

The Nature and Value of Vagueness in the Law

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Introduction

Lawmaking is – paradigmatically – a type of speech act: people make law by saying things. It is natural to think, therefore, that the content of the law is determined by what lawmakers communicate. However, it is sometimes vague what content they communicate, and even when it is clear, the content itself is sometimes vague. As a result, the law is to some extent vague. In this book, I examine the nature and consequences of these two linguistic sources of indeterminacy in the law. The aim is to give plausible answers to – or at least to help address – three related questions: In virtue of what is the law vague? What might be good about vague law? How should courts resolve cases of vagueness?

Many laws not only contain vague expressions, but contain expressions that are likely to generate deep disagreements over how to appropriately apply the relevant norms. These expressions – such as ‘neglect’, ‘reasonable’, and ‘with all deliberate speed’ – are typically associated with multiple attributes that cannot be measured in common units, which entails that for many cases there will be no answer to the question whether the relevant law applies to them. As a result, the content of these laws is to a considerable extent vague.

The second type of vagueness in the law is primarily due to the fact that lawmakers and their audience rarely share much information regarding legislative intent. As a result, interpreters are often not in a position to determine whether or not the legislature intended the relevant law to be construed literally. Consequently, it is sometimes vague whether the content of a law is its literal content or some non-literal pragmatic enrichment of that content.

Legal indeterminacy of these two types, I argue, is sometimes a good thing. First, lawmakers sometimes do better to enact law with vague content, and to let interpreters handle borderline cases if and when they arise, than to try to work out a more determinate alternative. Second, lawmakers sometimes do better to make it vague what the content of a law is than to not legislate at all.

However, we also have at least three good reasons not to overestimate the value of vague law. First, some of the value associated with the use of vague terms in the law is wrongly attributed to vagueness. Second, due to the highly contingent nature of behavioural incentives, we should not overestimate the extent to which vague law incentivises people to take desirable courses of action. Third, because there is reason to doubt that courts generally have any special expertise with respect to underlying purposes of many of the ‘affected’ areas of law, such as tort and contract, we should not overestimate the extent to which they are able to maximise fidelity to law in deciding borderline cases.

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Nevertheless, I argue, courts can often appropriately decide borderline cases by consulting reliable statements about legislative purpose made by lawmakers at key points in the legislative process. In particular, if lawmakers can be expected to possess relative expertise with respect to the relevant domain of conduct or if there is sufficient need to respect the legislative bargains that facilitated the relevant legislation, then judges should – other things being equal – resolve vagueness in the law by deference to such statements of intent.

The Structure of the Book

There is an overarching theme that binds the chapters of the book together, of course, but the aim is not to present a specific argumentative thread running from beginning to end. Instead, the chapters are connected by a particular focus – on vagueness and law, specifically, but also on law and language, more broadly. However, although the book is not intended to provide a complete statement on the topic, I do hope it helps make piecemeal progress on a variety of closely connected issues.

Since most of the arguments in the book presuppose an account on which the legal content of a (valid) statute or constitutional clause directly corresponds to its communicative content, I begin – in chapter one – by presenting the main components of such an account, grounded in claims about the nature of authority and about how individual legal contents interact to produce the overall legal content of a given system. Such an account is of course bound to be controversial, so for those who do not feel inclined to go along when I move from claims about language to claims about legal content, it is perhaps worth pointing out that – as even Greenberg (2011) notes – it is still the case that, on any plausible jurisprudential theory, the meaning of a legislative text will be ‘highly relevant to the statute’s contribution to the content of the law.’¹

While chapter one concerns the general relationship between law and language, chapter two narrows the focus down to vagueness, focusing on arguments by Timothy Endicott and Jeremy Waldron. Endicott has argued that vagueness in the law is sometimes valuable because some forms of human conduct simply cannot be regulated by precise norms.² In these cases, he thinks, vagueness is valuable in virtue of being a necessary means to valuable legislative ends. I argue that vagueness is actually not a means to the relevant legislative ends. Rather, vague law is a necessary consequence of an even more important feature of the law, which I call *incommensurate multidimensionality*. Value, however, only ‘transmits’ from ends to means, but not to necessary consequences of those means. This critique

¹ See Greenberg (2011) 219.

² Endicott (2011).

also applies to many versions of the popular view – marshalled, for example, by Waldron – that vagueness is valuable because it is necessary for securing valuable flexibility in the law.

In chapter three, I turn to a thoroughly sceptical view regarding the value of vagueness in the law. Roy Sorensen has argued that it is a mistake to think that vagueness has a constructive function in law, such as delegating limited lawmaking power to officials.³ It merely *appears* to be functional, he says, due to ‘a cluster of logical and linguistic errors’ about its nature.⁴ In response to Sorensen’s argument, which threatens to take away what is traditionally thought to be the main reason for thinking that vagueness in the law can be a good thing, I argue that lawmakers sometimes do better to enact vague law – and thus to delegate limited lawmaking power to agencies and courts – than to set simple bright-line rules or to work out complex precise alternatives.

In chapter four, I continue to examine the power-delegating value of vagueness in the law, but my primary concern will be the relationship between vagueness, uncertainty and (desirable) behaviour, focusing on arguments by Endicott, Sorensen and Gillian Hadfield. Endicott argues, for example, that vague law allows the courts to work out the details of the law, which may be preferable in domains where the courts satisfy certain competence conditions, and that vague law can give people incentive to avoid creating risk to others or to contract out of liabilities in cost-effective ways.⁵ Although I agree with certain aspects of Endicott’s view, I argue that due attention to issues like the highly contingent nature of behavioural incentive and the limits of judicial competence shows that the value of vagueness in the law should not be overestimated. I also address Sorensen’s concerns about whether uncertainty about liability in fact gives people a valuable behavioural incentive, since his argument raises important general worries about one of the main grounds on which vagueness has been taken to be valuable to law, especially by scholars influenced by law and economics, including Hadfield (and, to some extent, Endicott).

Chapters two to four concern the value of using vague terms in legislation. We can call this vagueness *of content*. In chapter five, I turn to another – somewhat neglected – form of vagueness: vagueness *about content*. As I aim to show, not only is the content of a legislative utterance often vague, it is often vague what the content of such an utterance is. The starting point for this discussion is the simple observation that in ordinary conversational settings it frequently happens that speakers assert something other than what they literally say. Given the ubiquity of this phenomenon, it makes sense to ask whether it also frequently happens that *legislatures* assert something other than what they literally say.

Andrei Marmor has argued that non-literal legislative speech is rare.⁶ According to Marmor, a speaker succeeds in asserting something other than what she literally

³ Sorensen (2001a).

⁴ Sorensen (2001a).

⁵ Endicott (2011).

⁶ Marmor (2008).

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says only if it is obvious that she cannot be intending to assert the literal content of her remark. And that rarely happens in law, he says. I argue that the epistemic constraint on non-literal assertion is often lower than Marmor holds – although its exact ‘height’ may (like standards of proof) vary between legal domains. I also argue, however, that Marmor’s argument can be fruitfully revised: the content of a statutory directive is rarely determinately different from its literal content, due to the fact that legislative contexts generally contain little unequivocal information about legislative intent.

The fact that the conversational background in the legislative speech context generally isn’t rich enough to warrant a reinterpretation, however, does not entail that the content of the law is – by default – its literal content. I argue that once we analyse all the relevant pragmatic aspects of legislative utterances, we see that there is plenty of room for indeterminacy about utterance content on the framework I adopt. The basic idea is that in certain cases in which the audience is warranted in withholding belief regarding the speaker’s communicative intention, the primary content of the relevant utterance is indeterminate between the literal content of the sentence uttered and some non-literal enrichment thereof. This has significant consequences for the analysis of a number of important but controversial legal cases, which I discuss in some detail.

Given what I say in chapters one and five, in particular, my view may seem to imply a version of textualism. And, as I discuss in chapter six, in one sense it does, at least insofar as textualism is taken to be a theory of legal *content* rather than legal *interpretation* (on the understanding that legal interpretation is the act of developing the law in the face of indeterminate/inconsistent legal content or a particularly problematic result). Textualism, however, is more than just a theory about legal content – it is primarily a normative theory of adjudication of which such a theory is a part. And as I explain, my view differs significantly from full-fledged textualism. Part of the reason is that I think that legal content is often less determinate than textualist rhetoric suggests. Mainly, however, the difference is that I don’t think that the standard textualist considerations support their limited view of the judge’s role in all cases in which interpretation is called for.

In chapter seven, I conclude my main discussion by arguing that interpreters can use similar strategies to resolve the two types of vagueness that I have discussed: sometimes, the law’s background purpose(s) will dictate a decision. However, I also argue that there are significant restrictions on the sort of background rationale that courts can legitimately appeal to, at least insofar as the aim is to maximise fidelity to law. I propose that such appeal is restricted to what I call the *operative rationale* of the law: roughly, justification that lawmakers are willing to offer publicly under sincerity-inducing conditions.

It is one thing, however, to say that borderline cases *can* be settled by reference to legislative purposes and another to say that they *should*, and so we need to consider what normative reasons judges might have to resolve cases of vagueness on the basis of the relevant statute’s background justification. I think that there are at least two types of reason for such deference. First, judges can have

authority-based reasons to defer to legislative intentions, if the legislature can be expected to possess expertise regarding the relevant domain of conduct. Second, however, judges may also have non-expertise-based reasons to defer to the legislature's intentions in borderline cases. I argue that one of the strongest reasons in favour of resolving borderline cases by reference to legislative rationale is that doing so respects legislative bargaining and thereby helps preserve a fundamental feature of the legislative institution.

