THE ROLE OF PURPOSE IN LEGAL REASONING

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ABSTRACT

Nevin Johnson: The Role of Purpose in Legal Reasoning
(Under the direction of Alex Worsnip)

I argue the concept of *purpose* or *function* plays a central role in understanding the nature of legal reasoning. Other views have emphasized other concepts in legal reasoning, like the concepts of language and morality. Theories that emphasize the role of language in legal reasoning argue that legal reasoning primarily involves the ascertainment of the linguistic content of legal norms; I call these "law as language" views. Theories that emphasize the role of morality in legal reasoning I call "natural law theory." Both of these theories have their own problems. The law as language view fails to account for reasoning involving unwritten law. Natural law theory does better at explaining reasoning involving unwritten law, but fails to properly explain the nature of reasoning about written law. Oftentimes, judges say that they are applying a law they deem to be unjust. For example, a judge might be putting into action a *legislative intent* that they do not think represents the best moral justification of the legal system in question, but that nonetheless represents the legally correct result of the case at hand. I recast both the law as language view and natural law theory as offering different ways of ascertaining the purpose of the law in different domains. The role played by purpose is thus more systematic in legal reasoning than the roles played by language and morality. Appeal to purpose plays an important role in both written and unwritten law, and can proceed in a moralized or non-moralized manner.

To my family

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TABLE OF CONTENTS

LIST OF FIGURES

Chapter 1: "Legal reasoning" generally and *desiderata* for a theory of legal reasoning

This introductory chapter consists of three parts. Part I gives a basic overview of this dissertation's subject-matter, situating it within the broader topic of reasoning generally. Part II presents eight *desiderata* for a theory of legal reasoning. Part III summarizes and concludes.

I.) What is "legal reasoning"?

This entire dissertation is aimed at making progress on the question "What is 'legal reasoning'?", so there is only so much that can be said by way of introduction. Nonetheless, it will be helpful (and perhaps essential) at the outset to zero-in a bit more on my subject-matter. One can (and perhaps should) at least roughly isolate a phenomenon before trying to understand it philosophically.

Before we get to "legal reasoning," a few words about reasoning *simpliciter*. Reasoning is often divided between the theoretical and the practical. Theoretical reasoning seems to be aimed at ascertaining the status of "matters of fact,"[1] and because of this, it frequently is viewed as being directed toward arriving at some *belief* or other,[2] though it could instead result in suspension of belief, or in a credence.

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[1] R. Jay Wallace, "Practical Reason," *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/practical-reason/ (2020).

[2] See, e.g., Paul Boghossian, "What is Inference?", *Philosophical Studies*, 169 (2014): pp. 1–18, p. 2; Wallace, "Practical Reason," *Stanford Encyclopedia of Philosophy*.

Whereas theoretical reasoning is concerned with what (if any) beliefs about the world we should hold, practical reasoning has a more intimate normative connection with *action*: "Practical reason is the general human capacity for resolving, through reflection, the question of what one is to do."[3] Whereas theoretical reasoning is said to conclude in *belief*, practical reasoning is said to conclude in *intention*, or perhaps *plans* or *decisions*.[4] Aristotle arguably made a stronger claim in saying that the conclusion of a practical syllogism *is an action* (as opposed to a mere intention to act).[5]

One might be tempted to think that practical reasoning is normative, whereas theoretical reasoning is descriptive, since practical reasoning is directed at figuring out what we ought to do, while theoretical reasoning "is concerned with matters of fact and their explanation."[6] But it is probably better to say that theoretical reasoning and practical reasoning are both normative, though in different respects. After all, theoretical reasoning has a concern with what one *ought* to believe.[7] (We might not want to say that theoretical reasoning is *directed* at answering the question "What ought I to believe?" since it seems this sort of reasoning is directed at more particular, immediate questions, like "Whether light is a wave or a particle.") From this perspective, "the contrast between practical and theoretical reason is essentially a contrast

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[3] Wallace, "Practical Reason," *Stanford Encyclopedia of Philosophy*.

[4] Gilbert Harman, "Practical Aspects of Theoretical Reasoning," in *The Oxford Handbook of Rationality* (Mele & Rawlings, eds.) (Oxford University Press, 2004).

[5] See Aristotle, *Nicomachean Ethics* book VII; for discussion, see Alexander Broadie, "The Practical Syllogism," *Analysis*, Vol. 29, No. 1 (1968), pp. 26-28.

[6] Wallace, "Practical Reason," *Stanford Encyclopedia of Philosophy*.

[7] Wallace, "Practical Reason," *Stanford Encyclopedia of Philosophy*.

between two different systems of norms: those for the regulation of action on the one hand, and those for the regulation of belief on the other."[8]

"Legal reasoning" can refer to different things: the reasoning jurors engage in after they are instructed by the judge on the relevant legal standard after a trial and "asked to apply that law to the evidence they've heard to reach a verdict," or to the reasoning a lawyer engages in when a client tells them their story and the lawyer then attempts "to figure out the laws, precedents, and facts that most favor the client and to integrate them into a persuasive case."[9] But "[w]hen scholars write about 'legal reasoning,' they are writing about judges."[10] Judges look to the relevant statutes, case precedents, constitutional clauses, etc., in order to decide what the law is and thereby resolve controversies brought before them.[11] Accordingly, for my purposes, the central case of *legal reasoning* is: the reasoning a judge engages in to figure out *what the law is*.[12] It is not only judges who are capable of, and in fact engage in, this kind of reasoning. Nonetheless, I find it helpful to treat judges— neutral arbiters[13] seeking to ascertain the true state of the law (as opposed to lawyers who might try to "bend" the law in their client's favor)—as the paradigm example of the sort of reasoning I am interested in. This focus on the judicial perspective is also characteristic of the literature. We are not here interested in the patterns of

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[8] See Wallace, "Practical Reason," *Stanford Encyclopedia of Philosophy*. Thank you to Alex Worsnip for discussion on the nature of theoretical and practical reasoning.

[9] Phoebe Ellsworth, "Legal Reasoning," in *The Cambridge Handbook of Thinking and Reasoning*, edited by K. J. Holyoak and R. G. Morrison Jr., (New York: Cambridge University Press, 2005): pp. 685-704, p. 685.

[10] Ellsworth, "Legal Reasoning," p. 685.

[11] Ellsworth, "Legal Reasoning," p. 685.

[12] Ellsworth, "Legal Reasoning," pp. 685-686.

[13] This is not to say (as a descriptive matter) that judges are entirely unbiased. Rather, judges aspire to a kind of neutrality that, for example, the attorneys for both parties in adversarial litigation do not aspire to.

inference of those who might *twist* the law to achieve some potentially quixotic end; we are interested in the *impartial* effort to reason towards the actual content of the present law in a given jurisdiction.

It might seem that legal reasoning is a form of practical reasoning, and indeed a number of philosophers of law have treated it as such.[14] For law seems to bear directly on questions of practical reason, both for the ordinary citizen subject to the law, and for the judges delegated or appointed to apply it. One might reasonably argue that it is part of the essence of the concept of law that it at least seeks or purports to guide conduct (even if it is not the only system of norms that seeks to guide conduct).

I think another frame of mind inclines us to view legal reasoning as a form of theoretical reasoning. From this perspective, legal reasoning involves examining the grounds of law in order to figure out which propositions of law are true. The grounds of law are the things that make true the propositions of law (i.e., statements of law that are true or false within a given legal system, like: "The statewide speed limit is 65 miles per hour"). For example, in a legal system with a legislature, the ground of any legal proposition might include whether the legislature has passed a text with a certain number of votes and whatever other formalities are required. Whether the legislature has satisfied the grounds of law for that legal system seems to be a matter of fact that can be ascertained the same way many other matters of fact can be ascertained. This looks like a case of theoretical reasoning. Additionally, such reasoning concludes in beliefs about what the

[14] See, e.g., Gerald Postema, "Jurisprudence as Practical Philosophy," *Legal Theory*, vol. 4 (1998): pp. 329-357.

law of a given jurisdiction *is*.[15] And given these facts or beliefs, we can *then* ask the normative question: "What ought I/we to do?"

Even a judge deciding some case, having figured out what the law is on some issue, can still ask a normative question about action: whether to apply the law or not (or to *decide* a case in a particular way, or issue a certain *order*). For example, if a judge concludes an applicable law is unjust, perhaps the judge then faces the question of whether they should apply this unjust law, or perhaps instead explicitly disobey the law by refusing to apply it, or instead cleverly alter this unjust law through a kind of judicial usurpation (or, perhaps the judge could just resign). Only those who would accept the idea that there is always a moral obligation to obey or apply the law would think that settling the question "What is the law?" would *ipso facto* settle the practical question "What ought I to do?". It is true that the law at least purpose to *tell* us what we ought to do. But one might still push the line that there is still a further, all-things-considered question as to whether we *should* do what the law tells us to do.

Law thus seems to exhibit a kind of duality. From one perspective legal reasoning seems like theoretical reasoning. From another, it seems like practical reasoning. This duality is exemplified where Scott Soames writes "Although legal rules are normative, the claim that a particular set of such norms is taken by citizens and holders of public offices to be legally authoritative is descriptive."[16] Ultimately though, I think the account that follows does not require a commitment either way regarding whether legal reasoning in general is a form of

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[15] Some even reduce all of practical reasoning into theoretical reasoning, saying that practical reasoning is directed at forming beliefs about what one ought to do (thank you to Alex Worsnip for correspondence on this point).

[16] Scott Soames, "Deferentialism: A Post–Originalist Theory of Legal Interpretation," *Fordham Law Review*, vol. 82 (2013), p. 613.

theoretical reasoning or practical reasoning. I will identify a concept and pattern of inference that I think is characteristic of legal reasoning across many domains. Having identified this, one could ask the further question of whether the result of this inference is normative or reason-giving for action, or is instead a descriptive statement that articulates a mere matter of fact.

While one might think this process of figuring out what the law is merely involves finding the right book and looking up the right rule, this is not the case. There is a conception of legal reasoning often found in the popular mind where all the lawyer (or any person interested in finding out the law) has to do is find the relevant "law book" and locate the relevant rule in that book in order to find out what the law is on a particular issue. The only reasoning that then needs to be done is a rather straightforward, deductive application of the general rule to the particular circumstances at hand. But, as any first-year law student will (hopefully) quickly discover, this conception is a misconception.[17]

It does look right to say that *part* of what is properly called legal reasoning could be characterized as deductive. For example, say that the applicable legal rule is to the effect that "finders of lost personal property hold good title against all but the true owner, so long as the finder is lawfully present in the location where the goods are found." Jeremy finds a baseball on the ground as he is walking along the sidewalk. Here, it seems that the deductive, syllogistic application of this rule would say he is legally entitled to the baseball (unless the true owner can come along and demonstrate as much). So deductive reasoning in law is possible.

But this example in an important respect is artificial. The proposition of law was taken for granted in employing the deductive syllogism, and it was applied to some factual scenario.

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[17] See Frederick Schauer, *Thinking Like A Lawyer: An Introduction to Legal Reasoning* (Cambridge, Massachusetts: Harvard University Press, 2009) p. 1.

The form or part of legal reasoning I am interested in in this dissertation is not the part of legal reasoning that involves straightforwardly applying law to fact in these sorts of cases. Rather, what I am interested in in this dissertation is the anterior question of *what the law is in the first place*. When Neil MacCormick argued that legal reasoning can (at least sometimes) take a deductive form, it was cases involving the deductive application of law to fact that he had in mind.[18]

We will be more occupied with what Hart called "problems of the penumbra."[19] These are the problems that lie "outside the hard core of standard instances or settled meaning":

> If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises.[20]

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[18] As MacCormick writes in chapter two ("Deductive Justification") of *Legal Reasoning and Legal Theory*: "given that courts do make 'findings of fact' and that these, whether actually correct or not, do count for legal purposes as being true; given that legal rules can (at at least can sometimes) be expressed in the form 'if *p* then *q*'; and given that it is, at least sometimes, the case that the 'facts' found are unequivocal instances of 'p'; it is therefore sometimes the case that a legal conclusion can be validly derived by deductive logic from the proposition of law and the proposition of fact which serve as premisses; and accordingly a legal decision which gives effect to that legal conclusion is justified by reference to that argument." Neil MacCormick, *Legal Reasoning and Legal Theory*, (Oxford: 1994 [1979]) p. 37.

[19] H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* vol 71, no. 4 (1958): pp. 593-629, p. 607.

[20] Hart, "Positivism and the Separation of Law and Morals," pp. 607-608.

Purely deductive applications of law to fact are not my main concern.[21] I am more interested in the structure of legal inferences that are non-deductive in character. (My concern with this "penumbra" will come out more in my discussion of legal disagreement below.)

In connection with this, it is worth noting that legal reasoning importantly is non-monotonic in character (whereas deductive reasoning is monotonic). Reasoning is monotonic when, if "a proposition *A* can be inferred from a set *S* of sentences, then *A* can be inferred from any set that contains *S*."[22] Reasoning is non-monotonic when such inferences cannot be made.[23] John Pollock treats non-monotonic reasoning as being the same as "defeasible" reasoning (a term he actually credits H. L. A. Hart of all people with introducing in 1948[24]). With deductive arguments, if the conclusion of a deductively valid argument is false, at least one of the premises must be false. But with defeasible arguments, "*the addition* of information can mandate the retraction of" an ultimate conclusion "without mandating the retraction of any of the earlier conclusions from which the retracted conclusion was inferred."[25] Outside of the law, examples of non-monotonic (or defeasible) reasoning include inductive generalization and reasoning derived from perceptions.[26]

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[21] "It is sometimes thought that deduction is an important form of legal reasoning. It isn't." Melvin A. Eisenberg, *Legal Reasoning* (Cambridge University Press, 2022) p. 87.

[22] Gärdenfors, P. "Reasoning in conceptual spaces," in J. E. Adler & L. J. Rips (eds.), *Reasoning: Studies of human inference and its foundations* (Cambridge University Press, 2008): pp. 302–320, p. 304).

[23] Harman refers to monotonic reasoning as "cumulative" and non-monotonic reasoning as "noncumulative." Gilbert Harman, *Change in View: Principles of Reasoning* (MIT Press: 1986) p. 4.

[24] See John Pollock, "Defeasible Reasoning," in J. E. Adler & L. J. Rips (Eds.), *Reasoning: Studies of Human Inference and its Foundations* (Cambridge University Press, 2008): pp. 302–320, p. 452.

[25] Pollock, "Defeasible Reasoning," p. 453.

[26] "For instance, I may believe that the wall is gray on the basis of its looking gray to me. But it may actually be white, and it only looks gray because it is dimly illuminated. In this example, my evidence (the wall's looking gray) makes it reasonable for me to conclude that the wall is gray, but further evidence could force me to retract that conclusion." Pollock, "Defeasible Reasoning," p. 451.

For an example in law, say the following legal proposition is true of a given jurisdiction: "It is illegal to drive over 55 miles per hour." Sam is driving at 65 miles per hour within the jurisdiction. So we might deductively infer the seemingly obvious legal conclusion that Sam has broken the law. But, say we then learn that Sam was rushing someone to the hospital, and that there is another norm in the legal system that says "Any law of this jurisdiction is not violated in cases where the benefit of conduct that would otherwise violate the law clearly outweighs the harms of such conduct." Then we might not be so sure. Even if we come to accept the conclusion that Sam has not broken the law after all, this does not force us to retract the "premise" that there is legal norm to the effect that "It is illegal to drive over 55 miles per hour." Legal reasoning is often defeasible in character.[27]

Another example of non-monotonic reasoning in law is *Riggs v. Palmer*.[28] In that case, someone named Elmer murdered their grandfather in order to inherit under his will. The residuary legatees[29] under the will sued the administrator of the will, arguing they should get the inheritance instead of Elmer. The relevant statute governing wills said nothing about whether someone can inherit if they had murdered the testator, and instead only specified things like "how many and what kinds of witnesses must sign, what the mental state of the testator must be," etc., requirements that were satisfied in this case.[30]

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[27] "All statements of institutional fact, and all statements of legal norms, have a certain defeasible quality." Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) p. 76.

[28] It also serves as an example of theoretical disagreements in law—to be discussed in section II.b. below.

[29] The residuary legatees are those who would have inherited had Elmer become deceased before his grandfather.

[30] Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 16.

While the dissent argued that the "plain meaning" of the statute of wills (with its complete omission of exceptions for cases where the beneficiary had murdered the testator) showed that Elmer should inherit, the court found for the residuary legatees. The court reasoned that "statutes should be constructed from texts not in historical isolation but against the background of […] general principles of law," one principle of which includes "the principle that no one should profit from his own wrong."[31] So whereas the statute of wills considered in isolation might have seemed to require the transfer of property to the murderer, other legal norms prescribed a different result.

Reasoning is non-monotonic when it only holds "based on assumptions about what is 'normally' the case."[32] A given legal norm, in isolation, may seem to prescribe a particular result. But then, we find some *other* legal norm that either competes with the original norm, or perhaps shows it to have some exception, or limit in its scope.[33] So legal reasoning importantly is non-monotonic in character, and it is these sorts of cases that I am interested in, rather than the genuine (but less interesting) deductive portions of legal reasoning.

II.) **Eight *desiderata* for a theory of legal reasoning.**

It has proven to be very difficult to give a general account of the structure of legal reasoning. As Benjamin Cardozo wrote in his classic *The Nature of the Judicial Process*, "any judge, one might suppose, would find it easy to describe the process which he had followed a

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[31] Dworkin, *Law's Empire*, pp. 19-20.

[32] Gärdenfors, "Reasoning in conceptual spaces," p. 304.

[33] "The basic idea of nonmonotonic inferences is that when more information is obtained about an object, some inferences that were earlier reasonable are no longer so." Gärdenfors, "Reasoning in conceptual spaces," p. 304.

thousand times and more. Nothing could be farther from the truth."[34] Unsurprisingly then, "there is no solid consensus about what legal reasoning *is*."[35]

Some say that legal reasoning is *mysterious*.[36] While some characteristic *kinds* of legal reasoning are readily identifiable in a generic sense (e.g., rule-based reasoning, analogical reasoning), the law is notoriously resistant to systematic, algorithmic treatment, and the literature on legal reasoning is accordingly rife with disagreement. Enamored with the law's mystery, one might be tempted to rest content with obscure references to the craft of judging and lawyering, or the role of wisdom and experience in legal reasoning.[37]

Felix Frankfurter wrote that, when it comes to responding to the "problem of statutory construction," that is, the challenge of describing "the task confronting judges when the meaning of a statute is in controversy"—he himself comes up "empty-handed."[38] Frankfurter "confess[es] unashamedly that I do not get much nourishment from books on statutory construction, and I say this after freshly reexamining them all, scores of them."[39] Instead, "[w]hen one wants to understand or at last get the feeling of great painting, one does not go to books on the art of painting"; instead, Frankfurter says we should just look at the craft itself.[40] But we might find

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[34] Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press: 1949) p. 9.

[35] Ellsworth, "Legal Reasoning," p. 685.

[36] See, e.g., Larry Alexander & Emily Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, 2008); see also Richard Posner, "Professionalisms," *Arizona Law Review*, vol. 49 (1998).

[37] See Dworkin, *Law's Empire*, pp. 10-11; see also Brett Scharffs, "Law as Craft," *Vanderbilt Law Review*, vol. 54 (2001).

[38] Felix Frankfurter, "Some Reflections on the Reading of Statutes," *Columbia Law Review*, Vol. 47, No. 4 (1947): pp. 527-546, p. 530.

[39] Frankfurter, "Some Reflections on the Reading of Statutes," p. 530.

[40] Frankfurter, "Some Reflections on the Reading of Statutes," p. 530.

this sort of perspective unsatisfactorily unstructured, or "too content with the mysteries it savors."[41]

Drawing inspiration from Posner, perhaps one could explain the mystique of the law by pointing out that it is in the self-interest of the legal profession to *develop* a professional mystique and thereby increase the demand for its services. This could be done, for example, by requiring that all legal services be done by licensed lawyers, restricting entry into the profession, adopting "an obscurantist style of discourse" ("in order to make the profession's processes of inquiry and inference impenetrable to outsiders"), enforcing strict educational entry requirements (to "make[] the professional's thought processes more opaque to outsiders"), and resisting "systematization of professional knowledge" (since "[o]nce the knowledge that is the professional's capital is organized in a form in which people can employ it without having to undergo the rigors of professional training, the professional becomes dispensable").[42] We might try, however, to do more than this cynical, economic explanation, as it does not so much *cast light on* and thereby illuminate the "mysteries" of the actual structure of legal reasoning, as much as it gives a causal story that seemingly explains *away* the law's mystique.

It is not common for theories of legal reasoning to patiently spell out multiple theoretical *desiderata* that the author then sets out to explain. Ronald Dworkin's theory in *Law's Empire* takes *one* phenomenon of legal reasoning—the "theoretical disagreement about law"—and essentially makes it the sole evidentiary concern for this theory. Antonin Scalia, in *A Matter of Interpretation*, does not really lay out clear *desiderata* at all, though he does provide arguments

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[41] Dworkin, *Law's Empire*, p. 10.

[42] Posner, "Professionalisms," pp. 3-4.

for his view and examples of its application. There are exceptions to this in the law review literature, however.[43]

To begin the project of casting light on this mysterious phenomenon, in the following eight sub-sections I survey and describe eight *desiderata* for a theory of legal reasoning. By *desiderata* I mean something along the lines of "features it would be good for a theory to have" or "aspects of legal reasoning it would be good for a theory to take account of." I call them *desiderata* as opposed to something like "constraints" or "requirements," because I leave it open whether, all things considered, a theory must account for the thing in question, or have the feature that I describe.

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[43] Richard Warner lays out eight desiderata for a theory of legal reasoning (Warner collectively refers to this as a "criterion of adequacy"); a theory of legal reasoning should account for the following facts (1) good reasoning preserves justification: "necessarily, if one has a justification for the premises, then one has a justification for the conclusion" (2) "reasoning is frequently incomplete" (3) "completing incomplete reasoning is typically a matter of reconstruction" (4) "legal reasoning sometimes creates precedents" (5) "precedents are typically "other things being equal" rules" (6) "legal reasoning is sometimes guided by precedents" (7) "the application of many crucial legal concepts requires an assessment of relevant likeness" (8) "courts interpret and reason from various forms of legislation." See Richard Warner, "Three Theories of Legal Reasoning," *Southern California Law Review*, vol. 62, no. 5 (1989): pp. 1523-1572, pp. 1530-1550. In my own way, I take on most of Warner's concerns here.

Wellman provides a less formal list of considerations. "An adequate theory of judicial argumentation should ascribe a logical structure to the arguments adduced by a judge," where we are able "to describe the kind of inferences which are supposed to relate" premises to conclusions. Vincent Wellman, "Practical Reasoning and Judicial Justification: Toward an Adequate Theory," *University of Colorado Law Review* 45, 49 (1985): p. 49. But a theory of legal reasoning should not "account[] indiscriminately for each judicial argument without regard to its logical form or its success in justifying its conclusion"; accordingly, it will "acknowledge some arguments to be well-reasoned, but treat others as flawed." Id. at p. 50. A theory of legal reasoning "must elucidate the common criteria of validity which explain our critical evaluations of judges' arguments." Id at pp. 52-53. As relevant to our evaluations of judges' decisions, we expect that (1) judges offer reasons for their decisions (where we distinguish between the holding and the justification for the holding) (id at pp. 53-54); (2) we expect "that judges should treat like cases alike" (pp. 54-55); "We expect that in giving reasons judges will appeal to certain special propositions styled 'rules of law'" (p. 56); (4) judges reason *about* rules in addition to reasoning *from* them (as when "the judge must decide, among the various applicable rules, which rule's application would be warranted") (p. 58); (5) "Along with rules, judges characteristically appeal to principles and policies of law" (p. 58); (6) "Another salient form of reason offered by judges to justify their conclusions is the analogy" (p. 58).

I break up the eight *desiderata* into three groups: specific, intermediate, and general.[44] The *specific desiderata* are considerations that are more unique to the domain of *legal* reasoning in particular, the *intermediate desiderata* are those which, while relevant to legal reasoning, likely could be relevant to other kinds of reasoning as well, and the *general desiderata* are those which are arguably relevant to all philosophical theorizing about any subject whatsoever (or perhaps even scientific theorizing, for that matter). The four specific *desiderata* are: (1) explaining the patterns of legal inference across *all* the main domains of law; (2) explaining what is referred to as the "Janus-faced" character of legal reasoning; (3) addressing the "problem of relevance" for analogical legal reasoning;[45] and (4) accounting for the existence of (reasonable) disagreements about law. The two intermediate *desiderata* are: (1) explaining how the characteristic patterns of legal reasoning can be *justified*; and (2) explaining or accounting for the non-monotonic (i.e., defeasible) character of legal reasoning. The two general *desiderata* are (1) explanatory unity; and (2) theoretical simplicity.

a.) **Explaining the patterns of legal inference across *all* (or hopefully at least *many*) of the diverse domains of law**.

Law is a massive and diverse phenomenon. There are different kinds of legal systems: the most famous distinction perhaps being between "common law" versus "civil law" systems.[46] A

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[44] My grouping here is not exact, and I even waffle a bit on where to locate some of the *desiderata*. Thankfully, this is of no moment, yet I still find it worthwhile the put these into groups, even if the relative generality of these *desiderata* falls more on a spectrum, as opposed to falling neatly into clearly-delineated groups.

[45] This third *desideratum* in particular could be put in my "intermediate" group, since non-legal forms of analogical reasoning could have to answer to it as well. I place it here though to remain officially non-committal about the status of the problem of relevance for non-legal analogical reasoning, and how analogical reasoning in law relates to other kinds of analogical reasoning.

[46] One can also see scholarly studies of "primitive" legal systems, which, presumably stand in contrast with those that are "advanced."

"common law" system is one "which relies heavily on court precedent in formal adjudications." In our common law system, even when a statute is at issue, judicial determinations in earlier court cases are extremely critical to the court's resolution of the matter before it."[47] "Civil law systems rely less on court precedent and more on codes, which explicitly provide rules of decision for many specific disputes."[48]

Within particular legal systems there are also many different areas of law. The North Carolina bar exam, for example, tests around fifteen subjects, including business associations (e.g., agency, corporations, and partnerships), civil procedure, constitutional law, contracts, criminal law, criminal procedure, evidence, family law, legal ethics, real property, secured transactions (including the U.C.C.), torts, trusts, and wills and estates. And the amount of law one needs to know to pass the bar exam is a rather small subset of even the total law of that jurisdiction (and the others that embrace it).[49]

There are many different "sources" of law. These include statutes, constitutions, administrative regulations, and court decisions (otherwise known as *precedents* or *common law*). The main "split" within the law is between (1) instances of reasoning that proceed from

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[47] Toni M. Fine, *American Legal Systems: A Resource and Reference Guide*, chapter 1: "Basic Concepts of American Jurisprudence" (Anderson Publishing, LexisNexis Group 1997).

[48] Toni M. Fine, *American Legal Systems: A Resource and Reference Guide*, chapter 1: "Basic Concepts of American Jurisprudence" (Anderson Publishing, LexisNexis Group 1997).

[49] From what I can tell it is not uncommon for bar exams to completely omit large subjects like: administrative law, American Indian law, bankruptcy, employment law, environmental law, immigration law, international law, and (federal) taxation.

canonically formulated legal norms—this includes statutes, constitutional provisions, and administrative regulations, and (2) instances of reasoning that proceed from precedents.[50]

Moving beyond these basic categories, there is an even broader array of considerations that are appealed to in the course of legal reasoning. In addition to the sources of law just mentioned, legal reasoners appeal to such things as history, tradition, the "original understanding" of the law, dictionary definitions of words appearing in various laws, the *legislative intent* behind the passage of a law, and even various *moral* concepts (like justice or fairness) or *pragmatic* concepts (like efficiency or workability).[51]

Part of the reason it has been so difficult to develop general accounts of legal reasoning is the great diversity of the things that are appealed to in the course of legal reasoning. A theory of *legal* reasoning should seek to go beyond just giving an account of reasoning about some particular domain of law, like statutory law, or reasoning about constitutional law. It should at least aspire to explain what is going on *across* these different legal domains with the various considerations that appear in them. We should be curious whether there is some notable feature of legal reasoning—like some concept that is deployed or an assumption that is made—in the course of reasoning from the diverse sources of law (statutes, constitutional clauses, and

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[50] This is recognized by Wellman above where he writes that a theory of legal reasoning should recognize that "legal reasoning is sometimes guided by precedents" and also that "courts interpret and reason from various forms of legislation." See Wellman, "Practical Reasoning and Judicial Justification," p. 49.

Ronald Dworkin, in showing how *law as integrity* (Dworkin's favored theory of legal reasoning that will be discussed in chapter two) is applied, chose to illustrate it in three domains: common law (where the source of law is precedents), statutory law, and constitutional law. These three legal domains occupy chapters eight, nine, and ten, of *Law's Empire*, respectively.

[51] See Michael Gerhardt, *The Power of Precedent* (Oxford: Oxford University Press, 2008): pp. 18-19.

precedents) that are associated with the various domains of law (criminal law, constitutional law, tort law, contract law, etc.).

This *desideratum* will stand out as being more prominent than the others in the story that is told in the next two chapters. The other theories of legal reasoning lack the resources to capture what is going on across the main domains of law. The overarching project here is to give an explanation of legal reasoning that is more systematic than the extant accounts.

b.) **The Janus-faced character of legal reasoning**.

One feature of legal reasoning that has been emphasized by legal philosophers is what is called the "Janus-faced" character of legal reasoning. While the Janus-faced character of law and legal reasoning is often taken to be an important feature of them,[52] I have not yet seen it taken as an orienting aim or *desideratum* for a major theory of legal reasoning.

The *Janus-faced* character of legal reasoning is taken to be one of legal reasoning's most significant features.[53] On the one hand, "law is a social phenomenon"[54] and seems to be firmly grounded in past political decisions. On the other, "the concept of law expresses a human ideal and a standard of criticism."[55] "[C]ommon law anchors solidly in the past its normative demands on present actions and guidance for future actions."[56] Law looks towards both an ideally just

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[52] See, e.g., Dworkin, *Law's Empire*; Gerald Postema, "Classical Common Law Jurisprudence (Part I)," 2 *Oxford University Commonwealth Law Journal* 155 (2002).

[53] See: Dworkin, *Law's Empire*; Postema, "Classical Common Law Jurisprudence (Part I)"; Richard Fallon, "Reflections on Dworkin and the Two Faces of Law," *Notre Dame Law Review*, vol. 67 (1992): 553; Martha Nussbaum, "Janus-faced law: A philosophical debate," in *The Timing of Lawmaking* (Frank Fagan & Saul Levmore, ed.) (Elgar, 2017).

[54] Fallon, "Reflections on Dworkin and the Two Faces of Law," p. 572.

[55] Fallon, "Reflections on Dworkin and the Two Faces of Law," p. 572.

[56] Postema, "Classical Common Law Jurisprudence (Part I)," p. 155.

future, but also towards the past, to "the world of social fact."[57] A theory of legal reasoning cannot ignore the two faces of Janus: "Our understanding of law will be deeply impoverished if we fail to recognize this duality."[58]

Notice that these statements about Janus's two faces indicate two axes: (1) a temporal axis: the past and future; and (2) a non-temporal axis: social fact and normative ideal. As Nussbaum writes in another characteristic statement: law "looks backward toward older laws and traditions, and it looks forward to social goals and aspirations."[59] There is a sense however in which the temporal axis seems less fundamental than the non-temporal axis. Goals and

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[57] Fallon, "Reflections on Dworkin and the Two Faces of Law," p. 573.

[58] Fallon, "Reflections on Dworkin and the Two Faces of Law," p. 573. Other similar statements are found in two different entries of the *Stanford Encyclopedia of Philosophy*:

> "Law furthers social stability but may entrench norms of oppression. Law can also be a necessary means for reform. Law can be an anchor to the past or an engine for the future. Each function has its place. Feminist legal philosophy is an effort to examine and reformulate legal doctrine to overcome entrenched bias and enforced inequality of the past as it structures human concepts and institutions for the future."

Leslie Francis and Patricia Smith, "Feminist philosophy of law," *Stanford Encyclopedia of Philosophy*, last modified October 24, 2017, https://plato.stanford.edu/entries/feminism-law/.

> "As might be expected, as a result of these different (although often intertwining) intellectual backgrounds and sources of interest in interpretation, legal theorists approach this subject with very different questions and concerns to which they give concomitantly different answers. For all this, however, a surprising number of legal theorists agree—at least at an abstract level—about one central characteristic of interpretation, namely that interpretation is a Janus-faced concept, encompassing both a backward-looking conserving component, and a forward-looking creative one. In other words, an interpretation of something is an interpretation of *something*—it presupposes that there is a something, or an original, there to be interpreted, and to which any valid interpretation must be faithful to some extent, thus differentiating interpretation from pure invention—but it is also an *interpretation* of something, i.e. an attempt not merely to reproduce but to make something of or bring something out of an original."

Julie Dickson, "Interpretation and Coherence in Legal Reasoning," *Stanford Encyclopedia of Philosophy*, last modified February 10, 2010, https://plato.stanford.edu/entries/legal-reas-interpret/.

[59] Nussbaum, "Janus-faced law: A philosophical debate," p. 249.

aspirations (or the *realization* of goals and aspirations, at least) lie in the future, and the social facts which are taken as a basis for reaching such aspirations necessarily lie in the past.

We can further uncover the Janus-faced character of law by looking at a few things Dworkin says about the famous chestnut that the "Law works itself pure"—a reference to how law somehow changes via judicial reasoning and adjudication. Dworkin describes the "mysteries" that lie behind this phrase, where one "mystery argues that these changes are (or at least can be) guided by the law itself, personified, playing out an internal program or design."[60] The key idea here as it relates to the Janus-faced character of legal reasoning is that the law works *itself* pure (not, for example, that *judges* work the law pure). The law somehow *contains within itself* the recipe for its own improvement. The question then becomes: What is the process of reasoning that finds something in law, and then *uses that same thing* as the basis for improving it?

c.) **The problem of relevance**.

Another important issue in the philosophy of legal reasoning is the *problem of relevance*. The problem of relevance is discussed in connection with analogical reasoning, which plays an important role in reasoning from precedent.[61] In outline, a precedent case is thought to govern a later case when the precedent case and the later case are sufficiently similar or *analogous*.[62] But

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[60] Ronald Dworkin "Law's Ambitions for Itself," *Virginia Law Review*, vol. 71 (1985), p. 173.

[61] "Arguments from precedent and analogy are characteristic of legal reasoning." Grant Lamond. "Precedent and Analogy in Legal Reasoning," available at https://plato.stanford.edu/entries/legal-reas-prec/, *Stanford Encyclopedia of Philosophy* (2006).

[62] "The most important limitation on the application of precedent is that the decision in an earlier case is only binding in later cases where the facts in the later case are the 'same' as those in the earlier case." Lamond, "Precedent and Analogy in Legal Reasoning." Lamond continues by noting "In saying that two cases are the same, it cannot be that they are *identical*. It is obvious that no two situations are identical in every respect: they must differ at least in having occurred at different times and/or different places." *Ibid*.

since two things are similar and different in a seemingly innumerable number of ways,[63] it is said that the two cases must be sufficiently similar in all *relevant* respects.[64] This raises the question: by what process of reasoning do legal reasoners assess whether two cases are sufficiently similar in all "relevant" respects? Call this the *problem of relevance*.[65]

One might propose, in the spirit of John Salmond, that the relevant facts of a case are those which were *logically necessary* to reach the result in the precedent case. But "[t]here will be an endless number of correct but quite different descriptions of the recorded facts of any specified case, and any one of these descriptions could be built into the formulation of a rule under which the decision in that case could be subsumed."[66]

Postema notes two opposed ways of answering the problem of relevance: *particularism* and *rule-rationalism*. Particularism says the judgment of similarity between two cases is done

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[63] Here is a brief example from case law that makes the point. To state it very simply, "qualified immunity" protects government officials from legal liability so long as they do not violate *clearly* established law. *Begin v. Drouin*, 908 F3d 829, 836 (1st Cir 2018). Precedent is part of what establishes what counts as "clearly established law. In applying this standard, a federal court of appeals has remarked that "Of course no two cases are identical. But a case need not be identical to clearly establish a sufficiently specific benchmark against which one may conclude that the law also rejects the use of deadly force in circumstances posing less of an immediate threat." *Id*. at p. 836. "'[T]here is no requirement of identicality. In arguing for clearly established law, a plaintiff is not required to identify cases that address the 'particular factual scenario' that characterizes his case.'" *Id*. (quoting *Alfano v. Lynch*, 847 F.3d 71, 76 (1st Cir. 2017)).

[64] "In practice the differences between any two cases will be much more significant than this, and yet they may—legally speaking—still be the same. For this reason, theorists often speak of two cases being the same in 'all relevant respects'. Which of course simply raises the question of what makes two cases 'relevantly' the same." Lamond, "Precedent and Analogy in Legal Reasoning."

[65] Rolf Sartorius, "The doctrine of precedent and the problem of relevance," *Archiv für Rechts und Sozialphilosophie* 53 (1967): pp. 343–365. Sartorius puts the question in the following way: "What is the general nature of the criteria of relevance which provide the basis for distinguishing between material and immaterial facts within any particular legal system?" (Sartorius, p. 357). Burton speaks of the crucial step in analogical reasoning, whereby the legal reasoner "judge[s] whether the factual similarities or the differences are more *important* understand the circumstances" as the *judgment of importance*. Steven Burton, *An Introduction to Law and Legal Reasoning* (Aspen Publishers 3rd ed.: 2007), p. 26 (emphasis original). Burton's discussion of this "judgment of importance" I think is, in sum and substance, the same as the problem of relevance.

[66] Sartorius, "The doctrine of precedent and the problem of relevance," p. 348.

"by some form of immediate insight," a "mode of access" that "is direct, immediate, and ultimately ineffable."[67] Analogical reasoning for the particularist "is just the movement of practical reason from particular case to particular case."[68]

Rule-rationalism, in contrast, "insist[s] that reasoning meant to justify judgments, decisions, and actions necessarily relies on rules or principles."[69] The idea is that the relevant similarities between two cases are set by a rule "that supplies criteria of relevance."[70] On this view, rules have at least three important functions in analogical reasoning: (1) the rule "*makes it the case* that the two cases are analogues"; (2) "the rule *justifies* the inference from the source analogue to the target analogue"; and (3) "the rule serves as a guide for thought of those who engage in analogical thinking."[71]

Postema's own response to the problem of relevance is to say that analogical reasoning involves locating cases in "a network of instances linked by inferential relations, of reasons supporting, refining, elaborating other reasons, and being supported, restricted, or elaborated by yet others."[72] On this view, "[t]o judge the (robust) relevance of certain features of a case is not to report the deliverance of some kind of special ineffable insight, intuition, or perception," but is

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[67] Gerald Postema, "*A Similibus ad Similia*: Analogical Thinking in Law," in *Common Law Theory* (Douglas Edlin, ed.) (Cambridge University Press, 2007), p. 109.

[68] Postema, "*A Similibus ad Similia*," p. 109.

[69] Postema, "*A Similibus ad Similia*," p. 111.

[70] Postema, "*A Similibus ad Similia*," p. 111.

[71] Postema, "*A Similibus ad Similia*," pp. 111-112.

[72] Postema, "*A Similibus ad Similia*," p. 120.

rather "to endorse a judgment the content of which is given by its location in the web of reasons that support it and that it supports."[73]

Postema also points to the role played by the *sense of justice* in judgments of similarity. Or, to be more specific, to "a sense of *manifest injustice in concrete circumstances*."[74] Postema here is relying on the idea that sometimes we can recognize what would count as an *injustice* without being able to fully articulate what affirmatively counts as just (we can make *some* negative judgments, but we are unable to articulate *the* positive one): "All these features – the concreteness, the manifestness, and the negativity – are central to this street-level sense of justice. What orients deliberation is the sense that certain similarities or dissimilarities are excluded, that certain directions in which the analogy might be taken are ruled out, judged inappropriate, or unfair."[75]

While Postema's comments about the embeddedness of legal judgments and the role played by the sense of (in)justice are important, they do not seem to me to be sufficiently specific to provide a fully satisfactory answer to the problem of relevance. So the question becomes: what can be said in general regarding the process of reasoning by which legal reasoners ascertain and make judgments of legal similarity in light of some set of precedents (other than for example, appeal to a broad "sense of justice")?

d.) **Accounting for the existence of (reasonable) legal disagreement**.

Disagreement is a flashpoint in a number of areas of philosophy. Understanding the nature of disagreement in some realm is often taken by philosophers to play an important role in

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[73] Postema, "*A Similibus ad Similia*," p. 121.

[74] Postema, "*A Similibus ad Similia*," p. 129.

[75] Postema, "*A Similibus ad Similia*," p. 129.

understanding the nature of the realm in question. For example, in C. L. Stevenson's "emotivist" view that ethical statements are, fundamentally, not assertions of propositions that bear truth values, but rather are expressions of approval and disapproval that attempt to influence others, ethical disagreements are illustrations of how ethical statements "are used in a cooperative enterprise in which we are mutually adjusting ourselves to the interests of others."[76] In meta-ethics, the existence of certain kinds of moral disagreement is sometimes used to draw skeptical conclusions regarding the metaphysical status of morality.[77] In epistemology, the "peer disagreement" literature focuses on the question of whether we should "conciliate" and reduce our confidence in some proposition (or drop belief in it entirely) upon encountering a peer who disagrees with us, or rather whether we can remain "steadfast" in our beliefs in the face of disagreement.[78]

In the area of scientific reasoning, studying the ground of scientific disagreement might help illuminate the structure of such reasoning. For example, on at least one interpretation of Thomas Kuhn's later work about science and scientific reasoning, Kuhn sees five values ("accuracy, consistency, scope, simplicity, and fruitfulness") as being part of the basis for selection of *paradigms* in science, where disagreement regarding the application of these values

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[76] Charles Leslie Stevenson, "The Emotive Meaning of Ethical Terms," *Mind*, Vol. 46, No. 181 (1937), pp. 14-31, p. 31.

[77] Folke Tersman, "Moral Disagreement," *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/disagreement-moral/ (2021). There is, perhaps most famously, John Mackie's "argument from relativity," also known as the "argument from disagreement." *Ibid*.

[78] Bryan Frances & Jonathan Matheson, "Disagreement," *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/disagreement/ (2018).

leads to the adoption of different paradigms.[79] For Kuhn, these values play an important role in scientific reasoning because "Kuhn takes the values as constitutive of the rationality of the scientific enterprise—even in times of crisis and paradigm-change," but application of these "universal values of science" in particular contexts leads to scientific disagreement.[80]

The existence of *legal* disagreement (i.e., disagreements about *what the law is*)—an area where there has been a recent flurry of resurgent interest[81]—is something that has been taken to be a prominent feature of law and legal reasoning. By legal disagreement I mean simply: a disagreement between two or more reasoners regarding *what the (content of) the law is*. Legal disagreement is found quite frequently amongst judges and lawyers (most famously, but certainly not exclusively, at the Supreme Court level).

The existence of legal disagreement, especially among experts, is a puzzling feature of law. A number of philosophical theories of the nature of law—especially positivist ones—emphasize the *settlement* or *finality* functions of law. The idea is that law is meant to settle moral and political controversies (issues on which parties cannot come to an agreement via nonlegal

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[79] "Kuhn believes that the values *taken in the abstract* are constitutive of science but that there is room for disagreement in the *concrete application* of these values in situations of choice. There are two ways in which the shared values underdetermine choice: individual scientists sharing these values may interpret these values differently—roughly, one's simplicity is another one's complexity. Furthermore, when the values are applied in situations of choice, they can conflict with each other such that they must be weighed against each other." Markus Seidel, "Kuhn's two accounts of rational disagreement in science: an interpretation and critique," *Synthese* (2021) 198, p. S6039 (Suppl 25): pp. S6023–S6051.

[80] Seidel, "Kuhn's two accounts of rational disagreement in science," S6040.

[81] See, e.g., Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," in *Ronald Dworkin*, ed. A. Ripstein (Cambridge: Cambridge University Press, 2007); Scott Shapiro, *Legality* (Harvard University Press: 2011); Brian Leiter, "Explaining Theoretical Disagreement," The University of Chicago Law Review, vol. 76 (2009); Brian Leiter, "Theoretical Disagreements in Law: Another Look," in *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (David Plunkett, Scott J. Shapiro, and Kevin Toh, eds.) (Oxford University Press: 2019); Dale Smith, "Agreement and Disagreement in Law," *Canadian Journal of Law & Jurisprudence*, Vol. 28 (2015); pp. 183-208; William Baude & Ryan D. Doerfler, "Arguing with Friends," *Michigan Law Review*, vol. 117 (2018).

means—say, by debating or negotiating with one another), or to settle coordination problems (problems the solution to which is arbitrary in some sense—like which side of the road to drive on). Perhaps law does this through the issuing of authoritative *commands* (as in the command theory of Austin), or through the social acceptance of group *plans* (as with the planning theory of Scott Shapiro). Either way, the function of law is intimately related to some sort of finality. And notice that to achieve this finality, it has to be *clear* to everyone involved in some sense what the solution is: the solution to the coordination problem of which side of the road to drive on will be impaired to the extent that people do not know which side of the road to drive on.

There is a less general but related point that can be made in light of Hart's jurisprudential theory. In his theory of law, H. L. A. Hart posits a fundamental norm in a legal system called the *rule of recognition*. This rule is a social rule that must be accepted as a common standard.[82] Essentially, something counts as law only if there is a social practice among the relevant legal officials to treat or regard something as law. But if there is disagreement about what counts as law amongst the relevant legal officials, it seems, *ipso facto*, that the thing they are disagreeing about cannot be law. At best, it would seem that in the case of a legal disagreement between judges, when the case is finally decided (say by a 5-4 majority), the judges *create new* law with their decision—and yet the judges report having a disagreement about the actual, present state of the law. Since positivists in the Hartian tradition (both inclusivist and exclusivist alike) "insist that the grounds of law are determined by convention," positivists are faced with the question of how it is that these legal disagreements can come to exist, and what exactly is going on in such cases.

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[82] See H. L. A. Hart, *The Concept of Law* (Oxford University Press: 2012, 3rd ed.), p. 116.

Ronald Dworkin in fact leveraged the existence of a particular kind of legal disagreement (what he called "theoretical" disagreement about law) as his main argument against Hart's positivism in *Law's Empire* (Dworkin's argument from theoretical disagreements about law will be discussed more fully in the next chapter). Ronald Dworkin used legal disagreements as the main (if not the *sole*) launching point for the voluminous argument of *Law's Empire*.[83]

I am not interested in adjudicating grand theories of law on the basis of disagreement, and I am not focused solely on disagreement, either (the way Dworkin arguably is, at least in *Law's Empire*). I do however think that the existence of reasonable legal disagreement gives us reason to examine these disagreements and see if there is anything in the structure of them that can cast light on the nature of legal reasoning.

It is possible that legal disagreements do not provide a fertile ground for understanding the nature of legal reasoning. Perhaps there are just brute differences in the minds of judges and other legal reasoners: in Judge A, Neuron #456 fired in a certain way that led to a certain conclusion, and in Judge B, Neuron #654 fired in a certain way that led to a different conclusion.

But suppose we were to look at legal disagreements and find, below the surface, certain assumptions or premises that play a systematic role in legal reasoning (in that they are found in different areas of law) and that also serve as the lynchpin of legal disagreement (at least in a lot of cases). It would seem that this would amount to a notable discovery about the nature of legal reasoning, about its characteristic patterns of inference and its justificatory structure.

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[83] In chapter one, Dworkin begins *Law's Empire* by presenting four legal disagreements (*Riggs v. Palmer*—"Elmer's Case", *TVA v. Hill*—"the Snail Darter case", *McLoughlin v. O'Brian*, and *Brown v. Board of Education*). Dworkin goes on to argue that (Hartian) positivism cannot make proper sense of these disagreements, since positivism must say that judges are either confused about the nature of their practice, or are intentionally misleading their audience. See Dworkin, *Law's Empire*, pp. 1-44.

