole. My claim is that sometimes institutional design counteracts the effects of undesirable individual motivations. Such is the assumption at the core of the adversarial system in which the search for truth is pursued in courtrooms staffed by advocates who are motivated by anything but a disinterested desire that the truth emerge.

Lon Fuller did much to describe the form that we should demand of legislation before honoring it as law.¹³⁶ As Fuller argued, legislation should be prospective, public, general, clear in meaning, free of contradiction, stable over time, judicially imposed, and within the realm of the possible. Fuller called these requirements the "inner morality" of the law, and he maintained that when applied procedurally, these requirements produce substantively better legislation than would be produced without them. He based this conviction on his faith in the maxim that "substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things."¹³⁷ More specifically, Fuller thought that substantively good results are likely to be produced by both legislatures and common law courts, even if these institutions are staffed by imperfectly motivated individuals, so long as they adhere to the dictates of procedural fairness. "[C]oherence and goodness have more affinity than coherence and evil. . . . [W]hen men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are."¹³⁸

Fuller's faith that fair processes lead to substantive justice has met with a good deal of criticism. As H.L.A. Hart and the legal positivists pointed out, surely pernicious regimes *could* operate through Fuller's forms of fair legislation.¹³⁹ Or as Grant Gilmore pithily put it: "In Heaven there will be no law, and the lion will lie down with the lamb In Hell there will be nothing but law, and due process will be meticulously observed."¹⁴⁰

Yet the truth in Fuller's claim lies in the motivations that legislators

136. See L. FULLER, *supra* note 12, at 33-94.

137. Fuller, *supra* note 3, at 643.

138. *Id.* at 636.

139. H.L.A. HART, *supra* note 12, at 202; Cohen, *Law, Morality and Purpose*, 10 VILL. L. REV. 640 (1965); Dworkin, *The Elusive Morality of Law*, 10 VILL. L. REV. 631 (1965); Hart, *Book Review*, 78 HARV. L. REV. 1281 (1965) (reviewing Lon Fuller's *The Morality of Law*).

140. G. GILMORE, *THREE AGES OF AMERICAN LAW* 111 (1977).

have to comply with the inner morality of fair legislating. John Finnis puts Fuller's point nicely:

Individuals can only be *selves*—i.e., have the 'dignity' of being 'responsible agents'—if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a 'lifetime.' This is the primary value of the predictability which the law seeks to establish through [Fuller's eight desiderata] A tyranny devoted to pernicious ends has no self-sufficient *reason* to submit itself to the discipline of operating consistently through the demanding processes of law, granted that the rational point of such self-discipline is the very value of reciprocity, fairness, and respect for persons which the tyrant, *ex hypothesi*, holds in contempt.¹⁴¹

Legislators forced to operate within a system justified by and operating on public interest assumptions may well find that such assumptions "rub off" on their substantive aims when legislating.

Aside from the eight features of the inner morality of legislation, there exists another formal feature of the institution that even more directly blunts expression of non-public interest motivations by individual legislators. One need not be a utilitarian to recognize that when tabulating interests relevant to particular legislative options each is to count only for one. As a private citizen, no one gives equal consideration to all other persons. Wives, husbands, children, parents, and friends each have a prior claim to our time, interest, affection, and aid. Yet the legislative point of view is to put these personal interests aside and to give each citizen "equal concern and respect."¹⁴² Not surprisingly, this is also very much the moral point of view.¹⁴³ Thus, legislators, no matter how self-interested they may be, must put their justifications for legislation in terms of interests proper to the legislative/moral point of view. This is not just the point that hypocrisy is the compliment that vice pays to virtue. Rather, it is the point that a piece of legislation motivated by pure self-interest is likely to run into difficulties at the stage of justification, as well as at the stage of enactment.

The final feature that moderates institutional expression of individual self-interest is the interpretive stance taken by courts toward legislation. Much of what a statute becomes is in the hands of the courts when they interpret and apply statutory language. And courts do not interpret or review statutes on the assumption that they were motivated by the self-interested political calculations of particular legislators. Rather, purposive

141. J. FINNIS, *supra* note 81, at 272-73. Lest public choice theorists think that the word "tyrant" does not apply to their self-interested legislator, Finnis is explicit that "[t]he sort of regime we are considering tends to be . . . exploitative, in that the rulers are out simply for their own interests regardless of the interests of the rest of the community . . ." *Id.* at 274.

142. See R. DWORKIN, *supra* note 9, at 180-83, 272-78.

143. See K. BAIER, *THE MORAL POINT OF VIEW* (1958).

interpretation aims to find a legitimate public goal for a statute and to interpret its language in light of that goal.¹⁴⁴ Courts that interpret statutes in this way force a public interest conception onto the legislature, no matter what the motivation of individual legislators may have been. By so doing, courts force legislation towards a conception of the good and so make it legitimate to regard such legislation as a theoretical authority concerning the content of the good.

