



PHILOSOPHICAL FOUNDATIONS OF

# Language in the Law

EDITED BY  
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# Philosophical Foundations of Language in the Law

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# Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication

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## 1. Introduction

According to a view—really a family of related views—that has considerable currency at the moment, philosophy of language and linguistics have a direct bearing on the content of the law. The general outlook of this view—the *communicative-content theory of law*, or, for short, the *communication theory*—can be captured in the following way. Legal texts are linguistic texts, so the meaning or content of a legal text is an instance of linguistic meaning generally. It therefore stands to reason that, in order to understand the meaning of an authoritative legal text or utterance, such as a statute or regulation, we should look to our best theories about language and communication. Those theories tell us that a text or utterance has linguistic content—call it *communicative content*—that may go well beyond the semantic content of the text. Communicative content depends on certain communicative intentions of the speaker.<sup>2</sup> Communication is successful to the extent that the hearer succeeds in recognizing what the speaker intends to communicate. From this understanding of language and

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<sup>2</sup> I elaborate on the notion of communicative content toward the end of section 2.

communication, the communication theorists conclude that a statute's contribution to the content of the law is its communicative content.<sup>3</sup>

Recognizing that a statute's contribution to the content of the law is its communicative content will, communication theorists believe, solve or eliminate many problems that bedevil legal interpreters. As Stephen Neale puts it:<sup>4</sup>

a great deal of time and ink have been wasted in legal theory... on debates that are, at bottom, either fruitless or incoherent. The good news is that the confusions and confections that have given rise to spurious debates or produced the illusion of intelligible arguments are readily dispelled by doing some patient philosophy of language.

For example, philosophy of language will for the most part dissolve the long-running debate between textualists and intentionalists about statutory and constitutional interpretation.<sup>5</sup> Similarly, philosophy of language will reveal that the law is more determinate—there are fewer cases in which there is no applicable legal standard—than it is often thought to be.<sup>6</sup> Moreover, these happy results can be reached without moral argument, since they are straightforward deliverances of the study of language. In fact, the main theses seem to be regarded by their advocates as obvious or even trivial in the light of developments in philosophy of language.

I often hear the communication theory offered in conversation, especially by philosophers of language, and it has recently been advocated in print by Larry Alexander (1995), Larry Alexander and Saikrishna Prakash (2004), Cheryl Boudreau et al (2007), Paul Campos (1992, 1993a, 1993b), Stanley Fish (2005, 2008), Steven Knapp and Walter Benn Michaels (1982, 1983, 2005), Andrei Marmor (2008, 2011), Stephen Neale (2009), and Scott

<sup>3</sup> The enactment of a given statute would make it the case, other things being equal, that certain legal obligations (powers, privileges, and so on) obtain. Roughly, the statute's *contribution to the content of the law* consists of these legal obligations. I define the term more carefully at the beginning of section 2. The communication theorists focus on statutes, which, apart from administrative regulations, are the most promising case for them, and I will follow this focus here for convenience. My main arguments apply with the same force, however, with respect to other authoritative legal texts, such as constitutions, regulations, and appellate decisions. In my 2011, section III.1, I sketch reasons why appellate decisions are especially unpromising for any theory according to which a law-making act's contribution to the content of the law is the meaning of its text.

<sup>4</sup> (2009) at pp 3–4. For similar claims, see, eg Alexander (1995), Campos (1993) and Soames (2009a).

<sup>5</sup> Neale (2009) at p 4, Fish (2005) at pp 645–6. For similar claims, see, eg Alexander and Prakash (2004), Boudreau et al (2007) and Knapp and Michaels (2005).

<sup>6</sup> Soames (2009b) at p 404. Some communication theorists would not make this claim, recognizing that communicative content may well be less determinate—and more difficult to ascertain—than other candidates for a statute's contribution to the content of the law. See, eg Alexander (1995).

Soames (2009a).<sup>7</sup> Of course, other positions include some but not all of the theses of the communication theory.<sup>8</sup>

There is something very appealing about the communication theory. If one relies on analogies between legislation and personal communication, especially commands, it may seem obvious that the goal of statutory interpretation is to figure out what the legislature communicated. The communication theory draws on up-to-date philosophy of language to show us how to understand what the legislature communicated.

But the communication theory moves from an understanding of what the legislature communicated to a thesis about a statute's contribution to the content of the law. The content of the law consists of the legal obligations (powers, privileges, and the like) that obtain in a legal system at a given time. So a thesis about a statute's contribution to the law is a thesis about legal obligations. A move from a text's *meaning* to the existence of certain legal *obligations* requires argument. It is uncontroversial that, on any plausible view, the meaning of a statute's text is highly relevant to the statute's contribution to the content of the law. But it is highly controversial what role the meaning of the text plays in explaining a statute's contribution to the content of the law.

On my view, which I do not argue for directly in this chapter,<sup>9</sup> enacting a statute is a way of changing our obligations, rather than a way of communicating them, and moral or other normative considerations determine what difference to our obligations the enactment of a statute makes. To take a very simple example, there are reasons of democracy and fairness why aspects of the meaning of a statute that are not publicly available should not play a role in determining our legal obligations. Such considerations support the proposition that the content of the law does not (constitutively)

<sup>7</sup> Other writers take a similar position with a focus on constitutional interpretation. eg Lino Graglia (1992) and Richard Kay (1988, 1989). The communication theorists fall into two groups—those working in or strongly influenced by contemporary philosophy of language and linguistics, and those defending similar positions without that influence. (Of the writers cited in the text, Marmor, Neale, and Soames are in the first group; their predecessors include Sinclair (1985) and Miller (1990).) Both groups think that their shared position about the meaning of texts and utterances follows from obvious facts about the nature of language and communication. My arguments apply to both groups' positions, but I will for the most part focus on the work of the first group because of its use of philosophy of language. For an important difference in the way in which the two groups frame their main arguments, see note 22.

<sup>8</sup> Larry Solum (2008) shares the methodological theses of the communication theory, but, in his view, what philosophy of language reveals is that, with certain qualifications, the content of the law is what the semantic content of the relevant texts would reasonably be taken to be. On this 'public meaning' notion, see note 48 and accompanying text. Solum's discussion is limited to constitutional law, but his reasoning applies to statutes and regulations.

<sup>9</sup> See Greenberg (2004, 2006, 2011, forthcoming). I sketch the view briefly in section 3.

depend on the intentions of legislators to the extent that they are not publicly available.<sup>10</sup>

On this kind of view, philosophy of language is far from irrelevant. It can, among other things, help us to an improved understanding of some of the likely candidates for determinants of the content of the law. Without such an understanding, we cannot work out what relevance to the content of the law such candidates have.

Elsewhere, I argue for my positive view and raise problems for the thesis that the meaning of a statute constitutes its contribution to the content of the law.<sup>11</sup> In this chapter, however, I pursue a different, more concessive argumentative strategy. I grant many of the assumptions of the communication theorists and then argue that there are many candidates for a statute's contribution to the content of the law, including different linguistic and mental contents. For example, we have what the legislature said, what it communicated, what it meant, the 'public meaning' of the statutory text,<sup>12</sup> and in what way the legislature intended to modify the content of the law.<sup>13</sup> And there are many finer distinctions. We can distinguish content the 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. Differently, we can distinguish content the legislature intended to communicate but intended not to affect the content of the law, content the legislature implicated but avoided stating in order to avoid political responsibility, and so on.

The study of language can be important in helping us to make and clarify such distinctions, but beyond this information-providing role, it has nothing to say about which, if any, of these candidates constitutes a statute's contribution to the law. The communication theory therefore lacks the resources to say what any statute's contribution is.<sup>14</sup>

<sup>10</sup> I discuss other examples in sections 3 and 6. Dependence should be understood throughout as constitutive dependence, unless I specify otherwise.

<sup>11</sup> See citations in note 9.

<sup>12</sup> See note 48 and accompanying text.

<sup>13</sup> On such intentions, see section 5.

<sup>14</sup> Earlier incarnations of the communication theory have been powerfully attacked on a combination of related grounds concerning the nature, existence, and ascertainment of the relevant intentions of the legislature—most importantly that it is highly problematic what constitutes the relevant collective intentions. See especially Dworkin (1985) and Moore (1981). For recent discussions, see Waldron (1995) and Solum (2008). Hurd (1990) makes an impressive case that legislation does not satisfy the conditions for Gricean communication. Those attacks are compelling, and I will not repeat them. My challenge to the communication theory is, in a way, more fundamental than the earlier attacks because I argue that the theory fails even if we assume that the relevant legislative intentions are unproblematic and grant the communication theory's claims about language. It is worth noting that these claims about language are controversial within philosophy of language and linguistics.

I will defend several main theses:

- Granting the communication theorists' main conclusions from philosophy of language, it is far from obvious that the contribution to the law of a statute must be its communicative content, or indeed any ordinary linguistic or mental content associated with the statute.
- There are candidates for a statute's contribution to the content of the law other than communicative content, such as the content of the legislature's legal intentions.
- Beyond clarifying the nature of such candidates, the considerations offered by the communication theorists—and linguistic considerations generally—do not help to support one candidate for a statute's contribution to the content of the law over others.
- There are different aspects or components of communicative content that plausibly are differently situated with respect to whether they form part of a statute's contribution to the content of the law.
- Beyond clarifying the nature of the different aspects of communicative content, the considerations offered by the communication theorists—and linguistic considerations generally—do not help to explain the relevance of different aspects of communicative content to a statute's contribution to the content of the law.
- There are different legitimate notions or types of communicative content. Different notions are more fruitful for different theoretical purposes.
- The considerations offered by the communication theorists—and linguistic considerations generally—do not explain why one notion of communicative content rather than another is the appropriate one in the legislative context.
- Trying to understand legislation on the model of communication is misguided because legislation and legislative systems have purposes that have no parallel in the case of communication and that may be better served if a statute's contribution to the content of the law is not constituted by what is communicated by the legislature.

## 2. Motivating the communication theory

In this section, I clarify the motivation for, and the appeal of, the communication theory.

Let me start with a note about terminology. The communication theorists sometimes write of, for example, what a statute 'says', 'states', or 'asserts', or of a statute's 'content' or 'legal content'. Such terms are ambiguous between, on

the one hand, aspects of the linguistic meaning of the statutory text and, on the other hand, the relevant difference that the statute makes to legal obligations, powers, and the like. Because the communication theory draws a conclusion about the latter from the former, it will be important to have terminology that is unambiguous. Otherwise, one can easily slide from, for example, ‘what the legislature says’—a linguistic content—to ‘what the law says’—legal obligations. For aspects of the meaning of a statutory text or utterance, we can use the same terms as for other kinds of texts, eg *semantic content*, *conversational implicature*. For the (relevant) difference that the enactment of a statute or other law-making action makes to legal obligations, I will use the term *contribution to the content of the law—contribution*, for short.