If nothing else, such a diagnosis could aid in the *resolution* of legal disagreements. If we are able to zero-in on a point of consistent disagreement, we may be able to better understand the disagreement and resolve it. (And in fact, in chapter three—in light of my discussion of legal disagreements and the ground of them—I will briefly offer a novel solution that I think holds out the promise of resolving legal disagreements in a heretofore unappreciated way.)

It would also be good for a theory of legal reasoning to have the result that it "makes sense" somehow for the participants of the practice of legal reasoning to have such disagreements, that there is something *natural* or *expected* about legal disagreements. After all, if a theory of legal reasoning would have the result that legal reasoners would rarely if ever have this sort of dispute, that theory of legal reasoning would be inconsistent with a notable feature of the practice. So if there is something in the structure of legal reasoning that can explain what is going on when legal reasoners have a legal disagreement, and perhaps even shed some real light on such disagreements, the theory has arguably "checked the box" for this *desideratum*, and is thus the better for it.

Two intermediate *desiderata*

e.) **Explaining how the characteristic forms of legal inference can be *justified***.

In giving an account of legal reasoning that takes the judicial perspective—with its aspirations for neutrality in reasoning towards the present state of the actual law—I am in agreement with Vincent Wellman that we should not "account[] indiscriminately for each judicial argument without regard to its logical form or its success in justifying its conclusion."[84] We

[84] Wellman, "Practical Reasoning and Judicial Justification," p. 50.

cannot "subsume each inference employed by a judge, no matter how specious."[85] Some instances of judicial reasoning are good, and others are bad, and a theory of legal reasoning should be able to account for this.

To this extent, at least, a theory of legal reasoning is *normative* for the subject it examines. And yet I feel a bit of reluctance in describing what I am doing in this project here as (solely) normative. There is a phenomenon out there in the world, and I am trying to give an account of it by explaining it. To this extent, it seems that I am embarked on a descriptive project.

I feel cautious about referring to my theory as solely a "normative" theory of legal reasoning for another reason. There are several debates about what account of legal reasoning is correct as a normative matter—that is, what methodology judges should use in interpreting laws. Importantly there are debates between *textualism* and *purposivism* and between *originalism* and *living constitutionalism*. One thing I set out to do here is to even take these (normative) theories and explain how they all count as theories of *legal* reasoning at all. It would be unfortunate (but perhaps not fatal) for a theory of legal reasoning to have the implication that one of these theories does not count as a theory of *legal* reasoning at all. *Normative* theories of legal reasoning *themselves* serve as data that my theory is trying to make sense of.[86] So I do not want to make it seem like my theory is just another normative theory. What, if anything, do these

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[85] Wellman, "Practical Reasoning and Judicial Justification," p. 50.

[86] This probably further complicates matters, but it is not like these normative theories lack descriptive content (in fact, I will primarily be assessing these theories based on how well they fit with existing legal practice). While they do make claims regarding the way in which law *ought* to be interpreted and applied (this is what makes them "normative" for me), it is not like they think that their preferred methods of reasoning lack grounding in historical and contemporary practice. To this extent their aspirations, also, are descriptive as well as normative.

diverse (normative) theories of legal reasoning have in common? Even though this project does have normative elements as just mentioned, it is considerations like these that make me not want to lose sight of the *descriptive* component of what I set out to do here.

f.) **Explaining or accounting for the non-monotonic (i.e., "defeasible") character of legal reasoning**.

As briefly explained above, legal reasoning is non-monotonic in character. A theory of legal reasoning should try to explain or at least be consistent with the idea that legal reasoning is non-monotonic in character. Somehow the *addition* of information can change our view of what the law requires. Are there any *systematic* features of legal reasoning that lend it its defeasible character?

Two general *desiderata*

g.) **Explanatory unity**.

Many think that, in a variety of areas, it is a great virtue of a theory to show how seemingly disparate domains are actually explained by the same thing. Newton's theory of gravity showed the forces that moved the heavens were the same as the forces that make "moderate-sized specimens of dry goods"[87] fall to the ground. Einstein did one better by showing gravity to be a geometric property of four-dimensional spacetime.[88] This desire for unity may not be restricted to philosophical or even scientific theorizing. As Iris Murdoch writes: "the urge to prove that where we intuit unity there really is unity is a deep emotional motive to philosophy, to art, to thinking itself. Intellect is naturally one-making."[89]

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[87] John Austin, *Sense and Sensibilia* (Oxford: 1962).

[88] The Editors of Encyclopaedia Britannica, "General relativity," *Encyclopedia Britannica*, 12 Sep. 2019, https://www.britannica.com/science/general-relativity. Accessed 8 August 2021.

[89] Iris Murdoch, *Metaphysics as a Guide to Morals* (Penguin Press: 1992), p. 1.

As it relates to the present topic, if several seemingly disparate phenomena (i.e., the six specific and intermediate *desiderata* listed above) were explained by the same thing, I think this would show the theory to have significant explanatory power. Additionally, many philosophical treatments of legal reasoning will only look at legal reasoning within one domain, such as the common law, or constitutional law, or statutory law. A philosophical account that could do explanatory work in saying fruitful things about *all* of these domains, using the same philosophical machinery, would be a substantial improvement in our understanding of the nature of legal reasoning.

h.) **Simplicity**.

Ceteris paribus, simpler philosophical theories are better. Philosophers distinguish between *syntactic* simplicity and *ontological* simplicity. The former "measures the number and conciseness of the theory's basic principles" whereas the latter "measures the number of kinds of entities postulated by the theory."[90] An endorsement of ontological simplicity is found with the well-known formulation of Occam's Razor that states "Entities are not to be multiplied beyond necessity."[91]

Huemer has criticized the idea that simplicity (or "parsimony") is a good-making feature of philosophical theories, even if it is a good-making feature for scientific theories.[92] Others have

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[90] Alan Baker, "Simplicity," *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/simplicity/ (2016).

[91] Baker, "Simplicity."

[92] See Michael Huemer, "When is parsimony a virtue?" *Philosophical Quarterly*, vol. 59 (2009): pp. 216–236. "It has been widely claimed that simplicity played a key role in the development of Einstein's theories of theories of special and general relativity, and in the early acceptance of Einstein's theories by the scientific community." Simon Fitzpatrick, "Simplicity in the Philosophy of Science," *Internet Encyclopedia of Philosophy*, available at https://iep.utm.edu/simplici/ (accessed April 13, 2023).

defended a role for simplicity in philosophical theorizing.[93] While I think simplicity is valuable for a philosophical theory to have, I do not know what the deeper justification, if any, is for this. Isaac Newton wrote "It is the perfection of God's works that they are all done with the greatest simplicity," a justification for simplicity I cannot endorse. I am partial to what Eliot Sober says when he writes that "Just as the question 'why be rational?' may have no non-circular answer, the same may be true of the question 'why should simplicity be considered in evaluating the plausibility of hypotheses?'"[94]

III.) **Conclusion**.

Despite the difficulty of making progress on this topic, I hope to shed some light on the nature of legal reasoning. Holmes said that law "becomes civilized to the extent that it is self-conscious of what it is doing."[95] This dissertation is my own incremental effort at the civilization of law.

In doing this, I treat legal reasoning as a form of reasoning that importantly is non-deductive and non-monotonic in character. I set out to craft a (comparatively) simple theory that can explain the Janus-faced character of legal reasoning, address the problem of relevance, account for the intelligibility of disagreements about law, explain how characteristic patterns of legal inference are justified, account for the non-monotonic character of legal reasoning, all

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[93] See, e.g., Darren Bradley, "Philosophers should prefer simpler theories," *Philosophical Studies*, vol. 175 (2018): pp. 3049–3067; Andrew Brenner, "Simplicity as a criterion of theory choice in metaphysics," *Philosophical Studies*, vol. 174 (2017): pp. 2687–2707.

[94] Eliot Sober, "What is the Problem of Simplicity?" in Zellner, A., Keuzenkamp, H. & McAleer, M. (eds.), *Simplicity, Inference and Modelling: Keeping It Sophisticatedly Simple* (Cambridge: Cambridge University Press, 2001) pp. 13–31, p. 19.

[95] Frankfurter, "Some Reflections on the Reading of Statutes," p. 530.

while trying to achieve an improvement in explanatory unity—by looking across different legal domains, and by showing how these different features of legal reasoning are all actually explained by the same thing.

The main idea will be that looking at law through a functionalist lens plays an important role in explaining the above *desiderata* (with the first *desideratum* playing the most central, orienting role). The remaining chapters of this dissertation are as follows:

- Chapter two surveys other philosophical accounts of legal reasoning and discusses their strengths and weaknesses. It finds that they fall significantly short in satisfying the first *desideratum* (i.e., they do not satisfactorily provide a systematic account of legal reasoning as it operates in the diverse domains and departments of law).
- Chapter three presents my own account, the *furthering functions* view, and explains how it can account for the above *desiderata*; significantly, it argues that resort to the *function* or *purpose* of the particular law in question is what we need to appeal to in order to give a systematic account of legal reasoning.
- Chapter four is a defense of the idea of legislative intent. As we be illustrated at length in chapters two and three, one of the main ways that laws get their purpose is the *intent* behind the creation of such laws. In the statutory context, this is called "legislative intent." This final chapter sets out to articulate the contours of this concept and respond to arguments against the use of legislative intent in legal reasoning.

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Chapter 2: Other theories of legal reasoning

This chapter presents other theories of legal reasoning and criticisms of them. The theories discussed are *legal realism* and *legal formalism* (in section I), what I call the *law as language* view (in sections II and III) and what I call the *natural law theory* of legal reasoning (in sections IV and V). Section VI concludes.

The general findings of this chapter are as follows. *Legal realism* and *legal formalism* are not helpful categories for understanding, with sufficient precision, the structure and patterns of inference of legal reasoning. There are two forms of the *law as language* view: the *Gricean view* and *textualism*. I conclude that textualism is not particularly plausible even just as a theory of statutory reasoning, whereas the *Gricean* view is. The problem with the *Gricean* view (and any *law as language* view) is that some significant kinds of law are unwritten, so a complete theory of legal reasoning must be broader than this. *Natural law theory* does better than the law as language view when it comes to being able to explain reasoning about unwritten law, but not all of what is properly called legal reasoning proceeds in the moralized fashion envisioned by natural law theory.

I.) **Introduction: moving past *legal realism* and *legal formalism***.

The contemporary period of theorizing about the nature of legal reasoning stands against the backdrop of the debate between the two views (or perhaps groups of views) of legal reasoning known as *legal formalism* and *legal realism*—a debate that hangs over much of 20th

century jurisprudence.[96] Unsurprisingly, it is probably not possible to provide a wholly uncontroversial definition of either term.[97] Legal realism was a reaction to legal formalism, which has been defined in the following ways:

- "judges engage in mechanical deduction from a comprehensive, autonomous, logically ordered body of law"[98]
- "there is a pyramid of rules with a very few fundamental 'first principles' at the top, from which mid-level and finally a large number of specific rules could be derived. The legal decision maker, faced with a case to be decided, would study the body of law and discover the rule that determined the correct result."[99]
- "judges respond primarily[…] to the rational demands of the applicable rules of law and modes of legal reasoning"[100]

Legal realism has been defined in the following ways:

- "the law reflects historical, social, cultural, political, economic, and psychological forces, and the behavior of individual legal decision makers is a product of these forces"[101]
- "judges respond primarily to the stimulus of the facts," i.e., "judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law"[102]

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[96] "Legal scholarship of this century has been drawn to consider the nature and significance of rules by the challenges of the Legal Realists." Vincent Wellman, "Practical Reasoning and Judicial Justification: Toward an Adequate Theory," *University of Colorado Law Review*, vol. 57 (1985): 45, p. 56.

[97] See, e.g., Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," *Texas Law Review*, vol. 76 (1997), p. 267, stating it is "surprising how inadequate—indeed inaccurate—most descriptions of Realism turn out to be."

[98] Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2009), p. 8.

[99] Ellsworth, Phoebe C. "Legal Reasoning," in *The Cambridge Handbook of Thinking and Reasoning*, edited by K. J. Holyoak and R. G. Morrison Jr., 685-704 (New York: Cambridge University Press, 2005): p. 688.

[100] Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," pp. 277-278.

[101] Ellsworth, "Legal Reasoning," p. 690.

[102] Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," p. 275.

Missing from these definitions of legal realism is a claim often associated with legal realism, which is that the law is (radically) indeterminate. This comes out though when we think through, for example, Brian Leiter's definition of legal realism. Even though the judge primarily responds to the *facts* of a case, the judge still has to dress up their decision in the language of the law. So, having reached some (possibly intuitive) conclusion in light of the facts of a case, the judge will then just pluck a law book off the shelf to justify their decision *post hoc*. But then it looks like the law can be fit to almost whatever conclusion the judges needs it to. Thus, the law is (radically) indeterminate.

Since it is not the law that is guiding the decisions of judges, the legal realists also set out to try to figure out what actually does guide judicial decision. Legal realists disagreed about what kinds of factors were relevant here. Some focused on more group-level or sociological factors (such as socio-economic class), while others focused on more individual-level, psychological factors, like the personality of the judge (some in the latter camp even turned to Freudian psychoanalysis to discover the true causes of legal decision).[103]

Today, there is a trend to move past the debate between legal realism and legal formalism, and recognize that the truth of the matter is somewhere between these two extremes. H. L. A. Hart gave a lecture where he discussed the "Nightmare and the Noble Dream" in American jurisprudence. The Nightmare referred to the legal realist idea that the law is radically indeterminate and judges are actually making the law instead of discovering it, whereas the Noble Dream was the formalist idea that the law is determinate and discoverable. Hart came

[103] For discussion of this point, see Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence."

down to agree with the "unexciting" claim that the truth lies between the two extremes.[104] Brian Tamanaha has adopted the term *balanced realism* to capture a similar idea.[105] Empirical work could be marshaled for this basic claim (that judges are often—but perhaps not always— guided in their decisions by the law).[106] This is not to say that philosophy of law has entirely moved past the debate between formalism and realism, since scholars still come out on one side or the other in these debates.[107]

This dissertation does, however, look to set aside (or perhaps move past) the debate between realism and formalism. First, I do tend to agree with the "moderate" consensus that holds that the law is at least substantially determinate (even if it is not fully determinate). So it is fair to say that this dissertation takes for granted that judges with some frequency are in fact as a causal matter "moved" by the law to reach a particular decision, and that this law is used as the *justification* (and not merely described as a cause) of the legal result in a given case. The

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[104] As Hart concluded: "I have portrayed American jurisprudence as beset by two extremes, the Nightmare and the Noble Dream: the view that judges always make and never find the law they impose on litigants, and the opposed view that they never make it. Like any other nightmare and any other dream, these two are, in my view, illusions, though they have much of value to teach the jurist in his waking hours. The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other." H. L. A. Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," *Georgia Law Review*, vol. 11, no. 5 (1977): pp. 969-989, p. 989.

[105] Balanced realism for Tamanaha is a balance between "a skeptical aspect and a rule-bound aspect," where the former "refers to an awareness of the flaws, limitations, and openness of law," and the latter refers to "the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predictable decisions consistent with the law." Tamanaha, *Beyond the Formalist-Realist Divide*, p. 6.

[106] In a review of empirical work on the matter, Klein writes "Does the law play a role in judges' decisions? Quite often, yes." David Klein, "Law in Judicial Decision-Making," in *The Oxford Handbook of U.S. Judicial Behavior*, edited by Lee Epstein and Stefanie A. Lindquist (Oxford University Press, 2017), p. 236.

[107] For an example of a view that embraces realism, see Leiter, "Rethinking Legal Realism"; for views that embrace formalism, see Frederick Schauer, "Formalism," *The Yale Law Journal*, vol. 97 (1988); and Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 2018): p. 25.

question this dissertation addresses is: what is the most that can be said in general about the structure of the kind of reasoning that is happening in such cases?

Another reason I wish to move past realism and formalism is that the main distinctive claims made by legal realism and legal formalism are pitched at such a high level of generality that they do not seem to be sufficiently addressed to the question that is the focus of this dissertation (i.e., what are the characteristic patterns of inference of legal reasoning)—and hence are unhelpful. Let us say that we find out that the formalists are right, that judges systematically find as opposed to making law. We are still faced with the question of what is (and whether there even exists) some kind of *general* reasoning structure that judges employ to find this law. And even if legal realism were true, it could still be the case that general things could be said about the structure of the justifications offered by judges, even if those justifications are in some sense pretextual and *post hoc*. (If legal realism were true, one might wonder at the value of doing this, but in principle it could still be done.)

Once we move past legal realism and legal formalism and look at the work that has emerged over the past fifty years or so, there are actually not an *enormous* number of genuinely systemic attempts to describe the nature of legal reasoning. There is to be sure an enormous literature on legal reasoning, but once we separate out those works that are restricted to treatments of discrete topics within the domain of legal reasoning (like statutory reasoning, constitutional reasoning, analogical reasoning, or common-law reasoning) and also separate out those works that are focused on normative as opposed to descriptive theorizing (like the debates between purposivism and textualism, or between originalism and living constitutionalism), the pool of theories gets much more manageable.

In this chapter I will focus on two views of legal reasoning, which I will refer to as the *law as language* view and *natural law theory*. While both of these theories are rightly thought of as normative theories of legal reasoning, in that they provide accounts of how legal reasoning *ought* to be engaged in, these theories also have descriptive content. Each theory, in other words, is offered, not as a normative theory that is entirely discontinuous from the activity that is called "legal reasoning," but rather each theory finds in its normative prescriptions something that already significantly happens in the practice of legal reasoning. So even if each theory is normative, both also have descriptive content, and therefore it is appropriate to discuss them here.

II.) **Law as language.**

It is perhaps better to describe the *law as language* view as a *family* of views. These views are united in the idea that the creation and interpretation of law, fundamentally, just is a particular sort of creation and interpretation of *language*. The creation of law is the creation of linguistic items, and therefore legal reasoning is not different in kind—and is merely a particular species of—the ascertainment of linguistic content. There are two main versions of the law as language view that I will discuss here: *textualism* (as defended by Antonin Scalia and John Manning) and the *Gricean view* (as defended by Larry Alexander and Emily Sherwin). These views differ according to the relative importance they give to intended speaker meaning versus conventionally-encoded meaning on the other. The Gricean view says that legal reasoning importantly is aimed at trying to figure out what the speaker intended to convey with the legal utterance. The textualist view is skeptical of the existence or relevance of intended speaker

meaning (the grounds of this textualist skepticism is explored further, and responded to, in chapter four), and instead focuses on the conventionally-encoded linguistic content of legal norms (often described as "sentence meaning").

a.) ***Law as language*** **I: the Gricean view.**

I start first with the Gricean view defended by Larry Alexander and Emily Sherwin in *Demystifying Legal Reasoning*.[108] As Alexander and Sherwin state it, "posited laws are nothing more or less than communications from lawmakers to others regarding what the lawmakers have determined the others should do."[109] Legal reasoning thus importantly involves trying to identify the law-promulgators' *speaker meaning*, which they understand as "what speakers intend to convey by the" language they use.[110] In the area of statutory law, courts refer to this as *legislative intent*. In the constitutional context, this is known as the *original intent* behind the provision in question. Alexander and Sherwin's Gricean starting point leads them to defend the idea that the "Framers' intent" is what we are looking for in constitutional interpretation.

Alexander and Sherwin make clear that the relevant speaker's intent is the *actual* mental state that occurs at the time of enactment or utterance.[111] Legal reasoning is thus of the same kind that a child would use to interpret a parent's commands. Legal reasoning might be more complicated than this, but it is fundamentally the same kind of reasoning.

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[108] John Manning notes the general connection between Grice and intended meaning. See the text accompanying footnote 30 on page 429 in John Manning, "Textualism and Legislative Intent," *Virginia Law Review*, vol. 91, no. 2 (2005), pp. 419-450.

[109] Alexander and Sherwin, *Demystifying Legal Reasoning*, p. 131.

[110] Alexander and Sherwin, *Demystifying Legal Reasoning*, p. 134.

[111] Alexander and Sherwin, *Demystifying Legal Reasoning*, p. 141.

(I note that Alexander and Sherwin's invocation of the comparatively simple idea of speaker meaning as "what speakers intend to convey by the" language they use is not as true to Grice's original notion as it could be. Gricean intentions are *reflexive* in nature, in that they are intentions on the part of the speaker for the listeners to *recognize* that same intention. One of Grice's original examples involves a driver (call them Driver A) flashing their lights to get the other driver (call them Driver B) to recognize Driver A's intention in flashing the lights. Driver B is supposed to "reason as follows: 'Why is she doing that? Oh, she must intend me to believe that my lights are not on. If she has that intention, it must be that my lights are not on. So, they are not.'"[112])

Context and purpose play a role in both the non-legal and the legal instances of reasoning towards speaker's meaning—a role that is especially apparent in cases of infelicity. An example Alexander and Sherwin use is that of a mother who says to a child to "Pull the Autobahn up to the couch" (having meant to say "ottoman"). From the context, the child would reasonably infer that the mother does not want the child to bring a German highway into the living room, and is instead referring to the thing people put their feet up on when they are sitting down. Similarly (in an actual case), a legislature might pass a law that says, in part, "All laws […] are hereby repealed."[113] A judge would reasonably infer that the legislature did not mean to repeal *all* laws of the jurisdiction full stop, but instead only meant to repeal any laws inconsistent with the

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[112] Richard Grandy & Richard Warner, "Paul Grice," *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/grice/ (2021).

[113] *Cernauska v. Fletcher*, 21 Ark 678 (1947).

particular newly-enacted law.[114] Both cases are fundamentally the same, in that both involve ascertaining speaker meaning.

Their model perhaps makes the most sense in the case of law that is "commanded" by a legislature.[115] Alexander and Sherwin recognize that group lawmaking presents special sorts of problems in that, for example, a sufficient number of members of the group might not share the same intent in passing a law (these sorts of metaphysical issues will be explored more fully in chapter four). In such cases, there would be no fact of the matter as to the meaning of the legal text, in which case a judge deciding the law under such circumstances would be positing new law to cover the content of the law in such a case. But in principle, Alexander and Sherwin's account applies to both individual and group law-making.

A consequence of Alexander and Sherwin's account is that they do not take seriously analogical reasoning as an independent form of reasoning. Analogical reasoning is often thought to be a special kind of reasoning that is characteristic of common law reasoning. But on Alexander and Sherwin's account, analogical reasoning is just one (or some combination of) the other forms of reasoning they identify.

They argue that the reasoning that occurs in the common law context is actually a disjunctive phenomenon. On their account,

> courts function in two ways: they reason deductively from rules posited by others; or they posit law, relying on moral and empirical judgment, as any lawmaker must. For us,

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[114] As the court wrote in that case: "No doubt the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words, 'in conflict herewith,' which we will imply by necessary construction." *Cernauska v. Fletcher*, 21 Ark 678, 680 (1947).

[115] See Mark Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication" in *Philosophical Foundations of Language in the Law* (Andrei Marmor & Scott Soames, eds.) (Oxford University Press, 2011), p. 223.

> there is no middle ground in which courts discover non posited law in past decisions or texts, or combine morality and posited law to construct legal principles.[116]

The first part is the "deductive" mode of reasoning, where the legal reasoner, in Gricean fashion, first figures out the meaning of the rule by reasoning towards what they think the speaker meaning is in that case, and then deductively applies that linguistically-commanded content to the present situation. This kind of reasoning is no different from the reasoning an ordinary person would engage in to assess the content of an order or request made by another person in an everyday situation. When courts reason based on the precedent of previous common law decisions, one thing they could be doing is trying to figure out the linguistic content (understood along Gricean lines) of the legal rules postulated in those previous court decisions.

The other mode of reasoning judges engage in is the postulation of *new* common law rules. This kind of reasoning is no different from the sort of reasoning a legislator would engage in while making new statutory rules. This reasoning "rel[ies] on moral and empirical judgment" to come up with rules that the reasoner thinks it would be good for society to have.

In their discussion of analogical reasoning, Alexander and Sherwin first recognize that "As a factual matter, there are an infinite number of similarities and differences" between any two sets of facts.[117] Further, nothing in the outcome of an earlier precedent case "picks out which of these similarities and differences are important for purposes of comparison."[118] Because of this, Alexander and Sherwin say that "some rule or principle is necessary to identify important

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[116] Alexander & Sherwin, *Demystifying Legal Reasoning*, pp. 25-26.

[117] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 68.

[118] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 68 (note that this is the "problem of relevance" discussed in chapter one).

similarities" between cases, since in principle there is an infinite number of them.[119] Because it is the rule or principle that tells us what the relevant similarities and differences are, in identifying relevant similarities and differences between cases, we are really just reasoning on the basis of some rule that says what the relevant similarities and differences are. Analogical reasoning therefore could just be understood as deductive reasoning from rules in disguise.[120]

Another possibility for analogical reasoning that Alexander and Sherwin mention is that perhaps the perception of similarity and difference between the cases is purely intuitive. In such circumstances, however, Alexander and Sherwin say that, because "[r]easoning entails, at a minimum, a process of thought that one can articulate to oneself and to others,"[121] that purely intuitive analogical reasoning is not "reasoning" at all.[122] In sum, analogical reasoning, understood as a *distinctive* kind of (legal) reasoning, does not exist.

Instead, common law "analogical" reasoning for Alexander and Sherwin is either: (1) deductive reasoning from posited rules; or (2) some combination of ordinary empirical and moral reasoning (used to posit new rules). Sherwin and Alexander point out that, over time, common law reasoning has a tendency to result in certain rules posited by the common law judge. In these circumstances, instead of being posited by a legislature, the laws are posited by judges. Any subsequent judge who applies the posited common law rule is just reasoning deductively from a previously enacted rule, using Gricean reasoning to ascertain its linguistic content. The judges

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[119] Alexander & Sherwin, *Demystifying Legal* Reasoning, p. 76.

[120] This is the view referred to as "rule-rationalism" in Gerald Postema. "*A Similibus ad Similia*: Analogical Thinking in Law," in *Common Law Theory* (edited by Douglas Edlin) (Cambridge 2009) p. 111.

[121] Alexander & Sherwin, *Demystifying Legal Reasoning*, pp. 72-73.

[122] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 73.

who put in place that rule, however, were relying on ordinary moral and empirical reasoning in creating that rule. Such reasoning "is not uniquely legal" and is just "what any careful reasoner does in working through a moral problem"[123] (as a legislator would do in deciding what new laws to pass).

Alexander and Sherwin present their account of legal reasoning as flowing ultimately from the function of law itself. The function of law is to provide authoritative settlement of moral controversies. Such settlement is done via *rules*, which are understood as "general prescription[s] that set[] out the course of action individual actors should follow in cases that fall within the predicate terms of the rule."[124] Legal reasoning involves figuring out what the content of the authoritative settlement is, which, as already discussed above, is a function of the rule-maker's actual ("subjective") intent. Rules on their model have to have a quite determinate and readily ascertainable content, for if rules are to *effectively* fulfill their function of settling controversies, they "must prescribe, in understandable and relatively uncontroversial terms, a certain response to a certain range of factual circumstances."[125] Reasoning through the content of vague, ambiguous, or indeterminate legal norms (for example, legal "standards" as opposed to rules) actually involves a *delegation* of *rule*-making authority on the part of the rule-maker to some other person or entity (for example, the judge(s) who are assigned by the legal system to "apply" the norm in question).

Before I get to more substantive criticisms of the law as language view itself, I would like to mark a point of disagreement with Alexander and Sherwin's methodology. I do not think the

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[123] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 34

[124] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 11.

[125] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 11.

best way to go about the descriptive project of looking at the nature of legal reasoning is to start by engaging in some sort of conceptual analysis of law itself, and from there decide what counts as *legal* reasoning (aimed at figuring out what the law is) as opposed to creating new law. I think instead we should just look directly at the stuff that participants of this practice refer to as "legal reasoning," examine what features are considered to be prominent or important features of this thing, and then theorize about this phenomenon (i.e., try to explain it). One thing that has perhaps ultimately led Alexander and Sherwin astray (and made them susceptible to the criticisms that follow) is this mistaken methodology.

Alexander and Sherwin's Gricean view is just one of the two versions of the law as language view. Before I get to the criticisms that apply to both versions of the law as language view, I discuss the other version of the law as language view: textualism.[126]

b.) ***Law as language* II: textualism**.

The other law as language view I will discuss here is *textualism*. For a really quite wide variety of reasons (that will be explored much further in chapter four) textualists reject the search for intended speaker meaning and thus reject the search for *legislative intent* and *original intent*, at least so long as these are understood in any robust sense—this is why they differ from the *Gricean* view. They have their own ideas about how legal language works. The textualist thinkers I will focus on are Antonin Scalia and John Manning (though Jeremy Waldron and Frank Easterbrook have also defended textualist ideas).

One might be puzzled at the idea that textualists reject original intent. After all, don't textualists usually want to return the Constitution, in conservative fashion, to its originally

[126] Before getting to the general criticism of the law as language view, I will also discuss the problems that textualism is susceptible to, but the Gricean view is not.

intended meaning? Once upon a time, this was indeed a prevailing view amongst conservative legal scholars (e.g., Edwin Meese[127] published work defending the relevance of original meaning in constitutional interpretation).[128] But conservatives (and textualists) have since stepped back from this idea.

Modern textualists do *not* say they are looking for the originally *intended* meaning at the time of enactment, rather they say they are looking for what the *public, conventionally-encoded* meaning of the words was at the time of enactment. This is why textualists look to sources like dictionaries published at the time the law was passed. These are used as evidence, not of what the law was actually intended to mean by those who enacted it, but as evidence of what the publicly-understood meaning of the words was at the time of enactment.

Instead of *speaker meaning* or *legislative intent* or *original intent*, what textualists say they are looking for is the "objectified" intent, which is "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[129] Contemporary textualists like Antonin Scalia reject the search for the actual, "subjective" intent

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[127] Meese was an Attorney General under Ronald Reagan and has long been associated with the Heritage Foundation, a conservative think tank. See "Edwin Meese III" at The Heritage Foundation, available at https://www.heritage.org/staff/edwin-meese-iii (accessed February 23, 2023); "Attorney General: Edwin Meese, III" at The United States Department of Justice, available at https://www.justice.gov/ag/bio/meese-edwin-iii (accessed February 23, 2023).

[128] Edwin Meese II., "Toward a Jurisprudence of Original Intention," *Benchmark*, vol. 2 (1986): p. 10 ("It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as *amicus,* we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.").

[129] Scalia, *A Matter of Interpretation*, p. 17.

(where "subjective" is meant to refer to an internal, possibly unexpressed intent inside the mind of a subject).[130]

One might press the point and ask what exactly this "objective" (as opposed to "subjective") intent lying behind the operative statutory language is supposed to be—if not the actual intent *of the legislature*. One illuminating answer, but one which is only cited with *some* degree of approval by Scalia and Garner, is Tony Honore's idea that the concept of legislative intent is a "useful fiction":

> A statute, contract, or treaty is a compromise between different views. Perhaps no member of the legislature, and no party to the contract or treaty, would themselves have chosen the text that was finally agreed, if it depended on them alone. The point of speaking of the intention of the legislature or the contracting parties is not that any particular person's views should govern the interpretation of the text. It is rather that the interpreter should treat the text as if it represented the view of a single individual, and make it as coherent as the words permit.[131]

Scalia & Garner say, however, that it would have been better to use the phrase *statutory intent*, instead of legislative intent, where the usage of the latter "encourages this search for the nonexistent."[132] (One could take the further step, as Ryan Doerfler does, and adopt a full-blown fictionalism about legislative intent: because "intent attribution is necessary if legislation is to be an effective means of communication" but metaphysically there is no such thing as legislative intent, "then claims about legislative intent are systematically false if taken literally." So claims

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[130] The search for the actual legislative intent is bad for a few reasons. First, it is incompatible with democratic government, for if the law were to depend on actual legislative intent, that would be "one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily by read." Scalia, *A Matter of Interpretation*, p. 17. Second, accepting the idea that judges should search for actual legislative intent opens up the "practical threat" that "judges will in fact pursue their own objectives and desires." Scalia, *A Matter of Interpretation*, pp. 17-18.

[131] Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012), pp. 393-394 (quoting Tony Honore, *About Law* 94 (1995)).

[132] Scalia & Garner, *Reading* Law, p. 394.

about legislative intent must be regarded as fictive claims in order to make sense of this discourse.[133])

Scalia (and Garner) make clear that they accept *some* notion of statutory purpose, but what they have a problem with is some kind of unexpressed, "subjective" purpose. Any purpose of the law has to be derived from the *text itself*, and not from some attempt to peer into the "mind" of the legislature to discover some "actual" intent. And looking at the text itself is just ascertaining the linguistic content contained within it. Scalia and Garner approvingly include the following quotations from other legal scholars:

- "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."[134]
- "[T]he search is for the objectively manifested meaning, not for somebody's unexpressed state of mind."[135]
- "[a]scertaining the 'intention of the legislature'…boils down to finding the meaning of the words used."[136]

Scalia himself says it is "the objective indication of the words, rather than the intent of the legislature" that "constitutes the law."[137]

Textualists also say that it is the "public" meaning that is relevant. As Frank Easterbrook writes:

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[133] Ryan Doerfler, "Who Cares How Congress Really Works?" *Duke Law Journal*, vol. 66 (2018): p. 1022. As Doerfler later elaborates, "fictionalism about intent is a refinement of 'objectified intent' invoked by some textualists" (*id*. at p. 1023).

[134] Scalia & Garner, *Reading Law*, p. 394 (quoting Lord Reid).

[135] Scalia & Garner, *Reading Law*, p. 394 (quoting Robert E. Keeton, *Keeton on Judging in the American Legal System* 207 (1999)).

[136] Scalia & Garner, *Reading Law*, p. 395 (quoting R.W.M. Dias, *Jurisprudence* 219 (4th ed. 1976)).

[137] Scalia, *A Matter of Interpretation*, p. 29.

> Statutes are not exercises in private language. They should be read, like a contractual offer, to find their reasonable import. They are public documents, negotiated and approved by many parties in addition to those who write the legislative history and speak on the floor. The words of the statute, and not the intent of the drafters, are the "law."[138]

It seems very much that textualists have it in mind that a legal norm is to be identified with the conventionally-encoded linguistic content of the law in question (which corresponds at least roughly with Grice's idea of "sentence meaning"[139]). As Jeremy Waldron[140] writes:

> Legislators will come to the chamber from different communities, with different ideologies, and different perspectives on what counts as a good reason or a valid consideration in political argument. The only thing they have in common, in the diversity and in the welter of rhetoric and mutual misunderstanding that counts for modern political debate, is the given text of the measure currently under consideration. That is constituted by the conventions of the shared official language as the only landmark, the only point of reference or co-ordination, in a sea of possible misunderstanding—and even then it is fragile enough and always liable to fly apart on account of the fragility of shared meanings.[141]

John Manning says that "textualists choose the letter of the statutory text over its spirit."[142] Frank Easterbrook says that legal reasoners should look for "the ring the words would have had to a skilled user of words at the time, thinking about the same problem."[143] Textualists seek to emphasize the *general* facts about language that are accessible to all (most importantly, those who are subject to the law) *across* different contexts.

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[138] Frank Easterbrook, "The Role of Original Intent in Statutory Construction," *Harvard Journal of Law & Public Policy*, vol. 11 (1988), p. 60.

[139] Waldron equates the conventional meaning with Gricean sentence meaning in Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999): p. 142.

[140] John Manning refers to Waldron as "the leading philosophical textualist." Manning, "Textualism and Legislative Intent," p. 433.

[141] Waldron, *Law and Disagreement*, p. 145.

[142] Manning, "Textualism and Legislative Intent," p. 420.

[143] Easterbrook, "The Role of Original Intent in Statutory Construction," p. 61.

At the same time, though, textualists will also claim that they recognize the role of context in determining meaning. They will not say that we should read statutory texts in isolation from the rest of the statutory scheme. In this more limited sense, textualists are sensitive to contextual concerns. For example, Scalia grants that "prefatory materials" or the "prologue" (which includes things like a "preamble" or a "statement of purpose"), can be relevant to ascertaining statutory meaning: "the prologue does set forth the assumed facts and the purposes that the majority of the enacting legislature or the parties to a private instrument had in mind, and these can shed light on the meaning of the operative provisions that follow."[144] Textualists grant that words do not have meaning apart from their contexts, and that the prefatory materials are a part of the context. So words are not considered in isolation, divorced from their "purposive" contexts. As Scalia and Garner write, the prologue can "be considered in determining which of various permissible meanings the dispositive text bears. If the prologue is indeed an appropriate guide to meaning, it ought to be considered along with all other factors in determining whether the instruments is clear."[145] But even when it comes to examining these textual features of the context, textualist still seem to want to empathize the general facts about language, as opposed to what these words are actually being used to mean on this particular occasion.

Frederick Schauer's idea of "semantic autonomy" is similar to this textualist emphasis on the conventionally-encoded content (or sentence meaning).[146] Semantic autonomy is "the ability of symbols—words, phrases, sentences, paragraphs—to carry meaning independent of the

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[144] Scalia & Garner, *Reading Law*, p. 218.

[145] Scalia & Garner, *Reading Law*, p. 218.

[146] see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1993).

communicative goals on particular occasions of the users of those symbols."[147] Schauer thinks there is something "that enables one speaker of that language to be understood by another speaker of that language even in circumstances in which the speaker and the understander share nothing in common but their mutual language."[148] Schauer thinks that there is a foundation of acontextual meaning that the law relies on in order to linguistically articulate its generally-accessible norms and requirements.

Textualism might seem to make more sense for statutory law than the Gricean view does. After all, law-promulgators are not engaged in a stereotypical Gricean conversation, where two interlocutors are engaged in a cooperative back-and-forth, in a setting where they can ask follow-up questions to get clear about what the other person means to convey.[149] Law involves the public promulgation of standards of behavior to millions or even hundreds of millions of people across a variety of times, places, and contexts.

The textualist's frequent reference to dictionary definitions might seem to make sense for the legal use of language. Dictionary definitions seek to capture the meaning of words as they are used across a wide-variety of contexts. The sense that one gets from reading textualist opinions is that legal norms are derived in an almost mechanistic sense from these word meanings—and can perhaps even be described as the "mechanistic" process identified by the legal formalists.[150]

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[147] Schauer, *Playing by the Rules*, p. 55.

[148] Schauer, *Playing by the Rules*, pp. 55-56.

[149] This problem for the Gricean view is spelled out with more specificity in Andrei Marmor, "The Pragmatics of Legal Language," *Ratio Juris*, vol. 21, no. 4 (2008): pp. 423–52.

[150] Scalia embraces the term "formalist" to describe his view Scalia, *A Matter of Interpretation*, p. 25. Scalia does seek to distinguish textualism from *strict constructionism*, which he says is "a degraded from of textualism that brings the whole philosophy into disrepute" (*id*. at p. 23). Scalia writes "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means" (*id*. at p. 23).

However, the textualists' aspiration for mechanistic precision in the use and definition of words is a comparatively recent phenomenon. Medieval British Parliament did not pass carefully-drafted statutes where the language was scrutinized line-by-line: "Often the drafting of a statute was done by clerks and judge *after* Parliament had given its assent."[151] Even here the statutory language was merely *evidence* of the law Parliament had passed. Because "[t]here was no sacrosanct text,"[152] "argument in court rarely turned on the precise wording of a statute."[153] So at best, textualism is a model for reasoning about the statutory law of more modern times.

But there is a more serious problem for textualism. I think textualists greatly exaggerate the role that general, convention-wide features of language play in determining legal meaning. Just because language users share *something* across contexts does not mean this something is sufficient to facilitate communication, or "that these meanings are sufficiently robust to articulate rules": "conventions may be indispensable but also quite incomplete."[154] We cannot assume that, just because the meaning of a text is "plain" or "clear" the text therefore has the meaning that it does in virtue of its conventionally-encoded or "acontextual" content. As Richard Posner writes,

> All sorts of linguistic and cultural tools must be brought to bear on even the simplest text to get meaning out of it. This is not to suggest that all texts are ambiguous. A text is clear if all or most persons, having the linguistic and cultural competence assumed by the authors of the text, would agree on its meaning.[155]

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[151] Peter M. Tiersma, "A Message in a Bottle: Text, Autonomy, and Statutory Interpretation," *Tulane Law Review* vol. 76, no. 2 (2001): pp. 431-482, p. 436.

[152] Theodore F. T. Plucknett, *A Concise History of the Common Law*, p. 340 (Boston: Little, Brown and Company: 5th ed 1956).

[153] J. H. Baker, *An Introduction to English Legal History*, p. 236 (Butterworths: 3d ed 1990).

[154] Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) p. 191.

[155] Richard Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve Law Review* vol. 37 (1986): p. 187.

The ubiquity of the background and assumptions we bring to a text when we read or hear it can trick us into thinking a text has a clear acontextual meaning, making it difficult to discern what counts as conventionally-encoded meaning.

Kent Bach points out that these "[p]ragmatic regularities give rise to faulty 'semantic' intuitions."[156] That is, "since our intuitions about the semantic contents of sentences tend to be geared to what they're used to assert, our intuitions are biased toward typical uses rather than literal uses."[157] Consider the following examples:[158]

(1) John and Mary are married.

(2) Robin ate the shrimp and got food poisoning.

The literal meaning of claim (1) says nothing about whether John and Mary are married to *each other*, though this is what this sentence is usually used to convey. Claim (2) says nothing about the *causal* relationship between the shrimp and the food poisoning, but this sentence is likely used to convey the idea that the shrimp-eating caused the food poisoning.

There are legal examples. Consider these statutes:

(3) All drug stores shall close at 10 PM each weeknight.

(4) Whosoever, being married, shall marry any other person during the life of the former husband or wife is guilty of a felony.[159]

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[156] Kent Bach, "Context *Ex Machina*," in *Semantics versus Pragmatics* (Zoltan Gendler Szabo, ed.) (Oxford University Press, 2005): p. 22.

[157] Bach, "Context *Ex Machina*," p. 30.

[158] From Ekins, *The Nature of Legislative Intent*, p. 200.

[159] These two examples are drawn, with slight modification, from Ekins, *The Nature of Legislative Intent*, p. 201.

(5) Whoever shall unlawfully and maliciously set fire to any dwelling house, any person being therein, shall be guilty of felony.[160]

Would a drug store owner be in compliance with the first statute if they closed their store at 10 PM and re-opened at 10:15 PM? Even though this is not at all part of the "literal" or "plain" or "conventionally-encoded" content, the court took to the statute to mean close *and stay closed until morning*.

With regards to the example from English law in (4), it is not possible, under English law, for a person who is married to get married again (while they are still married). This means that it would be legally impossible to violate the statute if read literally. The statute is therefore read by the court to basically say "go through the form and ceremony of marriage" instead of "marry."[161]

The statute in (5) (which is section 2 of an English law, the Malicious Damage Act of 1861) would make a seemingly arbitrary distinction between offenders who set fire to the house while the *offender themselves* is inside the house as opposed to offenders who set fire to the house from outside it. The statute, therefore, is read to basically say "any person *other than the offender* being therein."[162] To make sense of these utterances, we employ assumptions about what the purpose of these legal utterances would likely have to be.

But we should not overreact to the paucity of conventionally-encoded content; we should not conclude, as Stanley Fish does, that "what a word or set of words mean is entirely up to their

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[160] With slight modification, drawn from Ekins, *The Nature of Legislative Intent*, p. 203.

[161] Ekins, *The Nature of Legislative Intent*, p. 202.

[162] Ekins, *The Nature of Legislative Intent*, p. 204. Ekins terms this a "semantic compression" because it is construed to convey a *narrower* proposition than what it literally says.

author"[163] and thereby deny the existence between sentence meaning and speaker meaning.[164] Instead, while there does seem to be *something* to be found the idea of "literal" or "plain" or "conventionally-ended" meaning, such meaning often "will be too sparse and uninformative to be a proposition the speaker has good reason to convey."[165] As Scott Soames recognizes, words and phrases, even when used in a legal context, are "a kind of schema that provide[] a common element to be filled out in different ways on different occasions."[166] We *complete* or *modify* the literal meaning with what we think it would make sense for a person to *intend* to convey using that utterance in the relevant context.[167] (Compare Richard Ekins' conclusion from the foregoing considerations that "The semantic content of a sentence is a skein of meaning, which speakers complete and expand, or use non-literally or to ground implicature, to convey what they mean"[168] with where Oliver Holmes wrote: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[169])

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[163] Stanley Fish, "Intention is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law," *Cardozo Law Review* vol. 29, no. 3 (2008): pp. 1109-1146, p. 1124

[164] "[T]he distinction between speaker's meaning and utterance meaning, often invoked by critics of intentionalism, can not hold. Anti-intentionalists assert that the very existence of sentence meaning—meaning that can be apprehended independently of any specification of intention—proves that meaning can do very nicely all by itself. The internationalist's counter-argument is that sentence meaning, in the sense claim, does not, in fact, exist." Fish, "Intention is All There Is," p. 1113 (footnote 16).

[165] Ekins, *The Nature of Legislative Intent*, p. 202. "Indeed, it is now a platitude that linguistic meaning generally underdetermines speaker meaning. That is, generally what a speaker means in uttering a sentence, even if the sentence is devoid of ambiguity, vagueness, or indexicality, goes beyond what the sentence means." Bach, "Context *Ex Machina*," pp. 15-16.

[166] Scott Soames, "Deferentialism: A Post–Originalist Theory of Legal Interpretation," *Fordham Law Review*, vol. 82 (2013), p. 599.

[167] See Ekins, *The Nature of Legislative Intent*, p. 204.

[168] Ekins, *The Nature of Legislative Intent*, p. 204.

[169] *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

These facts about language were recognized by earlier legal thinkers, if not without the more precise resources of contemporary philosophy of language. Felix Frankfurter had written:

- "Even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them. Other law terms like "police power" are not symbols at all but labels for the result of the whole process of adjudication. In between lies a gamut of words with different denotations as well as connotations. There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators."[170]

- "The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions?"[171]

I therefore suspect that textualists are guilty of exaggerating the role played by the acontextual, conventionally-encoded linguistic content.[172] (And if I might be permitted to editorialize a bit as an aside, I also suspect that this mechanism I have just discussed is (at least part of) what explains how textualists purport to be applying the law in a formulaic way, and yet it seems they are regularly able to reach legal conclusions that are consistent with conservative political views. Textualists can easily slip between focusing on only the conventionally-encoded content, or instead on "filling in" the conventionally encoded linguistic content in a way that harmonizes with conservative political goals. For statutes that aim to achieve conservative goals, textualists can fill in the content in a way that harmonizes with the conservative goal ("Surely what the

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[170] Felix Frankfurter, "Some Reflections on the Reading of Statutes," *Columbia Law Review*, vol. 47, no. 4 (1947): pp. 527-546, p. 534.

[171] Frankfurter, "Some Reflections," p. 541.

[172] "Much like textualists, original-public-meaning originalists tend to underestimate the role of pragmatics in communication. For that reason, original-public-meaning originalists rely upon the notion of 'conventional' meaning to a greater extent than is, perhaps, warranted." Doerfler, "Who Cares How Congress Really Works?", p. 1028 (internal footnotes omitted).

legislature meant here is…"[173]). Or, if the law has a left-wing goal, textualists can precisify the conventionally-encoded content of the law in a narrow, formulaic way, thus frustrating the achievement of the left-wing political goals. I am reminded of the almost gleeful way in which Scalia's dissent in *King v. Burwell*—which will be discussed in the next chapter—applied the text of Obamacare in a way that frustrates clear legislative objectives, but absolves itself or responsibility, instead saying it is up to the legislature to pass more precisely-worded laws.)

III.) **Critique of the *law as language* view.**

We have surveyed the two versions of the law as language view, and I have just discussed some problems for *one* version of the law as language view (textualism). In this section I discuss objections that apply to *both* versions of the law as language view.

a.) **Objection one: too many kinds of linguistic content**.