I turn now to the second assumption we must make if we are to justify taking legislators as theoretical authorities—what I have called the capacity assumption. To make this assumption plausible, one must look to those institutional features of a legislature which would make it the kind of “reliable observer” so often spoken of in moral theory. The ideal observer in moral theory is not only one who possesses the appropriate combination of egoism and altruism, but also one who is well-situated to decipher the moral facts involved in a given matter. Being well-situated is in part a matter of individual capacity: The observer must possess a good deal of experience with matters of the sort to be decided, a willingness to admit error in the past, a serious willingness to entertain opposing points of view, an ability to empathize with those points of view, a willingness to restrain premature or preconceived conceptions from dominating subsequent deliberations, an ability to reconcile the present decision with others in the past, an imagination capable of hypothesizing other situations arguably affected by this decision, and the humility to think that there is much to learn from the experiences that others have had that the observer has not. Being well-situated is also, in part, a function of the information available to the observer: It must be complete enough without being numbing in its detail and it must be organized in a manner that vividly presents the moral issues to be decided.

Ideally motivated, informed, and equipped observers are likely to make better decisions than those whose motivations, information, or capacities are less than ideal.¹⁴⁵ The next question is whether legislatures have these information-gathering capacities to make them ideal moral observers—or at least, more ideal than most. According to Fuller, both legislatures and courts are engaged in what he called the “collaborative articulation of shared purposes.”¹⁴⁶ Fuller maintained that “by pooling their intellectual

144. Imagine a court interpreting a statute so as to further the log-rolling opportunities of its sponsor on the grounds that log-rolling was what motivated her sponsorship!

145. This is different from Richard Brandt's point of praising “*cognitive psychotherapy*,” a process of “reflection on available information, without influence by prestige of someone, use of evaluative language, extrinsic reward or punishment, or use of artificially induced feeling-states like relaxation.” R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 113 (1979) (emphasis in original). Nor is it the point of those who identify the good with what an ideal observer would think. The point is only epistemic: Decisions made by ideal observers are *likely* to be better, which is why we should grant them theoretical authority over what we ought to do.

146. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697, 702 (1956), reprinted in 3 NAT. L.F. 68, 73 (1958).

resources," individuals can "come to understand better what their true purposes are"147 We all recognize the power of such collaboration in daily life because "we all know from personal experience that in moments of crisis consultation with a friend will often help us to understand what we really want."¹⁴⁸ Fuller extended this thought from personal moral decisions to the law. In Fuller's view, common law cases "show that communication among men, and a consideration by them of different situations of fact, can enable them to see more truly what they were trying to do from the beginning."¹⁴⁹ Fuller argued more generally that all theories of natural law assume that "the process of moral discovery is a social one"150

These thoughts suggest that a democratically selected legislature might be a well-situated moral observer. To begin with, there are a large number of individuals seeking to discover some optimal state of affairs. They have large fact-finding capacities at their disposal. They are representative of many points of view. They have strong incentives to reach agreement, but not in a way that compromises a principled resolution of the issues.¹⁵¹ All of these features combine to make legislatures look informationally well-situated to function as theoretical authorities concerning the content of moral obligations when they are motivated to perform such a role.

b. *An Account of Legislative Functions*

Even if there are institutional reasons for thinking that legislative utterances are more reliable heuristics than are the utterances of other institutions in determining how to bring about optimal states of affairs, we must still ask whether the conception of the legislature as a theoretical authority can do the work required of a theory of legal authority. Joseph Raz has claimed that an account of theoretical authority leads to what he calls "the no-difference thesis"; and this, in turn, leads to a set of difficulties which could prove insurmountable to an account of legislation based on a concept of theoretical authority. To construe legislation as only theoretically authoritative is to commit oneself to the thesis that legislative authority does not (and should not) change people's reasons for action. As Raz puts the claim of the no-difference thesis: "There is nothing which those subject to [legislative] authority ought to do as a result of the exercise of [legislative] authority which they did not have to do independently of that exercise, they merely have new reasons for believing that certain acts were

147. *Id.* at 703-04, reprinted in 3 NAT. L.F. at 74.

148. *Id.* at 702, reprinted in 3 NAT. L.F. at 73.

149. Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L.F. 83, 98 (1958).

150. *Id.* at 84.

151. As Dworkin explains, checkerboard results are not tolerated in legislation. See R. DWORKIN, *supra* note 85, at 217-18.

prohibited or obligatory all along."¹⁵² To endorse the no-difference thesis is to accept that "the exercise of authority should make no difference to what its subjects ought to do, for it ought to direct them to do what they ought to do in any event."¹⁵³ According to Raz, three problems result from endorsing this claim concerning legislative authority: (1) We cannot account for how legislation solves coordination problems; (2) we cannot account for how legislation defuses prisoners' dilemmas; and (3) we cannot account for when or why persons have duties to act (rather than just reasons for action).¹⁵⁴

(i) *Solving Coordination Problems*

Raz argues first that a conception of the legislature as a theoretical authority prevents one from explaining how the legislature could play a role in the solution of coordination problems. Coordination problems arise when the members of a group share an interest in coordinating their actions but lack a salient means of choosing from a set of possible actions a single one that will guide their behavior.¹⁵⁵ Anything that assists agents in settling on a particular course of action is a solution to a coordination problem. As Raz insists, the problem of how to coordinate our actions when we have a mutual interest to do so can be easily solved if the legislature functions as a practical authority. For a practical authority can designate one of many equally efficacious options as the one to be chosen, and

152. J. RAZ, *supra* note 12, at 30.

153. *Id.* at 48 (emphasis omitted).