Thus, although the book is primarily about specific questions regarding the nature and value of vagueness in the law, the discussion hopefully also sheds significant light on other important issues in jurisprudence. It will emerge – in particular from chapters one, six and seven – that two of the leading theories of legal interpretation in a significant sense often complement – rather than compete with – each other. If what I say in these chapters is correct, a sophisticated version of textualism is the best theory of legal content – the content of the law is determined by what the legislature can reasonably be taken to have said – while a constrained version of intentionalism is often the best theory of legal interpretation in borderline cases – in cases of vagueness, the law should sometimes be precisified in accordance with the justification that lawmakers are willing to offer publicly under sincerity-inducing conditions.

Chapter eight, meant to be read in tandem with chapter one, is perhaps a bit more like an appendix than a chapter, but I have decided to include it here due to the way it connects the specific topic of the main discussion (vagueness) back to the more general topic of law and language. In the chapter, I focus on an argument by Scott Soames for the claim that facts about legal practice can in an important sense adjudicate between rival theories of vagueness.⁷ If he is right, that's exciting both from the point of view of philosophy of law and philosophy of language. The argument is also likely to generate considerable optimism about what else we might expect to learn about language by looking at the law.

The purpose of the chapter is to significantly temper any such expectations, by arguing that – for reasons explained in chapter one – we have to give up the one premise of Soames's argument that he seems to take to be uncontroversial: that the legal content of a statute or constitutional clause is *identical* with its communicative content. I argue that due to the need for a fairly complex account of the relationship between communicative content and legal content, we should – as a general matter – be quite cautious about drawing general conclusions about language on the basis of facts about legal practice.

⁷ See Soames (2012).

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Authority, Communication and Legal Content

As I mentioned in the Introduction, the majority of the arguments in this book presuppose an account of legal content on which the legal content of a (valid) statute or constitutional clause directly corresponds to its communicative content. Following Mark Greenberg, let's call any view that embraces such an account a version of the *communicative-content theory of law*.¹ In this chapter, I develop a specific version of this theory – first sketched in Asgeirsson (2016) – grounded in claims about the nature of authority and about how individual legal contents interact to produce the overall legal content of a given system.

Recently, the communicative-content theory has come under serious pressure from several philosophers of law and legal scholars – including Greenberg, Lawrence Solum, and Dale Smith – who point out that legal textbooks are full of examples in which there appears to be some clear difference between the communicative content of a statute or constitutional clause and its legal content; a ‘gap’, if you will. We can call this the *Gappiness Problem* for the communicative-content theory of law (keeping in mind that the apparent gaps here are gaps in the theory's explanation of legal content and not gaps in the law itself). I argue that the problem raised by these examples gives us good reason to reject certain versions of the communicative-content theory, but hope to show that the account of legal content I provide – the *Pro Tanto view*, as I call it – manages to avoid the problem by allowing us to explain away the apparent gaps in a principled and unified way.

I also hope to show how the *Pro Tanto* account fits into a wider jurisprudential picture, both by noting its consequences for the individuation of legal obligations, powers, permissions, etc and, more foundationally, by linking it up with a conception of authority on which one of the central functions of law is to help subjects better comply with the reasons that apply to them. Given that, in so doing, I will be moving through several of the most prominent jurisprudential issues of the past century or so (authority, semantics and pragmatics of legal statements, legal content, legal normativity, legislative intention), a full defence of the resulting jurisprudential framework will require a book of its own, but I can at least take a chapter here to provide a robust and fairly comprehensive overview of its main components.

¹ See Greenberg (2011b) 217 ff.

I should emphasise, though, that although I hope to make some modest contributions along the way, the aim in this chapter is not to produce a philosophically newsworthy, wholesale account of the nature and normativity of law, but rather to show, as transparently as possible, the way in which the communicative-content theory is supposed to get its force. What this means, in part, is that many interesting issues, closely connected to what I discuss here, will have to be left for another occasion, or addressed only very briefly and/or at a fairly high level of abstraction. But, hopefully, we will at least have a plausible picture on which it is true – and in some significant sense necessarily so – that the legal content of a statute or constitutional clause directly corresponds to its communicative content.²

I. The Communicative-Content Theory of Law and Its (Recent) Critics

Before I go on to discuss the problems for the communicative-content theory raised by Greenberg, Solum, and Smith, I should note that it is not always clear exactly what relation proponents of the theory take to obtain between the two types of content. It might be a metaphysically ‘tight’ relation like identity or constitution, or it might be a slightly ‘looser’ relation like grounding or supervenience.³ What they share, however, is the view that the legal content of a statute or constitutional clause in some relevant sense *directly corresponds* to its communicative content.

It is also not always clear what people mean when they talk about the legal content of a statute or constitutional clause. Sometimes, it seems to refer simply to the legally relevant propositional content of the authoritative utterance in question, which makes sense if the relation between communicative content and legal content is taken to be one of identity or constitution. Legally authoritative utterances, however, do more than simply represent what legal obligations, powers, permissions, etc we have in virtue of the law being what it is; they also create them, which is why we can speak about the ‘effect’ that the enactment of a statute or constitutional clause has on the law. It seems appropriate, therefore, to identify the legal content of a statute or constitutional clause with the contribution that it makes to our legal obligations, powers, permissions, etc.

²As I’m sure will become obvious to some readers, the positive view developed and partially defended here owes a great deal to a constellation of contributions to the general jurisprudence debate made by Joseph Raz and Andrei Marmor, and to work by Scott Shapiro and John Gardner. I should also note that my thinking here has been particularly influenced, in one way or another, by recent work by Marmor, Mitch Berman, David Plunkett, Daniel Wodak, Richard Ekins, Samuele Chilovi and George Pavlakos. In addition, Barbara Baum Levenbook’s thoughtful engagement with the ideas presented here has also been important for their development.

³Here, I set aside the complication that on some views, constitution *is* identity, and on others, constitution is a type of grounding.

Already, this presents a *prima facie* problem for certain versions of the communicative-content theory. The communicative content of a statute or constitutional clause is – depending on one’s view about linguistic content – a set of possible worlds, an abstract information-carrying object (typically, an *n*-tuple of objects and properties, or – more recently – objects and properties bound together by some structure-providing relation), or a representational cognitive act-type. But the legal content of such a provision, I have said, is its contribution to the law – ie a legal obligation, power, permission, etc (or set thereof). Metaphysically, therefore, these two types of content appear to be quite distinct. If that is correct, it cannot be the case that the legal content of such a provision is identical with, or constituted by, its communicative content. Or so the worry goes.

This is an important worry, to be sure. But it is neither novel nor necessarily fatal. The most promising way to respond to this charge of ‘category mistake’, it seems to me, is to try to parallel replies to a similar objection in metaethics, to the effect that reasons can’t be propositions because ‘they are the wrong sort of beast’.⁴ As many authors have pointed out, there are – *contra* critics’ appeal to intuition – several refined ways to make fairly palatable the idea that reasons can be propositions.⁵ We might therefore be able to make equally palatable the idea that legal obligations, powers, permissions, etc are propositions, too. For one, it would be rather odd if propositions could constitute one type of normative phenomenon but not another, unless we have some special, yet-to-be-identified reason to believe that reasons are somehow importantly different from obligations, powers, permissions, etc or that specifically legal-normative phenomena are somehow importantly different from ‘ordinary’ normative phenomena.

We may, of course, not be persuaded by this response, and still be inclined to believe that, whatever they turn out to be, legal-normative phenomena definitely aren’t propositions. I will return to this issue further below, but for our more immediate purposes here, we do not need to settle this particular matter, since there are other, more decisive reasons to believe that legal content is not identical with, or constituted by, communicative content. As I argue below, all-in-all, the Gappiness Problem is persuasive against identity-based versions of the communicative-content theory and provides a strong case against constitution-based versions (although a lot depends here on what we take the constitution relation to require; more on this below). This leaves grounding- and supervenience-based views. Since supervenience claims suffer from known explanatory shortcomings, I propose a version of the communicative-content theory on which the fact that the legal content of a statute or constitutional clause directly corresponds to its communicative content is grounded in facts about the nature of authoritative expression and the constitutive rules of legal systems. If successful, the Pro Tanto view about legal content both avoids the category-mistake problem and allows us to provide

⁴ Dancy (2000) 115.

⁵ See eg Schroeder (2007), Lord (2008) and Morganti and Tanyi (ms); but see also Mantel (2015) for a recent critique of propositional accounts of reasons.

a principled and unified response to the Gappiness Problem, while preserving a robust version of the communicative-content theory.

A. Some Apparent ‘Gaps’ between Communicative Content and Legal Content

As I have indicated, what recent critics of the communicative-content theory have in common is that they direct our attention to run-of-the-mill examples in which legal practice indicates that there is some clear difference between the communicative content of the relevant legal provisions and their legal content. Insofar as the actual practice of skilled practitioners is good evidence of the relation between legal texts and the content of law, this means trouble for the communicative-content theory.⁶

Greenberg (2011a) points out, among other things, that in the United States, the requirement of *mens rea* is presumed to be part of any rule specifying a criminal offence, even if the language of the provision contains no such requirement. ‘It would be a strain,’ he says, ‘to argue that *mens rea* requirements are somehow part of the linguistic content of criminal statutes, whatever their wording and whatever the circumstances of their enactment.’⁷ Rather, in Greenberg’s view, the common law presumption modifies the legal content of statutes whose language does not contain the relevant requirement, and does so without thereby modifying their communicative content. Thus, if Greenberg is right, there is a gap between the communicative content of such criminal law statutes and their legal content.

At the constitutional level, Solum (2013a; 2013b) has pointed out that the legal content of the First Amendment of the U.S. Constitution appears to be considerably richer than its communicative content, due to the development of associated doctrines of constitutional law. For example, constitutional doctrine surrounding the First Amendment provides the legal landscape with rules concerning expression via billboards and notions such as *prior restraint*, neither of which can be said to be part of the communicative content of the relevant constitutional text – ie that ‘Congress shall make no law ... abridging the freedom of speech.’⁸ Nevertheless, both are typically taken to be part of the legal content of the First Amendment; the relevant doctrines, Solum says, ‘provide the “legal content” of the First Amendment freedom of speech.’⁹ According to Solum, it is therefore ‘clear that [communicative content and legal content] are not identical,’ since the former ‘does not contain the elaborate structure of free-speech doctrine.’¹⁰

⁶ Greenberg (2011a) 72.