Which difference is the relevant one? On standard views, the enactment of particular statutory language would make it the case, other things being equal, that certain legal obligations (powers, privileges, and so on) obtain (or do not obtain). That is, it would do so constitutively, not by causally influencing further events. The ‘other things being equal’ qualification is needed because other factors, such as another statute, may interfere, defeating or modifying the statute’s contribution.<sup>15</sup> The intuitive idea is that the legal obligations that would obtain in virtue of the statute’s enactment are the statute’s contribution. A little more precisely: for a law-making action, such as the enactment of a statute, to be successful qua law-making action is for it to make the case that certain legal obligations obtain. The enactment of a statute may also incidentally bring about other changes in the law, for example by persuading someone to bring a court action that changes the law. But a statute’s causing such changes is neither necessary nor sufficient for it to be a successful law-making action. A statute’s contribution is the effect on legal obligations that would constitute it as a successful law-making action.<sup>16</sup>

With this terminology, we can spell out the appeal of the communication theory. It is obvious that the meaning of statutory and other authoritative legal texts is intimately connected to the contribution that they make to the

<sup>15</sup> For example, the communication theory has to allow that a statute’s communicative content may be inconsistent with the communicative content of an authoritative legal text that has priority over the statute. The communication theory requires an account of how the contributions of different authoritative texts are to be reconciled and amalgamated. See my 2011, section 3. For convenience, I will generally omit the ‘other things being equal’ qualification, but it should be understood throughout. Also, for simplicity, I will hereafter ignore the fact that statutes may change the law in ways other than by creating obligations, including by eliminating obligations.

<sup>16</sup> The notion of a statute’s contribution could be developed more fully. And the ‘other things being equal’ qualification may present difficulties. But we need not do more because the notion is needed in order to formulate the communication theory. Its central thesis concerns a statute’s contribution. By contrast, Dworkin’s position and my own do not require such a notion because they are holistic in the sense explicated in my 2011 at pp 49–51, 59–60.



content of the law. Lawyers and judges spend a lot of time interpreting such texts. And there is often an obvious correlation between what is legally required and what authoritative legal texts say. So it is natural to assimilate the meaning of the text to what the law requires.

Moreover, despite famous attacks on a command model of law, it is natural and common to think of the law on the model of personal commands.<sup>17</sup> The command model vindicates and gives specific form to the idea that linguistic meaning is closely related to what is required. For it is plausible to think that what a command requires one to do is what the commander said or meant or communicated.

I have argued elsewhere that there is a picture of the relation between authoritative legal texts and the content of the law that is widely taken for granted. This *Standard Picture*—*SP*, for short—derives from the command model of law, while dispensing with certain aspects of that model that are obviously out of place in a contemporary legal system. In particular, *SP* retains from the command model the idea, very roughly, that what is authoritatively pronounced becomes a legal norm *simply because it was authoritatively pronounced*. In another paper (2011), I explicate in detail the intuitive idea. The main point, for our purposes, is that, according to *SP*, a legally authoritative utterance explains the validity of a legal norm *without explanatory intermediaries*—that is, not by explaining something else, which then explains the norm's legal validity.<sup>18</sup> For example, it is not that the making of the pronouncement changes people's expectations or moral obligations in a way that creates a legal obligation to act in the way that the pronouncement specifies. Crucially, the content of the legal norm that is explained by the authoritative pronouncement is simply what was pronounced. Thus, on *SP*, a statute's contribution (other things being equal) is the ordinary linguistic content of the statutory text or utterance.

The communication theorists typically proceed as if *SP* needs no defense, perhaps on the ground that it is obvious or trivial. Soames<sup>19</sup> begins his discussion by asserting: 'Progress can . . . be made on [the question of how the content of the law is related to authoritative legal sources] by seeing it as an instance of a more general question of what determines the contents of ordinary linguistic texts.' From that point on, he assumes that the content of the law is 'the linguistically-based content of the relevant legal texts—including

<sup>17</sup> Analogies to commands are ubiquitous in the statutory interpretation literature. See, eg Posner (1993), p 265, and Manning (2001).

<sup>18</sup> The idea is more fully explicated in my 2011 at pp 44–47. As I explain there, the thesis is consistent with the proposition that the making of an authoritative pronouncement is not sufficient for the corresponding norm's being legally valid. See also note 30 and accompanying text.

<sup>19</sup> (2009b) at p 403.

everything asserted and conveyed therein'.<sup>20</sup> Similarly, Alexander and Prakash (2004), Boudreau et al (2007), and Fish (2005) simply take for granted that the content of the law is the meaning of the authoritative legal texts.

It is easy to see how SP leads to the communication theory. According to SP, the content of the law is the meaning of the relevant legal texts or utterances. If we want to know how to work out the meaning or content of a text or utterance, we should look to our best theories about language and communication. So, the first point is that, given SP, it seems uncontroversial that philosophy of language can be straightforwardly called upon to tell us how to determine the content of the law.

Next, with qualifications not relevant here, it is uncontroversial in contemporary philosophy of language and linguistics that the linguistic content of a text or utterance does not depend on moral facts.<sup>21</sup> I believe that this position is correct, and I will assume it throughout.

Given SP and the fact that linguistic content does not depend on moral facts, we can see why the communication theorists think that the content of the law does not depend on moral facts: if the content of the law consists of certain ordinary contents, and those ordinary contents are determined entirely without appeal to moral facts, then, it may seem, the content of the law is determined without appeal to moral facts.

The main point lies in what we find when we turn to contemporary philosophy of language and linguistics.<sup>22</sup> In order to understand the point, we

<sup>20</sup> Soames (2009b) at p 403, *passim*.

<sup>21</sup> On some views, the meaning of, say, a botanical term may depend in part on the botanical facts. In the same kind of way, the meaning of moral terms may depend in part on moral reality. This kind of dependence is not relevant to the argument. Thanks to Seana Shiffrin for pressing the need for this qualification. There is also a well-known view according to which the 'principle of charity' is partly constitutive of meaning and mental content. According to one version of this kind of view, suggested by the work of Donald Davidson, charity involves maximizing the extent to which the subject prefers the good, as well as the extent to which the subject believes the truth. Even if meaning depends on facts about value in the way that such a view maintains, the kind of global dependence at issue would not affect the present argument. Throughout the paper, I set aside both qualifications mentioned in this footnote.

In addition, the point in the text about moral facts applies also to other facts. There are difficult and interesting issues about whether mental or linguistic content depends on normative facts other than moral (or other practical normative) facts, such as epistemic or intellectual normative facts. I am concerned here with practical normativity, such as moral or legal normativity, only. In this chapter, the points I make about morality typically apply to practical normativity generally.

<sup>22</sup> As noted above, the communication theorists' claims about language are controversial within philosophy of language. The account outlined in the text applies to the first group of communication theorists mentioned in note 7 above. Members of the second group reason in essentially the same way, except that—because they do not recognize the existence of other aspects of linguistic meaning, such as semantic content—they take the simpler position that the meaning of any text is what its author intended to communicate: eg Alexander and Prakash (2004), Fish (2005), and Knapp and Michaels (2005).

need a distinction between two fundamental kinds of linguistic meaning. First, there is semantic content—roughly speaking, that aspect of linguistic content that is conventionally encoded in a text.<sup>23</sup> In non-technical terms, the semantic content of a sentence is approximately its literal meaning.

Second, there is pragmatically communicated content—roughly speaking, linguistic content conveyed by an utterance that goes beyond what is conventionally encoded in the linguistic expressions. For example, the semantic content of the sentence ‘John drank five beers and drove home’ plausibly contains no information about the order in which John performed these two deeds. In many contexts, however, a speaker may utter the sentence in order to communicate that John first drank five beers *and then* drove home. Similarly, the semantic content of the sentence ‘Abigail has two children’ may well be simply that Abigail has at least two children. However, in some contexts, a speaker may utter the sentence in order to communicate that Abigail has exactly two children.

Philosophy of language and linguistics have, according to the communication theorists, taught us that the full linguistic content of a text is what is communicated by its utterance, including by pragmatic means. In general, the linguistic content of a text—whether in conversation, in an instruction manual, in a formal letter, or in a statute or judicial opinion—may go beyond its semantic content. Even what is said or asserted, let alone what is implicated, may go well beyond semantic content and, on some views, may not even include semantic content. Semantic content is merely a tool that we use to convey and ascertain communicative content.

The communication theorists conclude that an authoritative legal text’s contribution is the content that is communicated by the enactment of the text. The communication theorists take this conclusion to be obvious in the light of basic facts about how language works.<sup>24</sup>

The imprimatur of philosophy of language and linguistics is an additional source of appeal for the communication theory (beyond the appeal of SP generally). The theory purports to offer a hygienic and scientific way of resolving messy debates that have long persisted in legal theory. An important part of this appeal is the way in which philosophy of language seems to show

<sup>23</sup> There are at least two levels of semantic content, but we can ignore the distinction for present purposes. Also, there are competing accounts of the nature of semantic content, but the differences will not matter for our purposes. For recent discussion of how to draw the semantics/pragmatics distinction, see the papers in Szabo (2005).

<sup>24</sup> eg Soames (2009b) at p 16, says: ‘Thus, to interpret the law one must consult not just linguistic meaning, but also communicative intent. This point, though obvious from a correct understanding of the relationship between meaning and assertion, has proven too difficult for some of our highest courts.’

that the content of the law does not depend on moral facts, thus making it unnecessary to engage in moral reasoning to ascertain the law. A theory that excludes moral reasoning from the ascertainment of legal obligations has the advantage of avoiding a source of complexity and controversy. In addition, there is a familiar political reason for wanting to keep morality out—a role for moral reasoning is often thought to allow judges to substitute their own views for those of the legislature. Finally, legal positivist sympathies are common and grounded in an intuitive idea of the law.

The appeal of the communication theory, and in particular the way in which it draws plausibility from analogies with personal communication, can be usefully demonstrated with an example. In the notorious *Smith v United States*,<sup>25</sup> the central issue concerns the interpretation of a federal statute that provides an additional penalty for a defendant who ‘uses or carries a firearm’ ‘during and in relation to’ a drug trafficking crime. Several judges struggled with the question whether the meaning of ‘uses a firearm’ encompasses trading a firearm for drugs. The problem, the communication theorists believe, is that the judges were focused on the meaning of the statutory language—that is, on semantic content—rather than on what Congress meant or intended to communicate. If, in a typical morning exchange, my wife asks me ‘Have you had breakfast?’, it would be silly to waste effort parsing the semantic content, which arguably concerns whether I have *ever* had breakfast. Rather, I would take her to be asking whether I have had breakfast *today* because that is what she intends. Similarly, the judges in *Smith* should not have wasted time on the semantic content of the text, which is plausibly silent with respect to how the weapon is used. If Congress intended to communicate that only uses of firearms as weapons were to receive an increased penalty, then that is the statute’s contribution.<sup>26</sup> Given the commonsense appeal of this line of reasoning, as well as its backing in philosophy of language, one can see how the communication theorists have been led to take it as a general prescription for statutory interpretation.