154. *Id.* at 30-31, 48-51.

155. David Lewis explains the search for a coordination solution as follows:

Two or more agents must each choose one of several alternative actions. . . . The outcomes the agents want to produce or prevent are determined jointly by the actions of all the agents. So the outcome of any action an agent might choose depends on the actions of the other agents. That is why . . . each must choose what to do according to his expectations about what the others will do.

Some combinations of the agents' chosen actions are *equilibria*: combinations in which each agent has done as well as he can given the actions of the other agents. In an equilibrium combination, no one agent could have produced an outcome more to his liking by acting differently, unless some of the others' actions also had been different.

D. LEWIS, *supra* note 22, at 8. As John Finnis points out, coordination problems arise not only when coordination is advantageous, but also when, as a matter of right, certain obligations must be met. Thus, we must achieve coordination equilibria when determining how children are to be educated, how natural resources are to be managed, when force is to be permitted, and so forth. "[F]or most though not all of these co-ordination problems there are, in each case, two or more available, reasonable, and appropriate solutions, none of which, however, would amount to a solution unless adopted to the exclusion of the other solutions available, reasonable, and appropriate for that problem." J. FINNIS, *supra* note 81, at 232. For further discussion of the nature of coordination problems and their role in jurisprudence, see J. RAZ, PRACTICAL REASON AND NORMS, *supra* note 5, at 64, 159; T. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978); T. SCHELLING, THE STRATEGY OF CONFLICT 89-99 (rev. ed. 1980); E. ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 18-73 (1977); Fuller, *Human Interaction and the Law*, 14 AM. J. JURISPRUDENCE 1 (1969); Gans, *The Normativity of Law and its Co-ordinative Function*, 16 ISRAEL L. REV. 333 (1981); Green, *Law, Co-ordination and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983); Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982); Raz, *Authority and Consent*, 67 VA. L. REV. 103 (1981).

since its designation will be regarded as a content-independent reason to adopt that course of action, it will resolve the coordination problem.

But according to Raz, such a resolution is not available if the legislature functions only as a theoretical authority about particular moral facts. This is because there exists no (moral) fact of the matter that determines a single right answer to the question of how persons ought to behave in a situation requiring coordination. When the legislature picks out one course of action from among a set of equally moral options (for example, when it decrees that persons ought to drive on the right side of the road rather than on the left), it describes just one of several antecedently existing solutions to a coordination problem. If the legislature has only theoretical authority, its description gives us only an evidentiary reason to believe that the solution described is among the set of options that provides acceptable means of resolving the problem of coordination. It does not, according to Raz, give us a reason to act as the legislature describes, for it does not give us any content-independent reason to believe that others will conform their behavior in the manner described.¹⁵⁶ "Since solving coordination problems is one of the important tasks of political and many other . . . authorities, and as their relative success in it can only be explained by regarding authoritative utterances as *reasons for action*, one must reject the recognitional account of . . . authority."¹⁵⁷

Raz' conclusion that theoretical authorities inevitably fail to provide solutions to coordination problems is over-stated. All that is required to achieve a coordination equilibrium in any given case is some salient reason for each person to expect that others will conform their behavior in one way rather than another.¹⁵⁸ Consider, for example, the problem posed by individuals preparing for a picnic. Each has a reason to believe that others will not attend the picnic if there is a threat of rain. What is needed on the day of the picnic, then, is some salient reason for each person to think that others will share with him or her a common expectation about the weather. It would hardly be surprising if the weatherman's

156. "A wise man can tell me which options belong to that set, but he cannot tell me which of the options to choose before it is known what others will do." J. RAZ, *supra* note 12, at 30.

157. *Id.* at 31 (emphasis added).

158. As Gerald Postema explains:

Solutions to coordination problems are based on each party's exploiting mutually concordant expectations. . . . Since what *I* do depends on what *you* will do, in the ideal case I attempt to replicate your practical reasoning to determine what you will do. And since I know that what you want to do depends on what I do, I must, in replicating your reasoning, determine what you expect *me* to do. And since you are engaged in the same process with regard to me, to replicate your reasoning I must replicate your attempt to replicate mine, and so forth. Given this framework for the nesting of expectations, all that is needed to break the deadlock of a coordination problem is some fact about one of the equilibria which isolates it from the others and which is obvious to both of us and known by us both to be obvious to the other. Thus successful coordination requires the parties to locate some *salient* fact about one of the equilibria that makes it stand out, that is, to read the same message in the common situation, and with that message converge on a solution.