The fact that Alexander and Sherwin emphasize actual speaker meaning, whereas Scalia emphasizes some kind of "objective" meaning of the legal language in question points to the first critique of the law as language view I wish to discuss. Greenberg argues against what he calls the *communicative-content theory of law* according to which "[l]egal texts are linguistic texts, so the meaning or content of a legal text is an instance of linguistic meaning generally."[174] Greenberg is

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[173] As Fallon observes, "When textualists, at the same time, maintain that the words of a statute reflect an objective intent, it is not clear to what the phrase "objective intent" might refer unless textualists are in fact making assumptions about the knowledge and purposes of some actual or imagined speaker. The difficulty becomes sharply visible when textualists, such as Justice Scalia, avowedly reject pro- posed interpretations on the ground that they compel results "that no sensible person could have intended." Richard H. Fallon Jr., "Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment within Both," *Cornell Law Review*, vol. 99 (2014): p. 713 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc*., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring)).

[174] Greenberg, "Legislation as Communication?," p. 217.

arguing against those who think that insights from philosophy of language can straightforwardly be applied to the legal domain to cast light on the nature of legal content. According to some in this camp, for example, "philosophy of language will for the most part dissolve the long-running debate between textualists and intentionalists about statutory and constitutional interpretation."[175]

The problem for the communicative-content theory of law starts from the fact that "[t]here are different notions of communicative content."[176] For example, one notion of content Greenberg identifies is what he calls the "neo-Gricean" notion, which says "for a speaker's utterance of a sentence to have the communicative content that P is for the speaker to utter the sentence intending his or her hearers to come to recognize that the speaker is communicating P, in part by their recognition of this very intention."[177] On this view, "communicative content is constituted by the content of the speaker's communicative intentions."[178] This description seems to sufficiently track the account offered by Alexander and Sherwin above.[179]

Another notion of communicative content is what Greenberg calls the *objective* notion which says, "the communicative content of an utterance is what a member of the audience would reasonably take a speaker who had uttered the relevant sentence under specified conditions to have intended to communicate—in other words, what the neo-Gricean communicative content would reasonably be taken to be."[180] Stated summarily, "We can distinguish content the

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[175] Greenberg, "Legislation as Communication?," p. 218.

[176] Greenberg, "Legislation as Communication?," p. 230.

[177] Greenberg, "Legislation as Communication?," p. 231.

[178] Greenberg, "Legislation as Communication?," p. 231.

[179] Greenberg does not cite Demystifying Legal Reasoning, but does cite earlier work of Alexander as examples of commitment to the communication theory. See Greenberg, "Legislation as Communication?," p. 218.

[180] Greenberg, "Legislation as Communication?," p. 231.

legislature intended to communicate, content the audience reasonably would have taken the legislature to have intended, content the legislature reasonably could have expected the audience to recognize that the legislature intended to communicate, etc."[181]

So there are several possible candidates for what counts as the relevant intent in the communicative content theory.[182] The problem that confronts the communicative content theorist is: which of these communicative contents controls? As Greenberg writes:

> Some communication theorists have recognized this point and seem to think that they can simply rely on common sense and ad hoc stipulation to specify which aspects of communicative content get to be part of the law. Given the basic structure of the communication theorists' position, however, is difficult to see how they can have a principled basis for treating different components of communicative content differently with respect to whether they form part of the content of the law.[183]

So, Greenberg concludes, considerations from philosophy of language *alone* cannot tell us what considerations legal reasoners are looking at in reasoning towards ascertaining what the law is.

Not only are there multiple candidates for what could count as the communicative content of an utterance, but some views in philosophy of law deny that the content of the law is to be strictly identified with *any* communicative content whatsoever. For example, on Dworkin's view (to be discussed in more detail in the next section), the law includes the principles of political morality that best fit and justify the enactment of the statutory text in question. Further,

> That set of principles is not the meaning of the statutory text or utterance, nor the content of any mental state of the legislature, and need not coincide with any such meaning or content. Indeed, on the Dworkinian picture, a statute is not best thought of as carrying a particular meaning or content that its enactment adds, other things being equal, to the

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[181] Greenberg, "Legislation as Communication?," p. 220.

[182] Greenberg mentions further notions. "For example, according to one notion, the communicative content of an utterance is that part of what the speaker intended to communicate for which uptake by the audience could reasonably be expected." Greenberg, "Legislation as Communication?," p. 231.

[183] Greenberg, "Legislation as Communication?," p. 246

> overall content of the law. Rather, a statute's enactment changes the law by changing the set of past legal and political decisions—the data—thereby changing which set of principles best justifies the data. The content of legal texts or utterances is just one aspect of the data among others.[184]

So even if we have a statute with such-and-such linguistic content, it is still an open question what *legal* content was created by such-and-such linguistic content.[185] Therefore, communicative content and legal content can come apart, and so legal reasoning is not merely reasoning aimed at ascertaining the communicative content of legal texts. (This is not to say that Dworkin denies that the communicative content of a law is *relevant* to determining what law is made by that text; Dworkin is just denying that the legal content can be strictly identified with the communicative content.)

I have a hard time fully evaluating Greenberg's argument here. The argument has somewhat of a question-begging feel to me in that it seems to rely on the mere fact that a plurality of views have been proposed as to what counts as the communicative content of an utterance to infer the conclusion that considerations from philosophy of language alone are not sufficient to determine what counts as the content of the law.

On the other hand, the recognition of the fact that there are these different notions of content, and hence that there are these different processes of reasoning for ascertaining this content, could get us started on a critique of the communication theories. Consider again the

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[184] Greenberg, "Legislation as Communication?," p. 227.

[185] Dworkin at one point at least entertains the idea that, even if to some extent there is a plain meaning of some statutory text, there are still going to also be the principles that best fit and justify that plain meaning: "Integrity requires him to construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force. This means he must ask himself which combination of which principles and policies, with which assignments of relative importance when these compete, provides the best case for what the plain words of the statute plainly require." Dworkin, *Law's Empire*, p. 338.

candidate notions of communicative content mentioned above (as well as a hybrid notion of notion of communicative content) and the Dworkinian view of legal content, according to which legal content is not to be identified with *any* notion of communicative content:

- Neo-Gricean notion of communicative (and hence legal) content: "for a speaker's utterance of a sentence to have the communicative content that P is for the speaker to utter the sentence intending his or her hearers to come to recognize that the speaker is communicating P, in part by their recognition of this very intention"[186]

- Objective notion of communicative (and hence legal) content: "the communicative content of an utterance is what a member of the audience would reasonably take a speaker who had uttered the relevant sentence under specified conditions to have intended to communicate"[187]

- Hybrid notion of communicative (and hence legal) content: "the communicative content of an utterance is that part of what the speaker intended to communicate for which uptake by the audience could reasonably be expected"[188]

- Dworkinian (non-communicative) notion of legal content: legal content is identified by looking at the principles of political morality that best *fit* and *justify* the institutional actions of the legal system in question.[189]

For each of these four notions of legal content, we could imagine a legal system that adopts it as its operative notion of legal content. This conventional fact about the legal system could be true either of the legal system as a whole, or it could be true of particular domains within that legal system.

For example, imagine a legal system that has thoroughly adopted the objective notion of communicative content as its operative notion of legal content. The legal officials, including law-promulgators and law-interpreters, all understand legal content along these lines, as do those who

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[186] Greenberg, "Legislation as Communication?," p. 231.

[187] Greenberg, "Legislation as Communication?," p. 231.

[188] Greenberg, "Legislation as Communication?," p. 231.

[189] See Greenberg, "Legislation as Communication?," p. 227.

are subject to the law. It would be strange for a philosopher to come along and say "No, the legal content in your legal system is actually identified by engaging in Dworkinian moral reasoning." It would be strange indeed for an entire legal system to be incorrect about what its law is.

As I will try to illustrate in the next chapter, these different notions of communicative content and legal content have something in common: they are each associated with a different methodology for figuring out the *purpose* of a law. One way to figure out the purpose of a law is to look at what the creator of that law *actually* intended for the law to do (this would correspond roughly with a Gricean notion of legal content above). Another way to figure out the purpose of a particular law is to think about what it would be reasonable for an observer, looking at some properly bounded body of evidence, to hold is the purpose of the particular law (this would correspond roughly with an objective notion of legal content). Or one could reason towards figuring out which purpose is the morally most justified purpose this law could have (so long as such purpose passes some minimal threshold of "fit" with the text of the particular law in question).

So Greenberg's critique of the law as language view, while incomplete, gets us started in the direction of thinking that the particular notions of legal content that have been proposed might not be correct for all legal systems in all times and places. I move now to the objection that I think is much more serious for the law as language view.

b.) **Objection two: unwritten law**.

The law as language view makes the most sense when the legal norm takes written form, as with statutes and constitutions. But some traditions accept the existence of *unwritten* law. The main example of this is *common law* (and even as discussed earlier, with some medieval statutes

there was not even a canonical linguistic formulation of the law). With common law, it is not the case that there is some canonical linguistic formulation of a legal norm that a judge must then interpret and apply to the case at hand. Rather, there is some collection of previous decisions made in light of certain sets of facts. The judge then makes a decision for the present case in light of the earlier decisions. Traditionally, it is thought that this argument proceeds via some sort of argument by analogy. But as discussed above, the revisionist *law as language* accounts lack the resources to explain the structure of analogical reasoning as a distinctive kind of legal reasoning.

The fact that the textualist focuses on legal reasoning as involving the ascertainment of the linguistic content of legal norms does not fit comfortably with the idea of common law reasoning. It is thus not surprising that textualists are led to say rather funny things about common law reasoning. In the case of Alexander and Sherwin, they think, insofar as a common law judge has announced or posited some kind of legal norm, the later judges could apply that posited norm the same way a judge could apply a norm posited by a legislature. But for the judge in the precedent case, this is just making new law (using ordinary empirical and moral reasoning) as opposed to finding it.

Scalia fundamentally has the same view of common law reasoning. The function of common law adjudication according to Scalia is "to *make* the law."[190] Common law judging "consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."[191] Scalia's dismissal of common law reasoning continues with a sarcastic metaphor of the practice of distinguishing as "broken-field running through earlier

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[190] Scalia, *A Matter of Interpretation*, p. 6 (emphasis original).

[191] Scalia, *A Matter of Interpretation*, p. 7.

cases": "distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law."[192] The impression left is that *true* legal reasoning involves the study and interpretation of texts, and anything else is either a diminutive form of legal reasoning, or not legal reasoning at all.

This is an unsurprising but unfortunate result for textualism. It is unsurprising because a theory that ties legal reasoning to the interpretation of texts or written law accordingly will not have much of interest (or much of *anything*) to say about unwritten law, or laws that lack canonical linguistic formulations. Textualists say such cases are actually the creation of new law, and so while it might count as reasoning, it does not count as *legal* reasoning in the simple sense we adopted in chapter one: reasoning aimed at figuring out *what the law is*. This is unfortunate not least because common law reasoning is taken to be one of the main, if not *the* main, skill that is taught in law schools (at least American law schools). Alexander and Sherwin and Scalia all grant this, in fact.[193]

One might object that the type of reasoning that is actually employed in common law reasoning is reasoning from previous (written) precedent cases, and when a common law case is decided without being based on a previous written decision, this is the creation of new law.[194]

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[192] Scalia, *A Matter of Interpretation*, p. 9.

[193] "The idea that judges decide cases by reasoning from legal principles has a venerable history and a strong resonance for most lawyers and judges. According to this view of legal reasoning, a judge presiding over a disputer surveys the body of legal precedents, formulates a principle that explains them, and then applies the principles of determine the rights of the parties in the pending case. Law students are taught to reason in this way, judicial opinions follow this pattern, and traditional academic commentary employs a similar method to explain the law and propose reform." Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 88; see also Scalia, *A Matter of Interpretation*, pp. 6-7.

[194] Thank you to Alex Worsnip for correspondence on this point.

One problem with this is that it is inconsistent with the self-reported phenomenology of common law judges. "Classical common law judges did not regard themselves as 'making' law" and "they would have found it odd to regard" past precedential "decisions as discrete instances of law making."[195] Precedents themselves were often not even considered *themselves* to be law, but rather were *evidence* of the law.[196] Further, common law is not the only type of unwritten law that is said to exist. Even in the United States, which has a written constitution, it is also said that there is at least some aspect of American unwritten constitutional law.[197] Adrian Vermeule has argued that unwritten conventional norms pay in role in the adjudication of disputes involving administrative law as well.[198]

Other legal scholars have emphasized the fact that law often takes unwritten form:

- Richard Posner: "The common law, like the system of real numbers, is a conceptual system —not a textual one. The concepts of negligence, of consideration, of reliance, are not tied to a particular verbal formulation, but can be restated in whatever words seem clearest in light of current linguistic conventions. Common law is thus unwritten law in a profound sense. There are more or less influential statements of every doctrine but none is authoritative in the sense that the decision of a new case must be tied to the statement, rather than to the concept of which the statement is one of an indefinite number of possible formulations."[199]

- Timothy Endicott: "Many [legal] standards have no canonical linguistic formulation (that is, no form of words which, according to law, determines the content of the standard). Lawyers in common law systems are familiar with such norms: murder may be a criminal offence (or

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[195] Gerald Postema, "Classical Common Law Jurisprudence (Part 1)," *Oxford University Commonwealth Law Journal*, vol. 2, no. 2 (2002): pp. 155-180, p. 166.

[196] Gerald Postema, *Bentham and the Common Law Tradition* (Oxford University Press: 2019, second edition), p. 9.

[197] Mark Walters, "The Unwritten Constitution as a Legal Concept," in *Philosophical Foundations of Constitutional Law* (edited by David Dyzenhaus and Malcolm Thorburn) (Oxford University Press, 2016).

[198] Adrian Vermeule, "Conventions of Agency Independence," *Columbia Law Review*, vol. 113 (2013): pp. 1163-1238.

[199] Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," p. 186.

slander may be a tort, or certain agreements may be enforceable as contracts…), not because of the expression by any person or institution of a rule that it should be so, but because the institutions of the legal system customarily treat murder as an offence (or slander as a tort…)."[200]

- Neil MacCormick: "The device of legislation is one that delivers to the law-using community an authoritative text to guide and structure deliberation, the text itself comprising explicit norms of conduct and of liability. By contrast, the common law as a body of case law has no such explicit norms laid down in its authoritative texts, the law reports."[201]

While more details will have to wait until the next chapter, the basic idea here is that the law is made at least in part via some kind of social practice. As Richard Posner indicates in the quotation above, there are from time to time different linguistic formulations of the legal norms generated by these practices, but they are non-canonical. This means we cannot ascertain the legal content of these norms by looking solely at their linguistic content.

Postema, as part of his discussion of traditional Common Law theory, notes two kinds of law: *lex scripta* ("written law") and *lex non scripta* ("unwritten law"). *Lex scripta* "are laws existing and regarded as binding, in virtue of being enacted by a recognized legislative body according to recognized formal procedures."[202] *Leges non scriptae*, in contrast, *"*exist in the practice of the community, and are binding in virtue of that fact."[203]

While the law as language view might make good sense for *lex scripta*, it makes much less sense of *lex non scripta*. Law can take the form not only of canonically-formulated linguistic norms, but it can also exist as a "practice of the community." There might, from time to time,

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[200] Timothy Endicott, "Law and Language," available at https://plato.stanford.edu/entries/law-language/, *Stanford Encyclopedia of Philosophy* (2021).

[201] Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), pp. 44-45.

[202] Postema, *Bentham and the Common Law Tradition*, p. 14.

[203] Postema, *Bentham and the Common Law Tradition*, p. 14.

come to be linguistic formulations of these practices, but these would amount to approximations of the underlying practice (as Posner wrote above, "There are more or less influential statements of every doctrine but none is authoritative in the sense that the decision of a new case must be tied to the statement[…]"[204]).

The lesson from the foregoing discussion of the *law as language* view is that it would be better to say that, while the interpretation of text has an important place in a theory of legal reasoning, it does not seem to exhaust what can properly be called legal reasoning. In particular, a *Gricean* view of legal content in the statutory domain seems more plausible than the *textualist* view. But because of the existence of unwritten law, it seems that a *law as language* view cannot be the full story. If a theory of legal reasoning could somehow incorporate reasoning about both written and unwritten law, this would make for a stronger theory.

IV.) **Natural law theory.**

Despite some possible issues with the usage of this term,[205] I will use the over-arching phrase *natural law theory* to refer to theories of legal reasoning that see in legal reasoning an essential or important role for *morality* (the main view here I will discuss is Ronald Dworkin's though I will also discuss Michael Moore's similar view). Because it does not tie legal reasoning

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[204] Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," p. 186.

[205] "Dworkin does not normally use the label 'natural law' for his own work. In fact, with the prominent exception of one lecture, later published as an article, he has avoided referring to 'natural law' entirely, either as a description of his own work, or as an approach to contrast with his own. In that one reference, however, Dworkin concedes that his work might warrant the label 'natural law': 'If the crude description of natural law I just gave is correct, that any theory that makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.'" Brian Bix, "Natural Law: The Modern Tradition," in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules Coleman, Kenneth Einar Himma, and Scott Shapiro, eds.) (Oxford: Oxford University Press) p. 83.

to the ascertainment of linguistic content the way the law as language view does, *natural law theory* does much better than the *law as language* view when it comes to unwritten law and common law reasoning. But I will argue that natural law theory also founders as a systematic theory of legal reasoning. The natural law theory makes the opposite trade-off compared to the law as language view: the law as language view (particularly its *Gricean* form) makes pretty good sense of statutory reasoning, but not of common law reasoning (or reasoning about unwritten law); natural law theory is able to sense of common law reasoning (or reasoning about unwritten law), but founders as an account of statutory reasoning.

I take *Law's Empire* as Dworkin's canonical work on legal reasoning. The main motivation for Dworkin's theory of law and legal reasoning in this work is explaining or accounting for the existence of theoretical disagreements about law.[206] Dworkin's main goal in *Law's Empire* was not to argue for a particular theory of legal reasoning (though he does end up doing this in *Law's Empire*), but instead was to argue against positivist theories of the nature of law.[207]

I briefly summarize Dworkin's argument from theoretical disagreements about law in order to better situate his theory. Dworkin describes two kinds of disagreements legal reasoners could have about law: empirical disagreements and theoretical disagreements. Empirical disagreements about law are no different from any other disagreement two people might have about any matter of fact; for example, two people might disagree whether a particular legislature

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[206] Dworkin, *Law's Empire*, p. 11; for discussion, see Nevin Johnson, "*Legality*'s *Law's Empire*," *Law and Philosophy*, vol. 39 (2020): pp. 325-349, p. 327.

[207] "Critics have thus far concentrated their efforts on determining whether Dworkin's interpretive approach decisively refutes positivist theories of law." Denise Réaume, "Is Integrity a Virtue? Dworkin's Theory of Legal Obligation," *University of Toronto Law Journal*," vol. 39, no. 4 (1989), pp. 380-409, p. 380.

has passed a law legalizing marijuana—a disagreement that could be resolved by "Googling it." Theoretical disagreements about law in contrast are those where the two parties agree about all matters of empirical, social fact, which is to say they do not have any empirical disagreements; they agree about what the legislature has done, what words are contained in the relevant statues, etc., but the two reasoners nonetheless disagree about *what the law is*. For example, two people might agree that the Eighth Amendment prohibits "cruel and unusual punishments," but disagree about whether a law that permits the death penalty is a cruel and unusual punishment, and thus whether it is constitutional.

Dworkin levies this as an argument against legal positivism because positivism, in its most popular varieties that follow Hart, grounds the existence of law in social norms or conventions of some sort, which require some kind of convergence of behavior in order for legal rules to exist. But with theoretical disagreements about law the relevant social convergence does not exist. "Stated plainly, 'controversiality is inconsistent with conventionality', and thus theoretical disagreements are inconsistent with positivism."[208] And yet legal participants still act as if there is law there to discover in the absence of this social consensus.

Dworkin thinks his anti-positivist theory of law is necessary to account for the existence of theoretical disagreements about law because, since the law in cases of theoretical disagreements seems to "outrun" the convergent social practices, something else must explain how law can exist in the absence of social consensus (since legal participants still talk and think

[208] Johnson, "*Legality*'s *Law's Empire*," p. 329 (quoting Scott Shapiro, *Legality*, p. 302).

as if they are "finding law" even in cases of theoretical disagreements).[209] The thing that grounds the existence of law in such cases is morality (it is not that one just looks to what the morally best outcomes would be given that the law has "run out"; rather, morality is used to identify the deeper, broader principles that underlie the law—it is the existence and application of these principles that legal reasoners are disagreeing about in cases of theoretical disagreement). So moral facts play an essential role in grounding or determining the content of the law. Dworkin's theory of legal reasoning accordingly incorporates this role.

Legal reasoning, for Dworkin, as an instance of *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."[210] The purpose imposed on the practice should ultimately be the one that portrays the practice in its "best light."[211] The purpose imposed on the practice is then used to *restructure* the practice in light of it.[212]

Dworkin contrasts constructive interpretation with conversational and scientific interpretation.[213] To take the more important of the two (for our purposes), conversational interpretation is where "[w]e interpret the sounds or marks another makes in order to decide what he has said."[214] This form of interpretation "assigns meaning in the light of the motives and

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[209] It could be that morality is used to come to a legal conclusion in cases of theoretical disagreements, but that morality is used to create new law, as opposed to finding it. A positivist could readily take on board that morality is so used in such cases. Therefore, it is crucial to Dworkin's argument, as an argument against legal positivism, that morality is used to *find* (pre-existing) law as opposed to make it.

[210] Dworkin, *Law's Empire*, p. 52; see also p. 77.

[211] See Dworkin, *Law's Empire*, at pp. 67, 77, 90.

[212] Dworkin, *Law's Empire*, p. 47.

[213] Dworkin, *Law's Empire*, p. 50.

[214] Dworkin, *Law's Empire*, p. 50.

purposes and concerns it supposes the speaker to have, and it reports its conclusions as statements about his 'intention' in saying what he did."[215] (Dworkin's "conversational" model corresponds roughly to the Gricean view described above.)

Dworkin sees the interpretation of art and the interpretation of law as being importantly similar because he rejects (for both) the idea that interpretation in these domains "is only a special case of conversational interpretation."[216] On this view (that Dworkin rejects), "[w]e listen, not to the words of art themselves[…], but to their actual, human authors. Creative interpretation aims to decipher the authors' purposes or intentions in writing a particular novel or maintaining a particular social tradition, just as we aim in conversation to grasp a friend's intentions in speaking as he does."[217]

Instead, Dworkin says that, for artistic and legal interpretation—while purposes *are* relevant—"the purposes in play are not (fundamentally) those of some author but of the interpreter."[218] To restate the definition of constructive interpretation: it "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."[219] "A participant interpreting a social practice, according to that view, proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify."[220]

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[215] Dworkin, *Law's Empire*, p. 50.

[216] Dworkin, *Law's Empire*, p. 51.

[217] Dworkin, *Law's Empire*, pp. 51-52.

[218] Dworkin, *Law's Empire*, p. 52.

[219] Dworkin, *Law's Empire*, p. 52 (emphasis added).

[220]Dworkin, *Law's Empire*, p. 52.

Dworkin's main reason for rejecting the conversational model of artistic interpretation seems to be (in reliance on the work of Hans Gadamer and Stanley Cavell) that constructive interpretation is *inevitable*: "We cannot avoid trying to make of the artistic object the best, in our opinion, it can be."[221] For example, in creating a production of *The Merchant of Venice* made to reach a contemporary audience, the director might have to betray some of Shakespeare's specific intentions in order to fulfill his more general ones. But even in this "fidelity" to Shakespeare's more abstract intentions, "'applying' that abstract purpose to our situation is very far from a neutral, historical exercise in reconstructing a past mental state."[222] Rather, "It inevitably engages the interpreter's own artistic opinions[…], because it seeks to find the best means to express, given the text in hand, large artistic ambitions that Shakespeare never stated or perhaps even consciously defined[…]."[223] Gadamer had written that "[s]ince there is 'an inevitable difference between the interpreter and the author that is created by the historical difference between them', there is a sense in which 'every age has to understand a transmitted text in its own way.'"[224]

Constructive interpretation (in art and law) begins by supposing that there is some purpose for the domain in question. Dworkin's provisional proposal for the fundamental purpose or point of law is that "Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble those ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about

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[221] Dworkin, *Law's Empire*, p. 54.

[222] Dworkin, *Law's Empire*, p. 56.

[223] Dworkin, *Law's Empire*, p. 56.

[224] Jonathan Crowe, "Dworkin on the Value of Integrity," *Deakin Law Review* (2007), pp. 171-172 (quoting Gadamer, *Truth and Method*)).

when collective force is justified."[225] The fundamental purpose of law as such is related to justifying the state's use of force by pointing to prior political decisions.

From this "suitably airy" account of the *concept* of law, *conceptions* of law are developed in order to end up with general theories of legal interpretation. "Conceptions of law refine the initial, uncontroversial interpretation" of the concept of law by "furnish[ing] connected answers to three questions posed by the concept": (1) "is the supposed link between law and coercion justified at all? Is there any point to requiring public force to be used only in ways conforming to rights and responsibilities that 'flow from' past political decisions?"; (2) "if there is such a point, what is it"; and (3) "what reading of 'flow from'—what notion of consistency with past decisions—best serves it?"[226]

Corresponding to (or, perhaps better: *included in*) each conception of law will be a theory of legal interpretation.[227] Dworkin explores three conceptions of law in *Law's Empire*: (1) conventionalism;[228] (2) legal pragmatism;[229] and (3) law as integrity.[230] Legal reasoning for Dworkin thus has to occur in two stages: following Shapiro I will refer to these as (1) the meta-interpretive stage; and (2) the interpretive stage. At the meta-interpretive stage, one must settle

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[225] Dworkin, *Law's Empire*, p. 93; see also John Gardner, "Law's Aim in *Law's Empire*," in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Scott Hershovitz, ed.) (Oxford University Press, 2012) p. 208.

[226] Dworkin, *Law's Empire*, p. 94.

[227] "The answer a conception gives to this third question determines the concrete legal rights and responsibilities it recognizes." Dworkin, *Law's Empire*, p. 94.

[228] According to conventionalism, "a right or responsibility flows from past decisions only if it is explicit within them or can be made explicit through methods or techniques conventionally accepted by the legal profession as a whole." Dworkin, *Law's Empire*, p. 95.

[229] According to legal pragmatism, "judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake." Dworkin, *Law's Empire*, p. 95.

[230] Dworkin, *Law's Empire*, p. 94.

on a *conception* of law in order to come up with a theory of legal interpretation. The way this is done is to see which "conception of law presents legal practice in its best light."[231] A theory of legal interpretation is the methodology that a legal reasoner uses to interpret a legal text or other legal materials. Once one has a conception of law (and thus a theory of legal interpretation) in hand, one can *then* take their theory of legal interpretation and look to the actual legal materials at hand (case law, statutes, etc.) in order to ascertain what the law is in particular situations.

The conception of law that Dworkin favors is *law as integrity*. "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[232] This involves identifying those principles that place the available legal materials (the practice of the legal community understood "pre-interpretively") in its *best light*. The principles that place legal practice in its best light are those principles that best *fit* and *justify* the legal practice as a whole. Legal reasoning, for Dworkin, takes on a Janus-faced character because legal interpretation is constrained by history, but that history is understood or looked at through the moralized lens of this "best light" analysis that imposes purpose on legal practice *as a whole* in order to restructure it. Thus, Dworkin's theory, as Shapiro points out, is "*doubly* interpretive"[233]: "To present legal practice in its best light at the first phase of legal

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[231] Shapiro, *Legality*, p. 296.

[232] Shapiro, *Legality*, p. 225.

[233] The first stage of interpretation (or "meta-interpretation," as Shapiro calls it) is found in chapters four, five, and six of *Law's Empire*, where Dworkin discusses conventionalism, legal pragmatism, and law as integrity, respectively. The second stage of interpretation is where the legal reasoner takes law as integrity and applies it to the available legal materials. Dworkin writes three chapters—chapters eight, nine, and ten—that illustrate the application of law as integrity to three contexts—common law, statutory law, and constitutional law, respectively.

interpretation requires the judge to present past legal decisions in their best light at the second phase as well."[234]

Integrity, the central value of Dworkin's theory of law as integrity, is a value of political morality that Dworkin insists is distinct from other political values—especially justice.[235] The idea of coherence plays a central role in Dworkin's notion of integrity: integrity "instructs that the law be seen as [morally] coherent"[236]; "the core idea of integrity is coherence of action and of principle."[237] Integrity is also an essential component in Dworkin's explanation of the Janus-faced character of law, for it requires the principled projection into the future of the past political decisions of the legal system. Integrity is connected with what Dworkin sees as the fundamental aim of law, which, recall, is justifying the state's use of coercion or force by pointing to past political decisions: integrity requires a morally coherent, which is to say, principled, justification of the state's use of force on the basis of prior political decisions.

To state Dworkin's theory of legal reasoning in a simpler (but slightly misleading) way, Dworkin importantly relies on a distinction between *rules* and *principles*. Rules are legal norms that have a determinate range of application: they apply in an all-or-nothing manner and are rather uncontroversial in their content. Principles, in contrast, merely have weight, and can only be uncovered by engaging in a kind of moral reasoning.

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[234] Shapiro, *Legality*, p. 300.

[235] Dworkin, *Law's Empire*, pp. 176-77.

[236] Dworkin, *Law's Empire*, p. 176.

[237] Gerald Postema. "Integrity: Justice in Workclothes," *Iowa Law Review*, vol. 82 (1997): p. 825.

One can think of the rules as the "positive law—the law in the books, the law declared in the clear statements of statutes and past court decisions."[238] The principles, however, are what comprise "the full law," which is "the set of principles of political morality that taken together provide the best interpretation of the positive law."[239] Constructing the best interpretation of the positive law involves identifying "the best justification available for the political decisions the positive law announces," which means identifying those principles that best (1) *fit* and (2) *justify* "the law declared in the clear statements of statutes and past court decisions."[240]

Note that the role principles play (as *justifications* for the rules or "clear" practices of the legal system in question) is dependent on what Dworkin proposed for the purpose of law as such —the purpose of law, again, is to *justify* the state's use of force. Dworkin thus argues that principles play an indispensable role in understanding legal practice, and he ultimately has to appeal to a fundamental purpose of law in order to motivate the role that principles play. As John Gardner writes, Dworkin's argument here is ultimately *transcendental* in character: Dworkin "tries to show that law must have a unifying-and-distinctive purpose by showing that we cannot make sense of law without assuming one."[241]

I should say a bit more about the relative roles of fit and justification in Dworkin's theory, as this is also the point where I perceive the greatest practical difference between Dworkin's natural law theory and Michael Moore's natural law theory. Under Dworkin's approach, fit actually plays a two-fold approach. Any interpretation of the law must meet some minimum

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[238] Ronald Dworkin "Law's Ambitions for Itself," *Virginia Law Review*, vol. 71 (1985): p. 176.

[239] Dworkin "Law's Ambitions for Itself," p. 173.

[240] Dworkin "Law's Ambitions for Itself," p. 173.

[241] Gardner, "Law's Aim in *Law's Empire*," p. 208.

threshold of fit with the available legal materials. This is because the interpretation has to be an interpretation *of some thing*, and if the dimension of fit with the text of the law were not satisfied in some minimal sense, the interpretation (however morally attractive) could not count as an interpretation *of that thing*.

Michael Moore's view appears to be more extreme in its relaxation of the fit category. Moore's view does not seem to have the threshold requirement of fit that Dworkin's view has. Moore writes "[i]f the strain on meaning is harsh enough, a judge may 'overrule' the ordinary meaning by acknowledging that this is a term of art in the law, guided by the law's special purposes and not by ordinary meaning."[242] As Jeffrey Goldsworthy describes Moore's view, "the 'dimension of fit' never poses an insurmountable obstacle to a resolution that is satisfactory according to the 'dimension of morality.'"[243] The judge weighs the ordinary meaning against interpretations that are more morally attractive but which are more of a stretch than other interpretations: "Less ordinary meaning, or a more strained reading of statutory definitions and precedent, will be traded off against a better purpose."[244]

Legal reasoning for Dworkin takes on a Janus-faced character because legal reasoning necessarily involves finding those principles that portray the legal system in its "best light." This "best light" analysis involves looking at what the prior political decisions of the legal system are (Janus's backward-looking face), but it also involves engaging in a kind of moral reasoning to identify those principles that best justify that practice, principles which then restructure the

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242 Michael S. Moore, "A Natural Law Theory of Interpretation," *Southern California Law Review*, vol. 58 (1985): p. 385.

243 Jeffrey Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," *San Diego Law Review*, vol. 42 (2005): p. 515.

244 Moore, "A Natural Law Theory of Interpretation," p. 385.

practice—since it is unlikely that every feature of the legal system will be consistent with the principles that best justify it (Janus's forwards-looking face).

V.) **Criticisms of *natural law theory***.

a.) ***Natural law theory* does not fit the conventional view of statutory reasoning**.

Let us spend a bit more time meditating on what it means for a legal reasoner to apply *law as integrity* in the context of statutory law. Interestingly, Dworkin finds common ground with the likes of Scalia when it comes to being a skeptic of "actual" legislative intent. Both Dworkin and Scalia disclaim the search for this "subjective" notion of intent.[245] But Dworkin also would avoid Scalia's search for "objectified" legislative intent because Dworkin disclaims the search for *any* kind of legislative intent. In accordance with the general idea of *law as integrity*, what the legal reasoner is doing is identifying the principles of political morality that would best fit and justify the passage of the statute in question. This includes both the text of the statute itself, as well as the political events that surround the passage of the statute; this broadly speaking would include anything conventionally associated with "legislative history" (e.g., committee reports, statements made during legislative floor debates, or signing statements).

Statements of legislative history, instead of being evidence of some kind of actual legislative intent, are thought of as being part of the legal data that should be accounted for by legal reasoners in figuring out which principles best fit and justify that data. Statements of legislative history are part of the institutional history of the legal system in question, just like

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[245] "Dworkin rejects the idea that the speaker's intended meaning is what interpreter's should try to elicit." Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press: 2018, 2nd ed.): p. 187.

prior judicial decisions and legislative statutes. Dworkin rejects the idea that statements of legislative history are evidence of the mental states of the particular legislators who made them, "presumed to be representative of the mental states of the majority of legislators whose votes created the statute."[246] Instead, the idea is to "treat[] the various statements that make up the legislative history as political acts that [an] interpretation of the statute must fit and explain, as it must fit and explain the text of the statute itself."[247] In doing this, the legal reasoner "will ask himself which reading of the act[…] shows the political history including and surrounding that statute in the better light."[248]

Dworkin grants that his approach does not fit with the way this practice is normally described: "It is true that in American legal practice, judges constantly refer to the various statements congressmen and other legislators make, in committee reports or formal debates, about the purpose of an act."[249] But Dworkin thinks that this notion of legislative intent cannot be sustained (echoing many textualist arguments against the very concept of legislative intent; these arguments will be discussed in chapter four). The alternative he presents to this is his own view of *law as integrity*.

I will not say that this inconsistency with the traditional view of statutory reasoning alone is enough to prove fatal to Dworkin's theory. But it is a notable shortcoming. As Dworkin himself grants, effectuating Congressional intent is considered a *dictum* for the interpretation of

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[246] Dworkin, *Law's Empire*, p. 314.

[247] Dworkin, *Law's Empire*, p. 314.

[248] Dworkin, *Law's Empire*, p. 313.

[249] Dworkin, *Law's Empire*, p. 314.

federal law.[250] Dworkin's account of statutory reasoning is significantly revisionist, in that it says legal reasoners are not actually looking for the Congressional *intent* of an enactment, but instead are just engaging in moral reasons to find the *principles* that best fit and justify that legislative enactment (including not just the statutory language but also the associated legislative history).[251]

Judges, legal scholars, and ordinary people often think that it is the proper role of a judge in cases of statutory interpretation to adopt a modest, deferential role, where the judiciary is subservient to the legislature. Felix Frankfurter wrote that the judge should not "go beyond" the "words used by the legislature" because to do so would go beyond the "function" of the judge:

> A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation.[252]

As Frankfurter writes further, "This duty of restraint, this humility of function as merely the translator of another's command, is a constant theme of our Justices."[253]

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[250] Citations on this could be provided *ad nauseum*, so here are three quotations from Supreme Court opinions: *Chevron v. Natural Resources Defense Council, Inc.*, 467 US 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *Blum v. Stenson*, 465 US 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Johnson v. United States*, 529 US 694, 710, footnote 10 (2000) ("Our obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result").

[251] One might try to reply on Dworkin's behalf here and say that this is an unfair criticism of law as integrity, because law as integrity is being offered a purely normative account here of how judges should interpret and apply statutes, not an account of what judges actually do. But this is not correct. Dworkin is ultimately offering an interpretation of our legal practice. He is trying to give an account of the best understanding of this practice. To this extent at least, it does have descriptive (as opposed to purely normative) aspirations. Despite the fact that Dworkin's view has both descriptive and normative components, I am less concerned with the normative status of Dworkin's argument. Instead, I am trying to point out the extent to which Dworkin's theory falls short, insofar as it is supposed to descriptively fit actual legal practice.

[252] Frankfurter, "Some Reflections," p. 533.

[253] Frankfurter, "Some Reflections," p. 534.

Richard Posner analogizes this judicial subservience to how a military subordinate must obey, and seek to effectuate the will and demands of, their superior officer. Posner analogizes this to a subservient role for judges in both statutory and constitution law:

> The situation with regard to legislative interpretation is analogous. In our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them.[254]

But what if the orders are not clear? Richard Posner extends the analogy further:

> The platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communication failed? Judges should ask themselves the same type of question when the "orders" they receive from the framers of statutes and constitutions are unclear: what would the framers have wanted us to do in this case of failed communication?[255]

In cases of unclarity, Posner argues that the judge should not engage in the "creative" task of trying to figure out which principles of political morality that meet some minimal level of logical consistency with the text of the law in question should be applied. Instead, the judge tries to be *totally* faithful and deferential to the will, attitudes, and intent of the promulgators of the law (whether they be constitutional framers or legislators). This analogy ultimately is an argument based on legislative supremacy for how judges should engage in interpretation. Arguably, the principle of legislative supremacy rules out natural law theory methods of interpretation.

This general point regarding judicial "inferiority" is leveled more pointedly by Richard Ekins (who argues against Dworkin's view) and Jeffrey Goldsworthy (who argues against

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[254] Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," p. 189.

[255] Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," p. 190.

Michael Moore's view). Richard Ekins helpfully spells out how counter-intuitive it is that, on Dworkin's view, "the law is never what somebody wills, but rather whatever story best fits and justifies all legal materials."[256]

> Dworkin does not adopt an internal point of view and explain how the reasonable legislator understands what he and the legislature do in enacting the statutory text. Indeed, Hercules' interpretive method departs radically from that reasonable self-understanding and would place legislators in an almost impossible position.[257]

This is because the legislator who expects Hercules to interpret the law in accordance with law as integrity will not be able to rationally expect that the law will be interpreted as the legislature collectively intends it to be interpreted. Instead, the legislator "will understand that the most he and the other legislators can do together in enacting a new statute is to contribute new interpretive material."[258] This legislator will know "that Hercules is likely to read the statute differently as time goes by, taking into account statements made by subsequent legislators, shifts in public opinion, new judicial decisions, and the enactment of new legislation."[259]

In order to try to make they law they intend to make, the legislators will have to

> think like Hercules, and determine how the judge would be likely to respond to various textual alternatives, given the other relevant interpretive material. The legislator would then adopt the text that would lead Hercules to the conclusion that he, the legislator, had already chosen. Thus, the legislators, if they adopted this draft, would act to direct Hercules, framing the interpretive materials in such a way that the law would change in the way they intended it to change. They would be forced into this odd dance because Dworkin rules out the obvious

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[256] Richard Ekins, "Legislative Intent in *Law's Empire*," *Ratio Juris*, vol. 24, issue 4 (2011): pp. 435-460, p. 450.

[257] Ekins, "Legislative Intent in *Law's Empire*," p. 455.

[258] Ekins, "Legislative Intent in *Law's Empire*," p. 456.

[259] Ekins, "Legislative Intent in *Law's Empire*," p. 456.

> course of action: enacting a decision by making it clear that it was their joint intention to decide in this way.[260]

Ekins concludes that Dworkin does not take legislation seriously.[261] Instead of the perspective of Hercules, Ekins argues "The reasoning and action of the legislator is, I suggest, unintelligible unless the law he makes is the law that he intends to make"[262] (Ekins' view of legislative intent will be explored more fully in chapter four of this dissertation.)

Jeffrey Goldsworthy argues that Michael Moore's view involves a claim of judicial *supremacy* over the legislature. First, recall that on Moore's view, there is seemingly no threshold requirement of fit. Instead, there is a more pure weighing of the moral attractiveness of an interpretation against the obviousness of linguistic meaning:

> A judge's linguistic intuitions are necessary in selecting [the purpose(s) of a statute]; for it is the statute as he proposes to interpret it that is the (speech) act for which he is seeking an intelligible purpose. His linguistic intuitions provide him with provisional interpretations of the nature of the speech act about which he is endeavoring to discover some purpose. The less satisfactory he finds the purposes of an act under its provisional interpretations, the broader he should be willing to stretch his linguistic intuitions about those interpretations in order to "discover" purposes he likes better. In this way he trades off his two sets of intuitions against each other; he uses a less ordinary interpretation of a term to further a more morally justifiable purpose.
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> There may be no set of acceptable purposes for a particular statute that a judge could find intelligibly promoted by it unless he greatly stretches his linguistic intuitions. Only then does he become self-conscious of his necessarily creative role.[263]

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[260] Ekins, "Legislative Intent in *Law's Empire*," p. 456.

[261] Ekins, "Legislative Intent in *Law's Empire*," p. 457.

[262] Ekins, "Legislative Intent in *Law's Empire*," p. 457.

[263] Michael Moore, "The Semantics of Judging," *Southern California Law Review*, vol. 54 (1981): pp. 151-294, pp. 293-294.

For Moore, "the principle of legislative supremacy is merely one of a number of principles that judges are entitled to override if they believe that other, substantive moral values are of greater weight."[264] The moral weight of "legislative supremacy" is something that is up to the judge."[265] The ultimate legal decisions depend on what values the *judge* "would prefer the legislature's enactments to serve.[266]

Moore's idea of the "creative" role of the judge stands in contrast to Frankfurter's admonition that the judge "must not read in by way of creation."[267] As Goldsworthy further elaborates, "Determining [the] meaning [of a statute on Moore's view] involves subordinating the words chosen by the legislature to moral values selected by the judges. The practical effect is that the legislature is no longer the sole author of the statute it enacts."[268] "The judges are elevated to the status of coauthors of every statute that comes before them for interpretation."[269] This involves the substitution of *legislative* supremacy in favor of *judicial* supremacy because "the legislature's contribution—the words it enacted—are subordinated to values chosen by the judges."[270]

I do not mean here to argue that for a system to count as a legal system it must fully endorse principle of legislative supremacy (and hence judicial inferiority). But the idea of legislative supremacy is related to what many see as a core feature of legal systems: that

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[264] Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," p. 516.

[265] Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," p. 516.

[266] Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," p. 516.

[267] Frankfurter, "Some Reflections," p. 533.

[268] Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," p. 517.

[269] Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," p. 517.

[270] Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," p. 517.

legislatures enact the law that they intend to make.[271] This principle of legislative supremacy is also related how many think legislators are held responsible, at least in democracies: "a polity cannot hold its legislators to account for their choices in office unless the law that their legislative act brings into being is the law that they intend to make."[272]

Instead of treating the idea of legislative intent as (at best) a useful fiction, and treating the idea of legislative supremacy as a secondary concept whose relevance can only come in via the mediation of a judge's weighing of moral principles, it would be better, I submit, for a theory of legal reasoning to be able to make sense of legislative intent's central and unmediated relevance to legal reasoning.[273]

To preview, the way my functionalist account explains the relevance of legislative intent is that the intent a creator has in making something is one of the ways a thing can get its *purpose* or *function*. This is true not just of laws, but other artifacts more generally. And in the case of law, its purpose is used to help construe its meaning (e.g., in the resolution of ambiguity—

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[271] Though I would not necessarily go this far, Joseph Raz argues that it can only make sense to give someone lawmaking powers if the law the law-maker makes is the law they intend to make:

> To give a person or an institution law-making powers is to entrust them with the power to make law by acts intended to make law, or at least undertaken in the knowledge that they make law. It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make. Assume the contrary. Assume that the law made through legislation bears no relation to the law the legislator intended to make. For this assumption to be at all imaginable the legislator must be unaware of what law will be made by his actions. If he can predict that if he does one thing tax will be raised by a certain amount, and if he does another thing tax will be cut by a certain amount, for example, then he will take that action which will have the effect he wants to have—that is, the law he makes will be the law he intends to make." Joseph Raz, "Intention in Interpretation," in *The Autonomy of Law: Essays on Legal Positivism* (edited by Robert George) (1999): p. 258.

[272] Ekins, "Legislative Intent in *Law's Empire*," p. 457.

[273] "[T]he legislature is a central legal and political institution and legal theorists should aim to make sense of its capacities[…]" Ekins, "Legislative Intent in *Law's Empire*," p. 458.

between two ambiguous readings of a law, the one that better furthers the law's purpose will be favored).

I take this to be the main shortcoming of natural law theory. Natural law theory's account of statutory reasoning differs dramatically from what legal reasoners say they are engaging in when thinking about statutory law. Accordingly, it does not seem very strong as a description of the nature of such reasoning. In the remainder of this chapter I continue looking at more objections to natural law theory.

b.) **The excessive philosophical and theoretical ambition of natural law theory.**

Cass Sunstein and Scott Shapiro each take issue, in slightly different ways,[274] with the perceived philosophical and theoretical grandiosity of Dworkin's theory of legal reasoning. They differ, however, on the precise basis for questioning Dworkin's ambitious theory.

The driving force of Sunstein's criticism of Dworkin's theory is Sunstein's idea of the *incompletely theorized agreement* ("ITA"). The basic thought is that, whereas ITAs play an important role in legal systems as a kind of "local" agreement that legal reasoners can rely on, Dworkin's theory forces legal reasoners to come up with deeper and more abstract justifications than those contemplated by, or embodied in, ITAs. Dworkin's theory thus is inconsistent with an important, and normatively attractive, way in which legal systems can function.

Sunstein envisions ITAs as being agreements that allow citizens and legal participants to agree on "concrete outcomes rather than abstractions."[275] They enable agreement about particulars despite disagreement about more abstract or theoretical matters. For example,

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[274] See Sunstein, *Legal Reasoning and Political Conflict;* Shapiro, *Legality*.

[275] Sunstein, *Legal Reasoning and Political Conflict*, p. 5.

"[p]eople may believe that it is worthwhile to protect endangered species, while having quite diverse theories about why this is so. Some people may stress what they see as human obligations to species or nature as such; others may point to the role of endangered species in producing ecological stability; others may invoke religious grounds; still others may emphasize that obscure species can provide valuable medicines for human beings."[276]

ITAs could be valuable in the legal context for a variety of reasons. For example, judges are heavily time-constrained in their decision-making, and so there is an incentive for making decisions efficiently.[277] Quite simply, "[f]ull theorization may be far too much to ask."[278] Additionally, judges also make legal decisions in the context of living in a diverse, pluralistic society (and, at the appellate level at least, often make decisions with a panel of other judges ranging from three to nine in number). Against this backdrop, "[m]utual respect may well entail a reluctance to attack one another's most basic or defining commitments, at least if it is not necessary to do so in order to decide particular controversies."[279] Perhaps, an ITA is the only way it would be possible for a multi-member court to reach *any* agreement on a particular case.[280] ITAs also reduce the costs of litigation, in the sense that "[i]f judges disavow large-scale theories then losers in particular cases lose much less. They lose a decision, but not the world. They may win on another occasion. Their own theory has not been rejected or ruled inadmissible."[281]

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[276] Sunstein, *Legal Reasoning and Political Conflict*, p. 5.