### 3. Refining the communication theory

In order to get clearer about the communication theory’s claims, it will be helpful to distinguish it carefully from four other superficially similar positions.

*First*, the communication theory’s claim about a statute’s *contribution* must be distinguished from the thesis that the *meaning* or linguistic content of a

<sup>25</sup> 508 US 223 (1993).

<sup>26</sup> See Soames (2009b) at pp 412–15.

statute is its communicative content. If the communication theory took a position merely on what a statute's meaning is, it would yield no conclusions about the content of the law—nor, therefore, about the correct resolution of any legal cases. In fact, the communication theorists regularly draw conclusions about statutes' contribution to the law. They make general claims about the way in which statutes contribute to the law, claims about the resolution of debates in legal theory that turn on the way in which statutes contribute to the law, and claims about the resolution of specific cases.<sup>27</sup>

*Second*, the communication theory's claim about a statute's contribution must be distinguished from the claim that the meaning—or, in particular, the communicative content—of a statute is *highly relevant* to its contribution. As I have emphasized, on any plausible view, the meaning of a statutory text is highly relevant to the statute's contribution.

To get clearer about the communication theorists' claim about the role of the meaning of statutory language in explaining a statute's contribution, it will be useful to compare the communication theory with alternative views on this issue. Consider Ronald Dworkin's (1986) position: the content of the law is the set of principles that best justify the past legal and political decisions or practices. On this position, a statute's contribution to the law is, other things being equal, the set of principles that would justify the enactment of the statute alone. 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 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.<sup>28</sup>

To take a very different example, on Scott Shapiro's (2010) planning theory of law, a statute's enactment creates or modifies a plan, and the statute's contribution is the content of the plan. That content, however, is not constituted

<sup>27</sup> I offer one qualification with respect to Neale (2009). Near the beginning of his rich paper, he says that what a statute states 'leaves wide open the question of the contribution it makes to the law', and avows that the latter question goes 'well beyond the philosophy of language': (2009) at p. 5. Except for the official disclaimer just quoted, however, Neale seems to assume throughout that what a statute states is its contribution to the law. Indeed, if a statute's linguistic content left 'wide open' its contribution to the law, and the nature of that contribution could not be answered by philosophy of language, Neale's paper could not do what it purports to do. For example, his paper claims, on exclusively linguistic grounds, to dissolve the debate between textualists and intentionalists. But that debate concerns a statute's contribution.

<sup>28</sup> For clarification and elaboration of this understanding of Dworkin, see my 2011, section II.2.

by the meaning of any text or utterance or the content of any mental state. The meaning of the statutory text is of course a relevant factor, but the content of the plan depends in important ways on the goals of the legal system.

My view, very roughly, is that a statute's contribution to the law, other things being equal, is the general and enduring effect on our moral obligations that the enactment of the statute brings about in certain characteristic ways.<sup>29</sup> On this *Dependence View*—*DV*, for short—the contribution of statutes to our legal obligations is, with important qualifications, determined by moral considerations, such as considerations of democracy and fairness. The meaning or content of a statutory text is merely one factor that may be relevant to the statute's contribution, and what relevance, if any, a particular factor has depends on what relevance moral considerations give it.

In general, enacting a statute changes our obligations by changing the morally relevant circumstances. More concretely, enacting a statute could create an obligation by making a particular solution to a coordination problem salient, by making it more likely that others will comply with a particular scheme, by making it the case that democratic considerations support the obligation, by getting officials to take actions that generate the obligation, or in diverse other ways. Some of these ways of changing our obligations rely on communication, and others do not. When they do rely on communication, what is communicated need not be the statute's contribution. For example, in the case of a coordination problem, the fact that the legislature voted for a particular bill can make a particular solution salient without the legislature intending to communicate that solution and without the audience recognizing such an intention. The legislature may even have intended to communicate a different solution. Members of the audience may have a 'public-meaning' theory of statutory interpretation; they may misrecognize what the legislature intended to communicate, and so on.

On the three positions just sketched, the meaning or content of a statutory text is relevant to the statute's contribution, but there are important differences between the role of meaning on such positions and the role of meaning on the communication theory. I believe that the most important difference is best understood in terms of the notion of explanatory directness introduced in the previous section. On the communication theory, the legally authoritative utterance of a text with a certain communicative content explains the obtaining of a legal norm with corresponding content *without explanatory*

<sup>29</sup> See my 2011, forthcoming, and also 2004, 2006. In order to understand this view, it is important to see that our moral obligations may include obligations that are not imposed by *ex ante* moral norms. For example, participation in a morally flawed scheme can become morally required if many others are participating or are likely to do so.

*intermediaries*.<sup>30</sup> By contrast, on the three positions just sketched, this proposition is not true. For example, on Dworkin's theory, the meaning of a statutory text will be importantly relevant to the statute's contribution. But the explanation runs through considerations of justice: the enactment of the statute—with its various features, including the meaning of its text—adds to the existing legal practices, thereby affecting which set of principles best justifies the practices. For convenience, I often express the distinction by saying that, on the communication theory, a statute's contribution is *constituted* by its communicative content (or *is* its communicative content, or the like), while on the contrasting views, a statute's contribution is not so constituted.<sup>31</sup>

Another difference between the communication theory and the three contrasting positions is that the communication theorists seem to hold that a statute's contribution (other things being equal) is fully constituted by its communicative content, though they of course accept that a statute's all-things-considered contribution may depend on factors other than its communicative content. On the contrasting positions, even a statute's other-things-being-equal contribution may depend on factors other than the meaning of the statutory text.<sup>32</sup>

We now come to the *third* of the types of positions from which the communication theory must be distinguished—positions that rest on normative considerations, such as considerations of democracy and fairness. In defending different positions on a statute's contribution, judges and other legal interpreters commonly appeal to political morality. For example, Justice Scalia and other textualists appeal to democratic and rule-of-law values to support textualism over intentionalism.<sup>33</sup>

There are familiar normative considerations that might be thought to support the communication theory's thesis about a statute's contribution. For

<sup>30</sup> For much fuller development of the notion of explanatory directness, see my 2011. As I emphasize there, the absence of explanatory intermediaries is consistent with (1) the existence of an explanation of what makes an utterance authoritative and (2) the possibility that the making of an authoritative pronouncement is not sufficient for the corresponding legal norm's obtaining.

<sup>31</sup> Someone might take issue with this characterization along the following lines. On Dworkin's view, a statute's contribution is constituted by the set of principles that best justifies the statute's enactment. Because the best justification of a statute's enactment depends constitutively on the meaning of the statutory text (among other things), Dworkin's view has the consequence, the argument continues, that a statute's contribution *is* partially constituted by the meaning of the statutory text. I think that this way of talking would be misleading, but 'constitute' and its cognates are used variously and sometimes loosely in philosophical writing. I stipulate the usage in the text as an abbreviation for the point about explanatory directness. In my 2005, I discuss the loss of explanatory power that can result from collapsing levels of constitutive explanation.

<sup>32</sup> On the notion of a statute's other-things-being-equal contribution, see notes 15–16.

<sup>33</sup> See, eg Scalia (1997) at pp 17–18. For another example of a normative defense of textualism, see Manning (2006).

example, some conceptions of democracy might support the idea that the law must be what the legislature intended to communicate. Differently, there are democratic considerations that support the idea that the content of the law must be publicly available, which may seem to resonate with the notion of what is communicated, as opposed, for example, to what the legislature wanted the law to be, but failed to communicate.

Given their overall theory, however, the communication theorists cannot rely on democratic or other normative considerations to support their position on a statute's contribution, nor would they wish to appeal to such considerations. A central theme of the communication theorists is that the philosophy of language can cut through the confused debates of legal theorists and tell us what constitutes the content of the law. By contrast, on a normative approach, normative considerations determine the relevance of different candidate contents (and other factors) to the content of the law. Philosophy of language helps to clarify what the candidates are. A normative approach thus gives philosophy of language a very different role from the dominant role that the communication theory assigns to it.

A closely related point is that the communication theorists take their position to rest exclusively on linguistic grounds. They also take it to be obviously true once one recognizes that the goal of linguistic interpretation is to discover the communicative content of the target text. It is difficult to see how the communication theory could be obviously true if it rested on considerations of political morality, given how thoroughly controversial political morality is.

More fundamentally, although some normative considerations may cut in favour of the thesis that a statute's contribution is its communicative content, it would be, to say the least, a daunting and obstacle-ridden project to defend the thesis on normative grounds. In order to do so, communication theorists would have to engage in a full-blown normative argument about what constitutes the content of the law—a debate they have not even entered.

So, an approach that appeals to moral argument to support a particular candidate for a statute's contribution would lack the features of the communication theory that give it its distinctive appeal. The approach could not claim its candidate was obvious in the light of up-to-date science. Rather, it would have an uphill struggle to defend a moral thesis that is, on its face, unpromising. Philosophy of language would take a back seat to moral argument.

*Fourth*, and finally, we need to get clear about the notion of communicative content deployed by the communication theory. There are different notions of communicative content. One notion of communicative content—the *neo-Gricean* one, as I will call it—derives from the seminal work of Paul Grice. According to the neo-Gricean notion, the communicative content of



an utterance is the content of a certain kind of complex intention. Roughly speaking, 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.<sup>34</sup> Following a relatively common terminology, I will sometimes call such intentions *communicative intentions*. The point I want to highlight is that, on the neo-Gricean notion, communicative content is constituted by the content of the speaker's communicative intentions.

By contrast, according to what I will call an *objective* notion of communicative 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—in other words, what the neo-Gricean communicative content would reasonably be taken to be. This notion is really a family of related notions that differ with respect to, for example, how the relevant member of the audience is understood, whether the speaker is idealized, and so on.<sup>35</sup> (I use the term *objective* because, on such notions, what is communicated by a given utterance does not depend constitutively on the speaker's—or anyone's—actual mental state.) Approaches that impute communicative intentions to speakers (that they do not in fact have) can be understood as attributing objective communicative content.

There are also hybrid 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. Again, one could understand what is communicated as that part of what the speaker intended to communicate that the audience in fact recognizes.

Some of the communication theorists leave no doubt that they understand communicative content to be constituted by the legislature's communicative

<sup>34</sup> Grice himself analyzed what a speaker *means* in terms of the speaker's communicative intentions: (1989) at pp 92–116, 219–21. Some have pointed out that such an analysis may provide a better account of what a speaker communicates than what a speaker means. eg Davis (2003) at chs 2–5. The term 'communicative content' avoids the issue.