Postema, *supra* note 155, at 174 (emphasis in original).

report provided such a salient reason to expect a common perception about the likely weather, since it is customary for people to consult this report before engaging in outdoor activities. The coordination problem would thus be solved in this case by the weatherman's description—a description, that is, by one having only *theoretical* authority.

The solution in this case reflects what game theorists have called a coordination norm or convention and what I want to call a "custom." A regularity in the behavior of members of a group when they are involved in a recurrent situation constitutes a custom if and only if:

- (1) it is common knowledge among group members that
 - (a) there is a general conformity to the regularity;
 - (b) most members of the group expect most other members of the group to conform to the regularity;
 - (c) most members of the group prefer that any individual conform rather than not conform to the regularity, given general conformity to that regularity;
 - (d) most members of the group prefer general conformity to some regularity rather than general conformity to no regularity;
- (2) part of the reason why most members of the group conform to the regularity is that (1)(a)-(d) obtain.¹⁵⁹

In the case of people planning a picnic, the practice of guiding outdoor behavior by the reports of a weatherman constitutes a custom, for it is common knowledge among picnickers that: There is general conformity to the practice of consulting the weather reports before picnicking (1(a)); most picnickers expect their fellow picnickers to consult the weather reports (1(b)); most picnickers prefer that each of the other picnickers consult the weather reports (1(c)); most picnickers prefer that there be some regularity to guide their decision and the decisions of their fellow picnickers concerning whether to attend the picnic (1(d)); and part of the reason that most picnickers consult the weather report is that they know each of the above facts (2). In this way, customs can evolve from salient reasons to choose one solution over another in recurring situations that pose coordination problems. Once a custom has become established, one has a salient reason to follow it, for its existence makes it likely that others will conform to it.

Similarly, in matters of public coordination, a salient reason for particular behavior would be provided if people, as a matter of *custom*, conformed their behavior to the deontic descriptions of the legislature. According to the non-communicative model of law that I have developed, there is a plausible account of why such a custom would unproblematically

159. This account borrows from D. LEWIS, *supra* note 22, at 42. See also Green, *supra* note 155, at 301-02 (discussing development of conventional equilibria); Postema, *supra* note 155, at 176 (same).

cally develop. For just as there are good reasons to think that the weatherman functions as a reliable guide to the weather, so, I have argued, there are good reasons to think that the legislature may function as a reliable guide to correct action. Therefore, just as the reliability of the weatherman gives us a salient reason to consult the weatherman before taking a picnic, so the reliability of the legislature gives us a salient reason to consult the legislature before embarking upon legally relevant courses of action.

As it becomes common knowledge that legislative descriptions function as capable heuristics in determining right actions, we could expect there to develop a regularity on the part of citizens to consult legislative utterances before engaging in action. Such a regularity would likely become a custom, for it would soon be common knowledge that most persons will look to the legislature for guidance and will expect and prefer that others do likewise. In situations where there are several equally right answers concerning how best to bring about a desirable state of affairs, this custom of looking to legislative descriptions for guidance would provide a reason to think that others would conform their behavior to the one solution described by the legislature. This custom thus would provide a reason for so conforming one's own behavior. We could expect, therefore, that even when the legislature describes just one of several equally good actions, the habitual appeal to legislative descriptions to guide action would result in near unanimous conformity with this description. Coordination problems would be solved on this account not by authoritative commands, but by the salience of charting behavior in situations allowing for several courses of action with the same guide as is used in situations requiring a single course of action.¹⁶⁰ And once a coordination problem is solved, a (moral) fact of the matter exists that determines the desirability of preserving the solution—a fact of which the legislative utterances which accomplished the solution are signs.

(ii) *Defusing Prisoners' Dilemmas*

Joseph Raz argues that prisoners' dilemmas constitute a second class of cases in which practical authorities can make a difference while theoretical authorities cannot. In prisoners' dilemmas, persons have reasons to act in ways that fail fully to maximize their interests; they also have reasons to change their situations so that they can in fact maximize these interests, but they have no means of changing the situations by themselves.¹⁶¹ Raz

160. As Finnis says, a commander is not necessary for there to be an authoritative solution to coordination problems. "Rather, the required state of facts is this: that in the circumstances the say-so of this person or body or configuration of persons probably will be, by and large, complied with and acted upon, to the exclusion of any rival say-so . . ." J. FINNIS, *supra* note 81, at 249.

161. Edna Ullmann-Margalit defines prisoners' dilemma situations as follows:

A generalized [prisoners' dilemma]-structured situation is any situation involving at least two

claims that prisoners' dilemmas are like coordination problems insofar as the commands of a practical authority can give the persons involved content-independent reasons for behaving in a manner which maximizes everyone's interests. Raz, however, appears to understate the size of the problem posed by prisoners' dilemmas by making them analogous to coordination problems. For as he argues, it is the sheer inability of the individual to effect change that makes the prisoners' dilemma, like the need for coordination, a problem.