⁷ *ibid.*, 76.

⁸ US Const Am 1.

⁹ See Solum (2013b) 20; see also Solum (2013a).

¹⁰ Solum (2013b) 20.

Adding to the examples supplied by Greenberg and Solum, Smith (ms) delivers what is perhaps the most direct blow to identity- and constitution-based versions of the communicative-content theory. First, Smith – elaborating on a point made by Solum (2008) – points out that mistaken precedents seem to change the legal content of the relevant statutes in such a way that there is – necessarily and by definition – a difference between their communicative content and their legal content.¹¹ He invites us to consider, for example, an appellate decision resulting from a court’s mistaken identification of statute’s communicative content. ‘If the court’s mistake is central to its decision’, he says, ‘that error becomes part of the law’, by which he means that the decision modifies the legal content of the statute, without thereby modifying its communicative content.¹² Consequently, a gap has been created between the two types of content. Or so it seems.

Second, Smith argues, some statutes specify that other already enacted statutes should be interpreted in a particular way – perhaps in accordance with their remedial purpose or in accordance with human rights – and thereby seem to change the legal content of the relevant pre-existing statutes without any change in their communicative content. Victoria’s Charter of Human Rights and Responsibilities Act, for example, specifies – among other things – that ‘[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’.¹³ In doing so, the Act modifies the contribution that some pre-existing provisions made to the content of the law, Smith argues.¹⁴

Note that it doesn’t seem to make sense to argue that the Act also modified the communicative content of the statutes whose legal content was affected. How could it? As Smith points out, the Act cannot reasonably be taken to affect what the legislators intended to communicate by enacting the pre-existing, now modified, provisions. And the Act certainly does not constitute new evidence of their original communicative intentions. Thus, like mistaken precedents, interpretive provisions that affect pre-existing legal provisions appear to create a gap between communicative content and legal content, which – according to the communicative-content theory – should not exist.

The examples provided by Greenberg, Solum and Smith all put serious pressure on the communicative-content theory of law. To be sure, one could argue that the communicative-content theorist might be able to account for the *mens rea* requirement as contextually implied, since criminal statutes are enacted in a context containing information about firmly established common law doctrines.¹⁵

¹¹ See Solum (2008) 7.

¹² Smith (ms) 21.

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).

¹⁴ Similar reasoning, I think, applies in the case of the Canadian Federal Interpretation Act, which specifies that ‘[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects’. See the Canadian Federal Interpretation Act, RS, c I-23, s 11.

¹⁵ See eg Manning (2003) 2467. See also Ekins and Goldsworthy (2014) 56.

But this requires getting rather – and perhaps unjustifiably – creative with the resources available to the communicative-content theorist in order to get around the problem posed by Greenberg’s example. Arguably, for example, a great deal of criminal law is addressed to ordinary citizens, who are by no means conversant with legal conventions, however firmly established. As a result, knowledge of substantive legal doctrines – such as *mens rea* – on behalf of the audience cannot always be assumed, which has significant consequences for this ‘contextual enrichment’ strategy.¹⁶ Further, even if this could somehow be made to work, it is hard – if not impossible – to see how this approach could be used to tackle the examples provided by Solum and Smith.

In response to Solum’s example, one could perhaps argue that it is a mistake to take at face value the apparent intuition of legal practitioners that doctrine surrounding constitutional provisions *modifies* their legal content. Maybe doctrine just *adds* content to constitutional law, supplementary to the legal content contributed by the relevant provision. Supplementation is rather different from modification. Or so the response goes.

On this ‘supplemental content’ approach, the communicative content of the free speech clause would have to be some kind of general and abstract principle, which doctrine then ‘implements’ or adds more definite content to, rather than an unrestricted prohibition. Or else we are stuck with the appearance of modification – ie, of constitutional doctrine limiting the unrestricted scope of the free speech clause. This approach, then, requires the legal content added by constitutional doctrine to be *consistent* with the communicative content of the First Amendment.

¹⁶ Consider, eg, the majority’s reasoning in *Staples v United States* (Scalia joining) (511 US 600 (1994)). In *Staples*, the question was whether or not Mr Staples had – by possessing an unregistered machine gun – violated the National Firearms Act, 26 USC § 5861(d), which states that ‘It shall be unlawful for any person ... to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.’ It was an undisputed fact that Mr Staples *did not know* that the firearm he possessed required registration, due to the fact that the weapon was a semi-automatic model inconspicuously modified to operate as an automatic one.

Now, the Act does not explicitly contain any requirements regarding the epistemic state of the ‘possessor’, and the district court therefore concluded that the Act *did* cover Staples’s situation and he was sentenced to probation and a fine; the court of appeals affirmed. The Supreme Court majority, however, argued that the relevant part of the Act had to be construed ‘in light of the background rules of the common law ... in which the requirement of some *mens rea* for a crime is firmly embedded’ (511 US 600, 605 (1994)). For Justices Thomas and Scalia, this meant that the communicative content of the legislative utterance was something roughly equivalent to the following: it shall be unlawful for any person ... to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record, *unless the person does not know that the object in question belongs to a type of firearm that requires such registration*. In other words, due crucially to the background assumptions shared by the legislature and its intended audience, the actual communicative content of §5861(d) is a *pragmatic enrichment* of its literal content. Or so they argued.

The problem with this line of reasoning, however, is that if ordinary citizens are generally the intended audience of criminal law, then the doctrine of *mens rea* cannot reasonably be taken to form part of the actual common ground and, consequently, there is no linguistic basis for claiming that the communicative content of §5861(d) is a corresponding pragmatic enrichment of its literal content. Thus, if the Act’s legal content includes a *mens rea* requirement, as legal practice says it does, then its legal content is different from its communicative content.

I think we find the ingredients for something like the supplemental content approach in Solum's own work on originalism. As he points out, an originalist might say that while the Supreme Court does not have authority to change the legal content of the Constitution, it does – under certain conditions – have authority to adopt further rules of constitutional law, so long as they are consistent with that content.¹⁷ I don't think we are forced, however, to say that these rules become part of the legal content of the First Amendment itself, as Solum's example assumes – it seems possible to hold instead that they constitute additional legal content, contributed by the development of constitutional doctrine. Such content is *associated* with the First Amendment, to be sure, but – on the view under consideration – doctrine does not actually contribute to the legal content of the Amendment itself.

As we will see, there is some kinship between this response and the Pro Tanto view introduced in section II. However, in contrast to the Pro Tanto view, which aspires to offer a unified response to the Gappiness Problem, the scope of the originalist response under consideration is significantly limited. Due to the consistency constraint, for example, the supplemental approach cannot explain away Greenberg's *mens rea* example, since the doctrine is inconsistent with the communicative content of criminal statutes whose language does not contain such a requirement (functioning, as it does, to limit their scope). Nor does it offer a way to handle Smith's examples.

I do not pretend to have examined every reasonable response to the Gappiness Problem, but do think it is resistant enough to give us good reason to reject identity-based versions of the communicative-content theory. Granted, we might – with some creative effort – be able to explain away some of the apparent gaps in one way or another, but no unified or comprehensive strategy seems available to proponents of this version of the theory. The 'contextual enrichment' strategy cannot explain away the apparent gap between the communicative content of the First Amendment and the legal content of free speech doctrine, just as the 'supplemental content' strategy cannot explain away the apparent gap between the communicative content of criminal statutes whose language does not contain a *mens rea* requirement and their legal content. And, more importantly, neither strategy can at all explain away the apparent gaps created by mistaken precedent and interpretive statutes.

The Gappiness Problem also puts very significant pressure on constitution-based versions of the communicative-content theory, but a bit more needs to be said since constitution – not being identity – allows for the constituted entity to have properties not shared by the constituting entity, which opens up the possibility that some such properties explain away the apparent gaps. I will return to this issue below (section III), but first, let me introduce the Pro Tanto account, which highlights nicely – I think – the properties that legal content must have in order to avoid the Gappiness Problem. Once we have a clearer idea of what is needed

¹⁷ See eg Solum (2013b) 22.

in order to explain away the apparent gaps, we will be in a better position to see why the problem also provides a strong case against constitution-based versions of theory.

II. The Pro Tanto View about Legal Content

As I have indicated, the Pro Tanto view about legal content is meant to provide the ingredients for a principled and unified reply to the Gappiness Problem by allowing us to explain away the apparent gaps between the communicative content of the relevant statute or constitutional clause and its legal content. The key is to recognise that legal reasons – like ‘ordinary’ reasons – can be defeated by other reasons, either by rebutting or undercutting. A reason is subject to rebutting defeat if it is outweighed by another conflicting reason – consider, for example, a scenario in which a person’s reason not to damage her new shoes is outweighed by a reason to help someone in need. Undercutting defeat, on the other hand, occurs when a reason is affected by another reason in such a way that its weight is reduced, either partially or completely – such as, perhaps, when the weight of a reason to help is to some extent reduced by the fact that the person is herself responsible for being in trouble.¹⁸

I should note that the framework that forms the basis of the proposed account is far from novel. Rather, I take it to be a broadly Razian view that relies on an independently attractive framework for explaining the nature of reasons generally, inspired in part by recent work in epistemology, metaethics, and deontic logic.¹⁹

The Pro Tanto view is intended as a contribution to the debate concerning the appropriate principles of individuation regarding legal content – ie, how legal obligations, powers, permissions, etc are individuated. Broadly following Raz (1972), the idea behind the proposed view is that it is theoretically beneficial to provide what we can call an ‘atomistic’ account of legal content, an account that elucidates the contribution that individual laws make to people’s legal obligations, powers, permissions, etc by ‘carving small and manageable units out of the total legal material in a way that will promote our understanding of the law by classifying laws into various types and by showing how these laws interrelate and interact with one another’.²⁰

Critics of the communicative-content theory, on the other hand, tend to be sceptical about the value of such accounts and often emphasise what we might call the ‘holistic’ appearance of the law. Dworkin (1977), for example, plainly says that he pays ‘no attention to [the general problem of the individuation of

¹⁸ See Dancy (2004) 42.