Terms such as 'means', 'says', 'states', and 'communicates' are used in various ways in ordinary English. There is obviously something stipulative about calling the content of the speaker's communicative intentions 'what is communicated'. Among other things, we ordinarily do not consider information to have been communicated unless successful uptake occurs. See the discussion of objective notions of communicative content in the text immediately below and in my unpublished paper 'The Communication Theory of Legal Interpretation and Objective Notions of Communicative Content' (hereafter referred to as MS).

<sup>35</sup> cf Saul (2002), Davis (1998) and Gazdar (1979).

intentions.<sup>36</sup> In the case of other communication theorists, the evidence is more equivocal, though the neo-Gricean position is on balance probably the better interpretation of all the theorists.<sup>37</sup> Fortunately, we need not engage in extensive exegetical discussion.

First, although I will assume the neo-Gricean understanding of communicative content for concreteness, my main arguments (sections 4–6) apply, *mutatis mutandis*, to versions of the communication theory that employ an objective or hybrid notion of communicative content. (Indeed, the arguments apply to any approach that attempts to ground claims about authoritative legal texts' contribution to the content of the law on exclusively linguistic considerations.) My arguments do not depend on which notion of communicative content is in play because my basic strategy is to show that the communication theory, relying as it does on linguistic considerations, lacks the resources to favor one content over others as a candidate for the content of the law.<sup>38</sup>

Second, to the extent that the communication theory adopts an objective notion of communicative content, the particular choice of objective notion will have to be defended on normative grounds. As we just saw, however, an appeal to normative grounds gives up the distinctive features of the communication theory. I argue elsewhere that there are many different possible objective notions; which one is relevant for legal purposes depends on normative considerations.<sup>39</sup> In brief, once we are not ascertaining the speaker's actual communicative intentions, but imputing communicative content, which content is to be imputed depends in part on what assumptions we make about the speaker. For example, is the question what the legislature is reasonably taken to have intended to communicate, given what we know about the actual way in which legislatures operate? Or is the question what a single speaker who uttered the statutory text in some specified context would reasonably be taken to have intended? To take another example, as I elaborate in section 5, the Gricean conversational maxims provide a natural way of constructing objective communicative content to the extent that the speaker may

<sup>36</sup> eg Alexander (2004) especially at pp 994–5 and Neale (2009) and see also (1992). The theorists in the group not working in the philosophy of language tradition are extremely clear that they take the relevant content to be the content of the legislature's intentions, but they are not always clear about the distinction between communicative intentions and other intentions.

<sup>37</sup> Boudreau et al (2007) hold that the relevant content is the content of the legislature's communicative intentions, but also suggest that the intentions are 'as-if' or imputed, rather than actual, intentions.

<sup>38</sup> The exception is my use of examples of unpalatable contents in section 4. Different examples of unpalatable contents can be found for objective notions of communicative content.

<sup>39</sup> I argue this point more fully in MS. See also section 6.

be presumed to be complying with the principles. In the legislative context, however, which principles have a parallel role plausibly depends on political morality or the goals of the legal system. Philosophy of language and Gricean theory have nothing to say about what we should *deem* to be the content of the legislature's intentions—nor about looking to contents that, because of the goals of the legal system or because of political morality, are deemed to be what the legislature intended.

To save words, I will generally drop the 'neo-Gricean' qualification and use simply 'communicative content' for the neo-Gricean notion and 'communication theory' for the position that the neo-Gricean notion yields. I want to emphasize this terminological point because I have found that legal audiences tend to assume something like the objective notion of communicative content and are then surprised and puzzled to learn that the communication theorists would think that the communicative content of an utterance, especially of a statute, depends on the content of the speaker's communicative intentions.

#### 4. Raising doubts about the communication theory

In this section, I will use two kinds of examples to raise doubts about the idea that a statute's contribution is its communicative content. Examples of the first kind show that, in general, the relevant contribution of a legally effective action may be different from its communicative content. Examples of the second sort illustrate some unattractive and counterintuitive consequences of the communication theory. The point of this section is not to refute the communication theory by counterexample; rather, the examples are meant to be suggestive, raising doubts about the underlying assumptions of the communication theory. The main burden of argument is carried by sections 5 and 6.

Anyone who thinks it is obvious that a statute's contribution is its communicative content should consider actions, such as voting for a candidate for public office and entering a verdict, that are not law-making actions but have as their primary goal the changing of legal statuses. A bit of terminology will be helpful. Just as the success condition of the enactment of a statute is its contribution to the content of the law, the success condition of the casting of votes by the electorate is a candidate's election to office. The term 'contribution to the content of the law' is inapt for the election of a candidate, however. We can use the term 'legal impact' as a more general term to encompass both a law-making action's contribution and the change in legal status effected by non-law-making actions.

Consider swearing to uphold the Constitution, announcing 'we, the jury, find the defendant not guilty on all counts', signing consent forms, and uttering

marriage vows. In all these cases, the primary purpose of the speech act is to effect a change in legal status, and the utterances often have communicative content. But the legal impact of such an action standardly does not include its total communicative content, and may even be inconsistent with its communicative content.<sup>40</sup>

In the right context, one might intend to communicate any of a wide variety of messages by the above utterances—and, for that matter, might succeed in one's intention. Brides and grooms who use the traditional formulation 'for as long as we both shall live' may standardly mean and communicate that each one takes the other person as his or her spouse until one of them dies. That the wording is a conventional formula need not prevent the bride and groom from intending to communicate its literal content. But, of course, the legal impact in most jurisdictions is nevertheless that the couple is married only until annulment, divorce, or death, whichever comes first.

Similarly, a jury, in entering a verdict, may communicate messages that differ from the legal impact of the verdict. Consider, for example, a tort verdict that awards one dollar to the plaintiff or a criminal verdict that convicts a defendant charged with extremely serious crimes only of a trivial included offense. Signs and forms that state that one waives legal rights often communicate messages that are not the legal impact of the utterance.

The case of voting is especially relevant to legislation because legislating (in contemporary multimember legislative bodies) is simply a special case of voting. Voters often intentionally communicate messages by casting their votes for particular candidates.<sup>41</sup> Such communicative voting is perhaps especially common in elections that are not by secret ballot, such as in meetings of small organizations. Even in secret-ballot elections, people communicate messages by their votes. In the 2000 presidential election, many people successfully communicated how they felt about the two main parties—for example, that those parties were not worthy of governing—by voting instead for Ralph Nader. When voting on substantive proposals as well as on the election of candidates for office, people often cast votes intending to communicate messages only tangentially related to the issue officially being voted on. Philosophy department members might vote against a particular proposal to change the

<sup>40</sup> Speech act theory has sometimes distinguished such speech acts from communicative ones. See, eg Bach and Harnish (1979) at pp 108–25; (1992) at pp 105–6; and see also Searle (1976) (maintaining that a 'declaration' (Searle's term) does not express a psychological attitude and brings about the relevant change in status solely in virtue of the fact that the speech act has successfully been performed).

<sup>41</sup> Such intentions may satisfy standard conditions on communicative intentions. For example, a voter may intend that members of the audience come to understand what the voter is communicating by virtue of their recognizing this very intention.

curriculum, communicating by that vote that, say, the department should not bend to pressure from a powerful member. Of course, whether one can successfully communicate a particular message by a vote depends on the circumstances.

In standard electoral systems, the legal impact of a vote for a candidate—the way in which it counts toward the legal outcome of the election—is specified by the electoral system in a way that is entirely (constitutively) independent of the *communicative* intentions of the voter, and, for that matter, of what those intentions would reasonably be taken to be. Indeed, no communicative intention is needed in order for one's action to count as a valid vote. The legal impact of a vote for Ralph Nader did not depend on its communicative content.

As we are interested in the enactment of legislation by a legislature, the appropriate analogue is not the vote of an individual voter, but the election of a candidate by the electorate. I therefore want to develop an example in which the majority of the electorate votes for a particular candidate with a specified communicative intention. Suppose that a third-party candidate for a US state governorship is closely associated with a single issue—the legalization of marijuana, say. The candidate is widely assumed to have no chance of winning the election. Those who vote for the candidate intend, by casting that vote, to communicate that marijuana should be legalized. Those who vote for the candidate do not intend that the candidate become governor—they do not think that is possible, and they do not want him to be governor. Further, these facts are known to nearly everyone in the state.

In addition, as in many states, voters in the state have the power to enact legislation by direct ballot. (Also, to keep the example clean, let us ignore the relevance of federal law here and assume that the state has the power to legalize marijuana.)

To everyone's surprise, the third-party candidate receives an overwhelming majority of the votes. Because most or all of the voters in the majority have the communicative intention to communicate that marijuana should be legalized, the electorate has that intention (on any account of group intentions that would give the communication theorists what they need). Presumably, no one would maintain that the election has the legal impact of legalizing marijuana: the legal impact of the election is to elect the candidate to the governorship, despite the electorate's communicative intention.

Notice that the fact that the legal impact of the electorate's vote can only be to elect a candidate to the governorship does not prevent the vote from being successfully used to make a statement, assertion, or other communication whose content does not correspond to the vote's legal impact. In the example, the public successfully and reasonably recognizes that the electorate's vote is intended to communicate that marijuana should be legalized.

One might object that the intention to communicate that marijuana should be legalized is not the relevant intention. The objection cannot be that the intention to legalize marijuana is merely a motive for voting for the governor, not a communicative intention. It is stipulated that the voters, in casting votes for the third-party candidate, do not intend to elect him governor (eg in order that he can enact legislation legalizing marijuana). In fact, we can suppose that they believe that he would be such a poor governor that his election would doom the chances of enacting such legislation.

Also, it is stipulated that the voters' intentions satisfy the standard Gricean conditions on communicative intentions. For example, each voter intends that members of the audience—the public—come to understand what he or she is communicating by virtue of their recognizing that very intention. Moreover, the voters have no other intentions that satisfy those conditions. For example, they have no intention of communicating that the candidate should be governor. (An intention to cast the vote, even if required for the vote to be valid, is not a communicative intention.) In addition, the intention to communicate that marijuana should be legalized is the voters' primary aim in casting the votes.

A more interesting objection is that the legal impact of the electorate's vote is determined by the communicative content of a different legal utterance—for example, a statute that specifies the legal impact of an election. In the case of the enactment of a statute, the parallel move would be to maintain that a statute's contribution is not its communicative content because another statute, an appellate decision, or a constitution specifies otherwise. For example, an appellate decision or statute might specify that statutes are to be interpreted in accordance with their 'public meaning' rather than their communicative content.