In fact, however, what makes the prisoners' dilemma situation special and distinct from the situation posed by a coordination problem is that each individual involved has an interest in effecting change on the part of *others* but *not* on his or her part. All of us, for example, have an interest in devising a means of keeping others from treading on public lawns while preserving for ourselves the opportunity to take our regular shortcuts. We would, of course, prefer to give up our shortcuts if this were the only means of prompting others to give up theirs, for the worst possible state of affairs would be that in which the lawns were ruined by the criss-crossing of multiple paths. But absent some external incentive to give up our shortcuts, it will always be rational to encourage others to keep off the lawns while treading on them ourselves.

Raz' notion is that a practical authority can provide this much-needed external incentive by providing a content-independent reason to abide by directives that promote the best interests of all concerned. This content-independent reason alters the pay-offs at stake in choice situations and so defuses potential prisoners' dilemmas. Absent such a content-independent reason for choosing cooperation over non-cooperation, individuals will lack a source of motivation sufficient to prompt a choice for cooperation. Since theoretical authorities fail to give content-independent reasons for action, they fail, in Raz' view, to provide solutions to prisoners' dilemmas.

Yet Raz' assumption that prisoners' dilemmas require for their solution content-independent reasons for action is not beyond dispute. As those steeped in the Humean tradition of ethics have long argued, the maxims of morality themselves function as external incentives to opt for cooperation. According to David Gauthier, for example, a moral person is one

persons each of whom is repeatedly facing a decision as to whether to do A or non-A, such that

(i) If, in any occurrence of the dilemma among them, most of them do A the outcome is (and is known to them to be) mutually harmful;

(ii) If, in any occurrence of the dilemma among them, most of them do non-A, the outcome is (and is known to them to be) mutually beneficial—or at any rate better than the outcome produced when most of them do A;

(iii) Each of the persons involved obtains, at least in some occurrences of the dilemma among them, the highest possible pay-off in the situation when he himself does A while most of the others do non-A;

(iv) If, in any occurrence of the dilemma among them, some do A, the outcome to the non-A doers is less beneficial than it would have been had everyone done non-A.

who, when faced with a prisoners' dilemma, chooses to cooperate on the assumption that others make the same choice and who does not deviate from this choice even if certain that he or she will not be punished at a later time by others' deviance.¹⁶² If morality itself provides a means of defusing prisoners' dilemma situations, then we must assume that the reason such situations recur is that persons either lack a complete understanding of the maxims of morality or are not motivated by them. To the extent that the first reason explains the recurrence of prisoners' dilemmas, the legislature could effectively defuse such situations simply by functioning as a reliable guide to understanding the content of morality. That is, the legislature could truly solve prisoners' dilemmas in just the same manner that I have suggested it solve coordination problems—by functioning as a heuristic guide to moral facts. To the extent that the second reason explains the prevalence of prisoners' dilemma situations, there exists a means of imposing sanctions which can alter the pay-offs involved in choice situations so as to favor cooperative action. As I will argue in the next section, the imposition of sanctions is entirely consistent with a view of the legislature as a theoretical authority. To the extent that the legislature, in its capacity as a theoretical authority about optimal legal arrangements, considers cooperation in a given (prisoners' dilemma) situation necessary,¹⁶³ it can describe as optimal the state of affairs in which punishment is imposed on those who fail to choose cooperative action. Such a description will then provide a judge with a better reason to think that punishment of a certain sort is appropriate in a case involving a non-cooperative agent. The likelihood of judicially imposed sanctions, the knowledge of which is enhanced by legislative descriptions, can thus blunt the temptation to opt for non-cooperation that produces prisoners' dilemmas.

(iii) *Providing Duties to Act*

Joseph Raz contends that “[a]uthoritative directives make a difference in their ability to turn ‘oughts’ into duties.”¹⁶⁴ Raz’ conviction here is that we often have reasons to act, but these reasons are not obligation-creating unless and until the legislature passes a statute based on such antecedent reasons and so makes them obligation-creating. Put simply, Raz’ point is that statutes create obligations that were not there before, and a theory of the legislature that attributes to it only theoretical authority cannot capture this fact.

Yet the category of “oughts” which in Raz’view do not obligate without

162. See D. GAUTHIER, *MORALS BY AGREEMENT* 8–10 (1986).

163. It should be noted that prisoners' dilemmas can function positively in situations where we think cooperation dangerous. For an illuminating discussion of the advantages of non-cooperation in the area of antitrust law, see E. ULLMANN-MARGALIT, *supra* note 155, at 44–45.

164. J. RAZ, *supra* note 12, at 60.

enactment into law is an altogether mysterious one. Surely Raz would not want to suggest that while one ought not to murder, one is not obliged to forgo the activity until the legislature enacts a penal code prohibiting unjustified homicide. The obligation not to murder must be thought to exist antecedent to its legal declaration as a matter of morality and to be in no way *transformed* by its declaration. Perhaps, however, Raz believes that some behavior is not obligatory until required as a means of solving coordination problems or defusing prisoners' dilemmas. One ought, for example, to drive on the same side of the road as others and to pay taxes to support one's government, but one is not obligated to conform to the conventions of the road or to overcome one's temptation to free-ride on the contributions that others make to the government unless and until such behavior is statutorily required.