¹⁹ See eg Pollock and Cruz (1999), Dancy (2004), Schroeder (2011), Horty (2012) and Bader (2016); see also, eg, Prakken and Sartor (1996).

²⁰ Raz (1972) 831.

laws]; indicating that what matters is the normative status of people subject to law (ie their obligations, permissions, powers, etc), rather than the way in which their status is ‘composed’ – much like the significance of a book lies in the information it provides, rather than how the propositions it contains are individuated and how they combine to form the content of the book.²¹ In a similar vein, Greenberg (2004) argues that the ‘real’ problem of legal content is how normative facts make certain aspects of legal practice relevant to people’s normative status, rather than how law practices ‘determine the content of the law by contributing propositions which then get amalgamated.’²² ‘The content of the law’, he says, ‘is not determined by any kind of summing procedure, however complicated.’²³ And it is a mistake, he thinks, to assume that there are ‘discrete issues of what considerations are relevant to the content of the law and how the relevant considerations combine to determine the content of the law.’²⁴

A. The Basic Notions, and ‘Mechanics’, of the Pro Tanto View

The basic idea of the Pro Tanto view is twofold and fundamentally fairly simple. (For ease of exposition, I will restrict the following explication to obligation-imposing statutes and constitutional clauses.) First, the legal content of an obligation-imposing statute or constitutional clause is neither identical with, constituted by, nor (merely) supervenes on its communicative content (more on constitution, grounding, supervenience in section III.B below); rather, its enactment grounds a defeasible legal reason to take or refrain from a specified course of action (if certain circumstances obtain), a reason that corresponds directly to its communicative content. Second, in much the same way that ‘ordinary’ *pro tanto* reasons interact with each other to determine what a person ought all-things-considered to do, the legal reasons provided by enactment often interact with other (antecedent or subsequent) legal content to determine the all-things-considered legal obligations that people subject to the relevant system have.

On the Pro Tanto view, then – contrary to what most authors seem to assume, including critics of the communicative-content theory – it is not the case that the considerations appealed to (precedent, doctrine, presumption, interpretive provision, etc) *modify* the content that the enactment of a legal provision contributes to the law (obligations, powers, permissions, etc). Rather, they *interact* with that content in a certain way, by either undercutting or outweighing the reasons provided by it.²⁵

²¹ Dworkin (1977) 74, 75–76.

²² Greenberg (2004) 176.

²³ *ibid.*, 177.

²⁴ *ibid.*, 192.

²⁵ For now, I leave it open how best to analyse particular cases. Some cases may be better analysed in terms of outweighing, but generally I think it is more promising to analyse the relevant cases in

To fix these ideas, let us contrast, for example, the Pro Tanto account with the view that, unlike excuses and other affirmative defences, decisions on justifying circumstances actually modify the ‘affected’ rule, by altering the conditions under which people count as having committed an offence.²⁶ On the ‘modification view’, the rule has changed and no longer gives subjects a reason to take or refrain from the specified course of action in the circumstances decided upon; the court’s decision (that the defendant’s actions were justified in the relevant circumstances) has therefore altered the relevant statute’s legal content, without affecting its communicative content. In contrast, on the Pro Tanto view the rule still provides the same reasons as before, but some of these reasons are now defeated by the court’s decision.

We will get a better sense of the ‘mechanics’ of the Pro Tanto view when I explain how the view proposes to tackle the Gappiness Problem. As the example above illustrates, however, one of the core ideas behind this account is that a defeated reason is still a reason, which allows us to sensibly say that the (*pro tanto*) legal content of an ‘affected’ statute or constitutional clause remains intact.

The difference between modification and interaction is, of course, far from intuitive and it might be tempting to think that, say, decisions on justifying circumstances defeat some of the reasons provided by the relevant rule to such an extent that they no longer constitute any reasons at all.²⁷ In that case, the Pro Tanto view just collapses into a modification view. The usual way to counter this line of reasoning – due to Schroeder (2011) – involves a scenario in which someone’s evidential reason is increasingly undermined by an iteration of the defeating condition, but we can illustrate the relevant point with an example that is closer to home.²⁸

Let’s stick with the criminal case in which a court decides on justifying circumstances and stipulate that the court in question is a trial court. By hypothesis, the decision of the trial court defeats some of the reasons provided by the statute (for subjects to take or refrain from the specified course of action, if certain circumstances obtain) to such an extent that they constitute no reasons at all. The set of reasons affected by the decision is determined by the scope of the justifying circumstances specified by the court. But let’s then say that the decision is appealed and that the district court of appeal decides to uphold the trial court’s judgment. As a result of the appellate court’s decision, it seems that the statute in question now provides even *less* reason for subjects to take or refrain from the relevant

terms of undercutting defeat. It seems clearly odd, for example, to say that Virginia’s Racial Integrity Act of 1924 – which was deemed unconstitutional – gave white and non-white citizens a reason not to intermarry, while the constitution gave them a reason *against not* – ie, *for* – intermarrying and that the constitutional reason outweighed the statutory reason. It seems clearly better to say that, in fact, the Equal Protection Clause *undercut* the reason provided by the statute in such a way that, in fact, the Act carried no genuine weight at all (but that – from a purely legal point of view – it *would have*, if it hadn’t been for the 14th Amendment).

²⁶ See eg Fletcher (2000) 812.

²⁷ See eg Pollock and Cruz (1999) 37, Dancy (2004) 74 and Horty (2012) 228–29.

²⁸ See Schroeder (2011) 334–35.

course of action, vis-à-vis the specified circumstances. That is, the appellate court's decision adds some measure of practical 'oomph' to the trial court's decision on justifying circumstances, evidenced by the intuition that in deliberating about what to do, it is now appropriate for subjects to place more weight on the fact that any of the justifying circumstances obtain (if they do). This, however, makes sense only if – subsequent to the trial court's decision – the statute still provides reasons whose weight can be (further) reduced by the appellate court's decision, which contradicts the hypothesis.

We can iterate this scenario with increasing levels of judicial authority (for example, state supreme court, federal district court, federal circuit court, and the US Supreme Court). I want to be non-committal about what happens at the highest level, but at least until a decision has been made at that level, the statute in question still provides subjects with *some* reason to take or refrain from the specified action in the justifying circumstances specified by the trial court, although their weight may have been rendered 'inconsequential' already at that level.²⁹ And that is all we need to get the Pro Tanto view going.

The Pro Tanto view, then, relies crucially on the general idea that – just as with evidential reasons – many cases in which we are inclined to think that a practical reason has been completely defeated are actually cases of partial undercutting defeat. In these cases, the defeated reasons are still reasons, but their weight has been reduced below some threshold of relevance. Getting back to the Gappiness Problem, the strategy is to apply this line of reasoning to any alleged 'modification' of legal rules provided by the enactment of a statute or constitutional clause – unless this modification can reasonably be taken to have come about linguistically, by way of contextual enrichment. What is going on, according to the Pro Tanto view, when the contribution that a statute or constitutional clause makes to the body of law does not seem to correspond directly to its communicative content is that there is some interaction between it and other legally relevant considerations which explains this apparent difference. Thus, despite appearances, there is – on this view – no real gap between the communicative content of the relevant provision and its legal content. It's just that its *all-things-considered* legal 'effect', if you will, depends on the legal content of other legal-normative considerations.³⁰

²⁹ Another way to illustrate this point in the context of practical reasons is to imagine a scenario in which your boss, Al, tells you to ϕ , but then his boss, Burt, comes along and tells you to ignore Al's orders, only to be followed by Burt's boss, Cecil, who also tells you to ignore Al's orders. Assuming that authority is transitive in this case, it seems that although Burt's orders to ignore Al's orders undercut the reason you had to ϕ (in virtue of Al's having ordered you to), you have even less reason to ϕ now that Cecil has also ordered you to ignore Al's orders. If that is correct, then some reason must have remained after Burt's orders to ignore Al's orders, although its weight may have been reduced below some threshold of relevance.

³⁰ I take the Pro Tanto account to have some distinct advantages over Baude & Sachs's (2017) account of the interaction between statutes and other rules (rules of interpretation). On their view, what I have called the *all-things-considered* content is attributed to the statute via a direct function from statutes and rules of interpretation. But it seems to me that this function is for the most part left a 'black box', in which case it merely models rather than explains – whereas the Pro Tanto account, if successful, explains why there is such a function.

B. How the Pro Tanto View Handles the Gappiness Problem

The Pro Tanto view, then, has a relatively straightforward way to handle the problems for the communicative-content theory of law raised by Greenberg, Solum and Smith. Starting with Greenberg's *mens rea* example, and assuming we are talking about cases in which contextual enrichment is an unreasonable stretch, the Pro Tanto view takes criminal statutes whose language does not contain a *mens rea* requirement to actually give officials a reason to apply those statutes to cases in which a 'guilty mind' is absent; this reason, however, is defeated by common law doctrine. This analysis may seem to raise issues about the distribution of the burden of proof in criminal cases involving the relevant statutes, since the Pro Tanto view might seem to predict that the absence of *mens rea* should be treated as an affirmative defence, which does not reflect legal practice. Issues about the burden of proof, however, do not and – I think – should not depend on the metaphysics of legal rules. It does raise issues, though, regarding what weight we should give to the intuitions of skilled legal practitioners when we evaluate philosophical theories of law. I address this issue further at the end of the present discussion.