In the first place, this position would represent a major retreat for the communication theory. It would be consistent with the possibility that no statute's contribution is its communicative content, as long as there is one authoritative text that so specifies.

More importantly, once it is conceded that a statute's contribution need not be its communicative content, it would be hard to avoid the conclusion that a source of law other than an authoritative legal text could determine a statute's contribution. For example, in a legal system in which practice is a source of law, a practice of interpreting statutes in a way that diverges from their communicative content could make it the case that statutes' contributions are not their communicative contents. For, if the contribution of statutes to the content of the law can be specified by the law, and practice is a source of law, what could be the reason that practice could not do so? Presumably, then, practice could make it the case, in a particular legal system,

that a statute's contribution is, say, its 'public meaning' or the principles that best justify the statute's enactment.

At this point, we start to lose our grip on what the communication theory claims concerning a statute's contribution. Is the claim merely that it is the *default* that a statute's contribution is its communicative content? If so, why think that our own legal system is in the default position—after all, there is a great deal of case law and practice concerning the interpretation of statutes, much of it in tension with the claim that a statute's contribution is its communicative content. And, for that matter, why could a legal system not have a different default? At any rate, such a default thesis is much weaker than what the communication theorists want to defend.

It might be objected that votes for candidates for the governorship were not authoritative on the question of the legalization of marijuana.<sup>42</sup> But it is part of my point that the legal impact of an action can be determined in a way that is independent of its communicative content. To concede that the legal impact of a particular election can only be the election of a candidate to a certain office, regardless of the communicative intentions of the voters and regardless of what the audience reasonably takes to be communicated, is to concede this point. Once it is established that the legal impact of a vote can be determined in a way that is independent of its communicative content, communication theorists need to show that the legal impact of a vote by a legislature on proposed legislation is not so determined. Thus, an opponent of the communication theory could put her point in the terms employed by the objection: she could claim that the proper understanding of a vote by a legislature on proposed legislation is that the sole issue at stake—the sole issue on which the vote is authoritative—is whether, say, the semantic content of the bill should become law. What issue a legislature is addressing—that is, what impact its vote can have—when it votes on a bill is the very question at the center of the debate between the communication theorists and their opponents.

A different objection might begin by noting that, in my examples, the legal impact of the relevant action is uncontroversially specified by a legal standard or conventionally determined. For example, legal systems attempt to specify exhaustively the way in which votes in elections for public office count toward the outcome. Similarly, legal standards spell out the legal impact of going through the marriage ceremony. By contrast, the legal impact of legislation is highly controversial. It is true that the legal impact of legislation is more

<sup>42</sup> A closely related objection is that, in an election for a particular office, voters' intentions to communicate messages other than a preference for the chosen candidate are not authoritative. The objection is subject to a reply parallel to that developed in the text.

controversial than the legal impact of votes for candidates for public office or marriage ceremonies. The point of the examples, however, is that the legal impact of an action need not be the action's communicative content. And from the fact that the legal impact of an action is not uncontroversially determined by a legal standard or convention, it does not follow that the legal impact is the action's communicative content. There are many other possibilities. In section 3, I sketched three accounts on which the legal impact of a statute (or other authoritative legal action) is not constituted by the statute's communicative content or, indeed, by any linguistic content of the statute. One important possibility, illustrated by Dworkin's position and my own account, is that the legal impact of an action may be determined in part by normative facts, such as facts about what democracy and fairness require.

Promises provide a useful comparison. The analogue of a statute's contribution is the promise's 'normative impact'—the promissory obligations that it generates that constitute it as a successful promise. (Just as a law-making act's success consists in its generating legal obligations, a promissory act's success consists in its generating promissory obligations.) According to some influential accounts, a promise's normative impact is not the promise's communicative content nor is it conventionally specified. For example, on one account, the utterance of the promise generates expectations in the promisee. Because it would be unfair to disappoint these expectations, the promisor acquires a moral obligation. On a very different account, the making of a promise is a kind of action that effects a transfer of a right from the promisor to the promisee. For example, very roughly, on such an account, before I promise you that I will help you move house next Monday afternoon, I have the right to decide whether to help you move on Monday afternoon. By making the promise, I transfer that right to you, much as I might transfer ownership of a book to you by making it a gift to you.<sup>43</sup>

For present purposes, the point is that, on these accounts, the content of the promissory obligation is not constituted by the communicative content of the promissory utterance. Moreover, the promissory obligation need not have the same content as the communicative content. On the expectation account, obligations may diverge from the communicative content (in the neo-Gricean sense explained above) of the promise because, for example, what the promisee reasonably comes to expect may be quite different from the communicative content. On the transfer-of-right account, moral reasons

<sup>43</sup> For expectation accounts, see Fried (1981) and Scanlon (1999). For a transfer of right account, see Shiffrin (2008). On a third kind of account, promises generate obligations in virtue of a convention, but I will set this account aside, as I want to illustrate the possibility that the normative impact of an utterance may diverge from its communicative content for reasons other than a convention.



plausibly can make it the case that a promise has a different effect on the distribution of rights than what is communicated. On both accounts, the fact that a promise has a particular communicative content has no special status with respect to the content of the promissory obligation, but is just one possibly relevant fact among many, and its precise relevance depends on normative facts. And, on both accounts, it would be misleading to say that the promissory utterance's communicative content is even partially constitutive of the content of the promissory obligation.<sup>44</sup> Thus, the promissory analogy suggests that, even in cases in which no uncontroversial standard specifies the normative impact of an utterance, the utterance's communicative content may be just one factor potentially relevant to the utterance's normative impact, and its relevance may depend on normative facts.

The examples so far show that it cannot be taken for granted that the legal impact—or, more generally, the normative impact—of an action is its communicative content. I now turn to examples that illustrate unpalatable consequences of the thesis that the legal impact of a specifically legislative act is its communicative content.

In what is probably the typical case, the legislators have *no* communicative intention associated with the relevant clause of the statutory text. It is uncontroversial that most legislators do not read most of the text of the statutes on which they vote. The vast volume of legislation ensures this. Just to give a sense of the problem, in 2005–6, the most recent year for which statistics are available, Congress passed more than 7,000 pages of statutes.<sup>45</sup>

On any tenable account of collective intentions that would serve the communication theory's purposes, if most legislators have no communicative intentions associated with a particular passage, the legislature has no actual communicative intention with respect to that passage. In that case, the passage has no (neo-Gricean) communicative content, and, according to the communication theory, it makes no contribution.

In another kind of case, the legislature's communicative intentions are very different from what they are reasonably taken to be. One way in which this can happen is that the legislature can fail to understand the applicable rules of statutory drafting and interpretation. In section 5, I develop an example in which the legislature enacts a provision with the form 'A or B', intending to communicate a content involving an inclusive *or*, though the audience would reasonably understand the legislature to intend to convey a content with an exclusive

<sup>44</sup> See note 31 and accompanying text.

<sup>45</sup> Ornstein et al (2008) at p 127. The corresponding figures (from the state session laws) for a few important state legislatures: California 8,525 pages (1996); New York 3,734 pages (2008); and Texas 5,909 pages (2007).

*or.* The communication theory implies that the statute's contribution is determined by what the legislature intended, even if members of the audience—for example, skilled lawyers—would not generally recognize the legislature's intention, and even if the legislature would not reasonably be understood as having that intention. This implication is highly counterintuitive to skilled lawyers.<sup>46</sup>

Finally, in another type of case, which is probably very common, in order to perform a delicate political balancing act, the legislature enacts statutory language intending to communicate a particular message but not intending that that communicative content become part of the law. In one version of this type of example, the legislature implicates a particular content, but deliberately avoids stating it, with the intention that the implicated content not become part of the law. Suppose that in a health care bill, it is provided that 'federally funded facilities [as defined elsewhere] may provide abortions if necessary to save the mother's life'. The literal meaning of this clause leaves open whether federally funded facilities may provide abortions in other circumstances, but a speaker might well utter the words of the clause in order to implicate that abortions may be provided if, but only if, necessary to save the mother's life. The law-makers have the following combination of intentions. They intend to communicate that they are opposed to abortion and that non-life-saving abortions are not to be funded. The law-makers do *not*, however, intend that this aspect of the statute's communicative content form part of the statute's contribution. Rather, the legislators deliberately choose not to state the restriction on funding explicitly because they intend that the provision's contribution be entirely permissive—that abortions may be provided by federally funded facilities if necessary to save the mother's life. They intend the provision to leave open the possibility that non-life-saving abortions may be provided by federally funded facilities. (We can suppose that the legislature has good reason to expect that these intentions about the contribution of the statute will be fulfilled, given the way in which the relevant courts interpret legislation.)

The reason for this combination of intentions is that the law-makers want, as much as possible, to gain favour with anti-abortion voters without alienating pro-choice voters. They have made a calculation that anti-abortion voters care a lot about symbols and that the anti-abortion communication will therefore play well to them even if it is not legally effective, and that the

<sup>46</sup> It might be said, in response to such cases, that the relevant intentions are imputed or constructed intentions, rather than actual ones. As outlined in section 1, however, the communication theory cannot appeal to imputed intentions. There are different possible ways of imputing intentions, which yield different contents. The crucial question is which content constitutes the statute's contribution. To answer this question, we will have to move away from philosophy of language to normative theory. See the discussion in my MS.

pro-choice voters are more pragmatic and will therefore not be too alienated by the communication of a message that does not change the law. Again, it runs strongly against lawyers' understanding that messages that the legislature deliberately chooses to convey in a way that it believes will prevent them from becoming legally effective must nonetheless become part of the law.<sup>47</sup>

At this point, the purpose of the examples is merely to raise doubts about the communication theory—to show that the legal impact of an action or an utterance need not be its communicative content. This finding undermines the suggestion that it is obvious, given basic facts about language, that a statute's contribution is its communicative content.

## 5. Different components and notions of communicative content

In this section, I argue that there are multiple candidates for a statute's contribution, and that the communication theory lacks the resources to support one candidate over others. One candidate we have already mentioned is the semantic content of the relevant text—roughly its literal meaning. Two other candidates for a statute's contribution are familiar to legal theorists.

First, there is what a member of the audience would reasonably take the semantic content of the text to be, given only the information that is widely available. Such a notion seems to be roughly what textualists typically have in mind when they talk about 'public meaning', 'publicly available meaning', and the like, though textualists' accounts of public meaning also have elements of what a reasonable member of the audience would take *communicative* content to be.<sup>48</sup> I will use the term *public meaning* because it is widely used in the legal literature.

Second, there is the content of the legislature's intentions *with respect to the legal impact of the enactment*—*legal intentions*, for short. I will use the content

<sup>47</sup> The example illustrates, among other things, that an utterance may communicate different contents to different audiences. This point raises additional difficulties for the communication theorists because they need an account of which content communicated by the statutory text is the relevant one. (See section 5 for related discussion.)