There are at least two responses to this form of the argument. First, it is redundant. To argue that the legislature transforms reasons into obligations only when those reasons are reasons to coordinate or to cooperate is only to reiterate the claim that ran through the previous two sections. If Raz' criticism of the recognitional conception of authority is to be a third and separate criticism, it cannot rely upon the supposed inability of a theoretical authority to generate solutions to coordination problems and prisoners' dilemmas by "creating" obligations. Second, even the categories of oughts that are derived from the need for coordination and cooperation are not *created* or *transformed* by legislation into obligations. We have an antecedent obligation to avoid risking harm to others, and if this obligation cannot be met without conforming to the conventions of the road, then we have an obligation to conform to those conventions that is independent of any declaration by the government. Similarly, we have an antecedent obligation to support just governments, and if this obligation must be met through a series of financial contributions, then we have an obligation to pay taxes that exists antecedent to its legislative declaration and independent of others' conformity. The most that a legislature can do when it enacts legislation, then, is to define clearly antecedently existing obligations. That the legislature often makes clear the very existence of such obligations gives legislation the *appearance* of transforming reasons that seem not to provide obligations into obligatory reasons. But contrary to Raz' assumption, an appearance need only be explained away, not explained.

2. *A Compatible Justification of Sanctions*

According to Leslie Green, "[o]ne need not take Kelsen's extreme view that sanctions are part of the concept of law in order to see that a legal theory which could not account for the omnipresence and importance of sanctions in real legal systems would not count as a very good theory of

law."¹⁶⁵ If true, this admonition makes clear that a concept of law must account for the role of sanctions. Such an account may seem problematic in the context of this project, for if the legislature is only a theoretical authority, how can one be punished for failing to comply with its utterances?

Let us look more closely at the source of this worry. On a traditional command theory, the law is simply comprised of the orders of a sovereign. To violate any one of these orders is to violate the law. Hence, sanctions are justified whenever one fails to comply with the commands of a sovereign, since whenever one fails to comply with the commands of a sovereign one has broken the law. Such a justification is not available on my account of legislation, for the utterances of the legislature do not comprise the content of the law. According to the non-communicative model that I have constructed, the descriptions of the legislature concerning optimal legal arrangements only give us better reasons than we otherwise would have to believe that we have certain obligations. They function, that is, as heuristic guides to what we antecedently could have discovered. Such descriptions accordingly carry only evidential authority. It is not the case, therefore, that in failing to comply with a legislative description of appropriate action the citizen necessarily violates the law. For the legislature might be wrong about the optimal legal state of affairs and wrong thereby about the appropriate action to take in a given situation; in contrast, the citizen might be right about both. But if this is the case, how could one who rejects the descriptions of right action provided by the legislature be subjected to sanctions? How could we justify punishing someone who merely took a different view from the legislature concerning the content of legal obligations?

Our answer must rest on a view that we are justified in punishing people if and only if their behavior is morally wrong. The answer can be constructed as follows. A person who has violated a legal obligation of the sort I have tentatively defended deserves punishment. That he or she failed to comply with the descriptions of the legislature concerning the content of that obligation is itself merely evidence of guilt. We do not punish the person for failing to take the "advice" of the legislature; rather, we punish the person for failing to fulfill a morally imposed obligation of which the legislature's advice is mere testimony. For example, we punish the person who, when faced with a prisoners' dilemma, chose non-cooperation, *not* because the legislature had previously described cooperation as the optimal course of action in such a situation, but because cooperation *was* the optimal course of action in the situation. The person's failure to cooperate constituted a violation of a duty existing antecedent to the legislature's description of it.

165. Green, *supra* note 155, at 315.

This conception of the necessary conditions of punishment inevitably requires that judges determine which of the two parties—the legislature or the defendant—is closer to the truth about the obligation at issue in any given case. Such a requirement is not just inevitable but desirable. For while it may appear entirely anomalous to suggest that a citizen's interpretation might be closer to an accurate conception of the content of statutory law than is the legislature's statement of that law, this is no different from thinking that a citizen bringing a case under common law may be closer to the truth of what the common law requires than was the judge who drafted a previous opinion on the subject. If we think that the positions taken by litigants are sometimes more accurate statements of what the common law requires than are the conclusions reached by prior courts, then, under a model which gives the legislature the same sort of authority as a judge in a previous case, we ought to think that the conclusions reached by citizens about the sorts of obligations that they should fulfill are sometimes more accurate statements of the (statutory) law than are the conclusions reached by the legislature. And when the individual's conclusion is a more accurate statement of the law than is a particular piece of legislation, the citizen ought not to be sanctioned, for her failure to comply with the utterances of the legislature is not a failure to comply with the law.