Moving on to Solum's First Amendment example, the issue was that doctrine surrounding the First Amendment provides rules concerning prior restraint, expression via billboards, and other freedom-of-speech-related notions that cannot reasonably be said to be part of the communicative content of the constitutional text. This was considered a problem for the communicative-content theory because these rules are typically taken to modify the legal content of the First Amendment. Either the communicative content of the free speech clause is a general and abstract principle, the legal effect of which is made more definite by constitutional doctrine, or – compounding the problem – it is entirely unrestricted in character, but limited in its legal effect by the rules of implementation adopted by the Supreme Court. Either way, constitutional doctrine modifies the legal content of the First Amendment without modifying its communicative content and, hence, the former is neither identical with nor constituted by the latter.

The supplemental content approach, as we recall from the discussion in the previous section, requires the supplemented content to be consistent with the legal content provided by the free speech clause, which in turns requires us to take its communicative content to be a general and abstract principle, at least insofar as the aim is to save the communicative-content theory. (This consistency constraint was also the source of the limited scope of this approach.) On the Pro Tanto view, in contrast, there is no constraint of consistency, and so the communicative content of the First Amendment can readily be taken to be unrestricted, in which case its legal content is unrestricted, too. Absent other considerations, the First Amendment – on this view – gives officials a reason not to make *any* law abridging the freedom of speech, including, for example, law restricting expression via billboards, and to declare unconstitutional any law that does so.

The ‘normative landscape’ may change, however, once other relevant considerations are introduced. Consider, for example, the case of *Metromedia, Inc. v City of San Diego*, in which the Supreme Court recognised that ‘at times, First Amendment values must yield to other societal interests’ and ruled that a San Diego ordinance substantially limiting the erection of billboards in the interest of traffic safety (and city appearance) was not wholly unconstitutional.³¹ Once issued, the Court’s ruling – on the Pro Tanto view – defeats some of the reasons that officials, in virtue of the First Amendment, previously had. What explains the appearance of restricted legal content in the case of the First Amendment – ie its *all-things-considered* legal ‘effect’ – is the interaction between reasons provided by the Constitution and reasons provided by constitutional doctrine. But the latter does not *modify* the legal content itself; a defeated reason is still a reason.

The Pro Tanto account offers a similar solution to the two problems raised by Smith. The first issue was that mistaken precedents seem to change the legal content of the relevant statutes in such a way that there is – necessarily and by definition – a difference between their communicative content and their legal content. On the Pro Tanto view, however, such precedents do not modify their content. An appellate decision, for example, may result from a court’s mistaken identification of a statute’s communicative content and the mistake may indeed become part of the law, broadly speaking, but – *contra* Smith – the error does not become part of the statute itself. Accordingly, there is no gap between communicative content and (*pro tanto*) legal content, although there is, of course, a gap between communicative content and *all-things-considered* legal effect. This gap, however, is explained by the interaction between reasons provided by the relevant provision and the reasons provided by the court’s ruling.

The second issue raised by Smith was that some statutes specify that other already enacted statutes should be interpreted in a particular way and thereby seem to be able to change the legal content of the relevant pre-existing statutes without changing their communicative content (which remains fixed). On the Pro Tanto view, however, provisions like Victoria’s Charter of Human Rights and Responsibilities Act do not actually modify the legal content of already enacted statutes whose pre-2006 legal contents were not fully consistent with human rights. Rather, their legal content remains the same, but some of the reasons they give rise to are defeated by reasons provided by the Act. The *all-things-considered* legal ‘effect’ of those statutes, then, is different post-2006, but there is no gap between their communicative content and their (*pro tanto*) legal content.

It is important to (re)emphasise that the Pro Tanto view distinguishes between the legal content of a particular statute or constitutional clause – ie the legal obligations, permissions, powers, etc that they give rise to – and the legal content of the law as a whole – ie the total set of legal obligations, permissions, powers, etc in a particular jurisdiction. Because the content that a particular statute or

³¹ *Metromedia, Inc v City of San Diego*, 453 US 490 (1981).

constitutional clause contributes to the (body of) law is *pro tanto*, it may look, first, as if the content of many individual enactments differs from their communicative content and, second, as if the content of the law as a whole is not just the set of legal obligations, permissions, powers, etc contributed by individual legal norms. This apparent difference, however, is explained (away) by the interaction between *pro tanto* legal content contributed by individual enactments and other legally relevant considerations – precedent, doctrine, presumption, interpretive provision, etc. In this way, the Pro Tanto view purports to explain the ‘holistic’ appearance of law, without giving up what is often called *atomism*: the thesis that ‘individual legal norms are explanatorily prior to the content of the law as a whole’.³²

This, then, is how the Pro Tanto view about legal content proposes to tackle the Gappiness Problem. Generally speaking, the problem comes from the fact that the intuitions of skilled legal practitioners tell us that it is not uncommon for there to be some kind of gap between the communicative content of a statute or constitutional clause and its legal content, the most manifest of which are perhaps the gaps that seem to be created by subsequent modification of legal content. On the assumption that these intuitions are reliable indicators of the relationship between the two types of content, this gives us the ingredients for the following general argument against the communicative-content theory:

P.1 If – either necessarily or actually – the legal content of a (valid) statute or constitutional clause directly corresponds to its communicative content (via identity, constitution, grounding, or supervenience), then there cannot be a change in the legal content of a (valid) statute or constitutional clause without a change in its communicative content.

P.2 There can be a change in the legal content of a (valid) statute or constitutional clause without a change in its communicative content.

C. It is not the case – either necessarily or actually – that the legal content of a (valid) statute or constitutional directly corresponds to its communicative content.

The conclusion, of course, is that the communicative-content theory of law is false, in whatever version.

The Pro Tanto view allows us to resist P2 by holding that legal content provides (or consists in) *pro tanto* reasons for action, subject to possible defeat by other legal considerations, either by undercutting or outweighing. I say ‘resist’, because in order to demonstrate the falsity of P2, we will – depending on the modality involved – have to positively establish the impossibility of a change in the legal content of a statute or constitutional clause without a change in its communicative content, either *tout court* or within the set of possible worlds ‘like ours’. Both are tall orders, each with their own challenges. However, what the Pro Tanto view does manage to show is that none of the problems described in section I suffices to

³² For a discussion, see Greenberg (2004) 49 ff.

establish P2. In section III, I hope to put further pressure on P2, by showing how the Pro Tanto view links up fairly naturally with certain familiar claims about the foundation of authority.

Before moving on, though, I should acknowledge that the Pro Tanto view does require that we give up the claim that the actual practice of skilled practitioners is good evidence of the relation between the communicative content of an individual statute or constitutional clause and its legal content, which is arguably a significant cost. However, it does not require us to hold that the intuitions of skilled legal practitioners are wholly unreliable or irrelevant. Just as competent speakers of language have reliable intuitions about the content communicated via an utterance without having reliable intuitions about the exact semantic content of the words used and the details of how semantic content is affected by context to produce the content communicated,³³ skilled legal practitioners may well have reliable intuitions about the *all-things-considered* legal-normative 'status' of persons (ie their *all-things-considered* legal obligations, powers, permissions, etc) without having reliable intuitions about the exact normative content of the relevant legal considerations and the details of how that content interacts to produce that status. As a result, I do not think it counts against the Pro Tanto account that it does not respect the intuition of skilled legal practitioners that the legal content of the relevant provision gets modified in the cases discussed.

III. Authority, Communication and Legal Content

Having introduced the Pro Tanto view, it is time – as promised – to connect the view to a theory of authority and a principled account of how legal content is individuated. As a matter of general jurisprudence, the most fundamental claim on which the view relies is that it is among the essential functions of law to help subjects better comply with the reasons that apply to them and that the means by which law does so is by expressing views about how its subject ought to behave.³⁴ This mediation between subjects and reasons, of course, is the backbone of Raz's (1986) service conception of authority.³⁵ In what follows, I adopt a great deal of the service conception, but I do not want to commit myself to the claim that this is law's only essential function. If I'm right in what I say, the more modest claim is all I need to motivate the link between authority and the Pro Tanto view.

As a starting point, Raz invites us to consider the fact that, necessarily, the law claims legitimate authority, and that the normal way to justify authority is to claim that accepting the authority's directives as binding gives one a better shot at

³³ See eg Bach (2002) 29–32), Neale (2005) 183–84 and Soames (2008) 460–62.

³⁴ This claim of course itself presupposes realism about reasons, but the framework described here may well work on an anti-realist view, too.

³⁵ See Raz (1986) 53.

doing the right thing (relative not just to a one-off instance but to a domain of action).³⁶ On the assumption that it is possible to justify legal authority this way, the law must be of a certain kind, Raz says: it must be the kind of thing the directives of which, first, are (or are presented as being) 'someone's view of how its subjects ought to behave' and, second, can be identified 'without relying on reasons ... on which the [directives purport] to adjudicate'.³⁷

These two features each reflect the mediating role of authority, on Raz's account. Authorities issue directives that reflect a view – typically theirs – on how subjects ought to behave, a view they have come to, if they operate as they should, after considering the reasons that apply to their subjects independently of the involvement of the associated authoritative pronouncement. Raz calls such reasons *dependent reasons*. The authorities' directives, however, are not simply to be added to the balance of reasons, as suggestions or advice would be – rather, they should replace some of the reasons on which they depend. Thus, authoritative directives are reasons that preempt dependent reasons and the deliberation on the merit of performing the action prescribed (at least vis-à-vis the relevant dependent reasons).³⁸

Raz's classic summary of the service conception consists in the following trio of theses:³⁹

The dependence thesis: All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives ...

The pre-emption thesis: The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.

The normal justification thesis: The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.