<sup>48</sup> See, eg Easterbrook (1988), Scalia (1997) at p 17 and Manning (2003) at pp 2457–65; (2006) at pp 75, 101. Solum's (2008) at pp 51–4, preferred candidate also seems to be, roughly, what a reasonable member of the audience would take semantic content to be. There are different ways in which semantic content may come apart from what it is reasonably taken to be. For example, on some views, context, sometimes including certain intentions of the speaker, plays a role in determining the referential content of some context-dependent expressions. The relevant aspects of context may reasonably be taken to be different from what they actually are. A similar point applies with respect to ambiguous expressions.

of legal intentions to illustrate a competitor to communicative content for a statute's contribution.

A legal intention is an intention, by enacting a given statute, in order to change the law in a particular way. For example, when a legislature (or individual legislator) votes for a statutory provision, it (or he or she) may have an intention to change the law in a particular direction, say to restrict diversity jurisdiction, to make punishments for white-collar crimes stricter, or to prohibit a particular toxin from being used in pipes carrying drinking water. Such intentions can be extremely general—to protect the public health, say—or much more specific—to require employees of restaurants to wash their hands. Legal intentions differ from communicative intentions in a basic way. The content of a legal intention is *to change the law in such and such way*. As the above examples illustrate, the content need not include any reference to linguistic expressions. By contrast, the content of a communicative intention is, to put it in a simplified form, *to communicate thus and so by uttering 'S'* (where 'S' is a linguistic expression).

Despite this fundamental difference in the nature of legal and communicative intentions, one might think that the difference does not matter much for present purposes. According to this line of thought, a legislator who has the legal intention (say) to provide a subsidy to farmers who grow soybeans will intend to use certain sentences to communicate precisely that farmers who grow soybeans will receive a subsidy. In general, for each legal intention, a legislator will have a communicative intention to use certain words to implement that legal intention. If this simple model were correct, legal intentions would not be a genuine competitor to communicative intentions because they would yield the same legal content.

In fact, though they are not always carefully distinguished, a legislature's legal intentions often would yield different legal content from its communicative intentions. It will help to have an illustration.

In *Saadeh v Farouki*,<sup>49</sup> the DC Circuit faced the question whether a suit between two aliens, one of whom is a permanent resident of a state, qualifies for diversity jurisdiction under 28 USC §1332. (Very roughly, diversity jurisdiction allows suits to be brought in federal court if the plaintiff and defendant are citizens of different states or of a state and a foreign nation.) In 1988, Congress had amended §1332 by adding that, for purposes of diversity jurisdiction, 'an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled'.<sup>50</sup> The legislative history

<sup>49</sup> 107 F3d 52 (DC Cir 1997). Many thanks to Stephen Yeazell for bringing this case to my attention.

<sup>50</sup> *ibid* at p 55.

was abundantly clear that the point of the statutory amendment was to reduce the scope of diversity jurisdiction by removing a loophole under which diversity jurisdiction encompassed a suit between a resident alien domiciled in a given state and a citizen of that state. This goal was in accord with the general congressional policy of restricting the scope of diversity jurisdiction and with congressional concern over the workload of the federal courts.<sup>51</sup>

The semantic content of the amendment, if it constitutes a legal rule, would, however, in addition to removing the loophole, *expand* diversity jurisdiction to cover a lawsuit between a permanent resident of a state and another foreign citizen who is not a permanent resident of that state. The DC Circuit interpreted the statute in accordance with the legislators' legal intention to restrict diversity jurisdiction, not in accordance with the semantic content of the amendment.<sup>52</sup>

For present purposes, *Saadeh* illustrates the way in which legislators' communicative intentions can diverge from their legal intentions. The legislators' legal intention, let us assume with the DC Circuit, was to remove the loophole mentioned above, not to expand diversity jurisdiction in any way. It is very likely that the legislators' communicative intention with respect to the crucial sentence (quoted above) was to stipulate that a resident alien counts for diversity purposes as a citizen of the state in which he resides—relevantly the same as the semantic content of the sentence. Members of Congress almost certainly did not anticipate the legal consequence of expanding diversity jurisdiction that this stipulation would have. If the problem had been anticipated, the statute would have been drafted differently. So, it is *not* that the members of Congress used the words 'shall be deemed a citizen of the state in which such alien is domiciled' intending to communicate something along the lines of *shall be deemed a citizen of the state in which he or she is domiciled when, and only when, the opposing party is not a foreign citizen*. Rather, they simply did not understand the legal consequences that their communicative intentions would have, were they to become law.<sup>53</sup>

As *Saadeh* illustrates, the content of communicative intentions and the content of legal intentions can come apart in the sense that those contents would have different consequences for the content of the law. I have already made the point that legislatures often have no communicative intentions with respect to the relevant statutory language. Even setting this point aside, communicative intentions and legal intentions can come apart because lawmakers can be

<sup>51</sup> *ibid* at pp 58–61.

<sup>52</sup> *ibid* at p 61.

<sup>53</sup> *Griffin v Oceanic Contractors* 458 US 564 (1982) provides another example of a case in which Congress's legal intentions and communicative intentions likely came apart.

wrong about which specific linguistic contents will achieve their legal intentions. Legislators frequently do not consider the statutory language with care. In addition, it is difficult to anticipate all the legal and practical consequences of specific rules.

As communicative intentions and legal intentions can come apart, legal intentions provide a competing candidate for statutes' contributions. My main concern is not to argue for one candidate over another, but it is worth mentioning two reasons that legal intentions cannot easily be dismissed by the communication theorists. First, the fact that legislatures are more likely to have relevant legal intentions than relevant communicative intentions might be thought to favor legal intentions over communicative intentions. Indeed, the view that a statute's contribution is its communicative content will have the peculiar consequence that statutory provisions often make no contribution to the content of the law.

Second, in arguing for communicative content over *semantic content*, the communication theorists often emphasize that semantic content is a means for conveying communicative content. But given the way in which communication theorists understand legislation, communicative content is a means for achieving legal intentions. Legislatures intend to use particular words to communicate particular contents in order to change the law in a desired way. Legislators are more likely to have thought carefully about their legal intentions than about their communicative intentions, and it can be difficult to know which linguistic contents will achieve particular legislative goals. Legislators will therefore often fail to have communicative intentions that are suitable means to achieving their legal intentions. To the extent that the ends-over-means argument favors communicative content over semantic content, it favours the content of legal intentions over communicative content.

The communication theorists have nothing to say about why communicative content is a better candidate for a statute's contribution than the content of legal intentions. This lack is unsurprising, for philosophy of language and linguistics do not address legal intentions. There are many problems with the position that a statute's contribution is constituted by the content of the legislature's legal intention, but identifying these problems requires appeal to the nature and purpose of law and legislation. I consider the kinds of arguments that could support one candidate over another in section 6.

Even if we grant for the sake of argument that communicative content is the right place to look for a statute's contribution, the communication theory encounters further obstacles. Pre-theoretically, we might well think that some aspects or components of communicative content should not have an impact on the content of the law—or, at least, that some components should be

treated differently from others with respect to their potential to affect the content of the law.

For example, consider the familiar distinction between what is said and what is merely implied, implicated, or presupposed. There are many legal examples. For example, the Tenth Amendment states: 'The powers not delegated to the United States by the Constitution... are reserved to the States.' The amendment has often been argued to implicate or presuppose, though it does not say, that there are some powers reserved to the states. My abortion-funding example in section 3 illustrated another possible implicature—from 'if necessary to save the mother's life' to *only if necessary to save the mother's life*. One might well think that what is merely implicated or presupposed by a statute does not have the same bearing on the statute's contribution as what is said.<sup>54</sup>

The literature draws many further distinctions that plausibly have relevance to a statute's contribution. For example, implicatures that are partly conventional might have a better case to be part of a statute's contribution than implicatures that are purely pragmatic.<sup>55</sup>

In addition to the distinctions developed in the philosophy of language literature, there are distinctions that may seem especially relevant in the legal context, regardless of whether they are theoretically important in the study of language. The abortion-funding example illustrated a distinction between contents that the legislature intended *not* to affect the content of the law and contents with respect to which the legislature had no such intention. Perhaps the legislature's intention that a component of communicative content not form part of the content of the law makes a difference to the statute's contribution.

The abortion-funding case also illustrates a distinction between, on the one hand, implicated content that the legislature did not include in what it explicitly said simply because it chose the most natural means of expression and, on the other hand, implicated content that the legislature deliberately avoided including in what it explicitly said in order to avoid political responsibility. Again, one might think that implicated contents in the latter category have a different status with respect to the statute's contribution.

The communication theorists have not systematically addressed the issue of whether some components of communicative content do not form part of a statute's contribution. Some communication theorists want to exclude certain components, though they offer no theoretical justification for doing so.<sup>56</sup>

<sup>54</sup> See Marmor (2008) at pp 435–40; (2011); and Neale (2009) at p 56.

<sup>55</sup> See Marmor (2008) at pp 444–7.

<sup>56</sup> These communication theorists are the ones most influenced by the philosophy of language. See note 7. To my knowledge, theorists in the group not drawing on philosophy of language have not addressed the issue.

Soames, for example, wants to draw the line at cases in which the communicative content would yield 'transparently undesirable results in cases not previously contemplated'.<sup>57</sup> He offers no theoretical basis for responding to these unwanted consequences of the communication theory's basic thesis by excluding the contents in question from the content of the law (as opposed to, for example, considering them counterexamples to the communication theory). In his view, those components of communicative content that he wants to exclude are 'legally incorrect'.<sup>58</sup> He does not give much explication, but the idea seems to be that a component of a statute's communicative content is legally incorrect because it yields 'transparently undesirable results in cases not previously contemplated' or because it 'violates the clear intention driving the legislators in adopting it'.<sup>59</sup> Soames offers no account of why such a component is not part of the content of the law. Instead, he simply recasts his central thesis: what a statute contributes to the law is a soft-focus or fuzzy version of its communicative content.

In sum, it is plausible that different aspects or components of communicative content are differently situated with respect to whether they form part of a statute's contribution. 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. Their appeal to basic truths about linguistic communication is supposed to provide a blanket refutation of legal theorists who rely on legal practice, legal theoretical considerations, the goals of legal systems, political morality, and common sense to support competing positions about what constitutes the content of the law. Given the nature of this argument, there is no room for the communication theorists to rely on considerations not deriving from the study of language to modify the position that the content of the law is the communicative content of the legislative text. In fact, when the communication theorists suggest excluding various parts of communicative content from the content of the law, they seem to be implicitly relying on normative considerations, but without engaging with the large relevant literature that discusses the bearing of

<sup>57</sup> (2009b) at pp 417–18. For other examples, see Neale (2009) at p 56; Marmor (2008) at pp 435–48; (2011).