3. *An Account of the Distinction Between Law and Morality*

If statutes are natural signs of pre-existing moral obligations, and if the legislature functions as only a theoretical and not a practical authority concerning those obligations, the question naturally arises whether statutes are law at all. Perhaps "the law" is either the set of moral facts that cause statutes to be enacted or the body of court pronouncements concerning the moral facts of which statutes are signs. In either case, one would abandon the intuitive idea that statutes are themselves law.

There is a tendency towards both of these views in what has already been said. Suppose we took the essence of law to be legal obligation: Something is law only if it legally obligates citizens to obey it and judges to apply it. Suppose further that we took legal obligations to be a kind of moral obligation. Then because statutes possess only theoretical authority, we would be inclined to think that such statutes are not law.

Consider Joseph Raz' example in which the legislature passes a statute regulating the roadworthiness of vehicles. Recognizing that "[p]eople differ in their knowledge, skills, strength of character and understanding," the person who "has wide and reliable knowledge of cars . . . may have no reason to acknowledge the authority of the government over him regarding

the roadworthiness of his car."¹⁶⁶ If statutes possess only theoretical authority, this statute possesses little or no authority for the person who knows better than the legislature what is needed for his car to be safe (at least if he knows that he knows that). Accordingly, if statutes must obligate to be law, this statute is not law for such an individual. The law, by hypothesis, is what obligates such individuals, and what obligates such individuals is the underlying moral facts about what kinds of safety features are worthwhile.

The other possible view to which the non-communicative theory of legislation may seem to point is a kind of court-centered positivism. This is the view espoused by John Chipman Gray, who urged that statutes are not law, but only "sources" of law: The law is what courts do in the name of statutes.¹⁶⁷ Gray's view would here be motivated by an alternative conception of the law's essence—a conception based on the view that the essence of law is not obligation but the attachment of sanctions to forbidden behavior. According to such a conception, since statutory mention of sanctions is not an attachment of sanctions to forbidden behavior but merely a description of what would be an appropriate response to morally undesirable behavior, the only point at which there would be law is the point at which courts impose sanctions in individual cases.

The first alternative, which identifies the law with what is morally right *before* the legislature enacts it in a statute, is a pure form of natural law. The second alternative is a court-centered legal positivism reminiscent of American Legal Realism, for it identifies the law with what courts do in fact.

There is nothing in the non-communicative model of legislation as such that compels either the view that the essence of law is obligation or the view that the essence of law is the attachment of sanctions to undesirable behavior. Raz, for example, whose own views on a statute's authority produce piecemeal obligations on the part of citizens to obey statutes, maintains the commonsense view that statutes are law by denying that laws must obligate.¹⁶⁸ For Raz, law is that which *claims* to obligate citizens by its authority; to be law, it need not actually obligate them.¹⁶⁹

Still, my own inclinations are with St. Augustine and H.L.A. Hart: There must be a difference between law and the threats of a gunman, and that difference is most plausibly to be found in the fact that law obligates whereas threats backed by force do not.¹⁷⁰ Since on the model that I have sketched, statutes obligate citizens only to the extent that they accurately

166. J. RAZ, *supra* note 12, at 77-78.

167. See J. GRAY, *supra* note 63, at 125.

168. J. RAZ, *supra* note 12, at 99-110.

169. J. RAZ, *THE AUTHORITY OF LAW* 1-22 (1979).

170. H.L.A. HART, *supra* note 12, at 80-81.

describe the antecedently existing obligations of citizens, statutes are sometimes not law.

It is a delicate matter to specify exactly when statutes are sufficiently inaccurate in their description of antecedent obligations to forfeit their status as law. This judgment depends upon how often a theoretical authority can be in error yet still be considered a theoretical authority. Some errors must be allowed, for otherwise no one could be a theoretical authority. That the weatherman is inaccurate a good deal of the time does not mean that we cease to rely on weather reports and substitute our own judgments in their stead.

I do not propose to pursue such difficulties because they are not peculiar to a non-communicative theory of legislation. Rather, they represent a general problem for natural law jurisprudence that stems from the view that the essence of law lies in its capacity to obligate morally those to whom it applies. Thus, I regard this larger problem as tangential to the central concern of this article.

For the same reason, I also leave aside another large question about the nature of the morality that is the source of whatever obligations statutes may impose. It seems plausible to think that not all morality provides the "obligation base" for statutes. Rather, I am inclined to think that there are subparts of morality that are peculiarly fitting to be the "morality behind the law" in general, and the "morality behind the statutory law" in particular. To isolate the first kind of morality—the morality behind the law in general—would be to discover the functional essence of law. Is it to allow for the collaborative articulation of shared purposes, as Fuller thought?¹⁷¹ Or is it to serve the common good, as Finnis has suggested?¹⁷² Or is it to have a government possessed of the principled integrity that virtuous persons possess, as Dworkin has recently urged?¹⁷³ To isolate the second kind of morality—the morality of the statutory law in particular—would be to discover the proper ends and limits of legislation. May statutes reach any subject in the name of morality, or are there moral obligations of citizens that are none of the law's business? Although it would be a significant contribution to answer this second question by giving a complete specification of the morality peculiarly appropriate to statutory law, this task is one to be undertaken by natural law theory generally. It is not one uniquely required by the construction and defense of a non-communicative theory of legislation.