It is important to add to this that not only are authoritative reasons preemptive, they are also *exclusionary*. Exclusionary reasons are negative second-order reasons, in the sense that they are not simply reasons to act in a certain way, but reasons not to act on reasons to act in a certain way. Thus, authoritative directives are both

³⁶ In formulating the service conception, Raz uses the term 'directive' in a broad sense, to include 'propositions, norms, rules, standards, principles, doctrines, and the like', rather than to refer only to the content of a directive speech-act; see Raz (1985) 303.

³⁷ Raz (1985), 303.

³⁸ Such directives, therefore, are (at least qualified) peremptory reasons. Here, I follow Shapiro (2002), *contra* Raz, in holding that deliberation is properly normative (ie it involves action-guidance) and that pre-emptive reasons and peremptory reasons are normatively equivalent, if not ontologically so.

³⁹ Raz (1985), 299. Note that I have changed the order of the theses so that the pre-emption thesis occurs before the normal justification thesis.

positive, preemptive first-order reasons (reasons for, say, φ -ing, which replace the positive dependent reasons) and negative second-order reasons (reasons, then, not to act on certain reasons not to φ). Raz calls such composite reasons *protected reasons*.⁴⁰

Of special interest to us here is the service conception's corollary thesis that if it is among the essential functions of law to help subjects better comply with the reasons that apply to them, then – assuming that law is authoritative, rather than, for example, manipulative or educative – the law must be the kind of thing the directives of which are, or are presented as being, someone's view of how its subjects ought to behave. For the purposes of the Pro Tanto account, this thesis captures much of what I am after, but although I generally embrace Raz's conception of legitimate authority and its application to the legal domain, I'd like to move through some of the steps in a slightly different way, just to be able to make it transparent enough how I view the Pro Tanto account's relation to the service conception.

It is worth noting, first, that on the service conception, it is possible for A to have authority over B without A expressing a view of how B ought to behave. Such expression is needed only in order for A to *serve* B as an authority. And even so, A can express a view of how B ought to behave in many ways – some of them linguistic, some not. We probably all know the evil eye, for example – or an open palm pointed towards a dinner-ready table.⁴¹ Heck, A could even telepathically express a view about how B ought to behave, to put an example from Alexander (2010) to my own use;⁴² so long as B accepts the telepathed content as binding, A can serve her mediating role. For my purposes here, it is therefore useful to slightly rephrase the above corollary, to make it fully clear that linguistic communication is not part of the story yet (and to highlight that I don't want to insist here on analysing the relevant expression as a directive speech act, although this is indeed the analysis I favour⁴³): if it is among the essential functions of law to help subjects better comply with the reasons that apply to them (via its role as an authority), then law can serve this function only if it is capable of expressing a view about how its subjects ought to behave.

A. Legally Authoritative Expression and the Semantics of Legal Statements

Now, although – on the account proposed here – law's expression is (in a sense) a given, the same of course does not apply to which forms of expression count,

⁴⁰ See Raz (1979/2002), 17–18.

⁴¹ Note that the views in question do not have to be presented as authoritative in order to serve their role – it is enough that the 'recipient' treat the expressed view as binding.

⁴² See Alexander (2010), 142 ff.

⁴³ Note that an authority can serve its function even if it never issues a directive – so long as its subject treat the authorities expression as a directive, the normal justification thesis is satisfied.

and whose. This is contingently determined by law itself, which is to say that the rules of recognition at the foundation of any given legal system determine, among other things, who is authorised to express views about how the law's subjects ought to behave, and what form such expression must take. In other words, the constitutive rules of the relevant system determine what counts as the *law's* expression.

Typically, of course, the law expresses views about how its subjects ought to behave in a variety of ways – most prominently via legislation and judge-made law (coupled, in some systems, with administrative agency lawmaking). And some judge-made law happens not via precedent but via custom; the law need not express itself via a single expressive act – the view in question may emerge gradually over time, in virtue of any number of relevant acts. (Generally, I take judges to make law – as a matter of fact – even in strict civil law systems, although the process through which their decisions make law is perhaps significantly more ‘recalcitrant’ than in common law systems.)

I will return to the crucial issue of which forms of expression count, and whose, but for the time being what matters is that irrespective of particular modes of expression, in expressing a view about how its subjects ought to behave, the law presents a perspective from which its subjects genuinely have the specified obligations, powers, permissions, etc.

It may seem natural to take this to have specific implications for the semantic analysis of legal statements – most notably, perhaps, that it implies that when we use ‘ought’ in legal statements it means the same as it does when we use it in moral statements, ie that the meaning of the legal ‘ought’ is in some relevant sense ‘moralised’. This, indeed, is Raz’s view – when speakers utter legal statements in what he calls a *detached* fashion, the meaning of the statement is that, from the perspective of the law, the subject in question has a moral obligation, power, permission, etc.

Shapiro (2006) has further argued that, using Raz’s analysis, we can make good sense of what we can call ‘pure’ legal reasons. He points out that on one reading, the modifier ‘legal’ functions as an adjective, on the other, as a qualifier. On the adjectival reading, a legal reason to φ is a genuine moral reason to φ , the existence of which depends on the operations of legal institutions (suitably understood). A genuine reason here is just a fact or consideration that in fact counts in favour of some action. On the qualified reading, however, one has a legal reason to φ – roughly – just in case, from the perspective of the law, one has a genuine moral reason to φ (at least partly in virtue of the law having directed one to φ).

While I think the moralised perspectival analysis does capture an important truth about (the pragmatics of) authoritative expression, I do not think it furnishes the semantics of legal statements. As Wodak (2018) points out, as a proposal about the semantics of such statements, not only does it run up against what – for good reason – has become the orthodox view in linguistics about the meaning of ‘ought’ and other modal expressions (due largely to Angelika Kratzer’s influential David

Lewis-inspired work⁴⁴), it also suffers from certain intractable problems related to the ‘stacking’ of modifiers, ie sentence constructions where modifiers embed under other modifiers.

Wodak’s primary example is how the suggested account fails to provide a principled account of how, intuitively, ‘legal’ stacks with ‘moral’, as for example in the sentence ‘A has a legal moral reason to φ ’.⁴⁵ First, as Wodak points out, the stacking of the modifiers should clarify ‘what the legal point of view is about’, in a way that is analogous to effects of stacking ‘Kantian’ and ‘moral’ in, say, the sentence ‘A has a Kantian obligation to φ ’. But while such a clarification comes intuitively in the latter case, the same does not go for the former; the sentence seems linguistically anomalous, as it’s called. Another way to highlight the issue here might be to say that whereas moving between the sentences ‘From the perspective of Kantian theory, A has a moral reason to φ ’ and ‘A has a Kantian reason to φ ’ is intuitive, the same does not go for ‘From the perspective of the law, A has moral reason to φ ’ and ‘A has a legal reason to φ ’, which spells trouble for the moralised perspectival analysis.

Proponents of the moralised analysis might respond by claiming that stacking modifiers this way for some reason forces an adjectival – rather than a perspectival – interpretation, ie an interpretation on which ‘legal’ marks the source of the moral reason. But, in addition to absence of a principled explanation for this, we also seem forced, then, to conclude that the following sentence is semantically (and thus necessarily) inconsistent: ‘A has a legal moral reason to φ but does not have a moral reason to φ ’. A proponent of the perspectival account, however, should presumably want to be able to interpret this perspectivally, and to yield a truth in some circumstances. It seems, then, that the moralised view needs to posit some very convoluted, ad hoc rules governing the use of the modifier ‘legal’, in particular regarding the relationship both between single and stacked occurrences of it and between ‘legal’ and ‘moral’, as types of modifiers.

The Raz/Shapiro view no doubt captures an insight about the use of legal-normative language, but it does not seem to capture its semantics, then. The orthodox view, in contrast, does – I think. As a general account of the semantics of modal expressions, Kratzer’s view is motivated both by the attractiveness of a unified account of such expressions (like ‘ought’, ‘must’ and ‘may’) – given that their use exhibits a distinct feeling of invariance, not just in English but across languages – and by worries associated with positing indefinite polysemy (due to the vast variety of uses to which such expressions can be put). On Kratzer’s view, the meaning of modal expressions is the same across different uses but specific uses of the term get their different ‘flavours’ due to the different contexts in which they are used. This contextual variance is complex, yet systematic – in technical parlance, ‘ought’ has two parameters, which get specified contextually and the

⁴⁴ See, in particular, Kratzer (1981) and (1991).

⁴⁵ See Wodak (2018) 800 ff.

interaction of which determines the relevant modal ‘flavour’, and with it determines the truth-conditions of the statement in question.

The truth of claims in which modals occur is doubly relative, then; first, to what is referred to as the expression’s *modal base* and, second, to what is referred to as its *ordering source*. Kratzer calls these the expression’s *conversational backgrounds*, which come in different kinds. Backgrounds that provide a modal base are what she calls *realistic* – they can be *epistemic* or *circumstantial*, or possibly *empty*. Semi-formally, realistic backgrounds are functions that in w assign sets of worlds that are true in w . Backgrounds that provide an ordering source are *normative*; these can be *deontic*, *stereotypical*, *teleological* or *buletic*. Normative backgrounds impose an ordering on the set assigned by the conversational background fixing the modal base, ie, they are functions that yield an *ideal* represented by the set of propositions A which induces a partial ordering on the set of worlds provided by the modal base.

On this account, necessity (for our purposes, obligation) plays out in the following way, roughly: A proposition p is a necessity iff p is true in all accessible worlds that come closest to the ideal introduced by the ordering source.⁴⁶ And possibility (for our purposes, permissibility), in turn, is defined in terms of the absence of necessity (for the negation).⁴⁷ Importantly, Kratzer’s doubly relative account is also designed to capture graded modality, but we can leave that aside for our purposes here.⁴⁸

Now, applied to legal statements, the modal base will be empty. This just means that *all* possible worlds are accessible from w . The ordering source will be deontic: namely, *what the law provides*. The ordering source, then, orders all possible worlds with respect to how close they come to what the law provides. Semantically, therefore, saying that, legally, S must φ is to say that in all possible worlds that come closest to the ideal introduced by the law, $S \varphi$ s. And saying that, legally, S may φ is to say that it is not the case that in all possible worlds that come closest to the ideal introduced by the law, S does not φ (ie, that in at least one such world, $S \varphi$ s).