[277] Sunstein, *Legal Reasoning and Political Conflict*, p. 4.

[278] Sunstein, *Legal Reasoning and Political Conflict*, p. 42.

[279] Sunstein, *Legal Reasoning and Political Conflict*, p. 4; see also pp. 40-41.

[280] See Sunstein, *Legal Reasoning and Political Conflict*, p. 38.

[281] Sunstein, *Legal Reasoning and Political Conflict*, p. 41.

Finally, ITAs enable *moral evolution*, because "[a] completely theorized agreement would be unable to accommodate changes in facts or values. If the legal culture really did attain a theoretical end-state, it would become too rigid and calcified; we would know what we thought about everything."[282]

ITAs "are a key to legal reasoning."[283] Take, for example, analogical reasoning, a central component of legal reasoning. "People might think that A is like B and covered by the same low-level principle, without agreeing on a general theory to explain why the low-level principle is sound. They agree on the matter of similarity, without agreeing on a large-scale account of what makes the two things similar."[284]

Incompletely theorized agreement shares similarities with John Rawls' idea of *overlapping consensus*.[285] Both, Sunstein writes, "attempt[] to bring about stability and social agreement in the face of diverse 'comprehensive views.'"[286] Both incompletely theorized agreements and overlapping consensus are made desirable by social pluralism and the presence of "legitimate disagreement" in society.[287] But Rawls' and Sunstein's ideas are different according to Sunstein, because Rawls envisions overlapping consensus as operating in a direction opposite to that of incompletely theorized agreements. Whereas Sunstein envisions *agreement* about *particulars* in the face of *disagreement* about *theoretical* matters, Rawls

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[282] Sunstein, *Legal Reasoning and Political Conflict*, p. 42.

[283] Sunstein, *Legal Reasoning and Political Conflict*, p. 5.

[284] Sunstein, *Legal Reasoning and Political Conflict*, p. 38.

[285] Sunstein, *Legal Reasoning and Political Conflict*, p. 47 (referencing John Rawls *Political Liberalism (*1993)).

[286] Sunstein, *Legal Reasoning and Political Conflict*, p. 47.

[287] Sunstein, *Legal Reasoning and Political Conflict*, p. 47.

envisions *agreement* about *theoretical* matters occurring once we ascend to higher levels of abstraction in the face of *political* disagreement. For Rawls, "abstraction 'is a way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots."[288] Rawls envisions this ascent to a higher level of generality within the domain of the *political* as a way of avoiding having to grapple with even more intractable *metaphysical* debates. Rawls focuses on agreement about generalities, but Sunstein focuses on agreement about concrete particulars.

> Cass Sunstein writes that Dworkin
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> > does not emphasize or defend incompletely theorized agreements. On the contrary, his account appears to require judges to develop high-level theories and does not (to say the least) favor theoretical modesty. In Dworkin's hands, the relevant theories are large and abstract; they sound just like political philosophy or moral theory.[289]

Lawyers often have (for the reasons stated above) the "special goal" of "allow[ing] people to solve problems while remaining agnostic (to the extent possible) on theoretical issues," and so this "animates the search for incompletely theorized agreements."[290] This is a problem for Dworkin according to Sunstein because "this is not how real lawyers proceed," since lawyers "try to avoid broad and abstract questions."[291] "Such questions are too hard, large, and open-ended for legal actors to handle."[292] Incompletely theorized agreements work by *precluding* the

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[288] Sunstein, *Legal Reasoning and Political Conflict*, p. 47 (quoting John Rawls *Political Liberalism (*1993), p. 46).

[289] Sunstein, *Legal Reasoning and Political Conflict*, p. 49.

[290] Sunstein, *Legal Reasoning and Political Conflict*, p. 48.

[291] Sunstein, *Legal Reasoning and Political Conflict*, p. 48.

[292] Sunstein, *Legal Reasoning and Political Conflict*, p. 49.

very justifications that Dworkin's theory *requires* legal reasoners to search for. So, Dworkin's theory is to be disfavored, since it is inconsistent with the central role that incomplete theorized agreements play in legal reasoning.

Scott Shapiro criticizes Dworkin on similar grounds, arguing that Dworkin's theory of interpretation places a large amount of *trust* in judges to engage in moral and philosophical theorizing, a level of trust that is not granted to them given the way the American legal system is designed.[293] The gist of Shapiro's argument against Dworkin's theory of meta-interpretation is that it "fails decisively at the level of 'fit.'"[294] Whereas "'[b]est-lights' analysis is so philosophically demanding that it is appropriate only for legal systems inhabited by extremely trustworthy individuals," the founding of the American constitutional order, Shapiro thinks, reveals that the founders of the American legal system did not intend to bestow upon judges the level of trust that is required of them by Dworkinian meta-interpretation. In making this argument, Shapiro presents a history of the American founding to show how the founding order of the United States government "resulted from an emerging sense of distrust in the people as the guardians of liberty."[295] The federalist founders had "faith in the people to choose correctly[…] only in certain contexts, where temptation was significantly reduced and the set of options heavily constrained."[296] While the national government under the Constitution was given more powers than it had under the Articles of Confederation, the new national government had these powers divided to limit the possibility of governmental vice and overreach: "the federalists

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[293] Shapiro, *Legality*, p. 329.

[294] Shapiro, *Legality*, p. 329.

[295] Shapiro, *Legality*, p. 325.

[296] Shapiro, *Legality*, p. 325.

sought to minimize the tyrannical potential of the federal government by avoiding great concentrations of power and diffusing authority throughout various legal institutions."[297]

Dworkinian best-lights analysis, Shapiro thinks, requires a set of skills that the founders would not have believed the average person possesses. And even if people did possess the relevant competence, the founders "would also have been skeptical about whether such a discretionary procedure would be faithfully executed."[298] While it is true that there are institutional checks against judges,

> because Dworkinian meta-interpretation is so abstract and uses techniques unfamiliar to most nonphilosophers, the normal institutional checks are bound to be ineffective. It is doubtful that many people are conversant enough in philosophical method to be able to distinguish between a good philosophical argument made sincerely and a bad philosophical argument offered strategically.[299]

Finally, whereas the founders had been disillusioned of the "organic conception" of society that sees "people as a unified group sharing a sense of the common good," the founders "understood the citizenry to be riven by factions and motivated by parochial interests."[300] Dworkinian best-lights analysis, in contrast, "is a process that demands a shared background of values, beliefs, and interests. For only in a community unified in its conception of political morality will Dworkinian meta-interpreters converge on the same interpretive methodologies."[301]

One might object to Shapiro's argument here and say that, while the founders lack the intention to bestow such a great amount of trust in legal interpreters, "the designers of the current

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[297] Shapiro, *Legality*, p. 323.

[298] Shapiro, *Legality*, p. 325.

[299] Shapiro, *Legality*, p. 326.

[300] Shapiro, *Legality*, p. 326.

[301] Shapiro, *Legality*, p. 327.

system d[o] have such intentions."[302] First, this concession would undermine Dworkin's theory, because it "would not be applicable to every legal system, or even to secular, industrialized, capitalistic, pluralist, constitutionally democratic ones."[303] But even if Dworkin were satisfied if his theory applied to the current legal system of the United States, Shapiro thinks this more limited claim is not true either, for America remains committed to the basic principles of horizontal and vertical separation of powers described above, for, "despite over 200 years of revision, its basic institutional arrangements reflect an abiding suspicion of power."[304] Additionally, the American legal system remains committed to a pluralism that is founded on a rejection of the "organic conception of society."[305] In sum, "[b]ecause so many of the core rules of American constitutional law rest on principles of abiding distrust toward individuals with power, the importance of checking discretion, and the fact of pluralism, any conception of law that requires for its implementation a great deal of philosophical competence, moral rectitude, and political homogeneity will clash irredeemably with such a legal structure"; "Dworkin's argument in favor of this theory of legal interpretation founders because it does not take trust seriously."[306]

Let me briefly take stock. The first two objections to natural law theory (with a focus on Dworkin's version of natural law theory) have each in their own way shown that it does not seem correct for all times and places. In the first place, a legal system might want to adopt a

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[302] Shapiro, *Legality*, p. 327.

[303] Shapiro, *Legality*, p. 327.

[304] Shapiro, *Legality*, p. 328.

[305] Shapiro, *Legality*, p. 328.

[306] Shapiro, *Legality*, p. 329.

thoroughgoing version of the principle of legislative supremacy—a principle that natural law theory gives a subservient role to. Secondly, some legal system might want to focus on specific and contingent agreements, and in fact preclude judges from engaging in the kind of grand theorizing that Dworkin advocates.

There are three more objections to natural law theory to go (though I will say these final three objections are notably less important than the first two). In the next sub-section I respond to Alexander and Sherwin's argument that Dworkinian principles do not actually operate as effective constraints on legal reasoning—their arguments against Dworkin are wrong-headed.

c.) **Larry Alexander and Emily Sherwin's critiques.**

Larry Alexander and Emily Sherwin argue against a role for Dworkinian principles in legal reasoning by presenting two arguments that such principles are not actually operative within the context of legal reasoning: "we do not believe legal principles are viable as constraints on judicial reasoning."[307] I am keen to respond to these arguments because I do see the Dworkinian search for principles as a *kind* of legal reasoning (it is just, for the reasons articulated in the previous two objections, I do not think it can be the *only* kind of legal reasoning).

Their first argument goes as follows: first, notice that "by hypothesis, legal principles differ from morally correct principles because they must be made to fit a body of decisions that is sure to contain some mistakes."[308] Next, "if both morally correct and morally incorrect legal principles are immanent in existing legal materials, it must be the case that morally incorrect legal principles will sometimes outweigh morally correct legal principles; otherwise, all

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[307] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 94.

[308] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 95.

outcomes would follow from morally correct principles, and past outcomes would have no practical effect on present decisions."[309] But "[t]here is nothing in the past decisions themselves that can determine the weight of the legal principle they support," and the judge also cannot "refer to correct moral principles to assign weight to an incorrect legal principle, because correct moral principles will always dictate that incorrect principles should have no weight at all."[310] Therefore, the weight of Dworkinian legal principles "must be a matter of unregulated intuition or discretion."[311] Therefore, legal principles do not actually constrain legal reasoning.

This argument is wrong-headed. It is of course correct that legal systems will not always adopt morally flawless legal rules, and so the legal principles that underwrite those rules will also not be morally flawless. But Alexander and Sherwin are wrong to suppose that this means that "morally correct" principles have to be weighed against "morally incorrect" principles.

Michael Moore's discussion above is illustrative of what happens here. There are morally significant things that must be taken into consideration even in light of a legal system's adoption of morally flawed rules. These broadly speaking relate to rule of law values and reliance interests that are built up around the adoption of the potentially morally flawed rules. Morally flawed rules may not *ipso facto* deserve their own moral weight, but the legitimate, reasonable expectations that build up around these morally flawed rules do deserve their own moral weight. The moral significance of these reasonable expectations is weighed by the judge against an

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[309] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 95.

[310] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 95.

[311] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 96.

interpretation that might, based on its own merits, be superior to the initially adopted rule, but whose adoption would frustrate the reasonable expectations.[312]

And it is correct to say that the existing legal materials do not tell us or fully determine the weight that should be given to these different dimensions. But that is a core point the natural law theorist wants to make: we have to look to *morality*, and not just the available legal materials, to determine *what the legal significance is* of those legal materials—the legal materials themselves cannot determine their own legal significance.[313] And as to the final point—that the weight of Dworkinian legal principles "must be a matter of unregulated intuition or discretion"[314] and so therefore legal principles do not actually constrain legal reasoning—I think it is enough to invoke a point Aristotle made, which is that we should only expect of a domain a level of precision which is appropriate to it. With morality (and law), we are dealing with a subject matter that does not admit of mathematical precision.[315] And so it is appropriate that legal interpretation is a domain where arguments are only more or less plausible as opposed to clearly valid or invalid in a binary fashion. But this is not to admit that there is *no* rational guidance from Dworkinian principles. The fact that moral reasoning does not admit of mathematical precision does not mean it is incapable of guidance, or that there cannot be clear cases.

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[312] "The judge must weigh the rule of law values against the moral values that would be promoted by overriding those meanings." Goldsworthy, "Legislative Intentions," p. 515 (discussing Michael Moore's natural law theory of interpretation).

[313] This, in fact, is the core of Mark Greenberg's anti-positivist argument in "How Facts Make Law," in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (edited by Scott Hershovitz) (Oxford University Press, 2009).

[314] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 96.

[315] "But there is no such thing as deduction from a text. No matter how clear the text seems, it must be interpreted (or decoded) like any other communication, and interpretation is neither logical deduction nor policy analysis." Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," p. 187.

Alexander and Sherwin's second argument that Dworkinian principles do not actually constrain legal reasoning "is based on the requirement of fit with past decisions."[316] With regards to Dworkin's element of fit, they first point out "that the necessary degree of fit cannot be specified in a nonarbitrary way" because "nothing in the idea of legal principle tells where the threshold of fit lies and how many recalcitrant decisions the judge can ignore."[317] But more importantly, they argue "that the requirement of fit is not a real constraint [on legal reasoning]: a judge can always devise a legal principle that fits perfectly with past cases and also applies a correct moral principle to present and future cases" by "simply stat[ing] the applicable moral principle and add[ing] an exception describing past outcomes."[318]

This argument, too, is wrong-headed. This argument wrongly takes Dworkin's view of coherence to be a very spare notion of logical coherence. Of course a judge can arbitrarily allow exceptions for previous precedents—but that is the key word: *arbitrary*. Dworkin's coherence view is one that advocates for *principled* coherence. And principles here require sound moral reasons. Dworkin's theory would not countenance the preservation of bare logical coherence at the cost of having to adopt a morally arbitrary view of the law in some domain.

Next, Sherwin and Alexander argue that, even if Dworkinian principles actually do operate as a logical constraint on legal reasoning, such principles "can seriously impair the quality of decision making."[319] The argument here starts from the recognition that all legal norms (legal rules and legal principles alike) are morally imperfect in some sense, because all norms

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[316] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 96.

[317] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 96.

[318] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 96.

[319] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 98.

"must generalize in ways that lead to morally mistaken outcomes in some cases."[320] This makes reasoning from legal norms imperfect compared "to ideal natural reasoning, which perfectly reflects moral ideals."[321] "Rules, however, compensate in several ways for the moral mistakes they produce. They settle moral controversy, preempt errors by individual decision makers, provide coordination, and make decision making more efficient."[322] Legal principles, in contrast to legal rules, do not provide these compensating benefits. Principally, Alexander and Sherwin argue that because "judges have considerable freedom in reasoning from legal principles," there is a high risk that a judge will err in reasoning from legal principles, and because of the variation that will occur amongst judges in reasoning from legal principles, "legal principles cannot provide the benefits of coordination and will thus lead to further moral costs beyond their incorporation of past errors."[323]

Additionally, according to Dworkin's theory of legal principles, "[n]ot only do legal principles fail to provide the benefits of serious rules; they also override rules."[324] Rules are merely part of the input to legal interpretation according to Dworkin, and can be discarded,

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[320] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 99.

[321] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 99.

[322] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 99.

[323] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 99.

[324] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 99.

"[o]nce the threshold of fit has been passed."[325] Therefore, as long as legal principles are around, "there can be no serious rules."[326]

This argument has more bite to it, though it still overstates the case against legal principles. To the extent that there is moral value to the clarity of rules that serves to further the laws' coordination function, Dworkinian legal reasoners are supposed to take this into account. These are the rule of law values that are weighed against the moral superiority of a competing interpretation that overrides the established legal rules. The settlement function of law is not the only thing of value here. The law also seeks to settle matters *well*. And so it could come to pass that an established interpretation should be overruled by a morally superior interpretation, even when this leads, in some instances to an "unfair surprise."

With regards to Alexander and Sherwin's argument that the freedom judges have in reasoning from legal principles means there is a high risk that a judge will make mistakes, I am not convinced how we can settle this as an *a priori* manner. It is not clear to me that judges who are permitted to appeal to morality have more discretion than judges who are not permitted to appeal to morality. But I do think it could be eminently reasonable for a legal system to seek to *prevent* judges from engaging in their own moral reasoning in order to figure out the morally best interpretation of some area of law, at the very least because perhaps they do not want judges

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[325] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 100. I will say that I am not sure that Alexander and Sherwin's analysis of the role played by fit in Dworkin's theory of legal interpretation is correct. Alexander and Sherwin suppose that fit plays the role of a minimum threshold; the implication is that all interpretations that pass this minimum threshold are just to be evaluated according to their justification. I am not sure this is right, because another reading is that fit is always relevant, in that greater and lesser amounts of fit are always to be weighed against the greater and lesser amounts of justification that come along with them.

[326] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 100.

to exercise that *kind* of discretion. (This is one of the lessons from the discussion about legislative supremacy above.)

In addition to the above arguments that are meant to affirmatively cast doubt on legal principles, Alexander and Sherwin also seek to *undermine* the *motivations* for legal principles. First, in response to Dworkin's argument that integrity requires "that past and present litigants who are similarly situated" should be "treated alike," Alexander and Sherwin argue that "aside from the effects of justified reliance, morally incorrect decisions in the past do not justify morally incorrect decisions in the present and future."[327] "A lapse in the past is a cause for regret but not for additional moral wrongs."[328]

But I do not think that the natural law theorist is inexorably forced to accept a noxious legal version of "leveling down" (treating someone poorly now just because someone has been treated poorly in the past). Again, the point is that, in light the adoption of even morally imperfect rules, legitimate individual expectations and even societal structures are built up around the adoption of those rules. To that extent, consistency with the past does have moral weight. The issue is not about consistency giving us reasons to treat people badly. It is about consistency giving us reason to continue into the future that practice that has been engaged in in the past. There might be multiple schemes of legal rights and duties that are compatible with minimal notions of fairness. But maybe some of these, from the perspective of ideal morality, are better than the others, even while the non-ideal ones might be morally adequate. The idea is that the expectation interests of law subjects might cause a kind of "path dependency" that gives the

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[327] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 100.

[328] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 100.

legal system reason to not jump to another scheme of legal rights and duties that might have been better to start with from "square one." But since the legal system is not starting from square one, that option is precluded.

Finally, Alexander and Sherwin respond to an argument that Dworkin had made in *Taking Rights Seriously*, which was that legal principles solve the problem of retroactivity, because legal principles "'exist' prior to their application to particular cases, as the morally best principles that explain the body of excisions to date."[329] Primarily, Alexander and Sherwin point out that "it is not so clear that legal principles preexist particular decisions in a way that matters morally."[330] Because of the indeterminacy of the interpretation and application of legal principles, "the prior 'existence' of legal principles is no guaranty against unfair surprise."[331]

This indeed is a legitimate concern. One interesting thing worth noting here is Goldsworthy's point that the possibility that judges' appealing to morality is subject to a kind of "feedback loop":

> If citizens expected statutes to be interpreted according to their literal meanings, then it would be prima facie unfair to upset that expectation. But if citizens knew that judges, in interpreting statutes, may subordinate their literal meanings to moral values, the citizens would be less likely to expect statutes to be interpreted according to their literal meanings.[332]

So judges' continued appeal to morality could *make itself more permissible* by changing citizen expectations about whether judges will appeal to morality. It could makes sense for a legal system to not want judges to have this power, and to banish the judge from using their own views

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[329] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 101.

[330] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 101.

[331] Alexander & Sherwin, *Demystifying Legal Reasoning*, p. 101.

[332] Goldsworthy, "Legislative Intent," p. 516.

about morality to reason towards morally superior interpretations. And my thought is that the kind of reasoning that would occur in this sort of legal system would still properly be called "legal reasoning."

d.) **No distinctive purpose for law**.

Another important objection to Dworkin's theory says that there is no distinct purpose or function of law.[333] Recall that Dworkin's proposed characteristic aim of law is that it involves justifying the state's use of force by pointing to rights and duties that flow from prior political decisions. This is the foundational part of the structure that in turn justifies the interpretive practice of finding those principles that best fit and justify the available legal materials (it is not surprising that the theory of interpretation that tells us that legal reasoning involves finding the best justifications for the available legal materials is the one that best justifies the state's use of force). This proposal, however, shares the same problem with any account that identifies the essence of law with force or coercion, which is that, as Hart and Raz have pointed out, it is conceivable that a legal system could exist that is not based on the use of force or coercion. Even angels, whose divine motivations render needless the law's use of force or coercion, might need a legal system to guide and coordinate their actions.[334] But without this general "point" of law, constructive interpretation would not be able to get off the ground.[335]

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[333] See Joseph Raz, "Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment," in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009): p. 375.

[334] See Joseph Raz *Practical Reason and Norms* (Oxford: Oxford University Press, 1999): p. 159.

[335] See Gardner, "Law's Aim in *Law's Empire*," p. 208, noting that, even if the particular purpose of law identified by Dworkin is incorrect, "*some* unifying-and-distinctive purpose for law must be relied upon if arguments about the nature of law are to get off the ground."

e.) **Integrity**

This is the final, and least important, objection to natural law theory (and this objection in fact is unique to Dworkinian natural law theory). Several critiques focus on the centrality Dworkin gives to the value of *integrity* in legal reasoning.[336] Denise Réaume seeks to undermine Dworkin's two main motivations for accepting integrity as an independent value of political morality. First, Dworkin appeals "to our intuitions about integrity as a personal virtue, and then argu[es] that the state should be regarded analogously as an individual moral agent bound by the same code of integrity."[337] Those who act in an inconsistent way—which is to say, in a way inconsistent with the principles they are committed to—violate integrity. "But this merely draws attention to the general nature of rules or principles; it does not demonstrate the independence of integrity."[338] All norms of behavior are stated "in general terms": *all X should Y in circumstances C*.[339] If someone applies a principle in an inconsistent way (say, by failing to Y even though they are in circumstances C), it is true that they are being inconsistent—but this does not show that consistency is its own kind of moral value. Rather, the person has just failed to abide by the principle. Justice is comprised of principles, and principles by their very nature "require consistency in their application."[340]

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[336] See Larry Alexander & Kenn Kress, "Against Legal Principles," in *Law and Interpretation* (Andrei Marmor, ed.) (Oxford University Press, 1995); Crowe, "Dworkin on the Value of Integrity"; Réaume, "Is Integrity a Virtue?".

[337] Réaume, "Is Integrity a Virtue?", p. 391.

[338] Réaume, "Is Integrity a Virtue?", p. 392.

[339] See Réaume, "Is Integrity a Virtue?", p. 392.

[340] Réaume, "Is Integrity a Virtue?", p. 392.

Next, Réaume addresses Dworkin's argument for integrity that relates to the idea of "checkerboard solutions" to political disagreements. "For example, why not allow access to abortion to women born in even years and deny it to women born in odd years if the population is evenly divided about the morality of abortion?"[341] Dworkin argues that the value of integrity is needed to explain why we find such checkerboard solutions repugnant. Réaume in contrast argues that our rejection of checkerboard solutions "is for reasons of justice; and when these do not hold, the chequer-board is not rejected."[342]

First, checkerboard solutions are unprincipled, but this does not demonstrate the independent value of integrity; rather, as already explained, it just falls out of the *nature* of general principles (or any kind of norm for that matter). "It is inconsistent with any particular principle of justice to accept a chequer-board alternative."[343] And so our aversion to checkerboard solutions can be explained by the fact already pointed out above, that "principles are general standards," and justice is comprised of such general standards.[344]

Next, "A chequer-board solution can be an acceptable option only if the likely alternative is the success of the opposing principle of justice."[345] If one really were sure that one's preferred principle was not going to be implemented, one might very well prefer a checkerboard solution. But in ordinary politics, "both competing principles of justice are live options - or so it seems to

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[341] Réaume, "Is Integrity a Virtue?", p. 396.

[342] Réaume, "Is Integrity a Virtue?", p. 397.

[343] Réaume, "Is Integrity a Virtue?", p. 398.

[344] Réaume, "Is Integrity a Virtue?", p. 397.

[345] Réaume, "Is Integrity a Virtue?", p. 397.

their supporters."[346] Réaume points out that justice can also be invoked to further explain our discomfort with the particular example of a checkerboard solution that Dworkin uses—that of allowing abortions based on the birth year of the patient:

> Postulating that fairness requires the granting of access to only half the potential applicants creates a situation of scarcity. We are then faced with a second question of justice: how should we choose who will be denied? Justice is not indifferent to this. It can be approached like any other scarcity problem; we should canvass grounds of desert or need that might distinguish applicants, and, failing that, we should perhaps decide to allocate access by lottery. We can now see that Dworkin's examples violate justice in this respect as well. Year of birth is an unjust selection criterion. It is not unlike a lottery, but instead of treating each request for an abortion equally, it would allow several abortions to some women (if they so desired) while denying any to others.[347]

Finally, even if there are situations where we prefer the checkerboard solution, there might be other reasons why we would prefer the "wrong" principled solution to the checkerboard solution. For example, maybe one thinks "that the consistent application of the wrong principle will reveal its flaws and create the impetus for change."[348]

Cass Sunstein also attacks the value of integrity: "Integrity, if a product of good judicial judgment, is neither necessary nor sufficient for legitimacy."[349] It is not sufficient because legitimacy comes "from a justifiable exercise of authority, which requires a theory of just institutions[…] Legitimacy is an outcome of well-functioning democratic processes, not of a system of distinction-making undertaken by judges."[350]

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[346] Réaume, "Is Integrity a Virtue?", p. 397.

[347] Réaume, "Is Integrity a Virtue?", p. 399.

[348] Réaume, "Is Integrity a Virtue?", p. 399.

[349] Sunstein, *Legal Reasoning and Political Conflict*, p. 53.

[350] Sunstein, *Legal Reasoning and Political Conflict*, p. 53.

I am not as concerned as Réaume to figure out whether the coherence of the law derives from the value of integrity, the value of justice, or just the nature of principles themselves. I do want to push back however on Dworkin's idea that legal reasoning necessarily involves appeal to the deeper moral principles that underlie the law—and thus establishes a kind of global, theoretical, and moral coherence (or integrity). The framers of a legal system could have reason to create a one that merely embodies a local kind of coherence, and that perhaps even allows the existence of checker-board solutions. In the spirit of Sunstein, maybe incompletely theorized agreements are the only way to get certain things done. As I will argue in the next chapter, even though the Dworkinian search for deeper moral principles is not operative here, a distinctive feature of legal reasoning can still be present here. As I will try to show, even in these sorts of situations of merely local coherence, the resort to the *purpose* or function of the particular law in question is still a crucial step in the process of legal reasoning. Given the presence of a pluralistic society with divergent views, democratic processes can be messy and chaotic, and result in incompletely theorized agreements (and perhaps even checker-board solutions). A legal system could have reason to not let judges override these incompletely theorized agreements by resort to integrity. And yet, particular incompletely theorized agreements can still have purposes that are relevant to ascertaining the content of those agreements. (I try to illustrate this in the next two chapters.)

VI.) **Conclusion.**

The theories discussed in this chapter (*law as language* and *natural law theory*) do a decent job of explaining legal reasoning within some particular domain. Surely text and language

have an important role to play in legal reasoning, even if the ascertainment of linguistic content is not *all* there is to legal reasoning. Because of textualism's over-commitment to the importance of conventionally-encoded content, the Gricean account seems to paint a more accurate picture of statuary reasoning.[351] But the law as language view cannot be a complete theory of legal reasoning, for it lacks the research to explain reasoning that aims at figuring out the content of laws that lack (canonical) linguistic form.

Next, natural law theory is not wrong in saying that morality *can* be relevant to legal reasoning—in fact, this account does much better than the law as language view at making sense of reasoning about unwritten law. Alexander and Sherwin were wrong to think that Dworkinian principles cannot operate as a constraint on legal reasoning. But again, like the law as language view, natural law theory cannot be the complete story. It founders right where the Gricean view is most plausible: as an account of statutory reasoning. Given that it seems very appropriate for legal reasoning in entire areas of law (especially statutory law, as discussed above) to proceed in an "amoral" fashion, we should be skeptical of the idea that, in noticing a role for morality in legal reasoning, we have thereby identified the *most* fundamental—or even *a* fundamental—feature of legal reasoning.

These accounts of legal reasoning thus most noticeably are falling short on the first *desideratum* articulated in the previous chapter: they fail to explain the characteristic structure of legal inference across the main domains of law. The law as language view founders as an account

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[351] "Courts in particular accept a broadly Gricean—or, in terms more familiar to legal scholarship, intentionalist—framework, more or less without exception." Doerfler, "Who Cares How Congress Really Works?", pp. 986-987 (footnote 23).

of law whose content does not take a canonical linguistic form. Natural law theory founders most notably as an account of statutory reasoning.

What we need is something that unites the Gricean view and the Dworkinian view into a single structure. As I will try to show in the next chapter, each of these theories is articulating a different methodology for ascertaining the purpose or function of the law in question. What these theories omit is a recognition that there is an *abstract* notion of purpose that permeates all of legal reasoning. These theories find a methodology that is fitting and appropriate for a particular *domain* of legal reasoning, but then wrongly generalize this methodology as being characteristic of all legal reasoning as such. Language and morality have a role to play in legal reasoning, but it is a role that is more cabined than the *law as language* view and *natural law theory* suppose. They must be part of some larger structure. It is to this larger structure that I turn in the next chapter.

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Chapter 3: The furthering functions view

I.) **Introduction.**

What is the most general and explanatorily useful thing that can be said about legal reasoning? It is easy to say things that are true about all instances of legal reasoning. For example, all instances of legal reasoning are instances of reasoning. But we have not learned much about legal reasoning by noting this. When trying to examine the nature of some thing, if we cast our net too widely, we will capture too many other phenomena, and thus miss the important, distinctive features of the object of our study.

The opposite shortcoming would be to focus on some feature of legal reasoning that is found only in some proper subset of all instances of legal reasoning. The main existing theories of legal reasoning examined in the previous chapter have this vice: they focus too narrowly on features that only some instances of legal reasoning possess.[352]

The Gricean version of the *law as language* view has us look for the *speaker meaning* of a law (i.e., either the legislative intent behind the passage of a statute or the Framers' intent behind the adoption of a constitutional provision). *Natural law theory* has the legal reasoner think about the requirements of morality in ascertaining what *principles* of law best justify the existing legal materials. (I see the textualist view as a sort of conceptually confused version of

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[352] Other discussions that have this feature, but which do not necessarily have aspirations to be fully systematic theories of legal reasoning, include treatments of common law reasoning (Melvin Eisenberg's *The Nature of the Common Law*) and constitutional reasoning (e.g., Philip Bobbit's *Constitutional Fate*).

the Gricean view—it recognizes the indispensability of some notion of "intent," but it denies that such intent really exists. As a result, textualism still advocates for reasoning toward the "intent" of the law in question, but it does so on the basis of an impoverished body of evidence—i.e., the text of the law itself, devoid of its full context.[353])

The next step is to notice that these theories are providing different methodologies for ascertaining the *purpose* or *function* of the law in question. There is a *hidden* unity here, because Griceans talk about the search for "speaker meaning," whereas Dworkin talks of the search for the "principles" that underlie the law. But underlying these, I think, is a single conceptual unity. Once we perceive this deeper unity, we can realize that there is an *abstract* notion of purpose that appears widely in legal reasoning; this idea should play an important role in giving a unified account of legal reasoning.

My main claim, which I call the *furthering functions* view, is that legal reasoning importantly involves the legal reasoner's implicit reliance on a view of, or explicit ascertainment of, the *function* or *purpose* of the particular law in question (I take the terms "function" and "purpose" to be synonymous[354]).

Following John Rawls' discussion of the concept of justice and Ronald Dworkin's discussion of the concept of law,[355] we could describe the omnipresent notion of purpose as the

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[353] And as I editorialized in the previous chapter, this is what allows textualists to sneak in their own politicized assumptions about the "intent" of the law.

[354] The term "purpose" is more often used in legal discussions than the term "function"; but the term "function" is quite often used in philosophical discussions, so I use it as the name for my view, though to help avoid excessive repetition I will use both terms.

[355] The concept of justice for Rawls is the more general idea of trying to strike "a proper balance between competing claims" where "a conception of justice is a more specific idea that refers to a "set of related principles for identifying the relevant considerations which determine this balance." John Rawls, *A Theory of Justice: Original Edition*, p. 10 (1971, Belknap Press).

concept of purpose, and the various precisifications of this general concept (that we find in particular domains and particular legal systems, e.g., the Gricean notion of intent, or the Dworkinian search for "principles") we could refer to as different *conceptions* of purpose. Each conception of purpose is associated with a different methodology for ascertaining the relevant legal purpose. The *concept* of purpose is what is omnipresent in legal reasoning. In particular legal cases, a conception of purpose is deployed to reach a conclusion regarding what the particular *token* purpose of some particular law is—it is *that* specific purpose which is used most concretely to ascertain *what the law is*. (In other words, the broad concept of purpose is omnipresent, without there being some *particular* purpose that law *as such* serves.)

Given the existence of these different strategies, I think we can come to realize that we should not privilege (at the outset, at least) one strategy for ascertaining purpose at the expense of all others. Instead, there could be reason for using a particular strategy in one area of law, but not in another. In other words, the Dworkinian strategy for ascertaining purpose could be legally correct for some parts of one legal system, but not other parts (of even the very same legal system).[356] Each of these different conceptions of purpose—and their associated methodologies — might make sense in some domains but not others.

The rest of this chapter is a further spelling out, with real-life illustrations, of these claims. I will describe this general concept of purpose, and try to show how the main theories of legal reasoning discussed in the previous chapter can be thought of as different *conceptions* (or precifications) of the general concept of purpose (I will even offer further variations on the conceptions in what follows). In keeping with the themes of chapters one and two, the focus is

[356] Dworkin used the word "principles," whereas Moore more straightforwardly referred to them as "purposes," but the theories are structurally almost identical.

on the first *desideratum's* concern with providing a unified explanation of legal reasoning (this *desideratum*, recall, involved trying to explain the patterns of legal inference across the diverse domains of law). But in the course of this chapter's discussion I will also indicate throughout the role that purpose plays in explaining legal disagreement. My discussion of common law reasoning will also provide occasion to illustrate how reference to purpose is what addresses the problem of relevance. The end of this chapter will briefly address the role of purpose in explaining the Janus-faced character of legal reasoning, in explaining the non-monotonic character of legal reasoning, and in explaining how legal reasoning can be justified.

This chapter is structured as follows. Section II lays out the basics of my furthering functions view, but begins by first describing the general idea of *function* or *purpose* and the general features of functional analysis of law. The latter part of Section II describes the extent to which this insight has already been recognized—and the extent to which it hasn't—and tries to explain why this basic insight has been overlooked. Section III spells out more the main claim of the *furthering functions* view by providing a more detailed account of how purpose plays a role in statutory and common law reasoning, and also tries to show how this all can be united within a single structure.

With all of this structure in place, Section IV uses real legal examples to illustrate the role that purpose play in *common law* reasoning. Section V uses real legal examples to illustrate the role that purpose plays in *statutory* reasoning. Section VI (briefly) illustrates the role that purpose plays in *constitutional* reasoning. Section VII presents the possible normative upshot of the furthering functions view just mentioned in this introduction: the idea that a legal system could adopt a *pluralistic* strategy when it comes to adopting conceptions of purpose, and hence

of adopting the methodologies for ascertaining legal purpose. Section VIII summarizes how the furthering functions view fares in light of the eighth *desiderata* laid out in chapter one. Section IX concludes.

II.) **The furthering functions view: the basics**.

a.) **General features of functional analysis and how they apply to law**.

Some philosophical work has been done to understand the concept of law in functionalist terms.[357] Laws can be thought of as tools "created by people to serve certain purposes."[358] As Joseph Singer writes, "Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends."[359]

We can start with the notion of *function* itself: X's function is related to X's effects, "but not all of [X's] consequences or effects count as its functions."[360] A consequence of a heart's pumping blood is that it makes a thumping sound, but this is not part of the heart's function.[361] Only some of X's consequences will count as part of its *purpose*, *aim*, or *goal*, and hence as relevant to its *function*.

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[357] Kenneth Ehrenberg, *The Functions of Law* (Oxford University Press, 2016); Michael Moore, "Law as a Functional Kind," in *Natural Law Theory: Contemporary Essays* (Robert George, ed.) (Clarendon Press, Oxford: 1992); Leslie Green, "The Functions of Law," *Cogito* vol.12, no. 2 (1998): pp. 117-124.

[358] Ehrenberg, *The Functions of Law*, p. 10.

[359] Joseph William Singer, "Legal Realism Now," *California Law Review*, vol. 76 (1988), p. 474.

[360] Green, "The Functions of Law," p. 117.

[361] See Green, "The Functions of Law."

There are two main ways that things in general (at least, things made by people[362])—and laws in particular—can get their function.[363] The first way is from the *intention* of those who created the thing (I will refer to this as the *intended function* or the *originally intended function*).[364] Hammers were intentionally brought into existence for the purpose of driving nails, and so this is their function. Laws are brought into existence for the purpose of bringing about certain states of affairs: in the statutory context this is the *legislative intent* behind the enactment of the law. For example, Obamacare was passed to increase health instance coverage in the United States, and so this is Obamacare's purpose or function. In the constitutional context, the *originally intended function* is often referred to as the *intent of the Framers*.

The other way laws (and other things) can get their function is potentially more spontaneous and unplanned. Sometimes a thing is just *used* in a certain way to do something, particularly in a way that might depart from its originally intended function—I will refer to this as a thing's *use function*.[365] A hammer, which has the (*originally*) *intended* function of driving

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[362] There is a literature in philosophy of science that is concerned with trying to develop a naturalistic account to explain the function of things like organs, body parts, or other biological structures. One possibility for being a source of biological function would be the intentions of the Creator (but many philosophers of science do not want to appeal to this idea). So then there might be a move to the idea that the function is what explains the *origination* or *persistence* of the structure in question. But evolution can sometimes change the function of a structure, or make it lose its function entirely (as with vestigial structures). I do not think we need worry about the role of function in evolutionary biology here. For related discussion, see, e.g, Beth Preston, "Why Is a Wing Like a Spoon? A Pluralist Theory of Function," *The Journal of Philosophy*, vol. 95, pp. 215–54 (1998); Karen Neander, "The Teleological Notion of Function" *Australasian Journal of Philosophy*, vol. 69, No. 4 (1991).

[363] For similar points, see Green, "The Functions of Law."

[364] The terminology here can be varied. Leslie Green calls functions of this type *manifest* functions. (The term "design function" has been used to refer to function that "artifact inventors or designers envision for the artifact when fashioning it," as contrasted with "use functions," which "are the ways in which the artifact is used when people actually employ it." Ehrenberg, *The Functions of Law*, p. 24.

[365] Green, "The Functions of Law." The terminology here can be varied. Ruth Millikan's notion of *proper* function is used "to distinguish it from the ends that certain tokens might actually be used to serve." Ehrenberg, *The Functions of Law*, p. 21.

nails, could be *used* as a doorstop. The same thing can happen with laws: the originally intended function behind some legal provision could change over the course of tens or hundreds of years to have a different use function.

It is notable that these two main ways that a thing can get its function correspond, roughly, to the two kinds of law-making discussed in the previous chapter (*lex scripta* ["written law"] and *lex non scripta* ["unwritten law"]). Written law characteristically gets its function from the intent of the creator of the law—in statutory law it is the *legislative intent*, and in constitutional law it is the *intent of the Framers*. Unwritten law (i.e., law grounded in the practice of the community, where the community is understood either as the community at large, or perhaps more narrowly as the "judicial" community), in contrast, since it need not be the result of a single, law-creating action, characteristically has a *use* function. As Postema writes, common law "is a body of practices, attitudes, conceptions, and patterns of thought, 'handed down by tradition, use, [and] experience'."[366] Common law "rules *exist* just in so far as they are *used* or relied upon."[367]

This divide is not total, however, and we should not exaggerate the differences between these two different kinds of law. Just as an artifact brought into existence for an *originally intended* purpose can come to be *used* for another purpose (as with a hammer, originally intended to drive nails, that comes to be used as a doorstop), so can laws (even *lex scripta*) be brought into existence for one purpose, and come to be used for another purpose (but, again, perhaps only after the passage of many years). A statute that had some original intent might come

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[366] Gerald Postema, *Bentham and the Common Law Tradition* (Oxford University Press: 2019, second edition), p. 4

[367] Postema, *Bentham and the Common Law Tradition*, p. 5.

later to mean something different, as the judicial community comes to *use* that law for some other purpose. This shows how use functions can come to be relevant for statutory interpretation in a way that replaces the relevance of a statute's originally intended function. (Though I have not been able to research and develop this line of thought here, one hypothesis I have as possible future research is that "originalism" and "living constitutionalism" can be understood as a conflict between those who are trying to use the *originally intended* function of constitutional provisions versus those who advocate for a (current) *use* function of the law.)

A law's *use function* could be the result of fully conscious thought and foresight and planning (and in this way could be similar to *originally intended* function), but it need not be. Sometimes human beings engage in a practice without being fully aware of the function of that practice. The use function comes first (metaphysically, at least), and only later may people (including the participants in the practice) be able to reason and figure out what the function is. In the Convention debates over whether the United States Constitution should include an Origination Clause that requires appropriation bills to be initiated in the House of Representatives (the same way that, in English law, "money bills could only be originated in the House of Commons"[368]), John Dickinson argued that we should be willing to rely on bare experience as opposed to reason itself, and so we need not engage in "a full independent inquiry in the institutional and political mechanisms that cause the rule to produce the desired effects":[369]

> Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who

[368] Adrian Vermeule, "The Constitutional Law of Congressional Procedure," *University of Chicago Law Review*, vol. 71, no. 2 (2004), pp. 375-376.

[369] Vermeule, "The Constitutional Law of Congressional Procedure," p. 375.

> are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has give[n] a sanction to them. This is then our guide. And has not experience verified the utility or restraining money bills to the immediate representatives of the people. *Whence the effect may have proceeded he could not say*; whether from the respect with which this privilege inspired the other branches of [Government] to the H[ouse] of Commons, or from the turn of thinking it gave to the people at large with regard to their rights, *but the effect was visible & could not be doubted*.[370]

Sometimes things work without our fully knowing how or why they work. A law can have a use function without our necessarily being able to fully articulate that function (at least initially).

So whereas statutory law tends to be created in a more conscious, top-down fashion, with a legislature issuing commands to the people (and hence the idea of *intended function* is often most relevant here), other forms of law, like common law or customary law, emerge in a more bottom-up way (and hence we need to appeal to something more akin to a *use function* in order to understand it). Here, social ordering occurs in a way that does not involve the intentional lawmaking of a legislature. It also need not involve the formulation of a law with explicit linguistic content. Instead, the law can be unwritten: people (especially judges) just *do* things in certain kinds of situations, and this comes to be known as the law in that domain.

Consider two ways a law could come into existence regarding which side of the road people should drive on. A legislature could pass a statute that says people should drive on the right side of the road. Or, in the absence of such a statute, people could spontaneously organize themselves in such a way that they all drive on the right side of the road. If this norm is enforced the way other legal norms are enforced in that legal system, then it seems right to say it is a law. The *purpose* of these laws could be the same (e.g., coordinating people's behavior on the road to

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[370] Vermeule, "The Constitutional Law of Congressional Procedure," p. 376 (quoting Max Farrand, ed 1, the Records of the Federal Convention of 1787, p. 278 (Yale 1966)).

thereby prevent accidents) even though the manner in which each came into existence (and hence the mode of its current existence) is different.

Social norms can be either written or unwritten. *Laws* can be either written or unwritten. And unwritten laws just as well as written laws can have a *purpose* or *function*. As the *furthering functions* view states, and as I will try to support in what follows, the purpose of (particular) laws in both of these domains plays an important role in legal reasoning.

As a final little bit of persuasive evidence that laws have this functionalist, means-end structure, I will note that in American constitutional law, *all* laws are subject (in accordance with the Equal Protection and Due Process guarantees) to a test for their "rationality." Essentially, there are three different levels of "scrutiny" that laws are subject to, depending on the nature of the classification the law makes, or the class of persons burdened by the law. All laws at the very least are subject to what is called the "rational basis test," with some laws facing a heightened level of scrutiny.[371]

I will not go through all three forms of scrutiny, but here is a sketch of what the rational basis test looks like. This test says that a law is constitutional "if there is a rational relationship between the disparity of treatment [that the law creates] and some legitimate governmental purpose."[372] In accordance with the rational basis test's permissive status, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an

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[371] The other two heightened forms of scrutiny are "intermediate" scrutiny and "strict" scrutiny. To survive strict scrutiny, a law must be "shown to be necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

[372] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

imperfect fit between means and ends."[373] There just needs to be *some* kind of "rational" connection between the law and the state of affairs the law (as a means) is meant to bring about.

The overall structure of the constitutional reasoning here is to think, first, whether the *goal* (or *end*) that the legislature has is a "legitimate" one, and second, whether the *means* that the legislature has selected for achieving its goal bears a sufficiently close connection to the achievement of that goal. Under rational basis review, the legislature need not produce any actual evidence that the law brings about the legitimate goal: "In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[374] Under heightened standards of review, however, such evidence might need to be present.

While this is not supposed to be a knock-down argument that *all* laws have the functionalist nature I have just outlined, it is further persuasive evidence that this an important and fruitful way of thinking about law. I should also note that the sort of means-end reasoning used in constitutional rationality review is not what I am taking to be the core way in which the purpose or function of a law plays a role in legal reasoning (though I do think this sort of constitutional reasoning is interesting and notable). Most centrally, the purpose or function of a law is used to aid us in *construing* or *interpreting what the law is*—either construing some statutory or constitutional language (in the case of written law) or construing the contours of a social practice (in the case of unwritten law). With rational basis review we assess whether a law —*given* that it has such-and-such context—bears a sufficient connection with some legislative

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[373] *Heller*, 509 U.S. at 321.

[374] *FCC v. Beach Communications, Inc*., 508 U.S. 307, 315 (1993).

end. In contrast, I am trying to emphasize the role that having an eye on the end or function of the law in question plays in ascertaining what the (content of the) law is *in the first place*.

To summarize, the general concept of the purpose or function of law is that laws are means which are characteristically meant to bring about a particular end, aim, or goal. Laws can be thought of as tools "created by people to serve certain purposes."[375] And as I will elaborate more in the next section, reference to these particular legal ends plays an important role in legal reasoning.

b.) **The main thesis itself, stated generally: the *furthering functions* view.**

My main claim, which (again) I call the *furthering functions* view, is that legal reasoning importantly involves reference, as an (implicit or explicit) premise, to the purpose or function of the law in question. Legal reasoning thus operates to further the functions of law. In the case of written law, the purpose of the law in question is used to construe or interpret the *text* of the law. In the case of unwritten law (which involves social norms instead of written legal texts), the purpose of the law in question is used to construe or interpret some *social practice*. The role that purpose plays in reasoning toward figuring out the content of the *law* is analogous to the role that context plays in reasoning toward figuring out the *linguistic* content of some utterance. It is well-appreciated in philosophy of language that certain words like indexicals (like "I" or "there") have a meaning that is heavily context-sensitive. But context-sensitivity is not limited to such words. "Indeed, some think that virtually every natural language expression is context-sensitive."[376] I think something analogous to this holds true of law: legal content is "purpose-sensitive."

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[375] Ehrenberg, *The Functions of Law*, p. 10.

[376] Jeff Speaks, "Theories of Meaning," *Stanford Encyclopedia of Philosophy*, available at https://stanford.library.sydney.edu.au/archives/sum2019/entries/meaning/ (2014).

We might say that the purpose of a particular law is part of the ground of that law's content. Legal reasoning involves examining this ground of law in order to ascertain legal content. The place where purpose most obviously plays a role in legal reasoning is in the resolution of ambiguity in statutory language.[377] But non-linguistic social practices also can have their own kind of ambiguity (or lack of determinacy), which can be resolved (or more concretely determined) by figuring out what the purpose of the social practice in question is.