<sup>58</sup> Soames (2009b) at pp 415–16.

<sup>59</sup> *ibid* at 417–18.



normative considerations on the contribution of statutes to the content of the law.<sup>60</sup>

Could communication theorists retreat to the position that the content of the law is what is *said* or *stated* by the legislature—which, on some views, has an important pragmatic component and may not even include the semantic content of the words—as opposed to everything that is communicated? First, this move would not in all cases yield the results that the communication theorists prefer, let alone avoid all unpalatable consequences. The communication theorists seem to want to include some pragmatically communicated content beyond what is said and to exclude some content that they would count as part of what is said.<sup>61</sup>

More fundamentally, what would the argument for the position be? Why is the relevant content what is said rather than, for instance, the semantic content of the text, what would reasonably be taken to be said (even if not said), or the total communicative content of the legislative text? The appeal to the total communicative content of the legislative text at least is not ad hoc in light of the communication theorists' general claim that the full linguistic content of a text is what is communicated by its utterance (see p 225 above). Once the communication theorists retreat from the position that the content of the law is the communicative content of the relevant utterances, it is not clear what grounds they have for preferring one linguistic or mental content associated with the relevant utterance over others.

Moreover, given the current state of play in philosophy of language, it is reasonable to think that there are multiple legitimate notions of what is said (and of what is stated, and so on).<sup>62</sup> Which notion is most fruitful plausibly varies depending on the theoretical purposes of the inquiry. How could purely linguistic considerations determine which notion is the relevant one in the legislative context?

<sup>60</sup> eg Neale (2009) at p 56. Marmor (2011) explicitly accepts that the question of which components of communicative content are relevant to the content of the law is a normative one. (He also seems to be committed to the view that the communicative content of a statute is partially normatively *constituted*, though it is unclear how this view is consistent with the rest of Marmor's position.) Yet he takes several positions on which aspects of communicative content form part of a statute's contribution without offering any normative considerations in their favor or even suggesting that they rest on normative grounds: eg (2011) and (2008) at pp 444–5, 447.

<sup>61</sup> At some points, Soames uses broad language (eg 'the *linguistically based* content of the relevant legal texts—including everything asserted and conveyed therein', (2009b) at pp 403, 410, 422), and, at other points, narrower formulations (pp 16, 417). He tells me (in personal communication), however, that his view is that a statute's contribution is only what the legislature *says*. Notice, however, that the contents discussed above that Soames excludes from a statute's contribution can be part of what is said.

<sup>62</sup> For a small sample of a large literature, see Grice (1989) at pp 24–5, 87–8, 117–22; Bach (2001); Carston (1988); King and Stanley (2005); Recanati (1989); and Soames (2009b) at chs 10–11.

The communication theorists may bite the bullet and insist that the content of the law is the total communicative content of the authoritative legal texts. Just as there is more than one legitimate notion of what is said, however, there is more than one legitimate notion of the total communicative content of an utterance; again, different notions are plausibly more fruitful for different purposes.<sup>63</sup> Therefore, there are competing candidates for the communicative content that constitutes the content of the law, and some further principle is needed to support one candidate over others.

Early in this chapter, I contrasted the neo-Gricean notion with a family of objective notions of what is communicated. Neo-Gricean communicative content is what the speaker intended to communicate. On the neo-Gricean notion, therefore, Grice's Principle of Cooperation and the maxims of conversation, properly understood, are not constitutive of what is communicated, but are simply a means for inferring what the speaker intended. If the maxims are treated as constitutive of what is communicated, we get an objective notion of communicative content.

Specifically, let us consider a notion on which, for a particular content X to be part of the communicative content of an utterance is for it to be the case that, in order to be in compliance with the principles of communication that apply in the context (given what the speaker has uttered), the speaker would have to have intended to communicate X.<sup>64</sup> A speaker may in fact fail to have the relevant intention, for example because he is confused about the applicable principles. On such an account, what is communicated depends constitutively on what the norms require, rather than on what was actually intended. The intuitive idea behind this objective notion of communicative content is that the speaker is reasonably understood as intending to communicate what he would have had to have intended in order for his utterance to be in compliance with the maxims.

It will be helpful to have a concrete example in which different notions of communicative content have different consequences for the content of the law (assuming the content of the law is the total communicative content of the relevant authoritative text). The following example is loosely based on an actual case. A statute specifies that, with respect to certain tenancies in government-owned housing, 'a tenant may choose to (a) convert the existing tenancy to a 50-year lease; or (b) purchase the freehold' at a price based on a

<sup>63</sup> See, eg Davis (2003) at chs 4–5, Bach and Harnish (1979) at pp 15–16, Levinson (1983) at pp 15–16, Sperber and Wilson (1986), and Boudreau et al (2007). See also Saul (2002).

<sup>64</sup> The principles of communication applicable in the case of an ordinary conversation have been much discussed in the relevant literature. I address the question of the principles applicable in the legislative context in the next section and in my MS.

specified formula. A tenant realizes that choosing both options—converting to a 50-year lease and purchasing the freehold—would, because of the way in which the price formula is specified, produce a disproportionately large financial benefit to the tenant. In enacting the statute, the legislature had the intention to communicate that the choice was inclusive—that is, that a tenant may choose either option or both.

Suppose in addition that, given the context, in order to be in compliance with the applicable principles of statutory drafting and interpretation, the legislature would have had to have had the intention to communicate that the tenant may choose one option or the other but *not* both. Given its actual communicative intentions, the legislature violated the applicable principles by drafting the statute in the way that it did.

We could flesh out the facts of the example in various ways in order to provide grounding for this supposition. For example, it could be well established in the local jurisdiction's canons of statutory interpretation that legislative provisions of the form 'X may do A or B' permit one option or the other but not both. In order to specify that both options may be chosen, a statute must use language of the form 'X may do A or B, or both'. The legislature simply failed to observe this canon.

On the objective notion of communicative content, the legislature communicated that the tenant may not choose both options. On a neo-Gricean notion, the legislature communicated that a tenant may choose both options. Thus, the case turns on which notion is the correct one for legal purposes.

Our question is not which notion of communicative content is the legally relevant one, but what could favor one notion of communicative content over others. Let us assume for purposes of argument that the neo-Gricean notion is the more theoretically fruitful notion for many purposes in the study of linguistic communication. The assumption does not, without more, settle which notion is the relevant one for legal purposes. Without some deeper understanding of the underlying rationale or purpose that lies behind the appeal to the notion of communication in legal interpretation, it is hard to see how to adjudicate between different notions of communicative content (as candidates for a statute's contribution).

I want to emphasize that the problem is not specific to the neo-Gricean notion of communicative content. If the communication theorists were to opt for a more objective notion, for example, they would still lack the resources for defending the claim that a statute's contribution is the statute's communicative content. The problem is that considerations based exclusively in the study of language and communication do not afford the resources for defending the legal relevance of one notion of communicative content over others. To understand how legislation affects the content of the law, we need an understanding

of the nature and purposes of legislation. The point, of course, is not that it is indeterminate what constitutes a statute's contribution, but rather that the communication theory lacks the resources to explain which candidate is the relevant one. (To the extent that there is indeterminacy, it does not derive from the considerations discussed here.) In the next section, I take up the question of how legislation is relevantly different from communication.

## 6. Legislation and communication

The communication theorists seem to think it is obvious that legislating is intimately tied to communicating—perhaps even that legislating is a fundamental kind of communicating. They might therefore reply to my arguments by questioning why the enactment of legislation is relevantly different from communicative uses of language such as commanding.<sup>65</sup>

I first want to clear away any thought that communication is required for legislation in Anglo-American legal systems as they in fact are. Even if such a thought were correct, it would not give the communication theorists what they need. It falls far short of the conclusion that a statute's contribution is constituted by what is communicated. But the point is mistaken, so the communication theorists' argument for their thesis about a statute's contribution cannot simply assume that legislation requires communication.

The claim that communication is necessary for successful legislation is ambiguous. We need to distinguish, on the one hand, the claim that the enactment of a statute does not make a contribution unless *that contribution* is communicated from, on the other, the claim that the enactment of a statute does not make a contribution unless *the fact that the statutory text was validly enacted* is communicated. Plainly, only the first claim is relevant to the communication theory—the communication theory would not get off the ground if the relevant communicative content were merely that a particular text had been enacted!

If I do something in public, others can derive information about what I was thinking or doing, but, if I had no intention to convey such information to others, my action is not usefully termed communicative. At a minimum, for an utterance to be communicative, it must be the case that the speaker makes the utterance with the intention of getting a hearer to recognize a content. (The paradigm of linguistic communication requires more.) And for a communication to be successful requires that the hearer understand or recognize

<sup>65</sup> Thanks to Scott Shapiro and Seana Shiffrin for encouraging me to discuss these issues at greater length.

what the speaker intends to communicate. On this standard understanding, there is no non-question-begging reason to think that the enactment of legislation does not make a contribution unless it communicates that contribution. First, it is crucial to distinguish a publicity condition from a requirement of communication. It is often said that there is a publicity condition on the enactment of legislation, but the term 'publicity' is misleading. As Raz points out,<sup>66</sup> the publicity condition can be met by secret legislation, 'All that is denied [by the publicity requirement] is that legislation can consist in a private mental act.' The publicity condition must not be confused with a requirement that a statute's contribution be recognized by anyone—still less that the legislature's actual intentions be recognized.

Second, as we have seen, legislatures need not intend to communicate anything by enacting a bill. A majority of the members of the legislature needs to vote for the bill, but neither the individual members nor the legislature needs to have any communicative intention in order to do this.<sup>67</sup> We could rely on a fiction—for example that the legislature intends what a single rational person who had uttered the legislation under stipulated conditions would have intended to communicate. But, in that case, we could not justify the fiction on the ground that enacting legislation is in fact communicating; rather, we would need an argument why it should be treated like actual communication. The communication theorists have not attempted a revisionary argument that legislation does not make a contribution unless the legislature has appropriate communicative intentions. (The communication theorists cannot rely on their conclusion about a statute's contribution here, as the question at issue is whether the argument for that conclusion relies on an unwarranted assumption that legislation is, or requires, communication.) I will argue below that important goals of law-making may be better served without such a requirement.

Third, on the standard understanding, a statute's contribution is made on the legislation's effective date, regardless of whether anyone has even read the legislation. Even if the legislature has an appropriate communicative intention, no recognition of that intention is required for the statute's contribution to be effective. (Even if recognition of the statute's *contribution* were required, communication of the *fact of the enactment* of the relevant statutory language would be sufficient for such recognition to occur.)