On the view proposed here, the orthodox view about the semantics of modal expressions captures the meaning of legal-normative statements, while the Raz/Shapiro analysis captures a crucial part of what grounds the content of the law, ie, of the pragmatics of authoritative expression. On the assumption that grounding involves metaphysical necessitation, it may often be quite unproblematic to use these analyses interchangeably, especially if the relevant determination relation entails supervenience (either generally or coupled with domain-specific claims

⁴⁶ Kratzer (2012) 40.

⁴⁷ *ibid.*

⁴⁸ I should note that I make what is called the *Limit Assumption* – colloquially, that there is always a unique set of worlds closest to the relevant ideal (and thus the set of possible worlds to be considered has to be *finite*); see Lewis (1973). The Limit Assumption is controversial, but I think it is plausible in the legal domain; in any case, nothing really hangs on it, so it is safe to assume for the sake of (relative) simplicity.

about how the relevant underlying facts ground legal content).⁴⁹ As a matter of theorising, however, it pays off to take them to be compatible analyses of different, albeit intimately related, phenomena (rather than competing views about the semantics of legal statements).⁵⁰

B. Law's Expression and the Metaphysics of Legal Content

How does the law's expression, then, create legal content? As I mentioned above, I will have to say something about particular modes of expression in order to properly ground the communicative-content thesis, but for now it will pay off to continue to approach things in a simplified way. What matters for our immediate purposes is just that the law's expression creates an *ideal* (or a constellation thereof), which now applies to its subjects. *Prima facie*, this may sound ontologically innocent, but, as I will try to make as transparent as possible below, I take such ideals to be a part of reality and, further, to be significantly distinct from the speech acts that create them, something akin to a fictional normative entity (although not fiction, *per se*). The individuation of legal content, therefore, is derivative of the individuation of law's expression, on this account. As a matter of labelling, the general terms 'legal content' and 'the content of the law' refer, on my account, to the set of these artifactual entities, instances of which are 'purely' legal obligations, powers, permissions, etc (or constellations thereof). Hopefully, it will become clear how this is not merely a matter of *stipulative* labelling – these entities definitely earn their label, I think.

It is important to note that the creation here is not causal, but one of metaphysical determination – (purely) legal content *exists in virtue of* the law's expression. And the account of legal content presented here is non-eliminative, since I take legal content to be something 'over and above' its underlying facts, in a sense to be made clearer below. It will be a little harder to tell with confidence whether or not the account is reductive, in part because it depends on what we take reduction to be.

One might of course have doubts either, generally, about the existence of artifacts or, specifically, about the existence of legal content. As a matter of what kind of stuff there is in the world, is there any reason to count legal content among it, rather than just the underlying speech act? The answer here, I think, comes from considering the extent to which the legal content, as an artifact, has any significant properties which the fundamental facts do not. There is a range of relevant properties that suffice to distinguish legal content as 'new stuff', distinct from the

⁴⁹ On the relation between supervenience and metaphysical dependence, generally, or grounding, specifically, see eg Jackson (1998) and Chilovi (2018) respectively.

⁵⁰ If what I have said is correct, it follows that Coleman's (2007) *moral semantics thesis* contains an important insight, even though it is not strictly correct: '[T]he content of the law can be truthfully *re-described* as expressing a moral directive or authorization,' p 592.

underlying facts, I believe. Some of these are familiar temporal and modal differences and some are more peculiar to legal content, as such. Here are a few of the most prominent ones (for ease of exposition, I focus here only on obligations).

Unlike its underlying set of facts, a (purely) legal obligation is something which:

- endures beyond the existence of the relevant expression;
- is temporal but not spatial (albeit jurisdictional);
- can be created and repealed (ie made to exist and made not to exist);
- can be had by those subject to it (which is different from having a moral status from the perspective of the law);
- can be violated (or conformed to) by those subject to it.

In addition to giving us good reasons to think that legal content really exists, these (and numerous other) properties should also make us doubt that the relevant determination relation between the underlying speech act and the resulting legal content is that of constitution. Constitution, not being identity, of course allows for ways in which the constituted entity comes apart from its constituting facts, but it is reasonable to take the relation to still require a pretty strict sharing of properties.⁵¹ A statue and the lump of clay constituting it have the same shape, weight, smell, and so forth, for example. I don't think we see such overlap in the case of the law's expression and legal content, in which case we need to appeal to some other, less 'tight' metaphysical relation in explaining the relation between the two sets of facts. Grounding, I think, has the best prospect of doing the relevant explanatory work. It's certainly not anything like the determinable/determinate relation, mereological parthood, functional realisation, type or token identity, etc, all of which are (for our purposes here) comparably tight to constitution – and supervenience, as I have indicated, is not a 'deep' explanatory relation, although it may of course play a role in the overall explanation of the nature of the relevant set of facts.

Now, even if legal content is real and significantly distinct from its underlying facts, nothing said so far excludes the possibility that it is *epiphenomenal* – ie, that it is metaphysically determined but does not itself metaphysically determine anything else (with some trivial exceptions⁵²). To me, this is both one of the most vexing questions of general jurisprudence and one of the more significant ones, especially given recent arguments to the effect that even if there is such a thing as 'pure' legal content, there is no reason for us to appeal to it in theorising about law.⁵³ For any question that matters, the thought goes, we can instead appeal directly to the underlying facts, irrespective of which jurisprudential theory we hold.

⁵¹ For a discussion, see eg Zimmerman (2002).

⁵² Any instance of legal content would presumably ground the truth of a corresponding existential generalisation, for example.

⁵³ See, in particular, Herskovitz (2015) and Waldron (2013). Some put Greenberg (2014) in the same camp, but I think his view is significantly more radical than this.

To get some traction about how we might properly answer this question, we should consider, I think, whether – when related to legal content via grounding – the underlying set of facts (or some subset thereof) has any properties it would otherwise lack.⁵⁴ It seems to me that this is indeed the case, at least on the view proposed here. Those who propose to demote the notion of legal content often say that what we should be paying attention to is just the (genuine/real/robust) normative weight of the underlying facts, but it seems to me that, partly, the underlying facts have such weight – and/or have the particular weight that they have – in virtue of the fact that they ground legal content. If that is the case, then not only is legal content real, it is also ‘metaphysically efficacious’ and explanatorily indispensable.

Another way to frame this argument is to say that under certain conditions, authority becomes institutionalised and with that come criteria of legal validity. Only if expressed in the right way – as determined by the constitutive rules of the institution – does the grounding relation obtain and legal content come into being. Legal obligations, permissions, powers, etc, then, have a particular kind of institutional status, and they do so *essentially/non-derivatively*.⁵⁵ This way of putting things may allow us to state the response to the deflationist about legal content even more forcefully. If part of the explanation for why we should pay attention to the underlying facts is that the entities that these facts metaphysically determine have a certain property as a matter of essence, then, surely, those entities – and in particular that property – should have a clear place in our theorising about law. This may not be true of every theory of law, but it certainly seems to apply on the view presented here, which is enough to rebut the claim that – as a general matter – ‘pure’ legal content is a dispensable ontological category.

That said, what exactly *is* pure legal content, such that it is (supposed to be) real, distinct from its underlying facts, and not epiphenomenal? Fundamentally, of course, the law – when it exists – creates the equivalent of a Kratzer-style ordering source (see section III.A), simply in virtue of being a unified, normative system (partly in virtue of the fact that one of its essential functions is to help subjects better comply with the reasons that apply to them). It is in virtue of the existence of a legal system – as such – that we get an ordering on possible worlds at all. The law, we can say, is in the business of constructing ideals. Specific legal content then determines what the ordering is in fact like. Accordingly, individual contents – ie legal obligations, powers, permissions, etc – are best characterised, I submit, *by the way their creation affects the relevant ordering* (an ordering specific to a particular system/jurisdiction).

As I have indicated above, in proposing the Pro Tanto view as a response to the Gappiness Problem, I think that the interaction that determines the *all-things-considered* contours of the overall legal content of a given system is often fairly

⁵⁴ See Silver (ms) for an argument in the context of constitution.

⁵⁵ A grounded entity has a property non-derivatively just in case the property is not among the grounding facts. Plausibly, legal validity is not a property of anything in the grounding base.

complex – it is, indeed as Greenberg thinks, certainly nothing like an additive function, however complex. But it is still, *contra* Greenberg, an amalgamation of atomic entities. Focusing again just on obligations, some cases are pretty straightforward, such as when an expression with the content *that (in C) S must φ* changes the ordering of possible worlds so that, now, in all accessible worlds that come closest to the ideal introduced by the ordering source, $S \varphi$ s (whereas before this was not the case). In this case, the obligation to φ is wholly undefeated. In other cases, things are more intricate. Consider again, for example, the case in which common law doctrine ‘adds’ a *mens rea* requirement to a criminal offence. Here, an expression the content of which is a criminal statute, but the language of which does not contain a *mens rea* requirement, will create an interaction with the *mens rea* doctrine in such a way that, now, in all accessible worlds that come closest to the ideal introduced by the ordering source, no one acts in the specified way with whatever *mens rea* is taken to be relevant. In this case, the obligation contributed by the speech act is partly defeated, but – as a matter of individuation – the obligation itself is still determined by how it *would* affect the ordering, had it not been defeated.⁵⁶

Before moving on, I want to return briefly to some of the properties I said that legal content has, or can have. It may seem entirely mysterious, for example, how people subject to the law can *have*, let alone *violate*, the sort of entity I have described. Perhaps I am making a category mistake of some sort? I don’t think I am. To *have* something can mean a variety of things – I can have a headache, a reason, a sister, a cold, etc – but what is common to all these uses of the locution is some relevant sort of relation. In the case of obligations, generally, I think it is plausible to say that they relate agents and action-types in a certain way (or agents and propositions of which action-types are constituents). One *has* an obligation simply when one stands in that relation. And on the account of legal content I have just characterised, people subject to the law certainly stand in a relevant relation to action-types, I think. For one to have a (purely) legal obligation to φ , on this account, is for one to be related to φ -ing in a certain way – namely, to be an individual such that in all accessible worlds that come closest to the ideal provided by the relevant jurisdiction, one φ s. Another way to describe this relation – not too convoluted, I hope – is perhaps to say that for one to have a legal obligation is for one to be related to the relevant action-type(s) in virtue of being related to the ordering source, which orders the possible worlds in such a way that in all the best worlds, one instantiates the type.