In the statutory domain, there is a very strong concordance between the (Gricean) search for speaker meaning and the (functionalist) search for the intended function: they both point us toward the *legislative intent* behind the passage of the law. (This may be what ultimately explains why I was partial to the Gricean view over the textualist view in chapter two.) But despite the fact that I agree that the Gricean view is a highly plausible account of legal reasoning (at least in the statutory domain), I still want to say that, even in the statutory domain, what most fundamentally explains the relevance of legislative intent is not statutory law's *linguistic* nature, but rather its *functional* nature. As I tried to start pointing out in the previous chapter, I think the functional nature of law is a deeper and more systematic feature of law than its linguistic nature.

Written linguistic formulations of legal norms, in the form of statutes and clauses of the constitution, themselves count as "law," and are always described as such. Additionally, factual scenarios and the judgments that accompany them—what I call "precedents"—are also usually referred to as law, as when we hear phrases referring to "the case law." But this has not always been the case: historically, precedents have been considered *evidence* of the law, rather than the

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[377] "Generally, the interpretive problem arises because the statute is ambiguous." Robert Katzmann, *Judging Statutes*, p. 30 (Oxford University Press, 2014).

law itself.[378] But regardless of whether or not precedents are considered law or evidence of law, they still serve as important premises in legal reasoning.

The *purposes* of laws are also not always referred to as being part of the law itself. The Constitution of the United States of America begins with its own "statement of purpose" of sorts:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

While this statement (known as the "Preamble") is not its own independent source of substantive legal powers for the federal government,[379] the Supreme Court has appealed to it in understanding the Constitution's other provisions.[380] In the statutory context, legislatures often pass statements of purpose that state what the purpose of the law is. This text is voted on and enacted into legal effect just like the rest of the text of the law. In a sense then, it seems right to say that this text is part of the content of statutory law itself. But we still might want to distinguish between the "operative" and "non-operative" portions of the law. But regardless of whether preambles and statements of purpose are part of the law in a literal way, the purposes of law serve as an important class of legal reasons, in the sense that they are indispensable premises in the reasoning directed towards figuring out *what the law is*.

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[378] "The office of the judge is not to make, but publicly to expound and declare, the law: *jus dicere* not *jus dare*. In the latter activity they are the recognized authorities. Judicial opinions, expounding and declaring the law, then, are not themselves law but only 'the principal and most authoritative *evidence*, that can be given, of the existence of such a custom as shall form a part of the common law'." Postema, *Bentham and the Common Law Tradition*, p. 9 (quoting W. Blackstone, *Commentaries on the Laws of England*, Volume 1, p. 69 [Oxford, 1767]).

[379] See *Jacobson v. Mass*, 197 U.S. 11 (1904).

[380] See *Richfield Oil v. State Board*, 329 U.S. 69 (1946); *Boyd v. United States*, 116 U.S. 616 (1885).

Unlike Dworkin, I do not claim that law *as such* has a purpose or function. Dworkin had argued that the point of law is to justify the state's use of force; this ultimately led Dworkin to conclude that morality plays an essential role in legal reasoning. A number of other legal scholars have proposed the idea that law as such has a single overarching purpose or function:

- "the function of law is to organize behavior so that society members can solve coordination problems and cooperate in pursuit of their common good" (John Finnis)[381]
- the function of law is to "achiev[e] a certain kind of order […]through subjecting people's conduct to the guidance of general rules by which they make themselves orient their behavior" (Lon Fuller)[382]
- "The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality" (Scott Shapiro)[383]

Other possible proposed functions for law (either law *as such*, or perhaps just wide swaths of law) include the maintenance of "peace and order,"[384] the resolution of conflicts,[385] and

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[381] Ehrenberg, *The Functions of Law*, p. 182.

[382] Postema critiques Fuller's point here, in that coordination or order brought about by law does not itself need to be moral in character: whether a particular coordination is morally good depends on what the coordination is being used to bring about, for what purpose the coordination is being employed. As Postema writes, "Coordination is intelligible just when it can be seen in service of other intelligible ends, aims, values, or principles." Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, vol. 11 (Enrico Pattaro ed., Springer 2011) p. 531.

[383] Scott Shapiro, *Legality* (Harvard University Press, 2011), p. 213. Shapiro's circumstances of legality are quite similar to David Hume's circumstances of justice. The *circumstances of legality* "obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary." Shapiro 2011, p. 170. Circumstances are *complex* when they "demand significant knowledge and skill, tax cognitive capacities, and consume precious mental resources. Completely improvised attempts at coordination are thus bound to lead participants to distrust their own judgments or those of their fellow group members." Shapiro 2011, p. 133. Circumstances are *contentious* when "there is a threat that, without planning, some participants will choose poorly or worse, act at cross-purposes. The contentiousness of an activity might stem from its complexity, or from the simple fact that the members of the group have different preferences or values." Shapiro 2011, p. 133. Finally, circumstances are *arbitrary* when an activity "generates coordination problems that render the behavior of the other participations difficult, if not impossible, to predict." Shapiro 2011, p. 134.

[384] David Funk, "Major Functions of Law in Modern Society," *Case Western Reserve Law Review*, vol. 23 p. 282 (1972).

[385] Funk, "Major Functions of Law in Modern Society," p. 283.

dispensing society's sense of justice.[386] Philosophers of law have also offered characteristic functions for departments of law, such as contract law and tort law.[387]

On my account, in contrast, the abstract concept of purpose or function permeates most of legal reasoning, but there is not some *single*, particular function that so permeates it. Instead of thinking of functions for law *as such*, or functions for entire departments of law (like contract or tort) we could look at the function of more particular laws, understood in a rather granular fashion, within these departments. For example, the Americans with Disabilities Act of 1990 says that its purpose is, in part, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[388] I am *much* more interested in these lower-level, more granular functions of law, as opposed to the grander functions proposed for law *as such* (or for entire departments of law). It seems to me that it is the more granular, ground-level function that plays the most significant and noticeable role in legal reasoning. This should come out in my discussion of actual cases in later sections of this chapter (e.g., we will look at the role played by the purpose of Obamacare in *King v. Burwell*, and the role played by the purpose of the Federal Rules of Civil Procedure's summary judgment rule in *Celotex*).

Perhaps these functions might bear a family resemblance relationship to one another.[389] It might be interesting to try to map these different granular functions and see if they are related to

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[386] Funk, "Major Functions of Law in Modern Society," pp. 285-287.

[387] See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981); John Gardner, "What is Tort Law For? Part. 1 The Place of Corrective Justice," *Law and Philosophy*, vol. 30, no. 1 (2011), pp. 1-50.

[388] 42 U.S. Code § 12101 (b)(1).

[389] See Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe, trans.) (Wiley-Blackwell, 2009), section 67.

one another in large groupings—or if perhaps they could be subsumed under some single function. But for the purposes of this work I am agnostic about (and in fact feel rather skeptical of) the idea that law (as such) has some essential or singular function.

A twist on another Wittgensteinian image helps illustrate why I nonetheless believe that the concept of (abstract) purpose is significant for the philosophical analysis of legal reasoning. Wittgenstein states, of family-resemblance concepts like "number," that

> we extend our concept of number as in spinning a thread we twist fibre on fibre. And the strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres.[390]

Even if there is not some *single* fiber (or set of fibers that is not merely the distinction of all the fibers that run through it) that runs exhaustively through our whole concept of legal reasoning, I want to say that the *most central* fiber—the thickest one, the one that run longest through its length—is the (abstract) concept of purpose. The ideas of morality and language are also significant fibers in the long-running thread of legal reasoning (and surely there are other important features of legal reasoning that I do not discuss in this dissertation[391]), but they run shorter than the concept of purpose.

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[390] Wittgenstein, *Philosophical Investigations*, s. 67.

[391] "We need not pretend that there is one single true vision or version of legal system; there have been many illuminating accounts of one or another aspects of this idea or family of ideas." Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), p. 3.

c.) **The extent to which this basic insight has already been recognized**.

The idea that purpose (or function) has an important role to play in legal reasoning has been well-recognized—at least when it comes to statutory reasoning.[392] (The idea that purpose plays a role in analogical reasoning in the context of unwritten common law is much less appreciated.[393]) Neil MacCormick recognized the importance of the goals of a legal system in his discussion of the forward-looking, "consequentialist" aspect of legal reasoning, but his

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[392] Hart and Sacks write that "[i]n interpreting a statute a court should:" (1) "Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then"; (2) "Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words[…] a meaning they will not bear[…]" Henry M. Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, edited by William Eskridge, Jr. & Phillip Frickey (Westbury, New York: Foundation Press, 1995), p. 1374. Max Radin wrote "The use of the 'purpose' of the law as a means of interpreting it is duly listed as one of the methods of doing so in every discussion of interpretation. What I should like to insist upon is not that it is legitimate to inquire into the purpose of the statute, but that it is imperative to do so first and principally." Max Radin, "A Short Way with Statutes," *Harvard Law Review*, vol. 56, no. 3 (1942), pp. 388-426, footnote 20, p. 400.

[393] An exception is Hart and Sacks: "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living set forth in the two opening notes. Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless. It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it maybe be on occasion to ascertain it or to agree exactly how it should be phrased." Hart and Sacks, *The Legal Process*, p. 148. Steven Burton also recognizes the importance of purpose in applying the common law: "Without attending to a law's purpose, judicial decisions might be based on any facts that happen to loom largest to a judge at the time." Steven Burton, *An Introduction to Law and Legal Reasoning* (Aspen Publishers 3rd ed.: 2007).

discussion of it provides an at best misleading picture of the role a legal system's "goals" play in legal reasoning.[394]

This idea has been expressed in a wide variety of ways, with moral valences that range from positive, to negative, to neutral. Negatively, it is described as the "evil"[395] or "mischief" a law is meant to address. More positively, a court might refer to the "values" a law aims to achieve, or to its "reason" or "rationale." More neutrally, a court might refer to the "object," "policy," "aim," or "function" of a law. The purpose of a law can even be described in more poetic terms, like the law's "spirit," "soul," or "heart." Here is a collection of representative statements:

- Edmund Plowden (1518-1585): "It is not the words of the law but the internal sense of it that are the law … the letter of the law is the body of the law, but the sense and reason of the law is its soul…"[396]

- Felix Frankfurter: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that

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[394] MacCormick says that the appeal to consequences appears when there are "rival possible interpretations" that we must choose between. MacCormick, *Rhetoric and the Rule of Law*, p. 102. In these situations we "should look at the choice before them in terms of its consequences one way or the other, in relation to the law." Ibid. He elaborates that "[t]here is an analogy, but not an identity, here with 'rule consequentialism' in moral philosophy": "Decisions are not justified in terms of their direct immediate affects on the parties alone (that is when hard cases make bad law), but in terms of an acceptable proposition of law that covers the present case and is therefore available for other like cases (hence satisfying the demand of justice that like cases be treated alike)." *Id*. at p. 103. The main differences between moral rule-consequentialism and the "juridical" consequentialism seem to be that: (1) with juridical consequentialism, the endorsed rule actually becomes operative (at least when it happens in the context of an appellate case); and (2) in juridical consequentialism, the values we use to evaluate the rules are not whatever moral theory tells us are the genuine values, instead, "The values against which it is proper to test juridical consequences are those which the branch of law in question makes relevant" (Rhetoric and the rule of law, p. 114). For further discussion, see Maksymilian Del Mar, "The Forward-Looking Requirement of Formal Justice: Neil MacCormick on Consequential Reasoning," *Jurisprudence*, vol. 6 (2015): pp. 429-450.

[395] Robert Bork, "Legislative Intent and the Policy of the Sherman Act," *The Journal of Law & Economics*, vol. 9 (1966), p. 19.

[396] Peter M. Tiersma, "A Message in a Bottle: Text, Autonomy, and Statutory Interpretation," *Tulane Law Review*, vol. 76, no. 2 (2001), p. 435 (quoting J.H. Baker, *An Introduction to English Legal History* 240 (3d ed 1990).

policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate" […][397]

- Benjamin Cardozo: "However colloquial and uncertain the words had been in the beginning, they had won for themselves finally an acceptance and a definiteness that made them fit to play a part in the legislative process. They came into the statute through an amendment proposed when the bill [] was […] passing through the Senate. […] They came there freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion."[398]

- "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[399]

- "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application."[400]

A discussion of the law would be incomplete without at least one reference to Latin terminology.

The term *ratio legis* ("Reason for the law") is defined as "The policy reason or underlying

purpose for a specific norm, rule, treaty provision, act of legislation, or tribunal decision."[401]

Though this exact term seems to have fallen out of favor, courts understand it to be either

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[397] Felix Frankfurter, "Some Reflections on the Reading of Statutes," *Columbia Law Review*, vol. 47, no. 4 (1947): pp. 527-546, pp. 538-539.

[398] *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 220-221 (1936).

[399] *United States v. Boisdore's Heirs*, 49 U.S. 113 (1850); quoted with approval in *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

[400] *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). See also *Freedman's Sav. & Trust Co. v. Shepherd*, 127 U.S. 494, 506 (1888) ("This question must be answered in the negative; and in so adjudging we do not contravene the letter or the spirit of the statute relating to the assignment of claims upon the United States.").

[401] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2009). *Black's Law Dictionary* defines it as "The reason or purpose for making a law" (11th edition, p. 1514).

intimately related to, or the same thing as, the purpose of the law.[402] This idea makes sense because laws are brought into existence to alleviate some evil or promote some good; this is their rationale (or justification) *and* their purpose.

Former President of the Supreme Court of Israel Aharon Barak has connected many of these words together under the same concept:

> Judges interpret a statute according to the purpose it is designed to achieve. The purpose of a statute is the interests, objectives, values, policy, and social function that the statute is designed to actualize. It is the social change that the statute visits on existing law. It is the *ratio legis*.[403]

Sometimes there are even more extreme statements of this idea. Whereas some of the above statements are mostly clearly read as *normative* claims about what the judge ought to do, or as a statement of what judges *characteristically* or *typically* do, sometimes legal commentators make a stronger, more conceptual claim:

- Karl Llewellyn: "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."[404]
- Aharon Barak: "A piece of legislation with no purpose is a piece of nonsense."[405]
- Lon Fuller (asking rhetorically): "is it really ever possible to interpret a word in a statute without knowing the aim of the statute?"[406]

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[402] The Third Circuit Court of Appeals has written "the Court has looked to the *ratio legis* to see whether the assignment involved was "within the mischief which congress intended to prevent." *Thompson v. Commissioner of Internal Revenue*, 205 F. 2d 73, 76 (Court of Appeals, 3rd Circuit 1953). Sometimes courts refer to the reason of a law, without using the Latin phrase itself. See *United States v. Kirby*, 74 U.S. 482, 487 (1868) ("The reason of the law in such cases should prevail over its letter.").

[403] Aharon Barak, *Purposive Interpretation in Law*, p. 188 (Princeton University Press, 2007).

[404] Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed," *Vanderbilt Law Review*, vol. 3 (1950): p. 400.

[405] Barak, *Purposive Interpretation in Law*, p. 223.

[406] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review*, vol. 71, no. 4 (1958): pp 630-672, p. 664.

I do not feel compelled to adopt these stronger claims. I do not feel committed to the idea that every law is, as a metaphysical matter, some thing that is adopted in order to bring about some state of affairs—and that all laws have to be understood through the functionalist perspective described above.[407] (For example, perhaps some laws are just declarations or assertions that something is the case, or are meant to be *expressive* uses of language that are not meant to be causally efficacious regulations of conduct.[408]) I only claim that laws are systematically and characteristically brought into existence in order to bring about some state of affairs or other, and so this is an important and very widespread feature of legal reasoning (and, further, laws do in fact characteristically bring about some state of affairs or other).

Legislatures also understand the role of purpose when it comes to ascertaining legal meaning. Statutes often "contain a statement of the background or purpose of the legislation"; this can be referred to as a "'preamble,' 'recital,' 'whereas,' or 'findings' clause."[409] The practice of using these to interpret laws goes from the earliest years of the United States[410] back at least to the Middle Ages[411] (and possibly to ancient times).

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[407] Compare: "Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully." Hart and Sacks, *The Legal Process*, p. 122.

[408] *See* Cass Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review*, vol. 144 (1996). Sunstein notes that some debates over law are not related debates about the law's effectiveness to bring about some state of affairs. "Many people who oppose capital punishment would be unlikely to shift their position even if evidence were to show that capital punishment does have a deterrent effect. They are concerned about the expressive content of capital punishment, not about its ineffectiveness as a deterrent (or about other nonexpressive grounds for punishment). And many people who endorse capital punishment would not be much moved by evidence that capital punishment does not deter people from committing crimes. Their primary concern is the symbolic or expressive content of the law, not aggregate murder rates." *Id*. at pp. 2022-2023.

[409] Tiersma, "A Message in a Bottle," p. 451.

[410] *Wilson v Mason*, 5 U.S. (1 Cranch) 45, 76 (1801) ("The preamble of a statute is said to be a key to unlock its meaning.").

[411] Tiersma provides the example of the Statute of Pleading, "originally drafted in Norman French and enacted in 1362." Tiersma, "A Message in a Bottle," p. 451.

d.) **Why the role of (abstract) purpose has gone unappreciated**.

Despite the fact that this basic insight has been appreciated by a number of thinkers, the idea that the purpose/function of the law is a key concept in legal reasoning is far from common knowledge. We had to *tease out* the role of purpose in order to see the role that purpose plays in the other theories of legal reasoning, since these theories focus on other concepts (i.e., *language* and *morality*). A brief survey of prominent legal reference work indicates that the role of purpose or function is not viewed as central to law and legal reasoning.[412] How could it be that a concept that I claim to be so fundamental has been overlooked?

The extremely varied nature of the language just quoted above that judges use when they are trying to describe the process of reasoning they are engaged in provides an initial reason why the general role of purpose has gone under-appreciated. These terms differ in their valence and are pitched at different levels of abstraction. Some use terms that serve admirably as synonyms for purpose (like *goal* or *aim*), while others use more poetic (like *heart* or *spirit*). Yet I think

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[412] *Black's Law Dictionary* includes an entry for "function" but does not connect it to law in general or to legal reasoning, defining it as: "1. Activity that is appropriate to a particular business or profession <a court's function is to administer justice>. 2. Office; duty; the occupation of an office <presidential function>" (11th edition [Thomson Reuters, 2019], p. 815). *Black's Law Dictionary* also contains an entry for "purpose," but, again, does not connect it at all to legal reasoning, and in fact instead says that it especially applies to the law of corporations: "An objective, goal, or end; specif., the business activity that a corporation is chartered to engage in" (11th edition, p. 1493). Finally, *Black's Law Dictionary* does include an entry for "purposive interpretation," but it is listed along with 47 other entries for different kinds of interpretation. See pp. 978-980. ("Purposive interpretation" is defined in *Black's Law Dictionary* as "An interpretation that looks to the 'evil' that the statute is trying to correct" (p. 980).) *Merriam Webster's Dictionary of Law* (Merriam Webster ,2016) includes a similar definition of "purpose" (see p. 395), but, unlike *Black's Law Dictionary*, includes no entry for "purposive interpretation" and no entry for "function" (it should appear, but does not appear, on p. 207). The *Oxford Dictionary of Law* (Oxford University Press, 2015: eighth edition) does not contain entries for "function" or "purpose" (they should appear, but do not appear, on pages 275 and 499, respectively). To its credit, in its long entry for "interpretation (construction)" it does include, as one of the "principal rules of statutory interpretation," that "When an Act aims at curing a defect in the law any ambiguity is to be resolved in such a way as to favour that aim (the mischief rule)" and it continues later in the entry by stating "Ambiguities may occasionally be resolved by referring to external sources; for example, the intention of Parliament in regard to a proposed Act[…]" (p. 335).

under this very varied language lies a single, simple, and powerful (albeit abstract) idea: the state of affairs that the law, as a means, is meant to (or characteristically) bring(s) about.

Additionally, the language that invokes the concept of legislative intent is, strictly speaking, one step removed from the concept of purpose itself. The legislative intent is not *identical* with the purpose; intent (most literally) is a *state of mind*, whereas the purpose or goal of a law refers to the *state of affairs* the law is characteristically meant to bring about. But there is still an intimate connection between the two: the legislative intent grounds or determines the purpose of the law.

A third reason the role of purpose has gone under-appreciated is the explosion of recent interest in (and endorsement of) textualism. First, the way the debate between textualism and competing views is characterized is sometimes glossed as whether it is the "plain" text of the law that governs, or rather it is the purpose of the law that governs (this impression is not helped by the terminology for the views that are contrasted with textualism, like "purposivism"). This makes it seem like there is a debate regarding whether purpose can and should play a role *at all* in legal reasoning.

But, as discussed in chapter two, while some early textualist writers did argue that it is the seemingly a-contextual (and hence a-purposive) "plain meaning" of a statute that governs,[413] textualists now grant that *context* plays an important role in ascertaining the meaning of legal

[413] See David M. Driesen, "Purposeless Construction," *Wake Forest Law Review*, vol. 48, no. 1 (2013): pp. 97-148, pp. 111-112.

text.[414] They further grant that the *purpose* of the law in question is an important feature of context.[415] The rhetorical move that textualists usually try to make here is to speak of the intent of the law or statute *itself*—as opposed to the intent of the *legislature* in passing the law.[416] Textualists will sometimes approvingly use the term "objective intent," in contrast to "subjective intent"—taking "subjective" to denote the inner thoughts of the legislators, and "objective" to denote the public, reasonably ascertainable purpose that can be gleaned from the general meaning of the words contained in a statute.[417] This has created a situation of widespread conceptual confusion, where many people suppose there is serious debate over whether or not the purpose of the law is relevant to legal interpretation.

And in fact, despite their theoretical denials of the existence of legislative intent, actual legal opinions by textualists such as Justice Scalia still make reference to Congressional "intent" in a way that seems hard to square with the skeptical statements found in their academic writings.[418] For example, Scalia rejects proposed interpretations of a law when they have

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[414] "Besides converging in their aspirations to make courts the faithful agents of the legislature, modern or "new" textualists and purposivists concur on another point of central importance: the meaning of the words of a statute, as of other texts, depends on context." Richard H. Fallon Jr., "Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment within Both," *Cornell Law Review*, vol. 99 (2014): p. 687.

415 See Driesen, noting that textualists, like Justice Scalia, "admit[] that context, including statutory purpose, can inform statutory interpretation." Driesen, "Purposeless Construction," p. 120.

[416] "A textualist inquiry makes no direct reference to intent, yet textualists routinely refer to the aims and objectives of laws, terms that implicitly import a notion of intent." Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press: 2012), p. 49.

[417] Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 2018) p. 17. This was discussed at greater length in the previous chapter.

[418] For an excellent discussion of this phenomenon, see Jeffrey Goldsworthy, "Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism.," *Connecticut Law Review*, vol. 52 (2021).

consequences "that no sensible person could have intended," this, in turn, being marshaled as evidence of what Congress intended to do in passing some law.[419]

The true point of disagreement between textualist and non-textualist theories of legal interpretation is about what can properly be consulted as *evidence* of the purpose of the law in question. Textualists routinely look to things like overall statutory structure, or an explicit statement of purpose found in a statute itself to ascertain legal purpose (and even to things outside the "four corners" of a statute, like history itself, to find what is "deeply rooted in history and tradition"[420]). What textualists don't like is looking at statements of legislative history (e.g., floor debate statements, committee reports, etc.) to ascertain a statute's purpose.

It is actually quite striking how similar textualism is even to the "purposivism" of Hart and Sacks. Both agree that legal purpose is relevant to determining legal meaning. Both agree that legal reasoners should only adopt interpretations that are permitted by the text of the law in question.[421] Again, the main point of evidence is about the boundaries of the body of evidence that can be consulted in engaging in this process of reasoning.

Finally, textualists have tried to emphasize the idea that the conventionally-encoded content of the law is what determines its legal meaning. I have argued that this is confused. But I think these sorts of arguments have blinded even the opponents of textualism somewhat to the role played by purpose in legal reasoning.

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[419] *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc*., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring).

[420] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

[421] Hart and Sacks write that interpretation should "not give the words[…] a meaning they will not bear[…]" Hart Sacks, *The Legal* Process, p. 1374.

That was the outline of the further functions view. Now I want to spell out in more detail, and give a little more structure to, this basic idea. The main focus will be the two different modes of laws' existence (*lex scripta* and *lex non scripta*) and the two different modes of legal reasoning that correspond to these. In what follows I characterize these two basic modes of legal reasoning and then unite them in a single structure.

III.) The *furthering functions* view: a precisification (the PRECEDENT INFERENCE THESIS and the LINGUISTIC NORM INFERENCE THESIS).

Legal reasoning, in its reliance on purpose, occurs in two primary modes. First, legal reasoning can proceed on the basis of (canonical) linguistic formulations of legal norms—this type of reasoning is typified in statutory interpretation. Second, legal reasoning can proceed on the basis of factual scenarios and the (legal) judgments that accompany them ("precedents")—this type of reasoning is typified in common law reasoning.

There is a symmetry between canonical linguistic formulations of legal norms, on the one hand, and precedents on the other, in that one can be used to infer the other. Legal purposes serve as a "bridge" between these two notions. This could be expressed in the following two claims:

> PRECEDENT INFERENCE THESIS: precedents can be inferred from (a) canonical linguistic formulations of legal norms; and (b) relevant legal purpose(s).
>
> LINGUISTIC NORM INFERENCE THESIS: linguistic formulations of legal norms can be inferred from (a) precedents (i.e., factual scenarios and legal judgments that accompany them); and (b) relevant legal purpose(s).

Common law reasoning—which involves moving in the direction of the LINGUISTIC NORM INFERENCE THESIS—is distinctive in that there is no canonical linguistic formulation of the relevant legal norm at issue (at least to begin with). Common law reasoning is taken to be a kind

of legal reasoning that is aimed at figuring out the content of unwritten law. Instead of there being a legal norm that takes linguistic form, in the most minimal setting, there is a legal judgment that accompanies some set of facts. Person A will engage in certain behavior, leading to injury to Person B (this is the set of facts, call it "F"). Subsequently, Person B sues Person A. The legal judgment could be a judge declaring that "Person A is liable to Person B for negligence in light of F." This is a *precedent*: a legal judgment made in light of some set of facts. One precedent is used to analogically infer a second precedent, and then another, and another. Each step in this process, each analogical inference, I think is ultimately driven by and grounded in a view regarding what the purpose of the law in that area is.

Eventually, after some number of precedents have been built up, a sort of norm—a common law "rule"—can be inferred, but only from a collection of precedents, again, still with some view as to what the purpose or purposes are of the law in the relevant area. But unlike statutory law, where the linguistic formulation is canonical, any linguistic formulation of a common law legal norm is "defeasible" in some sense (recall, in my discussion of the *law as language view* in chapter two, where I quoted Richard Posner where he wrote, "[t]he concepts of negligence, of consideration, of reliance, are not tied to a particular verbal formulation, but can be restated in whatever words seem clearest in light of current linguistic conventions."[422]).

Statutory reasoning—which moves in the direction of the PRECEDENT INFERENCE THESIS—is distinctive in that the legislature provides canonical linguistic formulations of legal norms in the form of the statutory language. The legislature also frequently provides the legal purpose in the form of a statement of purpose in the statute itself. Or, the purpose of the statute can be found

[422] Richard Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve Law Review*, vol. 37, p. 186 (1986).

in more extrinsic circumstances, such as statements of legislative history or the general social context surrounding the passage of the law (judges might need to engage in further precisification of the statutory purpose, depending on how helpful the legislature's statement of purpose is). Judges then develop precedents that fill out the space of legal reasons on the basis of the legal materials the legislature has passed, thereby more precisely articulating the bounds of the reach of the statute that the legislature has passed.

This process where legal reasoning is employed to more precisely articulate the bounds of general legal language (i.e., where precedents are derived in accordance with the PRECEDENT INFERENCE THESIS) was recognized hundreds of years ago by the Framers of the United States Constitution. James Madison wrote in Federal 37:

> All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment. . . . [N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.[423]

A law is stated in general language ("No vehicles allowed in the park"). From this general language, we can use a view of the purpose of this legal language ("the purpose of the law is the reduce noise in the park") to derive particular precedents that more precisely articulate the bounds of this language ("a riding gas-powered lawnmower is a vehicle for purposes of this

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[423] Katzmann, *Judging Statutes*, p. 30 (quoting *The Federalist* No. 37).

statute"). This can happen again and again with different particular scenarios (a baby carriage, an electric wheelchair, a hoverboard, etc.), each generating a new precedent. This is a basic illustration of the PRECEDENT INFERENCE THESIS in action.

This process of "liquidat[ion] and ascertain[ment] by a series of particular discussions and adjudications"[424] can be done not just with written, statutory law, but it can also be done with unwritten law. The "particular discussions and adjudications" in the context of unwritten law is the process of analogical reasoning from case-to-case, driven in large part by a view of the purpose(s) of the law in question. A *network* of precedents can give a much more precise picture of the content of *lex non scripta* just as well as it can give a more precise picture of the content of *lex scripta*. Legal reasoning involves filling out the space of legal reasons as spelled out in the PRECEDENT INFERENCE THESIS and the LINGUISTIC NORM INFERENCE THESES.

The following is a visualization of this space of legal reasons. Another way to look at my main claim is to see that are three main kinds of legal reasons: (1) precedents, (2) linguistic formulations of legal norms, and (3) (legal) purposes.

[424] Katzmann, *Judging Statutes*, p. 30 (quoting *The Federalist* No. 37).

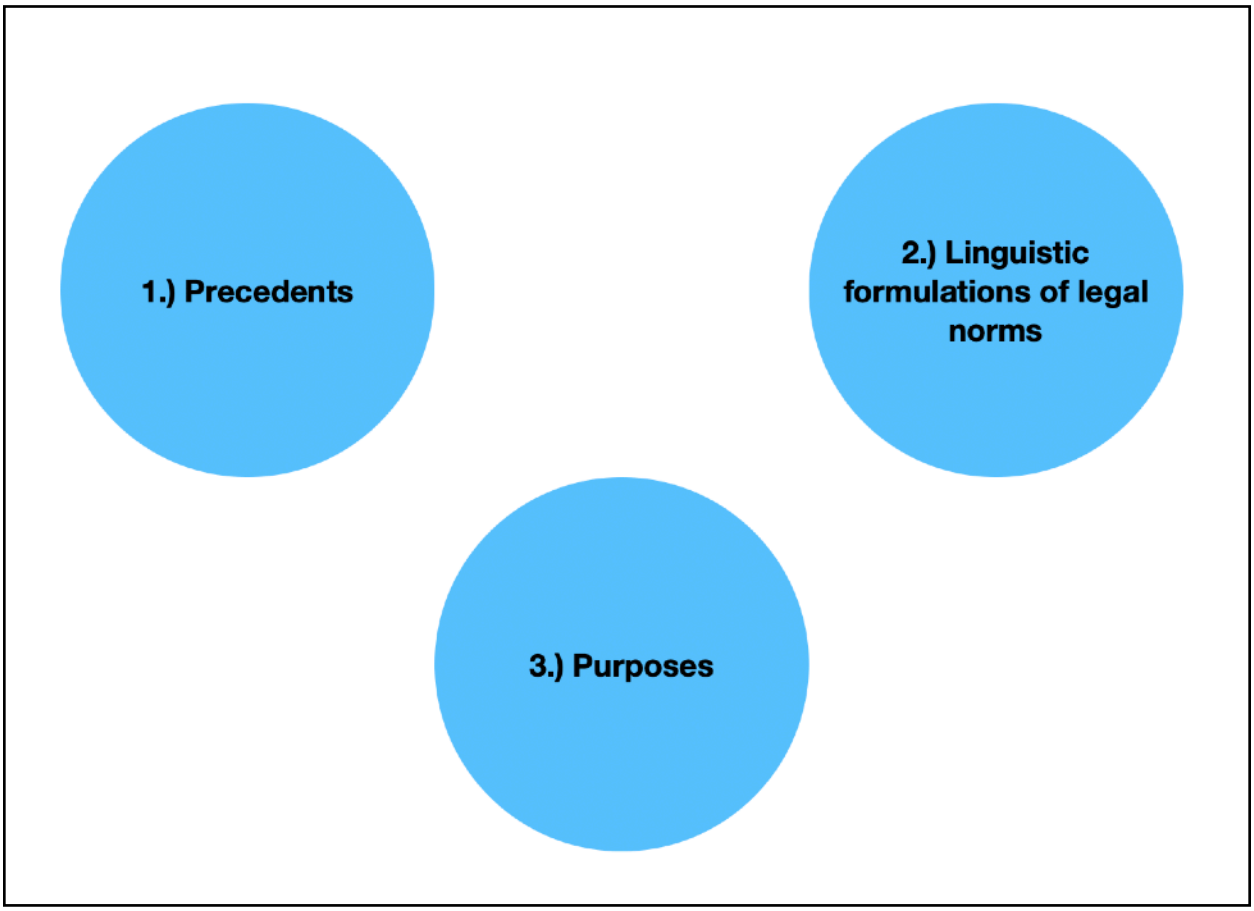

Figure 1: The space of legal reasons.

With the PRECEDENT INFERENCE THESIS, precedents are inferred from the kinds of reasons in the other two circles (i.e., purposes and linguistic formulations of legal norms). With the LINGUISTIC NORM INFERENCE THESIS, linguistic formulations of legal norms can be inferred from the kinds of reasons found in the other two circles (i.e, precedents and purposes). This illustration hopefully helps to show how I think that the two modes of legal reasoning are symmetric, mirror images of one another.

In giving my characterization of the PRECEDENT INFERENCE THESIS and the LINGUISTIC NORM INFERENCE THESIS above, I do not want to exaggerate the differences between common law reasoning and statutory reasoning. If a statute is written in a more "standard-like" way, as

opposed to being written in more precise, "rule-like" language, statutory reasoning can come to resemble constitutional reasoning in that it puts judges in the position of having to figure out, in a very freewheeling way, what the purpose of the law in question is. For example, federal antitrust law, which prohibits "unreasonable restraints of trade," has led to a debate regarding the purpose(s) of federal antitrust law (I briefly discuss the academic side of this debate later in this chapter).

In fact, I think my image of the tripartite space of legal reasons helps to illustrate how reasoning in the domains of statutory law and common law can come to resemble one another. In both situations, once some number of precedents has been built up (and linguistic formulations of legal norms have been inferred from a body of common law precedents), future instances of legal reasoning are going to tend to rely on *all three* kinds of legal reasons. The main difference is that, with statutory (and constitutional) reasoning, the text is non-negotiable, whereas with common law reasoning, the text has much less "force" on its own (but we perhaps should once again not exaggerate this, as common law rules can have their own "gravitational force"). But if the words of a statute (or constitutional provision) are very broad and amorphous (e.g., "due process of law", "equal protection"), then the reasoning in that domain might be indistinguishable from common law reasoning.

I should also not exaggerate the ease with which legal reasoners can ascertain the purpose of the particular law in question. For ease of exposition I have mostly described this process in simple terms, but we cannot just nonchalantly read off the purpose of the law and then add its content to the pre-existing law. When "new legal material[s]" are introduced—statutes included

—"the effect is not like that of adding an item to a list, or a stone to a pile."[425] Rather, the new legal materials are being absorbed into, and understood in light of, the existing law and legal materials of the jurisdiction.

I don't want to say there *cannot* be easy cases, where a statutory ambiguity in some provision is settled plainly by looking to the "Statement of purpose" that the legislature has passed along with the operative provisions of the law. But there will also be difficult cases. One reason for this is that a newly passed law is read in light of the law that already exists in that jurisdiction. For example, if a statute is ambiguous between two meanings, but one of the meanings is identical with the law as it already was, that gives us reason to think the meaning that effects a change in the law is the correct one (similar to how the Gricean norms of conversation lead us to expect that conversational interlocutors will not make pointless contributions to the conversation[426]). There are other complications in the ascertainment of purpose that happen in the statutory context that I will discuss in the section devoted to statutory reasoning (Section V below).

If anything, I should emphasize how difficult it can be to ascertain legal purpose. *Many* different kinds of facts and evidence can be relevant to determining what the purpose of a law is. The *text* of the law itself (including the title of the law, the overall statutory scheme, and, of course, any "Preamble" or "Statement of purpose" passed as part of the text of a law) can be used to determine the purpose of the law. *Historical materials* of many varieties (including

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[425] Gerald Postema, "Law's System: The Necessity of System in Common Law," *The New Zealand Law Review*, no. 1 (2014): pp. 69-106, p. 80.

[426] The Gricean norms require conversational participants, among other things, to only make *informative* and *relevant* contributions. H. P. Grice, "Logic and Conversation," in *Studies in the Way of Words* (Harvard University Press, 1989): pp. 26-28.

historical dictionaries, newspaper articles, and records of legal proceedings, like notes of a constitutional convention) can be consulted to see, for example, what the mischief was that a law was meant to address.[427] *Statements of legislative history* (such as committee reports, signing statements, and statement made during floor debates) can be used to determine legislative purpose. And if we are reasoning in the moralized fashion of Dworkin or Moore in figuring out which purpose is minimally consistent with the text of the law in question (or of the social convention in question), then *morality itself* can be relevant to determining legal purpose. We should notice, though, that it is legal purpose which makes all of these diverse considerations relevant to determining legal content. The role of leal purpose has significant explanatory power in showing how these diverse considerations can become legally relevant.

In what follows, I do some work to illustrate these diverse considerations at play in ascertaining legal purpose in three main legal contexts: common law reasoning, statutory reasoning, and (briefly) constitutional reasoning.

IV.) **Common law reasoning**.

I start first with common law reasoning. Reasoning about unwritten law characteristically involves analogical reasoning. Such reasoning is not guided by an explicit, linguistically formulated legal norm, but rather by what judges have *done* or *decided* in certain kinds of situations. Instead of looking to a legal norm with linguistic content to figure out how one should

[427] The discussion of *District of Columbia v. Heller* in section VI below helps to illustrate the role that historical materials, particularly materials related to the time of the founding, can play in determining legal purpose.

rule on a case, one instead looks to the past situations and decide whether one's present situation is (relevantly) like those past situations.

I illustrate the role of purpose in common law reasoning with two examples below. These examples illustrate the importance of purpose when it comes to both (1) solving the problem of relevance and (2) explaining legal disagreement. This section deals with both the problem of relevance and explaining legal disagreement because they are intimately related with one another. Recall that the problem of relevance deals broadly with the question of what facts in actual or hypothetical cases are relevant to reaching a legal judgment in a particular case. As I illustrate in this section, which facts are relevant to a legal result depends in crucial part on what one judges to be the purpose of the law in question. Accordingly, if two legal reasoners reach a different conclusion (or have different assumptions) regarding the purpose(s) of the law in question, they will come to have a disagreement regarding what the law is in that area. The problem of relevance and the existence of legal disagreement are connected in this way.

a.) **First case sequence: attractive nuisance doctrine**.

For the first example of common law reasoning, consider the following line of cases, which are simplified versions of a real series of cases emerging from California "attractive nuisance" doctrine.[428] Attractive nuisance doctrine emerged as an exception to the general rule in tort law when it comes to landowner liability to trespassers. The general rule is that landowners do not owe a duty of ordinary, reasonable care to trespassers (after all, the trespasser should not be there). Attractive nuisance doctrine makes an exception to this for the case of children who are injured by some kind of "attraction" on the property of the landowner. But not all types of

[428] The line of cases begins with *Barrett v. Southern Pacific Co*., 91 Cal. 296, 27 P. 666 (1891).

attractive conditions were taken to give rise to landowner liability. In this example, there are two different bodies of previous cases, as well as a present case:

- Body of cases #1: in prior cases where a child was injured by a *turntable*,[429] liability was found.
- Body of cases #2: in prior cases where a child was injured in a *natural pond*, liability was not found.
- Present case: a child was injured in a *swimming pool*.

This is an instance where there are two competing lines of cases where, depending on which line of cases is chosen, will result in a different finding of liability: is a swimming pool more like a turntable, or more like a natural pond?

The problem of relevance shows that there are a potentially infinite number of similarities and dissimilarities between these factual scenarios. For example, swimming pools and natural ponds both contain water; only one of them, however, is man-made. To resolve this case we need to figure out what the relevant *purpose* of attractive nuisance doctrine is. Here are some possible candidate purposes for attractive nuisance doctrine:

(i) to protect children from *danger*

(ii) to protect children from *man-made* danger

(iii) to protect children from *unusual dangers that do not merely duplicate the work of nature*

Liability will be found or not found depending on which purpose is selected as the relevant purpose of attractive nuisance doctrine. If the purpose of attractive nuisance doctrine is the first above-listed purpose—(i), to protect children from danger—then this would find liability in all

[429] A railway turntable is a large device for rotating railway cars; they are historically made of metal and wood and weigh tens of thousands of pounds

cases, since natural ponds, swimming pools, and turntables can all be dangerous. This purpose is not consistent with the holding in the natural pond cases, because liability was not found there. Selection of this principle would require overruling that line of cases. The next purpose—(ii), to protect children from man-made dangers—does a much better job of accounting for the previous cases. Turntables are man-made dangers, but natural ponds are not. If this is the correct purpose, then liability in the present case would be found, since swimming pools are man-made. The third and final purpose—(iii), to protect children from *unusual dangers that do not merely duplicate the work of nature*—is also consistent with the two previous groups of cases. Turntables are unusual and very large machines that are nowhere found in nature. Natural ponds, in contrast, basically by definition *do* merely duplicate the work of nature. And swimming pools, even though they are man-made, at least arguably do "merely duplicate the work of nature"—since the danger presented by a natural pond (drowning) is the same kind of danger present with swimming pools (swimming pools might even be safer than natural ponds, as the latter can have hidden dangers not present with ordinary swimming pools).

The first thing to notice at this juncture is how this example illustrates the role that purpose plays when it comes to the problem of relevance and explaining legal disagreement. Different facts come out as relevant depending on what one views as the relevant purpose or objective of attractive nuisance doctrine. If the relevant purpose is (ii) above, then any facts or evidence showing that the danger was made by the landowner instantly become relevant; if, in contrast, the relevant purpose is (iii), then facts showing that the danger was man-made are strictly speaking irrelevant—what matters is whether the danger is of the *sort* found in nature, regardless of whether the thing in question was *created* via natural or artificial processes.

Accordingly, two legal reasoners who come to different conclusions regarding the purpose of this area of law will come to different conclusions about what attractive nuisance doctrine legally requires in this setting. Judgments of *purpose* ground judgments of *relevance*. Disagreements about which facts are relevant (and how they are relevant) in turn can lead to legal disagreement about how a case should be resolved.

The resolution of any disagreement regarding purpose then becomes very important. How are legal disagreements regarding purpose resolved? How is purpose determined in common law cases? For present purposes, consider the following three possible ways for determining legal purpose:

(1) the (actual) moral facts

(2) the (community's) moral *beliefs*

(3) purposes embedded elsewhere in the law

Consider the first strategy, which involves appeal to the (actual) moral facts. This is roughly the *natural law* strategy (of Dworkin and Moore) in that it would examine the candidate purposes for the law in question, and see which one is the most morally justified. (Dworkin would call this the search for the underlying "principles" of the law, where Moore less misleadingly just calls these the law's "purposes.") To illustrate, the first candidate purpose ("to protect children from danger") has something going for it in that danger is something to be avoided, because danger leads to children being harmed, and harm is morally bad. The second purpose ("to protect children from *man-made* danger") is more narrow. What could this narrower purpose have going for it, morally speaking? Well, perhaps it is *unfair* to hold landowners responsible for *all* dangers on their property. Maybe as a matter of moral fairness, we should only hold landowners

responsible for dangers that they have brought into existence. Landowners did not bring natural dangers into existence, and so they should not be responsible for them. This is only an *illustration* of how natural law reasoning might go here—I am not saying this is how the (correct) moral reasoning in this area would play out: whatever the morally best purpose in this area is is the one which prevails.

Now take the second strategy. Instead of appealing directly to the actual moral facts, judges could instead appeal to the community's moral *beliefs*. In the first strategy, the judge just thinks for themselves what fairness actually requires. In the second strategy, the judge will do their best to ascertain what the community would *think* fairness requires. They might do this, for example, by reflecting on their own experiences of the community, or by making inferences from the nature of other social norms. (They could consult polls of people's moral beliefs, but I am not sure I have ever seen this done.)

Notice how this illustrates that, even though the Dworkinian strategy was able to make better sense of common law reasoning than the *law as language* view, it is not natural law theory's appeal to *morality as such* that makes it able to do so. Rather it is the fact that it directs us to figure out the *purpose* of the (common) law in this area—and it directs us adopt a particular "moralized" methodology for doing so. We need not consult morality *itself*—we could employ some other method for identifying the law's purpose (like consulting people's moral *beliefs*).

There is a kind of overlap between the first two strategies. Sometimes one hears it said that the judge should be a kind of mouthpiece or representative of the community. This is ambiguous between the first two strategies. It might mean that the judge should just think for *themselves* what the moral facts require, and, since the judge is a member of the community, this

judgment will be a reflection of the community. Or it might mean that the judge should instead more consciously think of themselves as an *agent* of the community, and instead of actually doing their own moral reasoning to figure out the best purpose for the statute (the way Dworkin or Moore's natural law theory of interpretation would have judges do it), the judge should do their best to produce a judgment that would be most consonant with the community's actual moral beliefs, even if they are morally non-ideal from the judge's considered perspective. Regardless of this similarity, it should be noted that the moral judgments of a judge could depart from that of the community. The judge's beliefs might be "bourgeois" and differ from the beliefs of the common person. There could very well be good reasons that a legal system would want to restrict judges from consulting their own morality while reasoning to figure out what the law is —thus at least attempting to rule out the possibility of judges engaging in Dworkinian reasoning.[430]

Now consider the third strategy. A judge might be able to use a purpose explicitly articulated in some other area of law to resolve the case at hand. For example, perhaps a government spending program has been initiated to educate landowners regarding the protection of wandering children from man-made dangers. The judge might use this as a basis to conclude that the law already has embedded within it the goal of protecting children from man-made

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[430] "There are good reasons why the judge's personal morality does not figure in common law reasoning. To begin with, because courts are largely removed from ordinary political processes the legitimacy of judicial decision making and lawmaking in the common law depends in large part on the employment of a process of reasoning that begins with legal rules and the society's standards rather than the standards that a judge thinks best." Additionally, "in the vast majority of cases in which law becomes important to a private actor, as a practical matter the institution that determines the law for the actor is not a court but a lawyer. It is therefore important that courts use a process of legal reasoning that is replicable by lawyers, so that lawyers involved in planning and dispute settlement can give reliable advice about the law." Melvin Eisenberg, *Legal Reasoning* (Cambridge University Press, 2022), p. 42.

dangers (and has also put the landowner on notice that there is reason to take precautions to protect children from such dangers).

Another thing worth noting about these three strategies for resolving purpose is that the second and third strategies are "positivistic," whereas the first strategy is not. By positivistic I mean that it does not involve any appeal (or attempted appeal) to "actual moral facts." The second and third strategies each involve appeal to certain "social facts," though precisely which social facts are relevant is different between the two strategies. In the second case, the social facts are those regarding the community at large, whereas in the third case, they are more narrowly limited to the domain of the law.

As with the attractive nuisance example, the goal of protecting children from certain kinds of dangers can be furthered without full specification of the content and domain of the legal norm. Only once some number of cases have been decided in a given area, then at *that point* some kind of norm could be formulated on the basis of that body of cases.