It is true that we ascertain what the law is, in important part, by reading legislation. But given that the enactment of legislation uncontroversially plays an important role in *making* the content of the law what it is, this truth about

<sup>66</sup> Raz (1996) at p 284, n 18.

<sup>67</sup> See, eg Kelsen (2006) at pp 33–4.

how we ascertain the content of the law does not support the claim that legislation requires communication. Compare: given the underlying facts, we can recognize that someone committed fraud or kidnapping without the perpetrator's or anyone else's communicating that he did so. So, in order to make the law publicly accessible (as opposed to in order to create law), a legislature can publish statutes with the intention to communicate the fact of their enactment. Then members of the audience—many of whom are more expert than legislators in working out statutes' contributions—can ascertain the content of the law.

I now turn to the reasons that communication is not a useful model for understanding legislation. In addition to the frequent absence of appropriate communicative intentions in the legislative context, there are many other differences between the prototypical personal communication context and the legislative context. The legislative context is impersonal: the members of the legislature and the overwhelming majority of the members of the audience do not know each other personally.<sup>68</sup> The legislative context is less cooperative than the typical communicative context—there is strategic behavior both within the legislature and between the legislature and the audience.<sup>69</sup> Such differences, however, do not necessarily take us outside the realm where the theory of linguistic communication may be directly relevant. The theory could perhaps be elaborated to handle these features of the legislative context, which, after all, are present to some degree in other communicative situations.

The most important reason that the communicative model is inapt is that many of the purposes of legislation may be better served if a statute's contribution is not constituted by what is communicated. Consider what goals we would try to promote if we were designing a legislative system. We would presumably want to design the system in such a way as to increase the likelihood of creating legal standards that would promote justice and welfare. We would also plausibly have more procedural goals, such as making the legal system morally legitimate (and the closely related goal of making legal obligations binding), ensuring that law-making is democratic and public, making the law publicly accessible, creating legal standards that will be complied with, and creating legal standards that do not conflict with the system's constitution. One might also think that a legislative system could have less noble goals, such as maintaining the status quo, advancing the interests of a particular group, promoting a particular ideology, or ensuring that legal standards reflect the distribution of power among interest groups. We will see that advancing such goals, whether of the more or less elevated sort, may not

<sup>68</sup> See Shapiro (2010), ch 3.

<sup>69</sup> See Marmor (2008, 2011).

depend on successful communication—on fulfilling the legislature’s communicative intentions. Indeed, many of the goals are goals of the legislative system or the society, and need not be purposes of the legislature. Consequently, the achievement of these goals is independent of whether the legislature’s intentions are fulfilled.

There is no parallel in the theory of linguistic communication. The study of linguistic communication is the study of the way in which speakers and hearers use language to exchange information. What makes an utterance communicative is the speaker’s intention to communicate, and the communication is successful to the extent that intention is fulfilled. Of course many other purposes can be served *by* communication, and the theory of communication may have to take account of them. But the study of communication does not concern purposes that could be better served *without* communication or by creating norms whose contents are distinct from what is communicated.

The fundamental difference in the nature of the goals of legislation and communication—along with other differences between the legislative context and the typical context of communication—provides several kinds of reasons why the most fruitful notion in the study of communication may not be the most fruitful notion in the context of statutory drafting and interpretation.

First, because there are great obstacles to a legislature’s having communicative intentions with respect to the statutes it passes, it would be advantageous if legislation could succeed in achieving its goals without requiring the legislature to have communicative intentions. We noted in section 3 that legislatures in large contemporary societies probably have no communicative intention with respect to typical statutory provisions. In addition to the sheer volume and technicality of legislation, the legislature typically does not choose its words in order to implement a communicative intention; rather, the words are the outcome of a complex process of negotiation and compromise. As a result, the language is often chosen not in order to implement anyone’s communicative intention, but because, for example, it is unclear enough for a majority to accept. Another difficulty is presented by well-known paradoxes of collective preference (such as Arrow’s Paradox). To require legislators representing constituents with diverse and conflicting interests to have a collective communicative intention would make it very difficult for them to enact legislation. Given the difficulties with communicative intentions, goals of law-making such as promoting justice and welfare provide a reason for having a legislative system that could create law without the legislature having a relevant communicative intention.

There are also reasons why, regardless of whether a communicative intention exists, it is better that the law not depend constitutively on what is in

anyone's mind. For reasons of fairness, democracy, and effectiveness, it is important that the law be publicly accessible. Legislators must create law for people they will never meet and who are not even born when the legislation is passed. The usual means of ascertaining what is in others' minds are not available. We have already mentioned that the words of the legislation are not chosen to implement the legislators' communicative intentions. Background knowledge of the legislators' beliefs, goals, and other mental states that could be used to help infer their communicative intentions is not available to all members of the relevant audience. And it is not possible simply to ask the speaker for clarification, as it is in many communicative situations. Finally, so-called legislative history—the main evidence of the legislature's intentions, other than the text of the legislation, that it is permissible to consult—is notoriously manipulable and unreliable.

It is not just that the law must be accessible to people who lack evidence of the legislature's communicative intentions. There are reasons of democracy and rule of law why it should not be permissible to consult much ordinary evidence of the legislature's intentions. For example, it would give undue power to the members of the legislature to allow their later testimony—even testimony on which they unanimously agreed—to be evidence of what the law is.

The goals of law-making provide deeper reasons why it is better that the content of the law not depend constitutively on what is communicated. These goals may well be best served by a system in which a statute's contribution is different from what it communicates. One example is provided by canons of statutory interpretation. The canon that statutes are to be construed so as to avoid constitutional questions could promote the goal of making a statute's contribution consistent with the legal system's constitution. Similarly, many canons promote the goal of making a statute's contribution publicly accessible. The canons are sometimes regarded as evidentiary devices for ascertaining the legislature's intentions. But this is a controversial substantive claim. A competing understanding of the canons is as norms that are partially constitutive of statutory content. On this understanding, the reason legislation is treated as conforming to the canons, other things being equal, is that the canons specify how legislation properly contributes to the law, rather than what the legislature is likely to have intended as a matter of actual psychological fact.

To take another example, suppose a legal system has the goal of making it the case that its legal standards reflect interest-group power. This goal could be advanced by a model according to which a statute's contribution reflects the position of the group whose power was decisive in the statute's enactment—for example, as explicated by positive political theory.

A very different example is provided by Dworkin's theory of law, according to which, again, a statute's contribution consists of the principles that would



best justify the enactment of the statute. Dworkin argues, very roughly, that if this account were true, the legal system would be more morally legitimate than it would be if other accounts of a statute's contribution were true. If so, then the goal of making the legal system morally legitimate would be promoted by a system in which a statute's contribution is not constituted by what the statute communicates. Of course, Dworkin's argument is controversial. The point is that, once we recognize the nature of the goals of law-making, we cannot assume that the model of personal communication is helpful. There is no reason to think that, in general, such goals as promoting justice, making statutes' contributions reflect the distribution of interest-group power responsible for their enactment, fostering the moral legitimacy of the legal system, or making law that is consistent with the constitution, will be most effectively advanced if a statute's contribution is what the statute communicates.

In light of this discussion, it cannot be assumed that situations in which a legislature enacts a statutory provision without an appropriate communicative intention are either abnormal or parasitic upon situations in which the legislature has an appropriate communicative intention. Rather, given the goals of legislation, such situations may simply be normal and primary cases of legislating. Therefore, it is unwarranted in theorizing about legislation—and authoritative legal texts more generally—to idealize to the normal or paradigm communicative situation. Any idealization must be appropriate to the nature and goals of law-making.

But do we not delegate law-making power to legislators so that they can make decisions for the society and then communicate to us what they have chosen? Is not the point of representative government therefore undermined if the law does not depend on what the representatives communicate?

First, as the discussion has indicated, there can be many purposes to a legislative system other than the aim of benefiting from the wisdom of the legislators. These purposes, to repeat, may be better served if the law does not depend on what the representatives communicate.

Second, it is simply a confusion to think that, if a statute's contribution does not depend *constitutively* on what the legislators intend, the legislators' intentions are made irrelevant. On any view, a statute's contribution will depend *causally* on the legislators' decisions and intentions. Even if the content of legislation is not *constituted* by what the legislators intend, if legislators can know how statutes contribute to the content of the law, they can work out how to enact a statute that will make the contribution to the law that they wish. (In fact, as long as the members of the legislature know how to affect the *direction* of the contribution that a statute would make, they can rationally use legislation to further their goals.) And there are important advantages in not having to ascertain what was in legislators' minds in order to figure out what law they created.

## 7. Conclusion

I have argued that, even if we accept its claims about linguistic communication and many of its basic assumptions, the communication theory does not give us a satisfactory account of how a statute contributes to the content of the law. What has led the communication theorists in the wrong direction? An important part of the explanation is surely a reliance on analogies to communication, especially personal communication.<sup>70</sup> I have argued that the goals of law-making make such analogies unhelpful, even misguided. It is not just that law-making has goals other than communication. More fundamentally, legislative systems have goals that are at odds with the nature of communication—in particular, goals that may well be better served if a statute's contribution is not constituted by the statute's communicative content. Legislation uses language to make law in the service of such goals. Its doing so neither requires communication nor is well understood on the model of communication.

Finally, it might be suggested that, even if legislation should not be understood on the model of communication, philosophy of language might be developed, in a way parallel to Gricean theory, to accommodate the enactment of legislation. Grice's principles are based on assuming a goal of efficient exchange of information, but perhaps an analogous theoretical structure could be worked out with parallel principles based on the goals of legislation. Philosophy of language certainly has much to say about uses of language that are not communicative, and no doubt there is much more to be said. The point that I want to make, however, is that if the goals of law-making include the kinds of moral goals discussed in the previous section—advancing justice, making law-making democratic, or fostering the legitimacy of the legal system—then which principles would be parallel to Grice's conversational maxims would depend on considerations of political morality, such as democracy, fairness, and welfare, as well as legal theory. Even if the goals of a legal system were less lofty—preserving the status quo, promoting a particular ideology, ensuring that the legal standards that are created will be enforced and complied with—the relevant principles would depend on normative and practical considerations. Consequently, a philosophy of language that works out such principles, and the theoretical framework in which they are embedded, would be a philosophy of language heavily implicated in normative theorizing and, in that way, very different from contemporary philosophy of language.<sup>71</sup>

<sup>70</sup> See Berman (2009) at pp 54–5 for a nice discussion of a related point.

<sup>71</sup> I do not mean to suggest that such a direction would be an appropriate one for philosophy of language to take; my point, rather, is to clarify the limited nature of the contribution that philosophy of language (as it currently is) can make to the question of what constitutes the contribution of statutes or other authoritative legal texts to the content of the law. For related discussion, see my MS. Thanks to Sam Cumming for encouraging me to address the issue raised in this paragraph.