171. Fuller, *supra* note 146, at 702, *reprinted in* 3 NAT. L.F. at 73.

172. J. FINNIS, *supra* note 81, at 134–56.

173. R. DWORKIN, *supra* note 85, at 95–96.

4. *A Compatible Theory of Interpretation*

Some views of interpretation rest on the assumption that if there is no communication, there is nothing to interpret. This result follows from the claim that interpretation involves the discovery of authorial intentions.¹⁷⁴ If this view were correct, then my non-communicative model of legislation would have the unfortunate consequence that statutes could not be interpreted.

Another view that suggests the same result is the contextualist's theory that words without authors have no meaning. Put in the idiom of Lewis Carroll's Humpty Dumpty: You can't know what a word means until you know what the speaker meant by using it. Without a speaker there is no meaning to be found.

Even a theorist as careful as Joseph Raz seems to have fallen prey to this trap, for Raz has urged that Dworkin cannot escape a communicative model of law if statutes are to be anything more than meaningless marks on pages.¹⁷⁵ Raz' assumption is that an author's communicative intentions transform meaningless marks on pages into meaningful propositions: If one abandons the search for communicative intentions, one abandons one's only means of bringing meaning to markings.

None of these views can withstand even cursory analysis. The claim that interpretation necessarily aims to recapture authorial intentions is simply an artificial limitation on the meaning of the term "interpretation." Plain meaning theories of statutory interpretation, for example, would not be interpretive theories by this criterion because they interpret by word meaning, rather than by authorial intent. I have already responded to the view represented by Humpty Dumpty's contextualist semantics when I showed in Part I how a theory of speaker's meaning cannot produce a theory of sentence meaning.¹⁷⁶ And Raz' view rests on the mistake of thinking that only communicative utterances can be more than meaningless marks on paper. That this is a mistake is illustrated by the guiding metaphor in this article, *viz.*, that of a scientist writing in a log so as to fix her memory, but not so as to communicate to anyone (including herself). Such a log is not a set of meaningless marks even though it is not a communication.

One cannot claim, therefore, that my non-communicative model of legislation necessarily renders statutes non-interpretable. Any objection would have to be based on the more modest claim that the theories of interpretation that our courts in fact use, or ought to use, require that

174. See Knapp & Michaels, *Against Theory*, 8 *CRITICAL INQUIRY* 723 (1982); Knapp & Michaels, *A Reply to Our Critics*, 9 *CRITICAL INQUIRY* 790 (1983); Michaels, *Is There a Politics of Interpretation?*, 9 *CRITICAL INQUIRY* 248 (1982); Michaels, *Response to Perry and Simon*, 58 *S. CAL. L. REV.* 673 (1985).

175. See discussion *supra* note 104.

176. See *supra* notes 44-54 and accompanying text.

statutes be considered communications. Yet a non-communicative model of legislation would call upon courts to interpret a statute by seeking to discover and to achieve the optimal state of affairs of which the statute is a natural sign. This is no more than a long-winded way of saying the familiar: that courts should interpret statutes in light of the purposes that they may best be made to serve. Given the popularity and defensibility of "purposive interpretation,"¹⁷⁷ the ability of the non-communicative model of legislation that I have outlined to justify it counts as one of the model's substantial virtues.

CONCLUSION

My construction of a non-communicative model of legislation constitutes an attempt to make sense of how legislation might be thought to possess the same sort of moral authority that natural law jurisprudence has long attributed to the common law. The project has not established the viability of a natural law theory of legislation. Rather, it has sought to provide an account of legislation which, if plausible, would be significantly more compatible with natural law jurisprudence than is the traditional communicative model that legal positivists and natural law theorists alike have long believed to be the only account of legislation available.

Whether such an account is ultimately defensible depends upon the success with which it can answer the traditional questions asked of a new concept of law. I have here only briefly suggested reasons to think that it can answer these questions effectively. If such reasons, however, provide the basis for a more exhaustive vindication of a non-communicative model of legislation, and if such a non-communicative model can be normatively motivated by a defensible political theory, then a rematch should be scheduled in the arena of legislative jurisprudence between the natural lawyer and the legal positivist;¹⁷⁸ for the natural lawyer will then be better armed to confront the legal positivist over how best to understand and characterize the statutory law.

177. "Purposive interpretation" refers to the interpretation of statutes according to the function which they are designed to serve, rather than the intentions which legislators had in drafting them. See Fuller, *supra* note 3; Moore, *Interpretation*, *supra* note 11, at 383-86; Radin, *supra* note 73, at 870.

178. I have elsewhere begun the task of defending a natural law theory of jurisprudence by spelling out the details of the model sketched in this article. See H. Hurd, *supra* note 17; H. Hurd, *A Natural Law Theory of Legislation* (Jan. 1990) (unpublished doctoral dissertation on file with author).