Awareness of this role of purpose thus provides another intermediary point between the views that Postema calls particularism and rule-rationalism. Particularism, recall, says that analogical reasoning "is just the movement of practical reason from particular case to particular case" that "is grasped not by applying some general rule or principle to the specific cases in view but rather by some form of immediate insight," be it intuition, feeling, or imagination.[431] Rule-rationalism in contrast says "that reasoning meant to *justify* judgments, decisions, and actions

[431] Gerald Postema, "*A similibus ad similia*: Analogical Thinking in Law" in *Common Law Theory*, D. E. Edlin, ed. (Cambridge University Press, 2007) pp. 102-133, p. 109.

necessarily relies on rules or principles"; there is some "norm or rule that supplies criteria of relevance."[432]

With this focus on purposes, we can say more than just that there is some kind of reliance on bare intuition or feeling (in)justice, but we need not go so far as to say that the judge is relying (even implicitly) on a legal norm or rule that justifies the decision. The full articulation of the legal norm will only happen as a result of a number of particular instances of judges making decisions on the basis of certain facts in furtherance of the purposes or objectives of the legal system. In this attractive nuisance example, a particular decision that finds that some danger merely duplicates the work of nature need not include a full articulation of the definition of what counts as such a danger, nor need it include a full list of such dangers. Much less will it include who counts as a "child" for purposes of attractive nuisance doctrine, or what counts as adequate protection against that kind of danger. The "full" norm can only result from a number of particular instantiations of these individuals fulfillments of the laws purpose(s). This is what I mean by the LINGUISTIC NORM INFERENCE THESIS above: linguistic formulations of legal norms can be inferred from (1) precedents (i.e., factual scenarios and legal judgments that accompany them); and (2) relevant legal purpose(s)). A more complete network of precedents gives a fuller picture of the content of the common law.

Common law analogical reasoning thus allows for a way of furthering the law's purposes without full linguistic formulation of a governing legal norm. Analogical reasoning allows for the incremental extension of the fulfillment of these purposes. Judges are *guided* by purpose without being (fully) rationally determined by them.

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[432] Postema, "*A similibus ad similia*," p. 111.

The function or purpose of law in a given domain can serve as a sort of a "bridge" from thinking about particular cases to the formulation of a legal norm that governs the case, such that the legal reasoner need not *apprehend* the norm in order to recognize the similarity and judge the cases to be analogues. A similar insight I think can be found in Wittgenstein: what counts as a "game" or what counts as "simple" (or what counts as falling under *any* concept for that matter) depends on what our *purpose* is in drawing a particular contrast with that concept.[433] Awareness of these purposes however need not be explicit, and need not be formulable within a theoretical framework. We can draw these comparisons without being able to articulate the full rule that describes these differences. Differing judicial "perceptions" of legal purpose—even if these "perceptions" are merely implicit—will accordingly ground disagreement regarding what the law is.

I cannot fully explore here the possibility that a legal reasoner's apprehension of the purpose may be merely implicit. But the possibility of merely implicit grasp of the functions of law can perhaps explain the role of *craft* and *wisdom* in legal reasoning,[434] and perhaps also goes some way to explaining the importance of the sense of justice in legal reasoning. Judges and lawyers, through repeated exposure to different laws and different cases, gain a sense of the

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[433] See, for example, *Philosophical Investigations*, section 69:

> "How should we explain to someone what a game is?
>
> I imagine that we should describe games to him, and we might add: "This and similar things are called 'games' ". And do we know any more about it ourselves? Is it only other people whom we cannot tell exactly what a game is?
>
> -But this is not ignorance. We do not know the boundaries because none have been drawn. To repeat, we can draw a boundary-for a special purpose. Does it take that to make the concept usable? Not at all! (Except for that special purpose.)"

[434] See Brett Scharffs, "Law as Craft," *Vanderbilt Law Review*, vol. 54 (2001).

varied functions of law within a given jurisdiction, and how law goes about fulfilling those functions, even if they cannot articulate a *theory* of the law's functions or purposes. Judges can *know how*[435] to go on finding similarities and differences in cases without being able to (fully) articulate the principles that provide the basis of or *justify* their going on. Functions give analogies a leg to stand on, without needing to have an explicit theory or principle in mind.

In sum, attention to the functions of law affords a middle way between particularism and rule-rationalism. We avoid particularism because the appeal to function gives us something more contentful than mere intuition or insight; particular cases are united at least in the functions that subsume them. We also avoid the other extreme of rule-rationalism, in that identification of similarity and difference can be done without apprehension of the relevant legal norm, since the judge can rely on legal purpose. (Additionally, perhaps the judge has a merely *partial* or *implicit* grasp of the functions that make those differences and similarities relevant and salient.)

b.) **Second case sequence: acquisition of unowned property**.

Another case sequence I draw from philosophical work on artificial intelligence and legal reasoning.[436] Interestingly, this literature has also zeroed in on the role played by purpose in common law reasoning. This literature is characterized by increasingly sophisticated attempts at creating formal models to capture common law reasoning's appeal to purpose. I am not concerned with the details of these models here, but instead use an important example from that literature to illustrate the general role of purpose in common law reasoning. The following case sequence starts with two precedents cases, followed by the third "present" case.

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[435] Jason Stanley, *Know How* (Oxford: Oxford University Press, 2001); Jason Stanley and Timothy Williamson, "Knowing How," *The Journal of Philosophy*, vol. 98, no. 8 (2001): 411–44.

[436] In what follows I draw from Bench-Capon, T. J. M., "The missing link revisited: The role of teleology in representing legal argument," *Artificial Intelligence and Law*, vol. 10 (2002): pp. 79–94.

In *Pierson v. Post*,[437] a case dealing with the circumstances in which someone acquires a property interest in previously unowned property, the plaintiff was hunting foxes on open land when the defendant intercepted the fox at the last moment (apparently even after the plaintiff had mortally wounded the fox). The court found for the defendant (i.e., found that the defendant rightfully gained legal ownership of the fox), on the grounds that "pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken."

The facts of a second case, *Keeble v. Hickeringall*,[438] are that the plaintiff had set up decoys to lure ducks to a pond on his property (the plaintiff apparently hunted ducks as a trade), when defendant maliciously fired a gun and scared away the ducks before plaintiff could kill the ducks and thereby gain actual possession of them. While one might think *Pierson* also calls for a judgment in favor of the defendant, the court in *Keeble* found for the plaintiff, on the grounds that the plaintiff was pursuing his livelihood, was on his own property, and the defendant acted maliciously.

Now imagine a third case comes along, *Young v. Hitchens*, where "both parties were commercial fisherman. The plaintiff spread a net, some half a mile in length, and began to close it. When the opening was no more than a few dozen feet wide, the defendant sped into the gap, spread his own net and caught the fish which had been trapped by the plaintiff as he closed his net."[439]

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[437] 3 Caines 175 (New York Supreme Court of Judicature, 1805).

[438] 11 East 574; 103 ER 1127 (1707).

[439] Bench-Capon, "The missing link revisited," p. 80.

From a simple analogical perspective, the facts of *Pierson* and *Keeble* considered in isolation are not enough to tell us who should win in this third case. The plaintiff in *Young* can point to the fact that he was pursuing his livelihood (just as the plaintiff was in *Keeble*), whereas the defendant in *Young* can point to the fact that plaintiff had not gained actual possession of the game and that their competition was occurring on open land (as in *Pierson*). What we must turn to are the *purposes* or *aims* of the law in this area.

Pierson involved at least two relevant purposes in this area of law: (1) the law should incentivize people to pursue their livelihood, and (2) the law should further the need for certainty. The *Pierson* majority found that (2) outweighed (1): the need for certainty demands that a clear line be drawn when one acquires ownership in unowned property such as wild game —the clear line being *actual* possession. The dissent, however, disagreed. The dissent thought that there was yet another purpose relevant to this area of law. The dissent argued

> that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "*sub jove frigido*," or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?"[440]

The dissent thus thought the majority was ignoring another purpose of law: the destruction of "wild and noxious beast[s]," one of which is the fox. Drawing the line using actual possession allows "saucy intruders" to swoop in, as the defendant did in this case. According to the dissent,

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[440] *Pierson*, 3 Caines 175, pp. 180-181.

this does not give a proper incentive for people to kill foxes. So the dissent concluded that (1) outweighed (2) in this case.

In *Keeble*, (1) was held to outweigh (2) because the plaintiff's pursuit of his livelihood was more valuable than the defendant's merely malicious behavior. In *Young* (the case involving fisherman and the nets) we could say the value of the plaintiff's activity might have even been "cancelled out" by the fact that the defendant was engaging in the same kind of activity as the plaintiff. So we could fall back on (2) the need for certainty and reach the same result as in *Pierson*.[441]

This case sequences illustrates a few things. First, purpose is essential for a determination of which facts are relevant to a legal judgment. The dissent in *Pierson* thought the purpose of the destruction of "noxious beasts" was a relevant purpose of law—this purpose makes the fact that the potential property was a fox legally relevant for the dissent (a fact seemingly not relevant for the majority); the majority disagreed, and they therefore each made a different judgment of relevance. The case sequence, culminating in *Young*, illustrates how judges sometimes find themselves weighing competing legal purposes in order to reach a legal judgment. And just as with the attractive nuisance doctrine case sequence, differential conclusions regarding purpose will lead to legal disagreement. The legal disagreement in these cases was grounded in disagreement regarding (legal) purpose.

Notice that, even when *weighing* purposes, the legal reasoner need not necessarily engage in the natural law theory type of reasoning where the legal reasoners tries to figure out which purpose is morally weightier than the other. One could instead reason about what the community

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[441] Bench-Capon, "The missing link revisited," p. 87.

of that jurisdiction *believes* is the morally weightiest of the two. It is the appeal to *purpose* (rather than *morality itself*, necessarily) that significantly explains the structure of common law reasoning.

V.) **Statutory reasoning.**

I turn now to the role of purpose in statutory reasoning. One needn't go as far as Lon Fuller's speculation in a classic piece and wonder whether it is "really ever possible to interpret a word in a statute without knowing the aim of the statute"[442] to think that interpreting legal language in light of its (functional) aim is an important feature of legal reasoning. Again, the paradigmatic way in which purpose is ascertained in the statutory context is to look to the legislative intent behind the passage of a law. The actual cases discussed in the rest of this section are meant to serve as illustrations of the role that purpose plays in statutory reasoning; this section focuses on three real examples: (a) *King v. Burwell*; and (b) federal antitrust law; and c) *Celotex*.

Before I get to these three examples, however, I want to spend a few pages discussing some complications (with brief illustrations) that arise in the statutory context concerning the way intent is ascertained—especially the role that background, systemic considerations play here. These considerations add more nuance to the rather simple picture that has been presented so far (and I discuss them now as opposed to later because it is not so obvious that these complications are operative in the three main cases I discuss).

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[442] Fuller, "Positivism and Fidelity to Law," p. 664.

Lon Fuller provided a simple hypothetical example that neatly illustrates the role of purpose in statutory reasoning. Fuller asks the reader to consider a hypothetical statute that provides (I modify Fuller's wording, slightly): that it is a "misdemeanor, punishable by a fine of five dollars, to go to sleep in any railway station."[443] Would someone who momentarily nods off while waiting for a train at 3 AM be in violation of the statute? Read literally, the statute indeed arguably applies to this conduct. But say we learn that the town had a problem of vagrants bringing blankets and pillows to the station and sleeping there overnight, and that the purpose of the statute was to prevent this sort of behavior. Then, we might read "sleep" not as "fall out of consciousness for any amount of time, however short," but instead as "lay down for a night's rest" (an arguably permissible way to understand what one would mean in saying "go to sleep").

Even holding the statutory language fixed, the meaning of the law changes when different purposes are substituted in (the same way that, even holding fixed a body of precedents, the legal meaning changes depending on what one thinks the purpose behind those precedents is).

(As a quick aside, notice how this illustrates the non-monotonic character of legal reasoning. The first premise (or reason) is the statutory language itself.[444] Normally, one might infer *p* as a conclusion from this premise, considered in isolation. But then we add a second premise, which states that the purpose behind the text of the law given in premise one. Now we conclude ~*p*. We need not retract premise one, and yet our conclusion is different. The role that purpose plays in legal reasoning explains at least one of the ways in which legal reasoning is non-monotonic in character.)

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[443] Fuller, "Positivism and Fidelity to Law," p. 664.

[444] Remember that I classified legal reasons into three kinds: precedents, purposes, and linguistic formulations of legal norms. We can then think of the three kinds of legal reasons as the three kinds of premises that are employed in legal argument and inference.

But the ascertainment of purpose cannot necessarily happen so easily—and in such "isolation" from the rest of the legal system—as my discussion of Fuller's hypothetical here would make it seem. Systemic features of the legal system in question can play an important role in determining the legal purpose of a new provision. When "new legal material[s]" are introduced—statutes included—"the effect is not like that of adding an item to a list, or a stone to a pile."[445] Rather, the new legal materials are being absorbed into, and understood in light of, the existing law and legal materials of the jurisdiction. Legal systems have their own system-wide presumptions or "canons" regarding how laws should be interpreted, including how the intent behind a law should be ascertained (these systemic presumptions are akin to how Gricean conversational norms, grounded in the conventions of conversation, are used to interpret what speakers mean). These guiding presumptions represent one important way in which law seeks normative coherence within its system.[446] These legal versions of Gricean norms will be legally valid or not depending on how widespread their acceptance is in the legal system in question.

A famous (or, depending on whom you ask, infamous) instance of this on display is in the *Holy Trinity* case.[447] That case involved a law that prohibited the "importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States" in order "to perform labor or service of any kind in the United States." The Church of the Holy Trinity in New York City contracted with one E. Walpole Warren, "an alien residing in England," for Warren to move to "New York and enter into its service as rector and pastor." In response to the argument that

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[445] Gerald Postema, "Law's System: The Necessity of System in Common Law," *The New Zealand Law Review*, no. 1 (2014): pp. 69-106, p. 80.

[446] See Postema, "Law's System."

[447] *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

performing religious services is "labor or service" within the meaning of the act,[448] the Supreme Court stated

> While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Perhaps the most important reason that the Court cited for refusing to impute an intent on the part of the legislature to reach this sort of conduct is found where the Court said "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true."[449] To support its historical claim, the Court quoted a litany of colonial grants and charters (associated with the likes of Sir Walter Raleigh and William Penn) that used religious language, as well as a number of state constitutional provisions to the same effect (such as the constitutions of Massachusetts in 1780, Mississippi in 1832, and Delaware in 1776). To ascertain legal purpose, legal reasoners often appeal to systemic and historical factors in figuring out legal purpose.

Here is another example. Return to *Riggs v. Palmer* (the case of the murderous heir) that Dworkin used as his first and main example of a theoretical disagreement about law in *Law's Empire*, and which is supposed to illustrate the role of morality in legal reasoning. Dworkin's

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[448] The law even made exceptions for certain kinds of jobs, like "professional actors, artists, lecturers, singers, and domestic servants." *Church of the Holy Trinity*, 143 U.S. at pp. 458-459.

[449] *Church of the Holy Trinity*, 143 U.S. at p. 465.

idea there was that the legal reasoner in that case is engaged in constructive interpretation to figure out which principles best fit and justify the available legal materials. The moral principle that the legal reasoner is supposed to infer as a result of this constructive interpretation is "no one shall profit from their own wrongdoing." This principle was used to conclude that a murderous heir cannot inherit in accordance with the will of the deceased.

But in fact, the main line of reasoning in *Riggs v. Palmer* involved an appeal to legislative intent:

> The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. **But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it**. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation[…][450]

It is only later in the opinion that the court states, as an additional reason for its decision, that "[b]esides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[451] And even then, it is far from obvious that the judges in that case had to engage in moral reasoning to find that principle, as opposed to just looking to the

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[450] *Riggs v. Palmer*, 115 N.Y. 506, 509 (Court of Appeals of New York, 1889) (emphasis added).

[451] *Riggs*, 115 N.Y. at 511.

tradition and conventions of the legal system in question to see that it is a guiding principle of interpretation. That opinion cites numerous other examples, like the case where a "person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon." A legislature that enacts a law against this interpretive background can reasonably be assumed to not have the intention that murderers will financially benefit from their killings (similar to how the conventional Gricean norms of conversation are used to make inferences about what speakers intend in conversation). So whereas seeing Dworkinian reasoning in *Riggs v. Palmer* requires a strained reading of a secondary reason offered in that case, the argument based on legislative intent—where systemic (but arguably non-moral) considerations are at play—is hiding in plain sight.

There is a final complication in the ascertainment of legislative intent (and hence of purpose) that I briefly discuss here, but to which I will not be able to provide a fully satisfactory answer. This complication starts with the fact that a person's intent (and also, a collective agent's intent) can be described at various levels of generality—call this the *generality problem*. The generality problem importantly shows up as a problem for Kantian ethics when it comes to the application of the categorical imperative—particularly the formula of universal law. It looks like an action's permissiveness depends on which level of generality the action is described at.[452] In a typical case, if the action is described very specifically, it is more likely to survive the universality test, whereas if it is described at a higher level of generality, it will not be

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[452] "Let us call the problem of finding a method by which to select two such descriptions and in doing so to arrive at a single relevant composite act description, the *problem of relevant descriptions*. This is a problem which cannot be avoided by any theory which proposes a condition on principles and claims to be action-guiding." Onora O'Neill, *Acting on Principle: An Essay on Kantian Ethics* (Cambridge University Press, 2014), p. 61.

permissible. For example, the maxim "If it is 3:58 PM on a Tuesday and you need some extra money, make a lying promise" might well survive universalization, since lying in such a specific set of circumstances would not undermine the overall institution of promises. But the more general maxim "If you need some extra money, make a lying promise" might not survive universalization (as Kant himself reasons).

Analogously, when a legislature passes a law, its intention could be to: (1) merely pass a law *with this text*; (2) pass this law *so that it can increase health insurance coverage*; (3) pass this law *so that it can maximize the good* (and so on and so forth). At which level of generality does the legislature's intent exist?

While I will not be able to articulate a general solution to this problem here, I do want to argue that this issue should not impel us to make the sort of inference that Laurence Tribe and Michael Dorf make in a 1990 *University of Chicago Law Review* article[453]—and an inference that I think the natural law theorist would be favorable to—which is that these various levels of generality compel us to resort to *morality* to find the correct level of generality: "The selection of a level of generality necessarily involves value choices."[454]

In the case of *individual* behavior, even though we do not have a formula or algorithm for ascertaining the intentions of individuals, we are still not led inexorably into the realm of values

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[453] Laurence Tribe and Michael Dorf, "Levels of Generality in the Definition of Rights," *University of Chicago Law Review*, vol. 57, no. 4 (1990): pp. 1057-1108. Tribe and Dorf are not centrally concerned with intent, but rather with the definition of fundamental constitutional rights—but the fundamental issue is similar: "How should the Court determine if an asserted right is fundamental? Even when prior cases explicitly designate a right in those terms, limitations of space as well as the institutional limitations embodied in Article III's case or controversy requirement will mean that those prior cases have not spelled out the precise con- tours of the right. The question then becomes: *at what level of generality should the Court describe the right previously protected and the right currently claimed*? The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection." *Id*. at p. 1058.

[454] Tribe & Dorf, "Levels of Generality," p. 1058.

and morality in order to figure out what an individual person's intent was in partaking in a particular action. Rather, we look to the person's action, what we know about the person, as well as the context, and in a large range of cases we are able to make inferences, and come to substantial agreement regarding, what that person's intent was in that case. This is not to say that there will be difficult cases and even indeterminacies where the agent themselves might not be sure of the precise nature of their intent (think, perhaps, of a parent who, after issuing a household command that "There is to be no junk food in this house" is confronted with the case of a salad from McDonald's—complete with fried chicken and thick dressing—and is genuinely unsure whether this falls within the boundaries of the "original intent" behind the command). Despite the possibility of these indeterminacies, my point is just that I am not convinced that the legal reasoner must inexorably appeal to morality to figure out what the purpose of a law is.

And in fact, the first more complete example of the role played by purpose in statutory reasoning that I now (finally) get to, I think serves as an illustration of how judges reason towards figuring out legislative intent without having to resort to morality itself.

a.) ***King v. Burwell*: the purpose of Obamacare guides its interpretation.**

Statutory reasoning involves interpreting the legal *means* (the language of the statute itself) in light of the legal *end* (viz., the purpose for which the statute was enacted). Paradigmatically, the purpose of a statute is grounded by the legislative intent. This is why judges repeatedly emphasize the importance of ascertaining legislative intent in legal reasoning. The example of this I discuss here is *King v.* Burwell, one of several landmark Supreme Court

cases that concerned the Affordable Care Act, also known as the "ACA" or "Obamacare."[455] *Burwell* involved an issue created by some statutory language dealing with the availability of tax credits for insurance created on Federal health insurance exchanges.

An insurance exchange is "a market-place that allows people to compare and purchase insurance plans."[456] Under the ACA, health insurance exchanges can be created in one of two ways. First, a State can create its own exchange. If no exchange is created in a given state by that state's government, the ACA says the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State."[457] But the statutory language then creates an issue as to "whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange." As *King v. Burwell* states the problem:

> The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." 26 U. S. C. §36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act."[458]

The majority opinion concluded that, while this provision considered in isolation might seem to be unambiguous, when considered in its larger context, it is shown to be ambiguous. By itself, the plain language seems to indicate that the tax credits are only available for plans purchased on State exchanges. But when put in context, the majority opinion concluded that the credits should be available for plans purchased on federal exchanges as well.

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[455] The first major Supreme Court Case to deal with Obamacare upheld the constitutionality of the individual mandate, but invalidated in part Obamacare's Medicaid expansion. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

[456] *King v. Burwell*, 576 U.S. 473 (2015).

[457] 42 §18041(c)(1).

[458] *Burwell*, slip opinion (Roberts, C.J.), p. 5.

The most important element of context that the Supreme Court pointed to was the purpose of the ACA. The first sentence of the majority opinion in *Burwell* is: "The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." The word "purpose" is not present here, and neither is the phrase "legislative intent." But by referring to what Congress "designed" the law to do, the Supreme Court is relying on the idea that the ACA is a means for bringing about a certain end, namely, a state of affairs where the number of individuals with health insurance is increased. The ACA, as a means of pursuing this end, adopted three "interlocking reforms":

1. a prohibition on insurers "from taking a person's health into account when deciding whether to sell health insurance or how much to charge."
2. an individual mandate that "requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service."
3. the granting of "tax credits to certain people to make insurance more affordable."[459]

The majority opinion reasoned that interpreting the ACA to not allow tax credits for insurance plans purchased on federally-created exchanges would frustrate the purpose of the law: "Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."[460] The Supreme Court quoted an earlier opinion that stated "We cannot interpret federal statutes to negate their own stated purposes."[461] If tax credits were not available in states with federally-created exchanges, then many people in that state would be exempt from the individual mandate, and so only one of the ACA's reforms

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[459] *Burwell*, slip opinion (Roberts, C.J.), p. 1.

[460] *Burwell*, slip opinion (Roberts, C.J.), p. 15.

[461] *Burwell*, slip opinion (Roberts, C.J.), p. 15 (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U. S. 405, 419–420 (1973)).

would apply in that state, a situation which "could well push a State's individual insurance market into a death spiral."[462]

A dissent in the case was fittingly penned by Justice Scalia. Scalia argued the plain meaning of the text of the ACA settled the matter. His jabs at the majority opinion are vintage: "The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.' That is of course quite absurd, and the Court's 21 pages of explanation make it no less so."[463]

But Scalia's "plain language" argument was accompanied by an argument related to statutory purpose. Scalia first points out that "it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element."[464] Scalia's basic argument here is that keeping tax credits away from plans purchased on federal exchanges gives an *incentive* for States to establish their own exchanges: after describing all of the difficult undertakings a State must engage in to create an exchange, Scalia writes "[a] State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange" and therefore "even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act."[465]

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[462] *Burwell*, slip opinion (Roberts, C.J.), p. 17.

[463] *Burwell*, slip opinion (Scalia, J., dissenting), p. 1.

[464] *Burwell*, slip opinion (Scalia, J., dissenting), p. 15.

[465] *Burwell*, slip opinion (Scalia, J., dissenting), p. 16.

So just as in the common law cases discussed in the previous section, we see here (in a statutory case) a majority and a dissent divided by different views of purpose. In the common law cases, purpose was used to construe precedents, whereas in *King v. Burwell*, purpose was used to construe statutory language. Again, these cases illustrate the connection between the problem of relevance and the explanation of legal disagreement. The lynchpin that creates a division between legal reasoners regarding judgment about *what the law is*, are the different views regarding the purpose of the law in question.

b.) **An example of statutory reasoning from academic debates about law: anti-trust**.

In this section, I move the focus from the judiciary to the academy. Statutory language is usually fairly precise (at least when compared to constitutional provisions), and hence normally takes the form of "rules" as opposed to "standards." And given the availability of statements of purpose and legislative history, judges are usually operating within a rather narrow range when it comes to the discretion they have in assessing the content of these laws. However, federal antitrust law gives us an example of a debate where, because the statutory language is so broad (and thus seems to fall on the "standard" side of the spectrum), the resolution of what counts as the purpose of the law in this area proves to be profoundly decisive.

Lina Khan's well-known[466] law review article "Amazon's Antitrust Paradox" re-ignited public debate regarding the content and application of federal antitrust law (and would help catapult Khan to the chair of the Federal Trade Commission in the Biden administration). The article contains two principal lines of argument. One is a mostly factual (as opposed to legal) argument concerning the ways in which Amazon engages in (relatively hidden) anticompetitive

[466] David Streitfeld, "Amazon's Antitrust Antagonist Has a Breakthrough Idea," *The New York Times*, September 7, 2018.

behavior. The second argument is a legal one that concerns how we should understand the purpose of federal antitrust law.

On Khan's account, with the ascendence of the Chicago school of economics, legal scholars such as Robert Bork argued that the purpose of federal antitrust law is the promotion of consumer welfare as best measured by price levels (harm to consumer welfare on this view is best shown "in the form of price increases and output restrictions"[467]). As the Supreme Court stated in 1979, "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[468]

For example, the Clayton Antitrust Act, in relevant part, prohibits any entity from acquiring ownership in a company where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[469] A "goal of antitrust policy is to increase the material welfare of society through the instrument of interfirm rivalry," which is to say "the enhancement of aggregate social wealth (economic efficiency)."[470] This function of antitrust law then informs its interpretation. For example, even though the 1982 General Motors-Toyota joint venture, a temporary "venture to produce a Japanese-type automobile in California…raised antitrust concerns because it involve joint production operations between the two most powerful automotive companies in the world," it was allowed to go forward in part because it "would enable GM to master the techniques of Japanese automotive production" and "reduce GM's cost of production" going forward.[471]

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[467] Lina Khan, "Amazon's Antitrust Paradox," *Yale Law Journal*, vol. 126 (2017), p. 720.

[468] *Reiter v. Sonotone Corp*., 442 U.S. 330, 343 (1979).

[469] 15 U.S.C § 18.

[470] Joseph Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress," *New York University Law Review*, vol. 62 (1987): p. 1023.

[471] Brodley, "The Economic Goals of Antitrust," p. 1022.

Khan argues that this singular focus on consumer welfare ignores other harms of anticompetitive behaviors that were the original objects of this federal legislation. As Khan states in summary form:

> Focusing antitrust exclusively on consumer welfare is a mistake. For one, it betrays legislative intent, which makes clear that Congress passed antitrust laws to safeguard against excessive concentrations of economic power. This vision promotes a variety of aims, including the preservation of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control. Secondly, focusing on consumer welfare disregards the host of other ways that excessive concentration can harm us—enabling firms to squeeze suppliers and producers, endangering system stability (for instance, by allowing companies to become too big to fail), or undermining media diversity, to name a few.[472]

Under Khan's vision of federal antitrust law, the government should intervene even in situations where consumer welfare is not obviously or immediately harmed. For example, if there is a company that gets so large that it raises concerns regarding the *political* power of that corporation, perhaps that corporation might have to be "busted" (or dealt with in some less drastic way)—even if that large corporation does not use its inordinate market position to harm consumers in the form of higher prices.

I have not even scratched the surface of Khan very extensive discussion of the legislative history behind the passage of federal anti-trust law. My point here is not to take sides in this debate over anti-trust law, but instead to use this as a brief illustration of how, even holding fixed the statutory language, when we change our view of the purpose(s) of the legal norm in question, this will consequently chain our view regarding *what the law is*. Disagreement about purpose accordingly grounds disagreement regarding the content of the law, even outside the judicial arena.

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[472] Khan, "Amazon's Antitrust Paradox," p. 743.

c.) ***Celotex*: the purpose of summary judgment guides the interpretation of the Federal Rules of Civil Procedure**.

In *Celotex*, a widow filed a wrongful death suit against Celotex Corporation on the grounds that her decedent husband was exposed to Celotex's asbestos products.[473] The defendant filed for summary judgment, which the trial court denied. The Court of Appeals for the District of Columbia Circuit reversed, holding "that petitioner's summary judgment motion was rendered 'fatally defective' by the fact that petitioner [defendant] 'made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion.'"[474]

Rules 56(c) states a grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Part of the Court of Appeal's basis for holding that a summary judgment motion must include supporting evidence was the language of Rule 56(e),[475] which, on one reading at least, makes it seem there is an affirmative duty to produce evidence in support of a summary judgment motion.

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[473] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This case was brought to my attention again recently in connection with Matt Kotzen's Fall 2022 course in philosophy of law at UNC Chapel Hill.

[474] *Celotex*, 477 U.S. at 323.

[475] This rule, at the relevant time, provided: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Supreme Court disagreed with the Court of Appeals, concluding that, while "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion," such moving party need not "support its motion with affidavits or other similar materials *negating* the opponent's claim." In other words, while the moving party naturally has a responsibility to indicate the basis for its motion, it does not bear the burden of *producing evidence* that tends to disprove the other party's claims.

Crucially, in reasoning towards this conclusion, the Supreme Court stated "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."[476] In other words, a defendant might not have evidence that tends to *negate* a factually unsupported claim, and so if the Court of Appeal's holding were applied, such unsupported claims would survive summary judgment. The Supreme Court's holding furthers the function of summary judgment within the civil litigation system.

VI.) **Constitutional reasoning**.

Even though I have treated statutory law as the exemplar of *lex scripta*, constitutional law is another important kind of law that is characterized by having canonical linguistic formulations of legal norms. In this section I briefly discuss the role that purpose plays in the interpretation of a controversial constitutional provision.

The Second Amendment to the United States Constitution states: *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed*.

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[476] *Celotex*, 477 U.S, at pp. 323-324.

An interesting thing about this tidy little law is that it says in the very provision itself what the *purpose* of this right is (at least in a general sense): it is adopted to bring about "the security of a free State." As such, this example conveniently and concisely illustrates the role that *purpose* plays in legal reasoning.

But because of how broadly this purpose is worded, it is ambiguous between two interpretations. First, the "security of a free State*"* could refer the idea of the security and freedom on the part of the *individual* people within the state (such as the freedom from crime or violence from other citizens). Second, "security of a free State" could mean freedom, not of individuals, but of the State *qua* State government. The "security" then would refer, not to the security of individual citizens, but rather the security of the State government in being free from things like foreign invasion.

How one resolves this functional ambiguity will affect how one thinks the *legal content* of this provision should be understood. If the purpose of the Second Amendment is to ensure freedom for individual people (from "ordinary" crime or violence, for example), the law would arguably permit possession of only those weapons necessary to protect oneself from other individuals—perhaps the purpose of the Second Amendment is to secure an individual right to self-defense. If the right is meant to constitutionally preserve the existence of emergency civilian militias to protect the State from foreign invasion, this legal provision might not incorporate an *individual* right to keep weapons at all, and would instead only create the right of the several States to be able to possess whatever weapons they need for a Militia. These two different

interpretations have both been endorsed by members of the Supreme Court, and this difference marks the split between the majority and the dissent in *District of Columbia v. Heller*.[477]

The majority opinion, penned by Scalia, structures its analysis around the structure of the clause itself: "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose."[478] Because "[l]ogic demands that there be a link between the stated purpose and the command," the majority opinion stated that it was adopting an interpretation of the Second Amendment that was consistent with its purpose.[479] The *Heller* majority held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[480] This is because an examination of history shows the chief purpose of the clause was to help eliminate the possibility of a certain kind of tyranny:

> That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.[481]

The reasoning is that, in order to protect the existence of Militias, individuals have to retain the right to possess weapons. Militias are mustered by calling up individuals to serve, and so it is

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[477] 554 U.S. 570 (2008).

[478] As Scalia elaborates, "Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose." *Heller*, slip opinion (Scalia, J.), p. 3.

[479] *Heller*, slip opinion (Scalia, J.), p. 4.

[480] *Heller*, slip opinion (Scalia, J.), p. 19.

[481] *Heller*, slip opinion (Scalia, J.), p. 25.

individuals who must have the right to possess weapons. And so, to protect the existence of Militias, individuals needs to retain the right to possess firearms (or so the majority reasons).

Buttressing its analysis, the majority argued that "[t]he phrase 'security of a free state' meant 'security of a free polity,' not security of each of the several States as the dissent below argued."[482] In support of this, the majority quoted Joseph Story, who "wrote in his treatise on the Constitution that 'the word 'state' is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community.'"[483]

The Stevens dissent agreed that the purpose of the law was relevant to its interpretation,[484] but disagreed as to what precisely the purpose of that provision was. The Stevens dissent emphasized the idea that the Second Amendment deals with the issue of the relative balance of power between the state and federal governments: "The proper allocation of military power in the new Nation was an issue of central concern for the Framers."[485] Of special importance "was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States."[486] However, alongside these fears of a standing army was the fact that "the Framers recognized the dangers inherent in relying

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[482] *Heller*, slip opinion (Scalia, J.), p. 24.

[483] *Heller*, slip opinion (Scalia, J.), p. 24.

[484] "Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects." *Heller*, slip opinion (Stevens, J., dissenting), p. 5. "The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text." *Heller*, slip opinion (Stevens, J., dissenting), p. 8.

[485] *Heller*, slip opinion (Stevens, J., dissenting), p. 17.

[486] *Heller*, slip opinion (Stevens, J., dissenting), p. 18 (quoting *Perpich* v. *Department of Defense,* 496 U. S. 334, 340 (1990)).

on inadequately trained militia members," such deficiencies being noticeable during the experience of the Revolutionary War.[487]

So initially, a compromise was reached, where "Congress would be authorized to raise and support a national Army and Navy, and also to organize, arm, discipline, and provide for the calling forth of 'the Militia'" but "the States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress."[488] But this initial compromise still left a gap: "While it empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's *dis*armament."[489] Therefore, some kind of "guarantee against such disarmament was needed."[490] Thus, according to the Stevens dissent, the purpose of the Second Amendment was to achieve a certain balance of power between the State and Federal governments, and *not* to prevent the federal government from regulating individual possession of weapons for civilian uses. As Stevens writes, "The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger."[491] As such, "the 'right to keep and bear arms' protects only a right to possess and use firearms in connection with service in a state-organized militia."[492]

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[487] *Heller*, slip opinion (Stevens, J., dissenting), p. 18.

[488] *Heller*, slip opinion (Stevens, J., dissenting), p. 19.

[489] *Heller*, slip opinion (Stevens, J., dissenting), p. 20.

[490] *Heller*, slip opinion (Stevens, J., dissenting), p. 27.

[491] *Heller*, slip opinion (Stevens, J., dissenting), p. 27.

[492] *Heller*, slip opinion (Stevens, J., dissenting), p. 11.

While I have not nearly been able to do full justice to the opinions in *Heller* (which comprise over 140 pages, much of it a rich discussion of constitutional history), I hope this brief discussion has been enough to show that the disagreement in that case was fundamentally grounded in disagreement about the purpose of the Second Amendment: the majority and dissent disagreed over whether the purpose of the Second Amendment is about preserving a balance of power between the national government and *individual citizens* (the view of the Scalia majority opinion) or whether it is about preserving a balance of power between the national government and the state governments.

VII.) **The possibility of pluralism in the ascertainment of purpose**.

If the correct interpretation of the law depends on a correct understanding of the purpose of that law, then, as we have seen, disagreements about the correct interpretation of any particular law are likely to result from disagreement about its purpose. How can we resolve such disagreements? I think the correct answer is that we should look to the relevant interpretive conventions of the legal system in question. This is consistent with what H.L.A. Hart called a *rule of recognition*, which is simply a social rule—a regularity of behavior that has normative force—that is the source of validity for legal norms.

But there is an important version of this answer that I think has been overlooked in the literature on legal interpretation. Existing theories of legal reasoning tend to focus on giving system-wide answers to the question of how legal materials should be interpreted: they advocate a "one size fits all" approach. Ronald Dworkin would apply law as integrity to common law, statutory law, and the constitution. Scott Shapiro's planning theory of legal interpretation takes

the same general structure of Dworkin's argument (with its two-fold separation between the meta-interpretive and interpretive stages), but tries to do everything positivistically, using only "social facts." Textualists apply their methodology to both statutory law and constitutional law.

Against these *monistic* methodological accounts, I want to point out the possibility of methodological *pluralism* in the ascertainment of purpose. This is because the relevant conventions regarding the way purpose is ascertained can be *local* as opposed to *global*.

Considered globally, the prevailing conventions for interpreting the law might not be coherent. But some kinds of incoherence and messiness might actually have their own normative attractiveness.[493] There could be legitimate reasons why the very same legal system might want to interpret legal texts in different areas of law differently.

This has already come out a bit in chapter two's discussion. There are good reasons to recognize legislative supremacy in the area of statutory law. A legal system might want judges to be *totally* faithful to whatever the judge genuinely thinks was the legislature's *actual* purpose behind the law (as opposed to the judge relying on some *other* purpose that the judge believes is morally superior to the actual, legislatively intended purpose, but still sufficiently consistent with the statutory text).

But perhaps a legal system trusts its judges to engage in their own moral reasoning to disambiguate between competing conceptions of purpose in some common law settings. If there is a convention that the law in this area is interpreted in Dworkinian fashion, then that is the correct legal result for that case in that jurisdiction, even if law is not interpreted in Dworkinian fashion in some other domain.

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[493] Sunstein's emphasis of a similar idea, that of local as opposed to global coherence, is an important theme in Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press: 2018, 2nd ed.).

This point is part of why I think the furthering functions view is not subject to the "demandingness" charge against Dworkin's view that I discussed in chapter two. Dworkin's theory requires legal reasoners to (first) engage in a constructive interpretation of the *entire* institutional history of the legal system in question in order to develop a conception of law and theory of legal interpretation, and then (second) to apply that theory of legal interpretation to the legal system in question, which involves the legal materials across *all* legal domains. Dworkin's theory of legal interpretation has the legal reasoner look at the entire legal system and see which set of moral principles, as a whole, provides the best justification of it.

For the most part, I do not think this is how legal reasoning proceeds. Judges do not characteristically engage in constructive interpretations of entire legal systems. Instead, they are most often dealing with discrete legal issues and controversies between particular litigants over granular questions of law.

The furthering functions view is much less demanding in that the correct methodology for legal interpretation is a matter of looking to local (as opposed to global) conventions. A judge can just look to the domain (or perhaps even sub-domain) of statutory law and see how purpose is ascertained in that area. A judge need not, as part of their reasoning, construct the morally best theory of the legal system in question. The judge need not even have a general theory of legal interpretation at all. Instead, the judge can just look to the local conventions that govern the interpretation of the law in the area that is at issue. The *locality* of interpretive conventions makes the furthering functions view less demanding than other theories.

Dworkin recognizes that judges do not regularly interpret entire legal systems, and he does describe the pragmatic reasons that judges have for not engaging in a constructive

interpretation of their legal system every time a new case enters the courtroom. But given Dworkin's theory, any priority of the local that he can countenance can at best be pragmatic or epistemic. As a metaphysical matter, the correct interpretation of the law is one that involves constructing the interpretation that makes the best moral sense of the entire legal system in question.

Here is a somewhat concrete example that, despite its imperfections, might help bring this issue down to Earth a little. Imagine that, in a given legal system, its department of contract law is understood along the lines of Charles Fried's theory, which is to say that the purpose of contract law in that legal system is to implement "the principle that autonomous individuals can choose to impose obligations on themselves by an exercise of free will."[494] In its department of tort law, in contrast, the purpose of tort law is viewed as bringing about an *economically efficient* allocation of the costs of accidents—and so moral norms and obligations are not treated as relevant. This arrangement very well might not survive Dworkinian constructive interpretation. After all, these values are quite different, and it is not clear why one should reign supreme in one area of law but not the other (where else could economic efficiency matter if not in the context of the enforcement of business agreements?).

Nonetheless, I think legal systems generally tolerate these sorts of incoherencies. As Sunstein points out, such incoherent solutions can be the result of the healthy operation of politics—it could b the result of an incompletely theorized agreement. A messy compromise (perhaps even one that amounts to a "checkerboard solution" discussed in the previous chapter) that does not elegantly fit with the rest of the legal system from the perspective of ideal morality

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[494] P. S. Atiyah, "*Contract as Promise: A Theory of Contractual Obligation* by Charles Fried" (book review), *Harvard Law Review*, vol. 95, pp. 509-528 (1981): p. 509.

might be the only one that is workable, given that that is the only meeting of the minds that could be achieved between different factions who disagree about fundamental moral matters: "We will let you prevail in one domain, if you allow us to prevail in another." Compromises are the stuff of everyday politics.

But workability might push us in the opposite direction.[495] The participants of the legal system in question might find that they are no longer able to flourish under the regime I have just described. Accordingly, one of the two values must prevail. Which of these it is that ends up prevailing will be the one that, in the argumentative context that this debate occurs, convinces the legal participants is the weightier one. But what I want to say here is that, in the absence of an agreed-upon convention describing either a methodology for resolving this disagreement, or that perhaps more directly specifies which value is the one that is paramount, this disagreement is more about what the law *ought* to be than about *what it is*. After all, the core of the legislative and law-making function is to select *which* goals or objectives a legal system will achieve, and then to select some means for achieving that goal. *Changing* the goals of a legal system seems to paradigmatically be a law-*making* as opposed to law-*discovering* activity.

VIII.) **The *furthering functions* view evaluated in light of the eight *desiderata*: a summary**.

Here again are the eight *desiderata* from chapter one:

(1) Explaining the patterns of legal inference across *all* (or hopefully at least *many*) of the diverse domains of law.
(2) The Janus-faced character of legal reasoning.
(3) The problem of relevance.
(4) Accounting for the existence of (reasonable) legal disagreement.

[495] Thank you to Gerald Postema for alerting me to this possibility.

(5) Explaining how the characteristic forms of legal inference can be *justified*.
(6) Explaining or accounting for the non-monotonic (i.e., "defeasible") character of legal reasoning.
(7) Explanatory unity.
(8) Simplicity.

Much of the discussion has already explained how some of these *desiderata* are accounted for by the furthering functions view (either implicitly or explicitly). But here in this section I go through, in at least summary form each of the eight *desiderata*.

At the core of the *further functions* view is a single, simple idea (*desideratum* [8]): laws are a *means* for bringing about some *end*, understood principally as some kind of *state of affairs*. The functionalist perspective connects the two ways in which artifacts generally come to have some functions with the two ways laws come to have a function. Laws are either (1) intentionally brought into existence (usually, by legislatures) in order to promote good or eliminate some evil; or (2) laws are just *used* to *do* something, even if there was not some institutionally-defined, canonical moment at which they were intentionally brought into existence. Legal functions are characterized by their multiple-realizability: they can inhere in both written and unwritten laws (i would note this is in keeping with the multiple-realizability of functions in other areas, like philosophy of mind).

Laws are not only adopted as a means for bringing about some end, but laws are also *construed or interpreted in light of* that end. Legal reasoning importantly involves reference to the purpose of the law in question, analogous to the way that someone might reason about the context of an utterance in order to ascertain its linguistic content. Laws are interpreted in a way that harmonizes with and furthers the legal end in view.

The basic concept of function is simple, but it is also supple. Not only does it bifurcate into the two main forms of law, but legal systems can adopt different methodologies for ascertaining purpose, and can also adopt different presumptions and interpretive conventions for ascertaining purpose. We can unite the different conceptions of purpose under the single concept of purpose.

These two general facts (the multiple-realizability of functions and the interpretive pluralism) go quite far in explaining how it is that many different kinds of considerations can be relevant to legal reasoning. References to text, history, social practices, dictionary definitions, and statements legislators make in connection with the passage of a law can all be explained as being part of a concrete attempt to figure out the purpose of the law in question.

Desiderata (1) and (7) are related, and the most notable given the overall structure of this dissertation's argument. In trying to give an explanation of the patterns of inference across the diverse domains of law, the explanation will be more powerful if there is some single thing that is doing the explaining. As Iris Murdoch wrote, "the urge to prove that where we intuit unity there really is unity is a deep emotional motive to philosophy, to art, to thinking itself. Intellect is naturally one-making."[496]

The main theme of this chapter and the previous chapter has been the idea that the furthering functions view satisfies these two desiderata better than the other main views discussed here. This dissertation has set out to give an account of legal reasoning that is as systematic as possible. The concept of purpose plays perhaps the most important role in establishing a unified explanation of the nature of legal reasoning.

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[496] Iris Murdoch, *Metaphysics as a Guide to Morals* (Penguin Press: 1992), p. 1.

The other views surveyed in chapter two came up short on this score. The *law as language view* and *natural law theory* are plausible as accounts of legal reasoning in only one domain of law or other. The law as language view foundered when it came to common law reasoning, and Dworkin's view foundered when it came to statutory reasoning. But something that unites even these theories of legal reasoning, and the legal reasoning that occurs in the various domains and departments of law, is the abstract concept of purpose.

These different theories of legal reasoning, found in the law as language view and natural law theory, can each be viewed as being associated with different *conceptions* of legal purpose, and hence as adopting different methodologies for ascertaining legal purpose. One way of identifying purpose is to identify the end that the law-maker (or the speaker) intended to bring about. Another way to identify purpose is to engage in moral reasoning and figure out which purpose is minimally consistent with the text of the law in question. Both of these methodologies are ways of coming to a conclusion about what the purpose of the law is—such purpose then being used as a basis for the interpretation of the law in question (e.g., in the resolution of ambiguity).

The rest of the *desiderata* are more subservient, and are primarily aimed at trying to show that the purposive nature of legal reasoning is not a trivial feature of it. As discussed in the section on common law reasoning above, *desiderata* 3 and 4 (dealing with the problem of relevance and explaining the existence of legal disagreement) are connected. Judgments of relevance in the context of analogical reasoning are driven by a view about what the purpose of the law in question is. Disagreements regarding purpose accordingly will ground legal disagreements. This was illustrated through the two case sequences described in section V (the

one involving attractive nuisance doctrine and the one involving the acquisition of unowned property).

Even when legal reasoners are interpreting a statute (or a clause of the constitution) and hence are not engaged in analogical reasoning, disagreement regarding purpose still serve as the ground of legal disagreement regarding what the law is. This was illustrated with the statutory examples of Obamacare (in *King v. Burwell*), federal anti-trust law (in the academic debates between individuals like Lina Khan and Robert Bork), and the summary judgment rule in the Federal Rules of Civil Procedure (in *Celotex*). *King v. Burwell*, for example, did not really involve analogical reasoning. But it still involved the construal of statutory text in light of. The perceived legal purpose.

The role of purpose in legal reasoning is also part of what explains the non-monotonic character of legal reasoning (6). Legal purpose is a way of construing or interpreting legal materials like statutes, constitutional provisions, and common law precedents. Hold fixed some statutory language as a premise, and swap out different legal purposes as the further premise, and this will change our view about what conclusion should be drawn (without altering the status of the original statutory language as a genuine premise or legal reason). This is in keeping with my idea that there are three main different kinds of legal reasons.

Attention to the role of purpose in legal reasoning also enables us to articulate a few different ways in which legal reasoning can be justified (5). By interpreting statutes with the legislative end in view, legal reasoning can harmonize the law with, and allow it to further, the functions of the law that the legislature intended it to achieve, thus satisfying what is arguably a

requirement of *legislative supremacy*.[497] And if the state of affairs that the law characteristically brings about as an end is one which is valuable by the lights of morality, then legal reasoning will be *morally* justified as well, insofar as it is part of something that is instrumental to bringing about a morally valuable states of affairs.

Now for the Janus-faced character of legal reasoning (2). This *desideratum* challenged us to articulate what it is that legal reasoners are able to find in law that is then used as the basis for improving it. Dworkin's theory, recall, makes sense of the Janus-face character of legal reasoning by saying that we look "backwards" at the institutional history of the legal system and then finding the principles that provide that morally best *justification* of this history. Because these (moral) principles are then part of the content of the law, the law gets restructured in a way that improves it morally.

Attention to the abstract notion of purpose makes us realize that it is not the role of morality *per se* that explains how law can be improved in a Janus-faced way. The process of reasoning that finds the purposes of a legal system's laws need not be found by engaging in moral reasoning. As we saw, there are a number of different methodologies that can be used to ascertain legal purpose. Regardless of which particular methodology is used (e.g., the moralized methodology of natural law theory, or the non-moralized versions), legal reasoning involves figuring out the purpose of the law in question, and interpreting and applying the law in light of that purpose. If a legal system has in fact adopted morally attractive purposes, then the law can be improved in a Janus-faced way even without judges engaging in any moral reasoning. This is a contingent matter (since some goals of a legal system might not be morally attractive), but it

[497] This argument was described in outline in the previous chapter. See Jeffrey Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," *San Diego Law Review*, vol. 42 (2005).

still shows that there is not an essential connection between the Janus-faced character of legal reasoning and the role of morality in legal reasoning.

There are two other kinds of situations where the law is arguably "working itself pure" in a Janus-faced way: (1) where existing legal rules are applied new circumstances; and (2) with the practice of overruling. With regards to the former, once a network of cases is built up around a written or unwritten legal norm, the legal system is able to achieve great clarity and certainty regarding the contours of the law in that area. This is what Madison was referring to when he said that meaning of a law is "liquidated and ascertained by a series of particular discussions and adjudications." And as I argued in this chapter, when courts are presented with new cases or sets of facts, they look to the function of the law in the relevant areas to see which legal norm should govern the case. As the boundaries of legal norms are made more precise by these repeated adjudications (in accordance with the PRECEDENT INFERENCE THESIS), the law is thereby improved.

With regards to (2), the practice of overruling, I have not been able to spend much time addressing the nature of overruling. But I did indicate, as part of the discussion of the attractive-nuisance doctrine example of common law reasoning, how resort to purpose can be used as a kind of "point of leverage" for overruling individual cases (or bodies of cases) that are inconsistent with the purpose of the law in the relevant area. It might seem that a Dworkinian appeal to a role for morality in legal reasoning is necessary to explain how law can be improved by overruling cases. But again, if the objectives a legal system has adopted are sufficiently morally admirable, the legal reasoning that furthers those goals will improve the law in a Janus-

faced way. Precedents that are inconsistent with the relevant functions of law are overruled—and the "law works itself pure."

IX.) **Conclusion**.

The *furthering functions* view holds that legal reasoning importantly involves figuring out the *function* or *purpose* of the law whose content the legal reasoner is trying to ascertain. The *abstract* concept of purpose is practically omnipresent, but the particular *conceptions* and *strategies* for ascertaining purpose can differ from place to place (the Gricean search for speaker meaning and the natural law theory search for the morally optimal purpose being the two most prominent examples). My account offers the hope only of deepening our understanding of legal reasoning, but also holds out the promise of improving the practice of legal reasoning by recognizing, in pluralistic fashion, the value of these different conceptions of purpose.

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Chapter 4: The concept of legislative intent

I.) **Introduction.**

This chapter discusses the concept of legislative intent. As argued in the previous two chapters, the Gricean search for speaker meaning in the legal context is one conception of the general concept of legal purpose or function: it involves searching for the *legislative intent* in reasoning towards *what the law is*. Reasoning aimed at figuring out what the legislative intent of a law is, and then using that intent to interpret that law, is a core feature of statutory reasoning.

In the past several decades, textualists have issued a number of attacks against this role for legislative intent in legal reasoning. This final chapter is primarily a response to these arguments. While the main argumentative structure of this chapter is accordingly *negative* (in that it is attempting to deflate textualist arguments against legislative intent), there are a few positive aspects to this chapter as well. I will give some positive characterization regarding what the concept of legislative intent is and what sorts of evidence we should be looking for in reasoning aimed at figuring out the content of that intent. I will also give *some* affirmative reason to believe that legislatures really do have intentions: the main point is that legislatures (and other group agents as well) exercise the core functions of agency, such that it makes sense to engage in a rationalization of legislative action and come to a conclusion regarding what the legislature's intent was in engaging in that action.

After a brief discussion of historical background (in section II), section III presents a variety of arguments (metaphysical, epistemological, ethical, pragmatic, and doctrinal arguments) that are skeptical, in a variety of ways, of the concept of legislative intent—in the end focusing on an argument made by political science theorist Kenneth Shepsle that relies on Arrow's impossibility theorem. The remainder of the chapter is a response to these skeptical arguments. Section IV address Shepsle's arguments in particular and finds that they are largely misplaced (though there is a small lesson to be drawn regarding the nature of legislative intent). Section V presents my own general view of legislative intent and argues that all of these skeptical arguments assume an incorrect model of legislative intent. Because modern legislatures are highly structured entities that are fundamentally "egalitarian" in character (in that each legislator has the full authority—in a qualified sense I will describe later—to agree or not to agree any legislative proposal), legislative intent is fully an open matter, in that its ground consists entirely in publicly accessible facts; legislative intent is radically divorced from the private intentions of individual legislators. Section VI concludes.

II.) **The historically important role of legislative intent in legal reasoning and the (comparatively) recent debate over this between textualists and purposivists.**

Unlike the rest of this dissertation which focuses on the law in general, this chapter is focused only on statutory law: the codification of law by legislatures (as opposed, for example, to "judge-made" common law). Laws that are passed by legislatures in response to some problem seem to be paradigmatic instances of laws that have (originally) intended functions: the law is *intended* to address some problem.

The idea that laws should be understood in accordance with the (legislative) intent behind them has a long and deep history. Thomas Hobbes wrote in *Leviathan* that "it is not the letter, but the intendment, or meaning; that is to say, the authentic interpretation of the law (which is the sense of the legislator), in which the nature of the law consisteth." Similarly, Aquinas claimed of laws that judges should "comply not with their letter (their wording) so much as with their maker's intentions."[498] Even the textualist John Manning confesses that within the United States, "[f]or almost its entire history, the Supreme Court has said that the touchstone of statutory interpretation is legislative intent."[499] Justice Reed wrote for a majority of the Supreme Court in 1940 that "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."[500] Similarly, Justice Rehnquist wrote in 1970 that "Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will."[501] Quotations and citations such as this could be produced *ad nauseum*.[502]

And this is true not just at the federal level. For example, a recent North Carolina Supreme Court opinion states:

- "The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment[...] Therefore, we must construe the statute while mindful of the criminal conduct that the legislature intends to prohibit."

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[498] Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012): p. 1.

[499] John Manning, "Inside Congress's Mind," *Columbia Law Review*, vol. 115 (2015): p. 1918.

[500] *United States v. American Trucking Assns., Inc*., 310 U.S. 534, 542 (1940).

[501] *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). These are quoted by Manning, "Textualism and Legislative Intent," supra, at footnote 1, p. 419.

[502] "Statutory interpretation as practiced involves widespread attribution of legislative intent." Ryan Doerfler, "Who Cares How Congress Really Works?" *Duke Law Journal*, vol. 66 (2018), pp. 995-996.

- "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish."[503]

(I will point out in passing the North Carolina Supreme Court's usage of the definite article as opposed to the indefinite article in stating "the" goal of statutory interpretation is quite notable.)

Even Ronald Dworkin (who, as we saw in chapter two, is no advocate of the use of actual legislative intent) states "It is true that in American legal practice, judges constantly refer to the various statements congressman and other legislators make, in committee reports or formal debates, about the purpose of an act."[504] Similar claims apply to the British legal system as well.[505]

But as often happens, the orthodoxy comes under fire. There is a debate in legal philosophy—intensified in the late 20th century with the rise of the "new textualism"[506]—between those who strongly endorse the use of legislative history in ascertaining legislative intent as part of assessing the meaning and application of a statute (*intentionalism* or *purposivism*[507]) and those who are less interested in legislative intent and instead advocate looking at the plain meaning or plain text of a statute in determining its meaning and application

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[503] *State v. Rankin*, 821 SE 2d 787, 792 (North Carolina Supreme Court 2018).

[504] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986): p. 314.

[505] Ekins, *The Nature of Legislative Intent*, pp. 2-3.

[506] John Manning, "What Divides Textualists from Purposivists?", *Columbia Law Review*, vol. 106 (2006): pp. 70-111, p. 73.

[507] Some sources use the terms intentionalism and purposivism interchangeably, but others distinguish them. For simplicity, I will use the term purposivism. (Lawrence Solum writes on his *Legal Theory Lexicon* blog in entry 078: "Theories of Statutory Interpretation and Construction": "The relationship between "intentionalism" and "purposivism" is tricky. Some theorists run these two approaches together, and others use the terminology in different ways. For the purposes of this Lexicon entry, intentionalism is a subjective approach that emphasizes legislative history as guide to the will of the legislature whereas purposivism is an objective approach that focuses on an inquiry into the purposes that an ideal legislature would have had if it had enacted the statute to achieve the public good.")

(*textualism*). As Barbara Levenbook writes, there is "much in the legal and philosophical literature to challenge the plausibility and even the coherence of the claim that there are [] determinate legislative intentions when legislatures are corporate entities."[508]

Puposivists hold that "judges—as Congress's faithful agents—must try to ascertain as accurately as possible what Congress meant by the words it used."[509] Textualism in contrast "is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context."[510] As described in chapter two, textualists are more focused (or, perhaps, *purport* to be more focused) than purposivists on the conventionally-encoded linguistic content of the text of a law.

Purposivists and textualists accordingly differ on the extent to which it is acceptable for judges to look to non-statutory materials, like the legislative history which led to a law's passage, in assessing what the law means and how it should be applied. The legislative history behind a statute, as evidence of *legislative intent*, is thus seen as a ready source for purposivists in assessing the meaning of a law. Textualists, on the other hand, "typically refuse to treat legislative history as 'authoritative' evidence of legislative intent."[511]

One might think that the mere *existence* of textualism as a theory of legal interpretation poses problems for my main claim in this dissertation (that looking to the function or purpose of law is important to understanding the nature of legal reasoning). For if textualism represents a kind of legal reasoning (even if it is not the one that is correct as a normative matter), it would

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[508] Barbara Levenbook, "How a Statute Applies," *Legal Theory*, vol. 12 (2006), pp. 71–112, p. 79.

[509] John Manning, "Textualism and Legislative Intent," *Virginia Law Review*, vol. 91 (2005): p. 419.

[510] Manning, "Textualism and Legislative Intent," 420.

[511] Manning, "Textualism and Legislative Intent," 420.

seem that a theory of the nature of legal reasoning would have to at least countenance it as a methodology that counts in general as a kind of legal reasoning. But, as discussed in chapter two, the disagreement between textualism and purposivism is not as extreme as it first seems, for textualists do not actually think that "legislative intent" is irrelevant to statutory interpretation. Rather the main disagreement seems to be over three things: (1) what it is we *mean* when we talk about "legislative intent"; (2) what can count as legitimate *evidence* of "legislative intent"; and (3) the *circumstances* in which we can depart from the statute's "plain meaning" in order to further legislative intent.

On (1), textualists are willing to talk about "legislative intent," but they say that "the concept of 'legislative intent' is a metaphor that invites interpreters to think about how to attribute a decision to a complex, multiparty body that does not have a mental state."[512] This is Scalia's notion of "objectified intent" discussed in chapter two. Purposivists, in contrast, are much more likely to understand "legislative intent" in a non-metaphorical sense.

On (2), textualists accept the idea that the intent of a law (so long as "intent" is understood in a certain way) is relevant in understanding the meaning of a statute's words. Whereas purposivists are willing to look to legislative history in understanding the meaning of a term, textualists tend to categorically exclude such evidence. As John Manning writes, "when a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose. To be sure, textualists generally forgo reliance on legislative history as an authoritative source of such purposes, but that reaction goes to the reliability and

[512] Manning, "Inside Congress's Mind," p. 1913.

legitimacy of a certain type of evidence of purpose rather than to the use of purpose as such."[513] Instead of legislative history, textualists are willing to look to other parts of the statute itself (like a statement of legislative intent) in ascertaining the meaning of a law.[514]

Finally, on (3), purposivists have a much broader array of circumstances in which they will be willing to look outside the text of the statutory provisions itself for evidence of legislative intent. Textualists say that, if the meaning of the statutory text itself is not ambiguous (at least for a particular case or context), *no* evidence of legislative intent can be admitted to vary that meaning. Purposivists, in contrast, will say that, even if the text of a statute itself (considered in "isolation") appears unambiguous, awareness of legislative intent might alter that seemingly unambiguous meaning.

Despite the fact that the divide between textualism and purposivism is not as wide as it might appear at first, I still feel compelled to respond to the textualist arguments that are inveighed against legislative intent (as well as the arguments of "intent skeptics" more broadly[515]). As we have seen, the functionalist view of law holds that one of the fundamental ways that laws get their function is from the intent behind their creation. Accordingly, I am inclined to the idea that the legislature really is a group agent that actually *does* things (i.e., pass laws), and that it has an *intent* in doing these things. I seek to defend what I think is a common

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[513] Manning, "What Divides Textualists from Purposivists?", p. 84.

[514] Other possible sources of legislative intent for textualists include: "the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment." Manning, "What Divides Textualists from Purposivists?", p. 71).

[515] Ronald Dworkin counts as an important example of someone who is an intent skeptic but not a textualist. This is because Dworkin's theory of legal interpretation, *law as integrity*, does not fall into either the textualist or purposivist camps.

sense idea[516] that groups can do things, and do them intentionally—the conspicuous example of which here is the passing of statutes. The relevance of legislative intent is also part of the Gricean view of legal meaning (one of the conception of the general concept of purpose) that was defended in chapter two. This brings me to defend the concept of legislative intent in this final chapter.

Finally, it could be said that it is a theoretical virtue of a theory that it represents a better "fit," *ceteris paribus*, to the phenomena it is trying to explain. Here, textualism seems to require a re-interpretation of the many statements of judges—when they say they are trying to understand the legislative intent behind the passage of a law—into metaphorical statements. In contrast, if a theory of some domain or practice can be made more consistent with the self-understanding of the participants of that domain or practice, then that theory is, all things being equal, the better for it. So, I am compelled to discuss and respond to arguments against the idea of legislative intent. It is to these arguments I turn in the next section.

III.) **Arguments against legislative intent**.

This section lays out the arguments made against the concept of legislative intent by "intent skeptics," and it proceeds in two main sub-sections. In sub-section "(a.)", I survey the bulk of the arguments put forward by intent skeptics. In sub-section "(b.)", I focus on an influential skeptical argument made by political scientist Kenneth Shepsle.

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[516] Ritchie describes "common sense" as a motivation for Group Realism: "Common sense tells us that there are humans, tables, and trees. Similarly, common sense tells us that there are teams, committees, African Americans, and men. Outside philosophy (and even within philosophy) arguments are not often made for claims that seem obvious." Katherine Ritchie, "The Metaphysics of Social Groups," *Philosophy Compass*, vol. 10, issue 5 (2015): pp. 310–321, p. 313.

a.) **The variety of arguments against legislative intent (metaphysical, epistemological, ethical, pragmatic, doctrinal).**

Arguments against the use of legislative intent in legal interpretation take a variety of forms; there are what we can call (1) metaphysical arguments, (2) epistemological arguments, (3) ethical arguments, (4) pragmatic arguments, and (5) doctrinal legal arguments. These arguments appear throughout the literature, and sometimes in ways that seem to run the arguments together (especially the metaphysical and epistemological arguments).

Because they get into material that I think would take us too far afield, I will only briefly mention the pragmatic arguments (4) and doctrinal legal arguments (5). My category of "pragmatic arguments" I use somewhat as a "catchall" to include miscellaneous and rather contingent reasons that using legislative intent in statutory interpretation could be disfavored. For example, one worry is that "[g]iven the volume and diversity of available legislative history, textualists fear that its use gives judges too much discretion to push their own preferred outcomes."[517] The argument is that there could be so many materials that in some sense relate to the "legislative intent" that judges could use them to reach just about any conclusion—even contradictory conclusions.[518] Another pragmatic concern that some judges articulate says that a judge's appeal to legislative history gives an *incentive* to lawmakers to do an end-run around lawmaking: "legislators have the ability to salt the legislative record with their preferred outcomes in the expectation that judges and administrators will treat those signals as reliable

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[517] Manning, "Inside Congress's Mind," p. 1925.

[518] Perhaps one can see why a full treatment of this sort of objection cannot be done here. Figuring out whether there is such a volume and variety of these legislative materials that judges lack practical constraint would itself involve a very systematic view of legislative history.

indicia of *Congress's* decision."[519] But if judges could rein in their temptations to pursue their own preferred outcomes, or if judicial opinion citations to legislative history actually did not incentivize legislators to "salt" the record with language they could not get into the actual bill, then these pragmatic arguments would not be compelling.

There are also doctrinal legal arguments. These arguments say that textualism is required as a matter of the legal doctrine of a particular jurisdiction. For example, American textualists point to the constitutional requirements of bicameralism and presentment[520] to argue that anything other than the text of a law itself (that is to say, anything that has not been passed by Congress and presented to the President for signature) cannot be used to determine the law's meaning.[521] Because the only legislative "work product" that counts as *law* is that which satisfies Article I of the Constitution, consideration of other legislative output or material would be unconstitutional.[522]

Again, I will not address the pragmatic and doctrinal legal arguments here. But notice that these arguments appeal to rather contingent matters, insofar as, for example, whether legislative materials are so diverse as to be unable to constrain judges in their reasoning, or whether a particular legal system's constitution prohibits the use of legislative history, could vary

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[519] Manning, "Inside Congress's Mind," p. 1926.

[520] Bicameralism means laws must pass both the House of Representatives and the Senate; presentment means all laws must be presented to the President for signature (while a bill can become law without being signed by the President, as in the case of a veto override, it still must have at least been *presented* to the President for signature or veto). See Article I, Section 7.

[521] See, e.g., Manning, "Inside Congress's Mind," pp. 1915-1926.

[522] Waldron articulates a similar argument, but the normative basis of the argument is from considerations related to the concept of democracy, rather than constitutional law: "But it is only the text that has been voted on, and it is only relative to that text that we can talk about a majority view." Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999): p. 141.

from jurisdiction to jurisdiction, or from one time to another. The deeper and more fundamental concern is with what I call the metaphysical (1), epistemological (2), and ethical arguments (3), which attempt to make a deeper attack at the idea of legislative intent.[523]

The most basic version of a metaphysical argument I can think of would be a general skepticism of the idea of group agents at all. On this view, there cannot such a thing as legislative intent, because there is no such thing as group agents or group intents *anywhere*, and so *ipso facto* there is no such thing as legislative intent. If one is sufficiently individualist about the ontology of social entities, it is unlikely that one would acknowledge the existence of group agents in anything other than a metaphorical sense. This bedrock metaphysical skepticism might be at work where, for example, Judge Frank Easterbrook writes "Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."[524]

Another metaphysical argument is found with Ronald Dworkin, whose argument has proven influential. Jeremy Waldron has written that the philosophical "idea of appealing beyond the statutory text to independent evidence of what particular legislators are thought to have intended has been subject to such powerful criticisms, most notably by Ronald Dworkin, that one is surprised to find it appearing again in anything other than a trivial form in respectable jurisprudence."[525] Dworkin's (and Waldron's) arguments against legislative intent presuppose a particular kind of theory as to how group intentions could be formed. The theory assumed by

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[523] I cannot rule out the possibility that doctrinal features of a particular legal system could rule out the possibility of appealing to the kind of "intent" I defend in this chapter.

[524] Frank Easterbrook, "Statutes' Domains," *University of Chicago Law Review*, vol. 50 (1983): p. 547.

[525] Waldron, *Law and Disagreement*, p. 119.

these arguments is that the legislative intent somehow would have to be the sum or aggregation of the intents of the individual legislators. One of Dworkin's arguments here seems to be that there is no non-arbitrary way of aggregating the intentions of individual legislators—because there are many possible aggregation procedures. In *Law's Empire*, Dworkin employs a series of rhetorical questions to illustrate the futility of selecting a procedure to metaphysically aggregate the intentions of individual legislators, because such a choice would be merely stipulative:

> Should he [i.e., the interpreter] use a "majority intention" approach, so that the institutional intention is that of whichever group, if any, would have been large enough to pass the statute if that group alone has voted for it? Or a "plurality" intention scheme, so that the opinion of the largest of the three groups would count as the opinion of the legislature even if the other two groups, taken together, were much larger? Or some "representative intention" approach, which supposes a mythical average or representative legislator whose opinion comes closes to those of most legislators, though identical to none of them? If the last, how is this mythical average legislator to be constructed?[526]

Dworkin's point seems to be that there is no non-arbitrary way to aggregate the intentions of the individual legislators; any selection of a particular aggregation procedure would essentially be *ad hoc*. Relatedly, Dworkin elsewhere writes of the related constitutional idea of the "intent of the framers," that it is not "some complex psychological fact locked in history waiting to be winkled out from old pamphlets and letters and proceedings. But this is a serious common mistake, because there is no such thing as the intention of the Framers waiting to be discovered, *even in*

[526] Dworkin, *Law's Empire*, pp. 320-321.

principle. There is only some such thing waiting to be invented."[527] Dworkin's ultimate argument is that we, as interpreters of the statute, are inexorably led to look for the principles of political morality that would best justify the passage of a statute with the text in question, rather than looking for the actual intent behind the passage of a statute at hand.

Another kind of argument that I include as a metaphysical argument leaves open the *possibility* that there could be such a thing as legislative intent (in other words, there could be an intent "in principle"), but then argues that such an intent is highly unlikely, if ever, to actually be present. These arguments assume that some particular aggregation procedure could be singled out as the correct one, but goes on to argue that the conditions that would ground a group intention are highly unlikely (if ever) to actually occur. Because the legislators differ from one another in their mental states, such a sum, however it is conceived, is highly unlikely to result in any coherent or recognizable intention. For example, legal scholar Max Radin writes in a classic *Harvard Law Review* article that "[t]he chances that of several hundred [legislators] each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small."[528] Radin's idea—that the group intent would have to be a sum or overlapping aggregation of the intentions of individual legislators—is a common assumption in skeptical arguments.

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[527] Ronald Dworkin, *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press, 1985): p. 41 (emphasis added). Kyritsis states that this "metaphysical" understanding of Dworkin's intent skepticism is perhaps inferior to one that emphasizes a more "moral" motivation: "there is a different way of understanding Dworkin's scepticism. On this alternative reading, his scepticism is underpinned by the following general philosophical conviction: legal obligations are a species of moral obligation. Therefore, they do not exist unless there is a moral justification of the right sort for them. Their content is determined by the principles of political morality that best fit and justify past political history. Political history includes legislative decisions. So legislative decisions are meant to constrain the selection of moral principles." Dimitrios Kyritsis, "Intending to Legislate" *Modern Law Review*, vol. 78, issue 1 (2015).

[528] Max Radin, "Statutory Interpretation," *Harvard Law Review*, Vol. 43, No. 6 (1930), pp. 863-885, p. 870.

Next are arguments that are more epistemological in character. Even if there were such a thing as legislative intent, these arguments say it is not easy—and perhaps impossible—to know what that intent is. Most of these epistemological arguments assume a version of the summative/ aggregative model. Max Radin exemplifies this way of thinking in the following passage from the same *Harvard Law Review* article:

> Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of [legislators], and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply. It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.[529]

Or, as Eskridge and Frickey write:

> It is hard enough to work out a theory for ascertaining the "intent" of individuals in tort and criminal law. To talk about the "intent" of the legislature, as that term is normally used, multiplies these difficulties, because we must ascribe an intention not only to individuals, but to a sizeable group of individuals—indeed, to two different groups of people (the House and the Senate) whose views we only know from the historical record. The historical record almost never reveals why each legislator voted for (or against) a proposed law, and political science scholarship teaches that legislators vote for bills out of many unknowable motives, including logrolling, loyalty or deference to party and committee, desire not to alienate blocks of voters, and pure matters of conscience.[530]

Ethical arguments offer a separate kind of reasons against the use of legislative intent in legal interpretation, but their force seemingly depends on the success of the epistemological arguments. Scalia writes:

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[529] Radin, "Statutory Interpretation," pp. 870–871.

[530] William N. Eskridge, Jr. & Philip P. Frickey, "Statutory Interpretation as Practical Reasoning," *Stanford Law Review*, vol. 42 (1990): p. 326 (citation omitted). Here is another from Easterbrook: "Few of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how 535 disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them." Easterbrook, "Statutes' Domains," p. 551.

> It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to be one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.[531]

I call this an ethical argument because of Scalia's invocation of the concepts of *democracy* and *fairness*. But the force of this argument is tied to the epistemological arguments, in that the epistemological argument holds that it would be (very) hard to figure out the content of legislative intent. And because it would be difficult to figure out legislative intent, this is akin to trying to read laws written high up on pillars.

We might even extrapolate a "conceptual" argument from what Scalia says here. Law as a concept implies an actual or attempted effort to governs which is to say, to guide conduct. But law can guide conduct only when it is known (or at least knowable). So an attempt to interpret the content of law by looking to (hidden) legislative intent is, in a sense, not to look for *law* at all.

I will argue that the metaphysical, epistemological, and ethical arguments surveyed above make incorrect assumptions about legislative (group) agency. But this will have to wait until section IV, as I wish to look, in the remainder of section II, in detail at an argument advanced by Harvard University political scientist Kenneth Shepsle. Shepsle's argument also makes the same incorrect assumptions about group agency, but there are details to the argument that compel me to treat it separately.

Eskridge and Frickey's line of thought (quote above) that appeals to "political science scholarship" and the "many unknowable motives" is more thoroughly developed in a paper by

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[531] Antonin Scalia, *A Matter of Interpretation* (Princeton University Press: 2018): p. 17.

Shepsle called "Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron."[532] I focus on Shepsle's paper because I take it as the most complete of these sorts of arguments[533] and it has also proven to be influential.[534]

b.) **Shepsle's skeptical argument**.[535]

Kenneth Shepsle argues that Arrow's impossibility theorem shows that legislative intent "is a two-word contradiction."[536] His claims on this matter are quite strong:

> Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning. To claim otherwise is to entertain a myth (the existence of a Rousseauian great law giver) or commit a fallacy (the false personification of a collectivity).[537]

Shepsle's Arrow-based argument has found friends in high places. A recent federal appellate opinion, after noting that *Chevron* (an important Supreme Court opinion that deals with defense to agency interpretations of statutes) "says that we should infer from any statutory ambiguity Congress's "intent" to "delegate" its "legislative authority" to the executive to make

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[532] Kenneth Shepsle, "Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron," *International Review of Law and Economics*, vol. 12 (1992): pp. 239-256. Shepsle's 1992 argument is restated in his 2010 textbook *Analyzing Politics*.

[533] For example, after Easterbrook states "Because legislatures comprise many members, they do not have 'intents' or 'designs,'[…]" Easterbrook writes "This follows from the discoveries of public choice theory. Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice." Easterbrook, "Statutes' Domains," p. 547 (citing, in part, Kenneth Arrow, *Social Choice and Individual Values* (2d ed. 1963)). But Shepsle's argument is the most complete argument I have encountered that relies on Arrow's theorem to argue against the concept of legislative intent. Ekins' *The Nature of Legislative Intent*, chapter 2, also treats Shepsle's 1992 argument as representative of the Arrow-type worry, see Ekins 2012, pp. 40-46.

[534] For example, Shepsle's 1992 piece and Easterbrook's 1983 discussion of Arrow are both cited with approval at Manning 2003, p. 2412 and Manning 2006, n 12, p. 74; Easterbrook's 1983 discussion of Arrow is cited with approval in Manning, "Inside Congress's Mind," p. 1918; Shepsle's 1992 piece is cited with approval in Adler 2000, n 86, p. 1390. An August 1, 2022 search on Google Scholar reveals that Shepsle's paper has been cited 701 times.

[535] I would put Shepsle's argument in the "metaphysical" category in the schema of skeptical arguments surveyed above.

[536] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 239.

[537] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 239.

"reasonable" policy choices," states that "Trying to infer the intentions of an institution composed of 535 members is a notoriously doubtful business under the best of circumstances."[538] This opinion was authored by Neil Gorsuch, and was published about five months before his nomination by Donald Trump to be an Associate Justice to fill the seat vacated by Antonin Scalia—another of our intent skeptics.

Arrow's impossibility theorem, for Shepsle, "establishes that several reasonable desiderata for collective choice procedures are incompatible. In the context of majority rule voting, this theorem implies that it is not possible to guarantee that a majority rule process will yield coherent choices."[539] Instead of a coherent choice, there will be an intransitive group ordering and so there will be no "collectively 'best' alternative."[540] Consequently, if some outcome is reached in spite of the intransitive group preferences, "the final outcomes may be arbitrary (for example, a function of group fatigue) or determined by specific institutional features of decisionmaking (for example, rules governing the order of voting on motions)."[541]

In light of the possibility of passing laws in the setting of a legislative cycle, Shepsle makes two claims about a majority that passes a law:

1. "one majority prevailed, but there were clearly others that could have, except for 'other factors' (unknown, and possibly unknowable)"

2. "the winning majority consists of many legislators; their respective reasons for voting against the status quo may well be as varied as their number"[542]

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[538] *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 42 (10th Circuit, 2016).

[539] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 241.

[540] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 241.

[541] Shepsle, "Congress Is a 'They,' Not an 'It'," pp. 241-242.

[542] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

"The first claim should raise some doubts about the normative status of any particular victor."[543] Because there are many possible majorities, and a path with a finite number of steps can be created between any two points on the chart above, it is very possible that the resulting majority which prevailed was only able to do so as a result of "idiosyncratic, structural, procedural, and strategic factors, which are at best tenuously related to normative principles embraced by democratic theorists and philosophers."[544] These features of the "institutional matrix" may be unintended consequences of legislative procedure, or may be the result of conscious agenda-setting by key institutional actors with an eye to bringing about a particular result. Regardless of whether the result was the consequence of intended or unintended manipulation, Arrow's impossibility theorem shows that it is quite likely that there were other majorities that could have prevailed were it not for the highly contingent features of the actual procedure used to reach the final result.

Of the second claim (which relates to the many varied reasons for legislators voting a certain way), Shepsle writes that it "adds an independent indictment to reading much, either substantively or normatively, into a winning policy."[545] Not only are there many possible majorities, but within any given majority, the reasons for which the legislators vote for some law are very diverse: "their respective reasons for voting against the status quo may well be as varied

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[543] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

[544] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

[545] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

as their number."[546] As such, it is not that there is a legislative intent; rather, there are "many *legislators*' intents."[547] In other words, "Congress is a 'they,' not an 'it'."[548] For example,

> Legislator A may have voted for an amendment that ultimately became part of the winning policy because he favored the "plain meaning" of the text. Legislator B, on the other hand, may have voted for it because he thought (incorrectly as it turned out) that the amendment would undermine support for the final bill or draw a presidential veto, thereby allowing the status quo ante to survive. Finally, Legislators C, D, and E may have supported the amendment, disinterestedly, as a reasonable compromise among competing interests. To ask, in this circumstance, what Congress "intended" is to invite a non sequitur.[549]

(Compare this quote from Shepsle with where Max Radin writes that the external act of voting is an "extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply."[550]) And when there are many majorities and one happens to win, or when many different legislators vote for some law for a variety of reasons, "we may be able to provide positive explanations of these results, but rarely will we also be able to provide normative justifications."[551]

Because of the existence of these cycles, the nature of committee-rule often plays a role in explaining what bill ultimately passes. For example, by being able to have its version of a bill considered late in the deliberative process, a committee "has the advantage of remaining on the

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[546] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

[547] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

[548] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 244.

[549] Shepsle, "Congress Is a 'They,' Not an 'It'," pp. 244-245.

[550] Radin, "Statutory Interpretation," pp. 870–871.

[551] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 242.

sidelines, so to speak, while disputes among various contenders to it are resolved."[552] Or perhaps, by being moved very early on in the motion process, the committee bill's "very presence has a discouraging effect on other motions. In short, the 'first proposed/last disposed' quality of the committee bill [] confers on it some decided advantages and thus confers on the agenda setters disproportionate influence over final legislative results."[553] Committees operating under closed-rule regimes[554] have additional power in that they have great discretion to essentially choose any bill so long as some legislative majority prefers the bill to the status quo, even if a stronger majority would have preferred some other bill to the status quo (a bill which is not voted on because of the closed nature of the committee). Finally, a committee's activities are disproportionately influenced by the chair of the committee, a position "determined not by election but rather by the practice of *seniority*."[555] In sum, all of these features of committees attenuate the "relationship between the content of legislation and the preferences of majorities"; "the capacity of a bill to enjoy the normative gloss of majoritarianism is likewise diminished."[556]

Shepsle combines the normative problems created by idiosyncratic procedures and agenda-setting (what I take to be the source of Shepsle's first worry above) with the problem related to the varied reasons legislators may have for voting the way they do. When a legislator expresses a preference for a bill by voting for it, it is not clear from this act alone what it means to say she prefers the bill to the status quo:

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[552] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 245.

[553] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 245.

[554] A closed-rule regime is where additional amendments are not permitted. Shepsle, "Congress Is a 'They,' Not an 'It'," p. 246.

[555] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 246.

[556] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 246.

> She may be expressing an idiosyncratic personal taste, a more considered value judgment (often referred to as an ideology), a reflection of the desires of particular constituents (for example, those among the folks back home that are attentive to and interested in the issue at hand), a reflection of the wishes of majorities back home in the district, a consideration given to those who have contributed to her welfare (campaign contributions, endorsements, bribes, speaking fees, etc.), or some complex mix of all these factors.[557]

But additionally, because the "complex of procedures only briefly referred to above induces a *game of strategy* among legislators," the vote for a bill may itself be a purely strategic move, one which "may reflect neither tastes nor ideology nor constituency concern nor interest group indulgence, but rather a strategic calculus."[558] "Votes are not accompanied with explanations, and, even if they were, it is not clear that anyone should give them any credence."[559]

In sum, Shepsle thinks we know very little about legislative intent after a law is passed:

> We know that one majority in each chamber has revealed a "preference" for the bill over x^0 [the status quo]. We do not know why, and it is likely that each legislator has a mix of different reasons. We do not know how majorities feel about choices with which they were never confronted (one of the results of agenda control). That is, we have only a limited capacity to distinguish between what legislators want and what various procedural elements have foreordained. Finally, a naive look at final passage, even with the additional assistance of committee reports, a transcript of debate in each chamber, and other manifestations of legislative history, does not permit us to differentiate the "will of the majority" from the machinations, both ex ante and ex post, of agenda setters. *All of these interpretive difficulties flow from the content of the Arrow theorem*.[560]

Shepsle concludes from all this that the concept of legislative intent "has no meaning": "Individual intents, even if they are unambiguous, do not add up like vectors. That is the content of Arrow."[561]

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[557] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 248.

[558] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 248.

[559] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 248.

[560] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 248 (emphasis added). I would note that Shepsle seems to have slipped here from the metaphysical worry to an epistemological one.

[561] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 249.

I think it is worth pointing out that there is another version this Arrow-based worry that strikes more at the heart of democracy itself and reaches much deeper than any problem with employing the concept of legislative intent in interpreting statutes. Instead of thinking about the voting profile of the *legislature*, we would look at the voting profile of the *electorate*. Citizen voters might have intransitive preferences the same way that legislative voters have intransitive preferences. If Shepsle is correct that this shows that we cannot speak of the intent or "will" of the legislative, then it seems also that we cannot say that some voting procedure spits out the true "will" or "intent" of the citizen electorate. And if this is true, then what authority does the resulting law have over the polity?

This bigger issue, the problem for democracy itself, is at the center of discussion in William Riker's *Liberalism Against Populism*.[562] For Riker, Arrow's impossibility theorem shows that the results of democratic procedures are in some sense not meaningful. As Riker concludes after a discussion of the theorem, "so long as a society preserves democratic institutions, its members can expect that some of their social choices will be unordered or inconsistent. And when this is true, no meaningful choice can be made."[563] This "forces us to doubt that the content of 'social welfare' or the 'public interest' can ever be discovered by amalgamating individual value judgments."[564]

Riker thinks this shows that the *liberal* conception of democracy is superior to the *populist* conception of democracy. Under the populist conception, "[w]hat the people, as a corporate entity, want ought to be social policy," and "[t]he people are free when their wishes are

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[562] William Riker, *Liberalism Against Populism* (W. H. Freeman & Co. 1982).

[563] Riker, *Liberalism Against Populism*, p. 136.

[564] Riker, *Liberalism Against Populism*, p. 137.

law."[565] Under the liberal conception, the only thing that is required is to make it so that the people can throw rulers out of power when the people think their rights are being violated. Liberalism "simply requires regular elections that sometimes lead to the rejection of rulers."[566] So as long as we get our chance to "throw the bums out", the value of democracy on the liberal conception is preserved.

Arrow's impossibility theorem, Riker thinks, throws the populist conception into serious doubt because there is no single thing which the people, "as a corporate entity, want" to be law. Since there is no true "popular will," social decisions do not mean anything, and therefore the populist conception is not a justified view of the role of democracy. But "[s]ince social decision are not, in liberal theory, required to mean anything, liberals can cheerfully acknowledge that elections do not necessarily or even usually reveal popular will."[567]

Riker's skepticism of the "popular will" is analogous to Shepsle's skepticism of "legislative intent." The source of skepticism in both cases is also the same: Arrow's impossibility theorem. The difference is that Shepsle is focusing on Arrow's theorem in the context of lawmakers voting for potential bills to become law, whereas Riker is thinking about citizens voting for potential candidates for office. (The existence of these two "levels," which exists with representative but not direct, democracies, shows that there is even a kind of iterated series of Arrow worries. Condorcet cycles could show up for citizens voting for candidates, and again with candidates voting for policies.) But I am only focused here on the legislative level, not the citizen voting level.

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[565] Riker, *Liberalism Against Populism*, p. 238).

[566] Riker, *Liberalism Against Populism*, p. 248).

[567] Riker, *Liberalism Against Populism*, p. 244.

IV.) **Discussion and appraisal of Shepsle's arguments**.

My response to the skeptical arguments surveyed in the previous section proceeds in two main parts. First, here in section III, I respond to Shepsle's argument in particular. While Sheple's arguments overall are wrong-headed, his arguments do show that, in figuring out what legislative intent is, we cannot use a naive version of a counterfactual test. But concerns based on Arrow's impossibility theorem do not render the concept of legislative intent incoherent, nor even render the concept not useful in legal reasoning.

Then, in the second part of my response to the skeptical arguments (found in section IV), I argue that all of these skeptical arguments assume an incorrect model of group agency. The skeptical (textualist) arguments assume a wrong-headed model of group agency on which the possibly unexpressed private intentions of the individual persons are somehow aggregated into a whole. Instead, I hold that legislative intent is grounded in publicly ascertainable facts. The mistake that the intent skeptics make is that, while their general assumptions about group agency might hold for some groups, it does not hold for legislative groups. Legislative agency has certain features which render skeptical critiques of it moot.

My response to Shepsle's argument in particular proceeds in two main parts. First, I argue (here, in sub-section "a") that Shepsle's worries do not all arise from Arrow's impossibility theorem. Rather, there are a few different things going on here, where only one of these worries strictly speaking arises from Arrow's theorem. Then, in sub-section "b", I argue that Arrow's impossibility theorem does not defeat the coherence of legislative intent. It still makes perfect

sense to speak of the intention of the legislature even in the actual presence of intransitive legislative preferences.

a.) **Getting clear about the true source of Shepsle's worries**.

It is not clear that the problems Shepsle identifies all flow from Arrow's impossibility theorem. That theorem says that, for any aggregation procedure that satisfies four requirements (universal domain, Pareto optimality, independence of irrelevant alternatives, and non-dictatorship[568]), there is going to be the possibility, despite the fact that the individual preferences are transitive and complete, that the group preferences will be intransitive (that is, that they will contain a Condorcet cycle).

It is not obvious at first why the mere *possibility* of intransitive group preferences should make us think the *concept* of legislative intent is *incoherent*. Arrow's theorem does not say that it is *guaranteed* that group preferences will be intransitive if the voting procedure satisfies the three requirements, but instead only that there is a likelihood of intransitive preferences, the likelihood increasing at the limit with the number of voters and the number of alternatives.

Imagine a group of five voters who are identical with one another in their preference-ordering and identical even with regards to the reasons for which they set their orderings (we can even make the voters atom-for-atom replicas of one another if we like). Let us then say that the voters use pairwise majority voting to select a single winner from among the alternatives. Even

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[568] *Universal domain* means that "the social welfare function [] can handle any combination of any individual preferences at all"; *Pareto optimality* requires the social welfare function "to respect unanimous strict preferences"; *Non-dictatorship* means there are no dictators, where "When a dictator strictly prefers one thing to another, the society always does as well"; and independence of irrelevant alternatives means that when comparing the social ranking of say, items A and B, a different voting profile that only changes the ranking of some third "irrelevant" item (call it C) that does not disturb the relative rankings of A and B cannot change the social preference regarding A and B. Michael Morreau, "Arrow's Theorem," *Stanford Encyclopedia of Philosophy* (2019), available at https://plato.stanford.edu/entries/arrows-theorem/).

under the strictest version of a summative conception of group agency, the group preference will be fixed perfectly by the individual preferences, since all individuals have the same preferences.

In this case of pure unanimity, it does not look like there are any problems for saying what the group's preference is, even on a summative/aggregative conception. Assume further that the facts about the voter preferences are public information. Because the psychology of the voters is identical and public, there is not even an epistemological problem in ascertaining what the group's intent is in selecting its choice, since the content of the group intent will be identical with the content of each individual's intent. Even though these voters are using a procedure that is covered by Arrow's Impossibility Theorem, there seems to be no issue whatsoever in ascertaining the intent of this group (even given the assumptions that Shepsle makes about what has to be satisfied for a group to have an intent). So the problems Shepsle identifies with legislative intent cannot flow from Arrow's impossibility theorem *alone*.

Rather the point has to be something like that there is a strong or significant likelihood of the presence of Condorcet cycles. As the number of voters and the number of alternatives increases, the probability of Condorcet cycles approaches 100% at the limit. And because in the case of a real democracy, we are in a multi-dimensional voting situation with many voters and alternatives, there is a very high likelihood of cycles. Because of the existence of these cycles, we cannot say that any single majority expresses the "true" intent of the majority.

Further, the conclusion of the argument cannot be that the concept of legislative intent is "internally inconsistent" and "self-contradictory," because even in cases where we are using a voting procedure covered by Arrow's impossibility theorem, there can be situations (like the case of unanimity above) where it is very natural to talk about what the group of voters (legislature or

otherwise) intended. So the strongest conclusion can make (at this juncture at least) has to be, not that the concept of legislative intent is incoherent, but rather that the range of cases where it seems appropriate to say that there is a legislative intent is smaller than the range of cases one might think originally think.

The next thing I would like to point out is that the problem that Shepsle identifies in his second claim ("the winning majority consists of many legislators; their respective reasons for voting against the status quo may well be as varied as their number"[569]) is not peculiar to voting procedures subject to the possibility of intransitive group preferences, and hence its source is not with Arrow's impossibility theorem.

Consider again some of the possible reasons for which a legislator could vote for a law that Shepsle surveys: (1) because he favored the "plain meaning" of the text; (2) "because he thought (incorrectly as it turned out) that the amendment would undermine support for the final bill or draw a presidential veto, thereby allowing the status quo ante to survive"; (3) because they saw it "as a reasonable compromise among competing interests";[570] (4) because of "an idiosyncratic personal taste"; (5) "a more considered value judgment (often referred to as an ideology)"; (6) "a reflection of the desires of particular constituents (for example, those among the folks back home that are attentive to and interested in the issue at hand)"; (7) "a reflection of the wishes of majorities back home in the district"; (8) "a consideration given to those who have contributed to her welfare (campaign contributions, endorsements, bribes, speaking fees, etc.)"; (9) "or some complex mix of all these factors."[571] It was because of these many different reasons

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[569] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 249.

[570] Shepsle, "Congress Is a 'They,' Not an 'It'," pp. 244-245.

[571] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 248.

that a legislator could vote for a law that Shepsle thought we could only speak of the many legislators' intents, and not legislative intent.

But these manifold reasons could just as well be reasons for a voter to express a certain set of preferences in a Borda count—a voting procedure that is not covered by Arrow's impossibility theorem. In a Borda count people rank their choices and then points are assigned for a given choice with higher choices getting more points. The candidate with the most points wins. Borda counts are not covered by Arrow's impossibility theorem because they violate independence of irrelevant alternatives.[572] One person's ranking could be because of idiosyncratic personal tastes, while another's reflects (a perhaps poorly calculated) attempt at strategy, while another's could be an attempt to reflect the majority preferences of the voters back home, and so on. So Sheple's argument here (which appeals that the fact that legislators have many varied reasons for voting the way they do and hence there is no single legislative intent) applies to other voting procedures not covered by Arrow's theorem. Therefore, Arrow's theorem is not the source of this problem, as Shepsle maintains ("We do not know why, and it is likely that each legislator has a mix of different reasons[…] All of these interpretive difficulties flow from the content of the Arrow theorem."[573]).

Relatedly, a voting procedure does not have to be the kind covered by Arrow's theory in order for it to be subject to the kinds of strategic manipulation that Shepsle mentions. A Borda

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[572] Without spelling out the details of a real example, essentially what can happen with Borda counts is that, say between candidates A, B, C, D, and E, that candidate A wins an initial Borda count. But then a few voters change their preferences for "irrelevant alternatives," like B & C. If the case is set up right, some other candidate (call it D) could end up being the winner of the later Borda count, even though no voter changed there preferences with regards to A and D (hence the statement of Marquis de Condorcet who said of the Borda count that it "relies on irrelevant factors to form its judgments").

[573] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 248.

count procedure could first involve introducing the possible bills in serial fashion, with the vote happening at the end of deliberation. A bill considered late in the deliberative process "has the advantage of remaining on the sidelines, so to speak, while disputes among various contenders to it are resolved."[574] A bill moved early in the process "has a discouraging effect on other motions."[575] So a Borda count can be just as subject to some of the deliberative advantages that Shepsle identifies in the context of majoritarian procedures.[576]

In sum, while there are worries with the usage of legislative intent in interpreting statutes, Arrow's impossibility theorem itself is not the source of all of these worries, and further, the worry cannot be that the concept of legislative intent is incoherent, but rather (at best) that it is not right to apply that concept in nearly as many cases as we would hope.

At this point, I see two Shepsle-type worries that remain: (1) when there actually are Condorcet cycles (i.e., intransitive legislative preferences), it is not correct to say that there is some single legislative intent, as some other law(s) could have passed with majority approval; and (2) even within a particular majority, there may be many different reasons why the individual legislators voted the way they did.

As we've already seen, worry (2) does not flow from Arrow's Impossibility Theorem, because individual legislators can have diverse reasons in the setting of voting procedures that

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[574] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 245.

[575] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 245.

[576] Shepsle, "Congress Is a 'They,' Not an 'It'," p. 246. The Gibbard-Satterthwaite theorem states (as summarized by Christian List) that "[t]here exists no social choice rule satisfying universal domain, non-dictatorship, the range constraint, resoluteness, and strategy-proofness." For example, "[a] dictatorship, which always chooses the dictator's most preferred alternative, is trivially strategy-proof. The dictator obviously has no incentive to vote strategically, and no-one else does so either, since the outcome depends only on the dictator." Christian List, "Social Choice Theory," *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/social-choice/ (2022). Thank you to Luc Bovens for the pointer here.

are not covered by Arrow's theorem. Worry (2) also relies on the same assumption as the skeptical arguments surveyed in section II, namely, that legislative intent is somehow an aggregation or summation of the possibly unexpressed intentions of individual legislators (and most seem to think this aggregation must be of *unanimous* inner intentions). I argue in section IV that this assumption about legislative intent is incorrect. Worry (1) does indeed have its source in Arrow's Impossibility Theorem, which concerns the possibility of intransitive group preferences; I respond to it in the following sub-section.

b.) **Intransitive legislative preferences do not render legislative intent incoherent.**

While Arrow's impossibility theorem shows that there may have been other majorities that could have prevailed, this does not show there is a problem with regard to the intent of the majority that in fact prevailed.

To see this, consider the following case:

> ***Three Wines***: Say a person is deciding to which of three friends to gift a bottle of California merlot to (they can only give one gift). They want to give it to friend A because friend A enjoys merlot. They want to give it to friend B to amuse B, because B likes the movie *Sideways* (where California merlot appears in the movie in the context of a joke). They want to give it to friend C, because C is a foodie, and merlot pairs well with a variety of foods, and so C would enjoy it. The person also has intransitive gift preferences (A>B>C>A).

The persons's possession of these intransitive preferences does not prevent them from acting; let's say they opt for option B by giving friend B the merlot. Just because this person has intransitive preferences in the background (and hence they could be cycled or "money-pumped"

through the other options[577]), does not mean that the person did not have an intent in the context of the particular action they actually ended up engaging in. The person's intent in gifting the merlot was to bring about the amusement of friend B.

An analogous point holds for legislatures. Just because other majorities could have prevailed in a way that cycles the "preferences" of the legislature as a whole, does not mean that the majority which prevailed on a particular occasion lacked an intention in doing what it did. So even if we are in a voting situation where there are intransitive group preferences, it can still make sense to talk about the intent of the majority which did in fact prevail. Therefore, there is no metaphysical problem here for the existence of a particular, concrete legislative intent in the context of intransitive preferences.

Perhaps Shepsle's argument does show that we cannot always look at a legislature ex ante (before the passage of a law) and answer the question "What does this legislature intend?" This is because it has intransitive preferences and there is no fact of the matter regarding what it wants to do. But the context of legal interpretation is different, because it occurs *ex post* (after the passage of a law). There, we can look and see what the legislature meant to bring about with the passage of a law (the same way we can look and see what the person intended to accomplish in gifting the merlot to friend B).

I will also grant that Shepsle's argument might show that a certain test that has been discussed for figuring out what counts as the legislative intent could be misguided (or, at least,

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[577] The problem with intransitive preferences that generates the "money pump" problem is that, for any two options where the agent prefers one option to the other, the agent should be willing to give some amount of money to get their preferred option. So we could indefinitely extract money from a person with intransitive preferences, while all along that person isn't ultimately getting anywhere. See Donald Davidson, J. McKinsey, and Patrick Suppes, "Outlines of a Formal Theory of Value," *Philosophy of Science*, vol. 22 (1955): pp. 140–60.

that we should not apply that test in a certain naive way). Different legal scholars have endorsed a "counterfactual" test for figuring out what the legislature would have intended in a particular scenario.[578] As Richard Posner writes, "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[579] Say the legislature passes a law with certain language that prohibits certain behaviors, but it is vague or ambiguous whether it applies in a particular case. A counterfactual might ask: "What would Congress have done in this scenario? Would it want to and have acted to prohibit this conduct?"

Perhaps Shepsle's argument shows that, in posing this counterfactual, we should not use it as an opportunity to be thinking about the background, possibly intransitive, preferences of Congress. This is because Congress could be cycled through the options that prohibit or allow the conduct in question. Instead, we should focus on the intent behind the law that was actually passed—and not some possible intent or preference that is inconsistent with or different from the law that passed. In putting ourselves in the shoes of Congress, we do not ask what Congress would have done about a particular factual scenario (because Congress could be endlessly cycled through options that alternately permit or allow the conduct in question), but instead what Congress would have thought about a particular factual scenario, given the option it actually acted on. (I am not endorsing a counterfactual test here—I am just trying to point out the lesson

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[578] Richard Posner endorse a form of a counterfactual test at Richard Posner, "Statutory Interpretation—in the Classroom and in the Courtroom," *University of Chicago Law Review*, vol. 50 (1983): p. 817. John Manning describes this as "imaginative reconstruction," where legal reasoners try "to imagine how the legislature would have resolved a particular interpretation question under the circumstances at bar." Manning, "Textualism and Legislative Intent," pp. 421-422.

[579] Posner, "Statutory Interpretation," p. 817.

we might learn from Shepsle that points out how we could go wrong in applying a counterfactual test.)

Having addressed Sheplse's argument in particular, the next section responds to the skeptical arguments more generally. I argue that all of the skeptical arguments surveyed in section II (Shepsle's included) assume an incorrect model of legislative agency, where the private intentions of individual legislators ground the legislative intent. Instead, I argue the ground of legislative intent consists entirely in publicly-available facts.

V.) **Response to textualist skepticism more generally**.

This section responds more generally to textualist skepticism about the existence of legislative intent. This section makes three main conceptual points: (1) legislative intent is not not reducible to the possibly unexpressed intentions of individual legislators; instead, (2) legislative intent is subject to a publicity constraint, meaning that the only facts that are relevant to determining legislative intent are publicly-available facts; and (3) the way for ascertaining legislative intent is, fundamentally, the same kind of reasoning process as is used for figuring out the intent of individual persons: namely, we engage in a process of rationalization that "makes sense" of the agent's conduct, given the context in which it occurs.

a.) **The character of legislative intent: dispelling incorrect assumptions about group agency.**

The skeptical arguments assume that legislative intent could be a function of the possibly unexpressed intentions of individual legislators. These objections envision that somehow there would have to be an overlapping of content on the part of individual legislators' own private

thoughts for there to be a group intention: the group intention would be whatever overlap (if any) that obtains between all of the individual legislators.

This assumption about legislative intent is incorrect.[580] Instead, as I will try to spell out in this section, legislative intent is a public matter. I will illustrate this by giving several examples of groups that arguably *do* have the features that textualists identify, namely, that a group intention could depend on, or be grounded in, the private intentions of an individual. But I will argue legislative groups are unlike these groups. In particular, the skeptical (textualist) assumptions about group agency might hold for what I call "informal" groups and "hierarchical" groups, but it does not hold for modern legislatures. With informal groups, the group action arises in a somewhat unstructured and spontaneous way: here, private intentions are needed in order to distinguish genuine group action from merely coordinated behavior. With hierarchical groups, the group action and group intention can become so tied up with an individual's actions and intentions (specifically, the leader of the group) such that it seems right to attribute the individual intention to the group. But, I will argue, legislative groups lack the crucial features of informal and hierarchical groups.

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[580] Ekins, *The Nature of Legislative Intent* (2012) has also pointed out that the textualist skeptical arguments assume an incorrect model of legislative agency, the "summative" or "aggregative" model of group intention, but, as I argue below, Ekins' own account of legislative action and legislative intent is incorrect as well. Other thinkers have articulated their belief that legislative intent (or some adjacent notion) is a public matter, but they do not appear to offer a full rationale for this. Scott Soames writes that, in cases of vagueness, "the court's duty is to adopt the minimum principled precisification of the indeterminate existing content that allows a definite verdict to be reached that most closely conforms to the original lawmakers' rationale for adopting the legal provision. By 'rationale,' I do not, of course, mean the causally efficacious motives that led them to act, which are often epistemically inscrutable and constitutively irrelevant. In addition to being private and difficult to discern, motives are as individual and various as the actors themselves. Attempts to aggregate them and identify the dominant motivators are at best speculative and at worst invitations to disguised judicial policymaking. A law's rationale consists not of the causally efficacious motives of lawmakers, but of the chief reasons publicly offered to justify and explain the law's adoption. This is what is worthy of deference, as well as being epistemically discernable in most cases." Scott Soames, "Deferentialism: A Post–Originalist Theory of Legal Interpretation," 82 Fordham L. Rev. 597 (2013), p. 605 (internal footnotes omitted).

Consider the following case, which has two versions:

Walking together

- *Version one*: Two people are walking down Fifth Avenue and they merely happen to be walking in sync with one another in coordinated movements (each is unaware of the other).

- *Version two*: Two people are walking *together* down Fifth Avenue.[581]

To an outsider observing, these two cases would be indistinguishable. But only one of these counts as an instance of *group action*. This seems to indicate that "the mark of joint action does not reside solely in its external or behavioral component."[582] The task then is to spell out what the "internal" component is that separates genuine group action from non-group action (such as individual behavior that is coincidentally coordinated). The literature on group agency has focused on cases with this general structure: a small number of people more or less spontaneously getting together for a discrete purpose—often where each individual has a unique contributing role (the other examples of this in the literature include: painting a house together, cooking food together, and a quartet playing a piece of music together). This has led many to think that group action is somehow directly tied to or grounded in the intentions of the individual who make up the group.

One influential account which tries to capture this idea is proposed by Michael Bratman. This account says that group agency does not result from a *single* mental state held by some sort of group agent, but rather involves "a state of affairs that arises when two or more persons hold a

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[581] See Facundo Alonso, "Reductive Views of Shared Intention," in *The Routledge Handbook of Collective Intentionality*, edited by Maria Jankovic and Kirk Ludwig (Routledge: 2018): p. 34.

[582] Alonso, "Reductive Views of Shared Intention," p. 34.

particular set of interlocking intentions."[583] These interlocking intentions are described by Bratman as follows:

> We intend to J if and only if:
>
> 1. (a) I intend that we J and (b) you intend that we J.
>
> 2. I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b.
>
> 3. 1 and 2 are common knowledge between us.[584]

The individual intentions "interlock" because each individual person intends that the group will J, and each person also intends to engage in their respective subplans that jointly constitute the group action. Additionally, these intentions are common knowledge shared by the individual members of the group. The subplans include any unique contributions that the individuals make as their part of the group plan. So in the walking example, each individual intends their own individual action of walking, and also intends that the group (in this case, the pair of friends) walk together in accordance with and because of the walking of each individual person. Or in the case of a quartet, one plays the piano in such-and-such manner, there other plays the violin in such-and-such manner, etc. Finally, all of these intentions are common knowledge.

Bratman's account is reductive in the sense that it reduces the "group intent" to the set of interlocking individual intentions.[585] It is non-reductive in another sense, though, which is that

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[583] Ekins, *The Nature of Legislative Intent*, p. 54.

[584] Michael Bratman, "Shared Intention," in *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press, 1999): p. 121.

[585] See Ekins, *The Nature of Legislative Intent*, p. 56.

the group intention is not reduced to any *particular* persons's intention, but instead arises out of the set of individual interlocking intentions.[586]

Notice that on Bratman's account "every member of the group must hold the relevant interlocking individual intentions before group intention may arise. Unanimity in the supporting structure of intentions is thus a precondition of group intention."[587] So if the two friends were to walk up to a random third person, and start imitating the pace of the stranger, the three people would not constitute a group that is acting, because the third person lacks the interlocking intentions (even if the two people, and hence a majority of the group, intended that the third person be part of the group).

I have no quarrel with Bratman's account—at least as an account of "informal" groups. For all I mean to say here, it could be the correct model of group action for certain kinds of informal groups. The unanimity requirement seems to make sense for informal groups: after all, the acting group owes its existence entirely to the individuals who comprise the group. To be part of the group, you have to have the relevant (interlocking) intentions. As illustrated in the example in the previous paragraph, a group of people cannot "recruit" someone to be part of an informal group: that person themselves also has to have the relevant (interlocking) intentions to

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[586] See Ekins, *The Nature of Legislative Intent*, p. 56.

[587] Ekins, *The Nature of Legislative Intent*, p. 55.

be part of the group and to contribute to its actions and intentions.[588] But for now I want to briefly table "informal" groups and Bratman's account.[589]

Here is another way in which the private intentions of an individual could be directly relevant to group action. Consider this case:

> ***Terror Mastermind***: A single terrorist mastermind has recruited a network of terrorist cells as part of an overarching plan to create a dirty bomb. One cell in London is gathering and fashioning the various metal components, another cell in Bruges is creating the relevant computer/digital components, and a third in Moscow is securing refined uranium. None of the three cells knows about the plan to create a dirty bomb (only the mastermind does), though they know they are working as part of a terrorist organization, and have done so voluntarily and willingly. (The mastermind has tricked the Moscow cell into thinking the uranium is for a (terrorist) nuclear submarine.)

I think it is sensible to say, about this case, that the terror *group* is executing a plan to make a dirty bomb, acting at the direction of the Terror Mastermind. Say that the terror group goes on to use the dirty bomb in a Western capital, and after the disaster, law enforcement authorities discover a secret journal the Terror Mastermind had written where the Mastermind decries Elon Musk, the top 1%, and grotesque accumulations of wealth, and says "violence must be used to sweep away the capitalist class and usher in a dictatorship of the proletariat." Here I think it

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[588] The person could form the interlocking intention in light of being approached by the other people, but my point is that they are not part of the group until this happens, regardless of how many people approach the new individual. "Strength in numbers" cannot overwhelm the unanimity requirement.

[589] There is a strategy for grounding legislative intent in small, informal sub-groups that says that Congress basically delegates or authorizes some much smaller subset of it to craft a law, and so it is the intent of the smaller (possibly Bratmanian) group that gets imputed to Congress as a whole. This strategy is endorsed by Lawrence Solan, and possibly McNollgast as well. "We routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play. The legislature is a prototypical example of the kind of group to which this process applies most naturally." Lawrence Solan, "Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation," *Georgetown Law Journal*, vol. 93 (2005): p. 428. McNollgast says that in looking for legislative intent we should "'identify the members of an enacting coalition and, in particular, the political actors who were pivotal in that their preferences had to be taken into account in order for a legislative agreement to be made." McNollgast, "Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation," *Law and Contemporary Problems* Vol. 57, No. 1 (1994): p. 7.

would make sense for news agencies to report that the terror *group's* intention was to bring down global capitalism, even if this *particular* anti-capitalist intention was only present in, and known to, the Terror Mastermind.

This sort of phenomenon—where an individual's intentions can seemingly be attributed to an entire group, even where the other group members do not possess this intention and even lack knowledge of this intention—is only possible because of the way in which the terror group members have functionally tied themselves to the terror group, in conjunction with the total control that the Terror Mastermind has over the terror group. The terror group members voluntarily signed up for the group, they agreed to do "terrorist things," and they voluntarily took part in actions that did in fact involve the creation of a dirty nuclear bomb—though they were not aware of this particular plan. But it still makes sense to say the group intention was to build a dirty bomb to bring down global capitalism, because of the way in which the individuals have functionally tethered themselves to the terror group, and the Terror Mastermind in particular. Groups like this I will call "hierarchical" groups.

Legislative groups are importantly unlike informal groups and hierarchical groups. With informal groups, the group owes its existence to the individuals that comprise the group. Further, whether an individual counts as a member of the acting group depends on whether or not that individual has the relevant interlocking intentions.

Legislative groups are not like this. Legislatures owe their existence *to law*, which is not a matter of the intentions of the people who happen to constitute the legislature at a given time. The legislature, as a legal entity, has an existence that (possibly) has *nothing* to do with the intentions of any particular person who happens to be a member of the legislature at that

particular time. We might wonder why someone would intentionally undertake all of the rigorous actions needed to become a legislator if they did not intend to be part of the legislature, but this does not show that the individual intentions are *necessary* as a metaphysical matter for that person to be part of the legislature as an acting group. It might *make sense* that an individual would have these intentions, but it is not required for their membership to be metaphysically valid. The only requirements are whatever is required by the law—no interlocking intentions are needed.[590]

The idea that I am trying to express here links up nicely with Searle's account of institutions. Searle argues out that institutional facts are a matter of what he calls "Status Functions," where Status Functions are created by the application of *constitutive rules*. Searle contrasts constitutive rules with *regulative rules*. Regulative rules "regulate antecedently existing forms of behavior"; for example, a speed limit of 55 miles per hour is a rule that regulates the pre-existing behavior of driving. Constitutive rules, in contrast, "constitute new forms of behavior."[591] For example, the "rules of chess do not regulate a pre-existing activity. Rather, the rules of chess constitute the activity in the sense that playing chess *consists in* acting in accordance with at least a large enough subset of these rules."[592] Searle says constitutive rules have the logical structure of "X counts as Y," or more precisely, "X counts as Y in context C."[593]

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[590] Of course, the law itself could require Bratmanian interlocking intentions, but this would be an entirely contingent matter.

[591] John Searle, "Status Functions," in *The Routledge Handbook of Collective Intentionality*, edited by Maria Jankovic and Kirk Ludwig (Routledge, 2018): p. 305.

[592] Searle, "Status Functions," p. 305.

[593] Searle, "Status Functions," p. 305.

Status Functions are created by the application of certain constitutive rules; they are functions that something has in virtue of the application of a constitutive rule. Further, "it is in virtue of the collective recognition or acceptance of the object or person as having that status, that the object or person can perform that function that has been assigned to it"[594] Money is an example of an institution. It has the functional status it has in virtue of society collectively treating, accepting, and declaring that "This (piece of paper) counts as money (in this context)." And it is *in virtue of* the collective bestowal of this status that money is able to function *as* money. The same goes for the fact that Joe Biden is the president of the United States: "Both of these are cases of functions—the function of money or the function of presidency—assigned, where the assignment confers a status and in virtue of the collective acceptance of the status that he is the president or that this is money, the function can be performed."[595]

Congress, like money or the Presidency of the United States, is an institution. Society treats certain things that particular individuals do as law-making acts. And it is *in virtue of* the fact that society treats these as law-making acts that the law-making acts are able to fulfill their function.

It is the society-wide exercise of these constitutive rules that makes Congress as an acting group different from the group of people walking together down Fifth Avenue, and hence makes the Bratmanian model incorrect for understanding this sort of group. If a nuclear bomb were to vaporize everyone walking down Fifth Avenue, that acting group (*these two people walking together down Fifth Avenue*) would go out of existence, and could never come back into

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[594] Searle, "Status Functions," p. 304.

[595] Searle, "Status Functions," p. 304.

existence. But if a nuclear bomb were to vaporize all sitting 535 members of Congress, Congress as an acting group would not go out of existence (or so I would submit to you). Congress, as a legal entity that has existed since the time of the Founding, would still exist, even though it has no individuals who comprise it. This shows an initial important difference between institutional groups like Congress whose existence is owed to society-wide constitutive rules, and informal groups whose existence is owed to the (possibly Bratmanian) intentions of the individuals who comprise the group.

Not only is the *existence* of the legislative group due to these society-wide constitutive rules, but the *point* of the existence of Congress, and what counts as *action* for Congress, are also matters that are not entirely "up to" the individuals who happen to constitute the Congress at a given time. For informal groups, what counts as action for a group depends—*entirely*—on what those group members have decided. An informal group might decide that a majoritarian procedure will be sufficient for group action; or, the informal group might require unanimity. Additionally, the *nature* of that group, i.e., what this group is for and what it will do, is again a matter that depends—*entirely*—on what those individual group members decide it will do. A group of people might assemble an informal group to paint a house, or play a quartet, for example. It is entirely up to them what the "charter" is for their informal group.

But for legislative groups like Congress, because of how their existence is grounded in society-wide constitutive rules, the *nature* of Congress is not something that is up to its members. How do we figure out the nature of Congress as an acting group? Well, we have to look at the content of the society-wide constitutive rules. I cannot provide a full account of this here, but the point of Congress, in the final analysis, could resemble something like the following: to pass

laws, in a democratically accountable manner, that promote the common welfare, justice, and freedom.[596]

Consider the following hypothetical:

> ***Bizarro Congress***: A mad scientist has been able to hijack Elon Musk's Starlink satellite system and use it for global mind control (but can't control more than around a thousand minds at once). The mad scientist decides to target the 535 members of Congress. After being taken over, all 535 members of Congress now believe that the point of Congress is "to promote destruction, injustice, and tyranny." The members of Congress, however, do not share this with the public, though it is a matter of common knowledge between the 535 of them.

Because all of the individual members of Congress believe that the purpose of Congress is to promote destruction, injustice, and tyranny, and all of this is a matter of common knowledge, their intentions all interlock in Bratmanian fashion. But despite this, I would submit that the point of Congress, as a legal entity, has not changed. This is because of the application and content of the constitutive rules.

If you are unconvinced by this thought, perhaps it helps to point out that I think there are actually two groups here: first, there is the informal (Bratmanian) group comprised of the 535 people—the purpose of this group is indeed to promote destruction, injustice, and tyranny. But second, there is *Congress* (considered as the legal entity that has existed since the time of the Founding)—the purpose of *this* entity remains as it was: to promote the common welfare, justice, and freedom (or something like that). Congress is indeed at this time comprised of the very same 535 who comprise the informal Bratmanian group. But the Congressional "charter" is not

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[596] The Preamble to the United States Constitution probably provides some relevant information here: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

something that is entirely up to the individuals who happen to comprise it at a given time; rather, it is a function of, again, the (society-wide) constitutive rules. And sure, if we modify the case and make it so that the public knows about this new diabolical purpose for Congress and assents to it, then the point of Congress really could become "to promote destruction, injustice, and tyranny." But this would be because society as a whole has changed, and hence the content of the constitutive rules have changed as well.

One must recognize that Congress as a legal entity, and hence as a group agent, has an existence that does not depend *at all* on the individual persons who make up the group, much less the intentions (interlocking or otherwise) of such persons. Further, what counts as action for this entity is not defined by, or grounded in, the intentions of the individuals who make it up. Since group action in this context is legal action, we must recognize that Congress as an institution is embedded in a larger web of legal structure. It is this larger structure that accounts for the existence of Congress as an acting group, and determines its fundamental features. We are misled if we try to understand group agency on this model as being analogous to the group agency of two people walking down the street; we have to "zoom out" from the Congresspeople themselves to see the system-wide social norms that underwrite the legal existence of Congress.

Again, and to spell it out in more detail, the existence of Congress is owed, not to the intentions of the individuals who make it up, but instead to law, more specifically, it is due to Article I of the United States Constitution. That document creates a "Congress" with two parts: the House of Representatives and the Senate. Section II of Article I sets requirements for the House of Representatives, like that it is comprised of members who serve two-year terms, that members must be at least 25 years old, and that it has "the sole Power of Impeachment." Section

III sets requirements for the Senate, like that Senators serve staggered six year terms, must be at last 30 years old, that the Vice President is "President of the Senate, but shall have no Vote" except in case of a tie, and that "[t]he Senate shall have the sole Power to try all Impeachments."

While the existence of Congress as an acting group is a comparatively simple matter, the issue of what counts as Congressional action, and who counts as members of Congress as an acting group, is a more complicated matter. First, the rules for membership of Congress stretch outside the Constitution to include state law. Section 4 of Article I states "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Section 5 of Article I states "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." The legal rules governing members of Congress are partly a matter of state law and partly a matter of federal law, and Congressional rules of procedure are partially a matter that is up to Congress.

The Constitution accordingly leaves much to be filled in by "rules of proceedings," which are determined by Congress itself. "Because each chamber has the constitutional authority to make its own rules, the House and Senate have developed very different ways of processing legislation, perhaps partially flowing from their constitutional differences. In general, House rules and practices allow a numerical majority to process legislation relatively quickly. Senate rules and procedures, on the other hand, favor deliberation over quick action, as they provide significant procedural leverage to individual Senators."[597]

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[597] Congressional Research Service, "Introduction to the Legislative Process in the U.S. Congress," CRS Report Prepared for Members and Committees of Congress (updated November 24, 2020).

Membership in legislatures as acting groups is not a function of the intentions of the individual people who make up the legislative group the way it is for informal groups. In most modern systems that have legislatures, Congressional membership is determined by a complex set of socially and legally defined procedures for things like registration of candidacy, election, and certification of elections. Because membership is a function of these procedures and not of individual intentions, legislative groups are (again) importantly unlike informal groups.

Next, legislative groups are unlike hierarchical groups (where the terror group in Terror Mastermind was supposed to be an example of a hierarchical group) in that legislative groups are, fundamentally, *egalitarian* in structure, and they have this egalitarian nature in virtue of the constitutive rules that constitute it. Legislatures are such that each individual legislator has the authority to assent or not assent to the legislative proposal under consideration. While there are leadership positions in Congress, this does not change the basic fact that, in the course of proposal debate, consideration, and voting, each individual legislator has before them the entire proposed plan of action. Members of Congress have full authority to assent to the entirety of legislative proposals—and I would submit that this is part of the general nature of Congress as grounded in society-wide constitutive rules. This is unlike the hierarchical group with the case of the Terror Mastermind, where parts of the plan were only known (and could only possibly be known) to different respective portions of the group. Each member of Congress has full access to a legislative proposal, as well as the reasons for and against that proposal that are officially articulated.

Of course, leaders in Congress play an important "gatekeeping" function, in that they might only allow certain bills to come up for a vote. This does not defeat what I am calling the

egalitarian structure of Congress. What I mean by the egalitarian structure is that, *of any given bill that is actually on the floor for a vote*, each member has the authority to consider the reasons for and against the proposal, and then to vote up or down in light of the content of the bill and the reasons for and against it.

Imagine a gremlin that is able to prevent a person from having any thoughts the gremlin does not want the person to have.[598] The gremlin can somehow "see" which thoughts the person is about to have, and then decide whether to allow the person to have those thoughts and flip a switch if it does not want the person to experience those thoughts. Even though the thoughts (and, *a fortiori*, the intentions) that the person can have are in a sense "up to" to the gremlin, we would not say that the person's intentions are actually the gremlin's intentions, or even that the gremlin's state of mind is part of the *ground* of the person's state of mind. Rather the gremlin is just playing a (very important) causal role, a *gatekeeping* role, in deciding what thoughts the person is going to have. Nonetheless, the constitutive ground of the person's mental state does not include the gremlin's mental states or brain states (it would just be the state of the person's brain states, or whatever).

The leaders of Congress are like the gremlin. They play a very important role in determining what "thoughts" Congress can have, but that does not mean that the possibly unexpressed inner thoughts of Congressional leaders are part of the constitutive ground of the Congressional state of mind. Rather, they are one of the *causal* determinants of Congress's state of mind. In this sense they are like *any* causal antecedent that would be part of the most complete

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[598] My gremlin is inspired by the individual named "Black" in Harry Frankfurt, "Alternate Possibilities and Moral Responsibility," *Journal of Philosophy*, vol. 66, pp. 829–39 (1969). But whereas Jones can change the agents decisions and actions, my gremlin can control all of the person's *thoughts*. Also, in Frankfurt's original example, Black does not intervene, but here, the gremlin does intervene.

causal explanation of the events that occurred in the world that led up to Congress doing what it did. The same point goes for the inner mental states and brain states of all individual members of Congress; they would be part of the most complete *causal* story that explains why Congress did what it did, but they are not relevant to determining *Congressional intent*. The *constitutive* ground of Congressional intent consists in facts that are open to all members of Congress; this most significantly includes the proposed plan of action and the reasons articulated for and against it as part of the official lawmaking process.

Additionally, in democracies at least, a central feature of legislatures is that its actions be subject to public evaluation. This means that legislative proposals and the subsequently enacted laws can all be scrutinized by the public. Not only is the content of legislative action subject to public evaluation, but the *reasons* behind legislative actions are also subject to public scrutiny. So while the *egalitarian* nature of legislatures means that the full content of legislative plans of action (and hence the legislative intent) is open to all *legislators*, the *democratic* nature of (at least some) legislatures means that the legislative intentions are open to *the public at* large, at least so long as the democratic legislature is functioning above some minimally decent and transparent level.

These features—the egalitarian structure of legislatures and the public accountability for legislative group action in democracies—are not unique to legislatures (and so other groups also have a publicity constraint on the existence of their intentions). Consider the following case:

> ***Faculty committee***: a public university creates a faculty committee made up of five tenured faculty members to decide which of two projects should be built on campus: (1) a large art installation, or (2) a new sports facility. The committee is chartered to decide what is in the university's best long-term interest, and to act accordingly—the proceedings are to be a matter of public record (because it is a public university). As it

> turns out, all five of the faculty live in a neighborhood next to campus, and construction of the art installation will greatly inconvenience their way to work. They also personally do not care much about art. Despite this, they realize that a lot of people do like art, so the committee recommends building the art installation. In the (public) debate and reasoning process on what to do, the five-faculty committee variously says things about how the art installation will improve the culture of the university.

The private intentions of the individual faculty members are not relevant, even in principle, to the group intention. This is because the faculty committee publicly debates and then votes on the public proposal under consideration, much like a legislature. The intention of the faculty committee *considered as* an official entity can be ascertained by looking to the public debate proceedings.

Now consider an analogous but more sophisticated case, meant to be a realistic legislative example:

> ***Strategic agreement***: On the issue of health care coverage, there are three different factions in the legislature: (1) the ***left wing*** ultimately wants universal government insurance ("single payer"), but thinks that universal private coverage could ultimately be a stepping-stone to a single payer system; (2) the ***moderates*** strongly prefer free market forces to govern, but, seeing the global trends, think that a government mandate for private insurance might be a good way to prevent the ultimate adoption of left wing proposals; (3) the ***right wing*** totally opposes any government "interference" in health care. None of the factions in isolation is enough to pass the law, so some kind of coalition has to be formed. The different factions factions act strategically in publicly offering reasons for the proposal. The left wing and the moderates could agree to expand private health insurance coverage via an "individual mandate" and subsidies.

Let's say that the left wing and the moderates come together to pass the law with subsidies to purchase private insurance, as well as a universal mandate. Notice that the left wing and the moderates have *contradictory* ultimate goals: the left wing wants a single payer system, and the moderates do not. I do not think we should infer from this that there is no legislative intent here (as Shepsle might have us do in the face of contradictory private intentions). Instead, there is

public agreement on a more proximate goal: increasing private health insurance coverage—this is the legislative intent behind the passage of the law. There is private disagreement about ultimate goals, but these unexpressed intentions are not even relevant in principle to what the legislature, considered as an official entity, does as an acting group.

Christian List and Phillip Pettit point out three things that agents characteristically have as part of engaging in agential functions:

(1) agents have "representational states that depict how things are in the environment"

(2) agents have "motivational states that specify how it requires things to be in the environment"

(3) agents have "the capacity to process its representational and motivational states, leading it to intervene suitably in the environment whenever that environment fails to match a motivating specification"[599]

Notice that, with legislatures, all of these agential functions occur in public. Congress and Congressional committees gather evidence about some topic via public testimony, and publish reports with its findings and conclusions. These reports can detail a "mischief" that is currently the subject of possible legislative action, and possible measures for addressing the mischief. Additionally, individual members of Congress publicly debate measures, articulating reasons for and against the proposals. After this processing of representational and motivational states, Congressional action culminates in a vote, where the measure is either adopted, or it fails. This measure is adopted with some end in mind, an end which is expressed in public, in accordance with official rules of procedure.

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[599] Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press: 2013): p. 20.

Legislative intent, like individual intent, is ascertained by engaging in a rationalization of the agent's action as it occurs in context. We look to what we know about the agent, what we know about the action, and what we know about the context, and we try to make sense of the agent's action. An intention or set of intentions is an output of this process. In the individual setting, all of the things just mentioned are at best *evidence* of the agent's inner state of mind. But, since I argue they are essentially *public* entities (at least given the way modern legislatures are constructed) *legislatures* have an intention whose content is entirely a function of publicly-ascertainable facts.

Whereas the constitutive ground of the intentions of individual persons consists in inner facts that are part of that person's (possibly unexpressed) state of mind, the constitutive ground of Congress's state of mind consists entirely in publicly accessible facts. In the Congressional cases, these include, principally, statements of legislative history. A statement made in a floor debate by an individual legislator is analogous to a (candidate) reason coming to the awareness of an individual person. Articulating a reason to all members of Congress in accordance with official procedures is how Congress "thinks." Individuals have inner thoughts and can evaluate the reasons for and against courses of action "in secret." Congress is not like this. For *Congress* (considered as an official entity) to even consider or weigh something as a reason for or against a legislative proposal, such reason has to be present before the full body. Congress's mind, in this sense, is *open*.

As such, the inputs to the rationalization process that we use to figure out Congressional intent are all, in principle, publicly-accessible facts. Because of the publicity of Congress's "state of mind," we could actually say that, ceteris paribus, it is easier to figure out the intentions of

Congress than it is to figure out the intentions of individual persons. (contrary to the statements of many skeptics of legislative intent). This is because, in the individual case, the inputs are at best *evidence* of the constitutive ground of the person's intentional states, whereas with Congress, the inputs *are* the constitutive ground of Congress's intentional states.

Again, we could *conceive* of the legislature merely as a collection of natural persons and wonder what is going on "inside" their minds. But that is not the capacity in which legal entities act. The faculty committee *could* be considered as a mere aggregation of individuals, but *qua faculty committee*, its action and intentions are a function of publicly-available information. The same goes for legislatures. Conceived as public entities acting in accordance with its constitutive procedural rules, Congressional action and intent are entirely a public matter. The ground of Congressional intent consists in publicly-available facts—there is nothing, even in principle, that is hidden but which could be relevant for determining *legislative* intent.

We saw something like this with *Bizarro Congress*. This case helped to illustrate that there are two ways of conceiving of the actions of the 535 members of Congress. One way is to view them as an informal group along Bratmanian lines: here, the group intention will be a function of the intentions of individual members the same as it is for any informal, Bratmanian group. The group intention here is constituted in the same way the group intention is constituted by a group of people walking together, or by a group of people painting a house, or by a group of people playing a quartet.

The other way to conceive of the members of Congress is as they are acting in their public-facing, institutional roles—as they are defined by the society-wide constitutive rules.

Here, the group action and group intention is a function of the *public*, *official* actions of Congresspeople, and not of their possibly unexpressed inner mental states.

Finally, we could take the conceptual argument against legislative intent that I teased out of Scalia's argument discussed earlier in this chapter and turn it back on itself. This argument, recall, said that law as a conceptual matter implies the public governance of conduct, and so therefore an attempt to interpret the content of the law by looking to (hidden) legislative intent is, in a sense, not to look for *law* at all. We can now see that this argument gives us additional reason to realize that, in reasoning towards *what the law is*, we have reason to adopt the latter conception of Congress mentioned above. The fact that law is a public phenomenon does not mean that legislative intent is irrelevant to determining the law. Rather, it means that we have reason to conceive of Congress as an official, public-facing entity, rather than as a Bratmanian assemblage of 535 people in an "informal" group.

b.) **Richard Ekins' account in *The Nature of Legislative Intent*.**

Richard Ekins' account of legislative agency and legislative intent is similar to mine in that it holds that legislative intent is an open matter and is not a function of the possibly unexpressed intentions of individual legislators. But Ekins' account offers a different explanation of this fact. Ekins' account holds onto the Bratman model that we saw in our examination of the *Walking Together* cases.[600] Ekins' account requires a small elaboration of Bratman's account, however, because the latter is designed only to apply to small, "informal" groups, whereas legislatures are more complex groups that exist over time beyond the membership or even existence of individual people. Ekins does this by distinguishing two levels of group intention:

[600] "I take group intention, as outlined by Bratman, to be the foundation of the structure of group action." Ekins, *The Nature of Legislative Intent*, p. 57.

(1) "the primary or particular intention of the group, which is the intention (the plan, the means-end package) that explains and defines the particular action of the group on this occasion" and (2) "the secondary intention of the group, which is the group's general intention to use certain procedures to determine its particular intentions: that is, the group's general plan to select particular plans, which are to be the means to its defining purpose."[601] The secondary intention of the legislature Ekins also refers to as the "standing" intention of the legislature.[602]

Whereas Ekins thinks that unanimity is required of the secondary intention, it is not required of the primary intention. There must be unanimous acceptance of the group's *procedures* for action: "the general plan or standing intention of the complex group must arise from the unanimous interlocking intentions of its members."[603] But there need not be unanimity in particular actions done in accordance with those procedures (assuming, of course, that those procedures do not themselves require unanimity): "the particular plans on which it acts need not be directly unanimous."[604]

For example, a group might unanimously adopt a procedure that says group action depends on simple majority vote. Say five friends are deciding where as a group they should go to dinner. They cannot unanimously agree, so they all agree to decide by majority vote. Going to

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[601] Ekins, *The Nature of Legislative Intent*, p. 58.

[602] "With simple groups, all plans are held and known in full by all members of the group. Complex groups are different[…] Their action is still based on unanimity, because all members of the group take the group's plan, to the extent it concerns them, to direct how they are to act. However, complex groups may adopt procedures to settle how plans for group action are to be formed, and the plans so formed may not be known in full by all members. The group has, one might say, two types of intention: secondary (standing) intentions, which are plans to form and adopt other plans, and primary (particular) intentions, which are plans that directly concern how the group is to act on this or that occasion." Richard Ekins, "Legislative Intent in *Law's Empire*," *Ratio Juris*, vol. 24, issue 4 (2011): pp. 435-460, p. 441 (internal citation omitted).

[603] Ekins, *The Nature of Legislative Intent*, pp. 59-60.

[604] Ekins, *The Nature of Legislative Intent*, p. 60.

the place they subsequently decide to go to for dinner still counts as group action because of the unanimous acceptance of the majority procedure.

A legislature also has standing and particular intentions according to Ekins. The standing intention of the legislature "arises out of the interlocking intentions of the individual legislators."[605] "The group's standing intention is to adopt the procedures that characterize the legislative process as the means by which it will act towards its defining purpose."[606] The interlocking intentions are found when "[e]ach legislator forms the intention 'I intend that we legislate by means of the relevant set of procedures" and each individual "intention interlocks with the intentions of other legislators to similar effect, so that 'I intend that we legislate . . . because of and in accordance with your intention that we legislate'."[607] The "particular intention arises from within the standing intention," meaning "it is formed by following the structure the group has adopted as its means to the end of being ready and able to legislate."[608] The particular intention of the legislature "is the intention on which it acts in any particular legislative act, which is both that for which it acts—changes in the law that are means to valuable ends—and the plan it adopts to introduce those changes—a complex set of meanings that expresses a complex set of propositions."[609] The standing intention applies throughout the entire process of legislating for the entire duration of the existence of the legislature, whereas a particular intention only exists in the setting of a particular law that is being passed. For example, the legislative intention

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[605] Ekins, *The Nature of Legislative Intent*,, p. 220.

[606] Ekins, *The Nature of Legislative Intent*, p. 219.

[607] Ekins, *The Nature of Legislative Intent*, p. 221.

[608] Ekins, *The Nature of Legislative Intent*, p. 220.

[609] Ekins, *The Nature of Legislative Intent*, p. 220.

in passing the Affordable Care Act would be the particular intention to expand access to health insurance.

Again, on Ekins' account, unlike the particular intentions, the group's *standing* intention requires unanimity.[610] The possession of the relevant standing intention on the part of each individual legislator is necessary for that person to be part of the acting group:

> The individual legislators each assert that they are members of the legislature—they are sworn into office, they participate in the legislative process, and they adopt the title of legislator (or local equivalent). Thus, the legislators are not just deemed to be members of the legislature, rather they understand themselves, acting jointly, to be the legislature. The law formalizes entry requirements and authorizes the group to legislate, according to a rule of legislative competence, but it does not create the acting group.[611]

If an individual legislator (i.e., someone who has otherwise met the relevant criteria for being a member, like winning election, being sworn in, etc.), lacks the relevant interlocking intention, Ekins envisions two possibilities that differ depending on whether the person *makes known* the fact that they lack the intention. First, if the "legislator" is someone like an anarchist who publicly rejects the legislative purpose, then while "[t]he remaining legislators who had not rejected the legislative purpose could continue to legislate, acting as the institution," it would nonetheless be the case that "the legislative action would be non-central in that it would not be a joint act of the purposive group that the institution should be."[612] The legislative action includes a subset of the people called "legislators," rather than all of them, because the anarchist "legislator" has renounced the interlocking standing intention. Second would be a case where an

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[610] "For the legislators to act jointly, their intentions to legislate together by means of certain procedures must be unanimous. If a legislator asserted that he did not belong to the group (or that the legislature did not exist) then, even though identified as a member by law or convention, he would not belong to the acting group." Ekins, *The Nature of Legislative Intent*, p. 221.

[611] Ekins, *The Nature of Legislative Intent*, pp. 220-221.

[612] Ekins, *The Nature of Legislative Intent*, pp. 221-222.

individual legislator is *secretly* "disaffected or alienated." Here, Ekins says that "[t]he group could still act jointly despite a lack of unanimity"[613] because "[t]he secret defector participates in the group act, even though his action is parasitic on that of a good member."[614] Ekins says (without complete explanation or motivation of this point in my opinion) that this is a "non-central case" but that "apparent compliance is sufficient to enable a type of group action."[615]

The content of what is adopted by the standing intention makes it the case that legislative action is "open" in the sense that the plan of action is open to all members of the legislature. This seems to come from the fact that Ekins thinks that legislation is necessarily a *reasoned* process. Ekins argues that, at least for sufficiently "well-formed" legislatures, "[t]he legislature acts for the common good by legislating when need be, which is to act to modify the set of legal rules that direct the community. The legislature exercises its capacity to legislate by choosing in response to reasons."[616] The legislature "considers relevant reasons and chooses reasonably how to change the law," and the actual structure of legislatures "assists rather than frustrates this exercise."[617]

For legislative action to be a reasoned process, there must at least be the possibility for coordination, which in turn requires to that the legislative plan of action be open in the sense that it is accessible (even if not all individual legislators are actually aware of the full plan):

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[613] Ekins, *The Nature of Legislative Intent*, p. 222.

[614] Ekins, *The Nature of Legislative Intent*, p. 65.

[615] Ekins, *The Nature of Legislative Intent*, p. 65.

[616] Ekins, *The Nature of Legislative Intent*, p. 143.

[617] Ekins, *The Nature of Legislative Intent*, p. 143.

> Legislators coordinate by reference to the open plan. Some legislators will be more or less aware of the content and detail of the proposal. Legislative action is possible because the plan is open to all legislators, for them to vote to adopt or not.[618]

Some legislators might focus and work on only some parts of the bill, but for the bill to be a coherent whole, all parts of the bill must at least be accessible to the members: "what is held in common amongst legislators and what structures how they act together is not the sum of the intentions held by each member of the majority, but an open proposal."[619] "For the choice to be rational what is chosen must be open to all members."[620] (One might criticize Ekins here on the grounds that his account of legislative intent that focuses on the "well-formed" and "rational" legislature is excessively idealized;[621] I do not pursue this line of criticism here.) Ekins might have an account that explains the open-ness of legislative action (at least for some legislatures), but I do not think Ekins has the correct account of legislative intent.

I reject Ekins' claim that the law "does not create the acting group."[622] Ekins' account goes wrong in trying to ground the existence of the legislature as an acting group in the intentions of the individuals that comprise the group (note that Ekins is pushed to do this because this is required by the Bratmanian model of group action discussed above). Ekins writes that individual legislators are "identified as members of the legislature by law and custom, but this is of secondary interest."[623] Instead, I argue that "law and custom" here are of primary interest: the

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[618] Ekins, *The Nature of Legislative Intent*, p. 234.

[619] Ekins, *The Nature of Legislative Intent*, p. 231.

[620] Ekins, *The Nature of Legislative Intent*, p. 234.

[621] Jeffrey Goldsworthy, "Legislative Intention Vindicated?" *Oxford Journal of Legal Studies*, vol. 33, issue 4 (2013).

[622] See Ekins, *The Nature of Legislative Intent*, pp. 220-221.

[623] Ekins, *The Nature of Legislative Intent*, p. 220.

law creates the acting group and also defines the basic features of procedure, which importantly includes the legislature's egalitarian structure and the requirements of group membership—which in turn mean that the legislative intent is open and public.

Ekins also is wrong to claim that "If a legislator asserted that he did not belong to the group (or that the legislature did not exist) then, even though identified as a member by law or convention, he would not belong to the acting group."[624] I argue that such a legislator would still be part of the "acting group" because they are still legally a member of the legislature (unless they resign or do whatever frees them from legislative membership according to the rules).

I also reject Ekins' claim that "For the legislators to act jointly, their intentions to legislate together by means of certain procedures must be unanimous."[625] Just as the *existence* of the acting group is owed to the members who make up the group on Ekins' account, the procedures that determine what counts as group action are also a function of the actual, unanimous acceptance by individual legislators: "The interlocking intentions of the legislators create majority voting procedure."[626]

Legislators do not need to unanimously accept the procedures that they act upon. Instead, it is sufficient for joint action that the rules of procedure *be followed*, even if the legislators do not unanimously *accept* those procedures. In fact, I do not think it is even necessary for *any* individual legislator to *actually accept* the rules of procedure. They just have to *act in accordance with them*. (Again, we could wonder why, on an individual level, a particular legislator would do all of these things if they did not actually accept the legislative procedures.

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[624] Ekins, *The Nature of Legislative Intent*, p. 221.

[625] Ekins, *The Nature of Legislative Intent*, p. 221.

[626] Ekins, *The Nature of Legislative Intent*, p. 222

But this is only relevant for assessing the *rationality* of the actions of *individual* legislators, and is not relevant for assessing whether *group legislative* action has actually occurred.)

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There is a final perspective I will mention, not as an additional argument for the claims I have offered here, but instead as a conceptual home that might help house some of the considerations I have articulated here.

I am referring to a classic legal distinction between *intent* and *motive*. To illustrate this distinction, and why it matters to the present context, consider the following example. A person holds a gun in their hand, points it at someone else, and pulls the trigger. All things being equal, one would infer that the person's intent in aiming the gun at the person and pulling the trigger was to grievously injure or kill the person by shooting them. But what was the *motive* the person had for pulling the trigger? Well, it could have been a number of things: the shooter is using violence to effectuate an armed robbery; the shooting victim is having an affair with the shooter's spouse; the person is attacking them and the shooter is actually acting in justified self-defense, etc.

The *intent* of some action gets to what the person had in mind, what they wanted or meant to accomplish, by doing whatever action they did; the intent is the difference in the world the person wanted to make with their action. The *motive* of an action is the *reason for which* the person wanted to make the difference in the world that they did. In criminal law, the intent is what is legally relevant, while the motive is legally irrelevant.

We can think about the passing of laws in a similar way. Laws are meant to make some difference in the world by getting people to act or forbear from doing some thing or other.

Perhaps legislatures can act with a certain intent in passing a law, and they can also act with a certain motive. And perhaps only one of these is legally relevant. So I propose the following as definitions:

> LEGISLATIVE INTENT: the difference in world the legislature meant to bring about with its change to the law.
>
> LEGISLATIVE MOTIVE: *the reason for which* the legislature wanted to bring about the difference in the world that it did with the change in the law.

In the ***Strategic agreement*** case described above, the more distant and inconsistent things that moved the different legislative factions to act would be the legislative motives. The shared content that more directly defines the Congressional action would be the legislative intent. And just as in the criminal context, only one of these (the intent) is legally relevant. These motives are not legally relevant and could properly be ignored by judges in reasoning about what that law requires, the same way the possible motives behind a crime could properly be ignored by a jury in its deliberations in a criminal case.

Perhaps Sunstein's idea of the incompletely theorized agreement here. The motives are the deeper or more distant points which mark the point of disagreement between two facts. They genuinely moved some legislative faction to act (and so they have genuine motive force), but the motives are not part of the reason for which the group, considered as unified, official entity, came to act. The *intent* marks the point of agreement, and structures the way in which the factions are able to act together. Perhaps this is why the intent is legally relevant, but the motive is not.

Again, I do not mean to articulate this as reason with its own independent force. Instead, I find the similarities between these cases worth mentioning, as a possible legal, conceptual home in which to house some of the ideas advanced here.

V.) **Conclusion**.

I have argued that the worries Shepsle identified do not have their source, strictly speaking, in Arrow's impossibility theorem, and further, that these worries do not pose a fatal threat to the concept of legislative intent. Next, I argued that the many different skeptical arguments against legislative intent assumed an incorrect model of group agency on which the possibly unexpressed contents of the minds of individual legislators is somehow relevant to Congressional intent. Instead, I argued that Congressional intent is constitutively a function of publicly-available facts.

Richard Ekins' account reaches a similar result by relying on the work of Michael Bratman. But I argued Ekin's account wrongly relies on individual legislator intentions in explaining the nature of Congressional action. Instead, I argue legislators do not need to have standing intentions for the legislative group to act. This is, again, because the existence and nature of Congress is grounded in society-wide constitutive rules.

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