It is worth pointing out that the account presented here is not, I think, subject to what Greenberg (2004) calls the *rational-relation* constraint, ie that the

⁵⁶We can now restate my diagnosis of the Gappiness Problem in slightly more precise terms. As I indicated above, critics of the communicative-content theory take the Gappiness Problem to be a problem in part because they take the legal content created by an authoritative expression to be determined by the effect it has on the ordering of worlds *all-things-considered*. Whereas I have argued that it is in fact determined by the way it interacts – or does not interact – with already existing legal content to affect this ordering.

underlying facts make intelligible or rationally explain that the legal facts obtain.⁵⁷ It seems to me that – *contra* Greenberg – this is a constraint which, if applicable, is applicable not to the relation between pure legal facts and their determinants but that between pure legal facts and robust normative facts. But even if it were applicable to the former, it would in fact be satisfied, I think, both in terms of how legal content is determined by the underlying speech acts and in terms of what makes this the case (the interplay between necessary facts about authority and contingent facts about rules of recognition). To use Greenberg’s own example, there is – on the proposed account – indeed a (I should add ‘transparent’) ‘reason that deleting a particular word from a statutory text [has] the impact on the law that it ... in fact [has]’.⁵⁸

So far, so good (I hope). It might still be thought, however, that I have made a category mistake. Even if legal obligations can be *modelled* by the orthodox modal semantics, isn’t it taking the machinery too far to say that such semantics in some relevant sense determine what they are? Not necessarily, I think – and here the law’s similarity to fiction becomes salient. In the case of genuine moral obligations, I do take the semantics to merely model reality, but in the case of the law, as I have said, we are in the business of constructing ideals (ordering sources). While not fiction, as such, the way in which the law creates these ideals is much like fiction, in the sense that ‘saying so makes it so’. By expressing a view about how its subjects ought to behave, such as ‘In C, S ought to ϕ ’, the law creates an ideal – in C, S ϕ s – which gets added to the existing body of ideals and interacts with it in more or less complicated ways. Since the ideal corresponds directly to the content of the view expressed, we have an explanation for why the legal content of an individual law corresponds directly to the content of the relevant expression, even if – taken as a whole – the content of the law has a rather ‘holistic’ appearance.

I should acknowledge that, as stated, the Kratzer semantics doesn’t by itself capture the way in which the various (pro tanto) legal contents interact to determine the *all-things-considered* way in which they affect the overall ordering. Worse yet, it may seem like the machinery actually makes impossible the scenarios that I’m trying to capture. In the standard semantics, conflicting ideals are typically taken simply to be ‘tied’ and so, for example, in the *mens rea* scenario, the semantics – unamended – could be taken to yield the verdict that it is *indeterminate* whether someone who did what the criminal statute prohibited but without the *mens rea* (required by the common law doctrine) has violated their legal obligation.

The inability to capture different weights within the ordering source, and their interaction, has long seemed to be one of the stickier problems of the orthodox view.⁵⁹ As a response, a number of promising suggestions have recently been made about how best to extend the standard framework to capture this. Some, like

⁵⁷ See Greenberg (2004) 163–64.

⁵⁸ *ibid.*, 165.

⁵⁹ See eg Lassiter (2011) and Finlay (2014).

Goble (2013), propose that we add a weight parameter to the propositions in the ordering source, while others, like Silk (2017), propose instead that we make them dependent on the absence of defeating conditions, while yet others, like Katz et al (2012), propose that we combine ('merge') any relevant ordering sources in a way that represents their priority relations. Of the three, I think the latter two are particularly attractive, especially Silk's, due to its simplicity. I suspect, however, that such extensions may not be necessary, so long as we can appropriately delegate some of the linguistic work to pragmatics. Uttering the sentence 'S must φ ' on its own, the content conveyed may of course be – and perhaps even normally so – that given *everything* that the law says, S must φ . As a matter of pragmatics, it is also generally inferable in such situations that the speaker believes (and intends to communicate) – the force of the obligation to be *all-things-considered*. But modal language is flexible and sometimes – in particular when conflicting obligations are present – the content conveyed may be that given *some of* what the law says, S must φ . In such cases, the pragmatic implication is defeated and the appropriate inference regarding the force of the claimed obligation would be that it is *pro tanto*.

The following example illustrates fairly well the mechanics I have in mind. Say that S utters 'You ought to help your friend fix their fence'. Without further context, the warranted inference here is that the speaker believes and intends to communicate that given *all* the relevant considerations regarding the value of friendship, you *all-things-considered* ought to help your friend (pragmatic aspects of the content italicised). However, if S subsequently utters 'But you also ought to help your other friend move to their new flat', this cancels both pragmatic inferences; now, the appropriate inference with respect to both statements is that given *some of* the relevant considerations regarding the value of friendship, you *pro tanto* ought to help your friend fix their fence/move to their new flat. Moreover, no information is conveyed here about the relative weights of the two competing obligations. This may be added explicitly – such as by complementing the two statements by saying 'It's more important to help your friend move, so that's what you ought to do', possibly (and perhaps normally) triggering an inference that the content intended to be conveyed pertains to an *all-things-considered* obligation – or information about relative weights may be part of the conversational background.⁶⁰ Of course, in ordinary conversation, a speaker is most likely to utter two conflicting modal statements in contexts in which it is unlikely that a resolution is to be had (either epistemically or metaphysically). In theoretical analyses, however, things are quite different, so we need an account of what licenses the above inference, even if such an argument is unlikely to be made in ordinary settings. The outlined picture does a reasonably good job accommodating both types of scenarios, I submit.

⁶⁰ Note that the notion of conversational background I have in mind here is much broader than Kratzer's technical one. Indeed, I *don't* want information about relative weights to enter into the Kratzer-type backgrounds.

This has obviously been a very rough sketch of the approach I prefer. I cannot expand on it here, but should note that what – in large part – motivates this pragmatics-heavy approach is that I think that adding a mechanism for capturing the way in which *pro tanto* norms interact (intra- or intersystematically) to produce the ultimate ranking is simply asking too much of semantics – it seems both unnecessary and to give rise to worries about unrealistic demands in terms of semantic competence (a worry some have already marshalled against the unamended Kratzer semantics⁶¹). How normatively relevant considerations combine – whether in the case of preferences, expected utility, morality, or law, etc – is a matter of how things are in the world. Such facts of course still play a very significant role in inferring and evaluating the content conveyed by the use of modal language, but not in virtue of actually being represented in the semantic content of modal statements. In any case, for our purposes here, I will make do with the standard semantics, as they are.

As a last matter in this rather extensive sub-section, I'd like to revisit briefly the relationship not between law's expression and legal content, but between the content expressed and the content of the law. Given the extremely close relationship that I take to obtain between the two types of content, it may be natural to wonder whether in effect I'm taking the (propositional) content of law's expression to *constitute* the associated legal content. The Gappiness Problem of course puts significant pressure on constitution-based views of the communicative-content theory, but I should acknowledge that I do not think I have a conclusive argument against them.

We *can* conclusively rule out the identity view, I think, because it doesn't have the resources to explain how legal content interacts so as to explain the apparent gaps. On different grounds, we can also rule out the mere-supervenience view. Supervenience, as I have indicated, is not a deep explanatory relation;⁶² the relation is also too coarse-grained for our purposes here, focusing, as it does, on types of facts (or properties), rather than on the structure of the facts themselves, as such. (I do think, though, that *pro tanto* legal content strongly supervenes on propositional content.⁶³) This leaves constitution- and grounding-based views, then.

Although I do not pretend to say enough on this occasion to provide anything like a conclusive argument against constitution-based versions of the communicative-content theory, I do think that – given the extensive sharing of properties required by constitutive explanations – the properties needed in order to explain the interaction between *pro tanto* legal content (in order to respond

⁶¹ See eg Finlay (2016).

⁶² We might also add that supervenience – although transitive – doesn't allow for levels in the same way as, say, constitution and grounding do; there is no such thing, for example, as mediate versus immediate supervenience.

⁶³ The *all-things-considered* content of the law, however, does not, since its logic is non-monotonic. For a related discussion, see Chilovi (2018). Since I take this to hold generally for facts that combine 'non-monotonically', I take this point also to apply in the case of metaethics.

to the Gappiness Problem) are probably too distinctive to warrant a constitution claim. While legal content has weight and is able to interact with other legal content in complex ways, propositions not only lack these properties, they seem not even to have any properties that manage to robustly help explain how legal content comes to have them, which makes me sceptical that legal content is constituted by communicative content. For a (crude) illustration of the problem, consider an analogous situation involving material constitution. Say that Statue 1 and Statue 2 ‘combine’ to form Statue 3; the shape of Statue 3 still is what it is in virtue of being constituted by Lump 3 (the product of merging Lump 1 and Lump 2). There is – I submit – no comparable story to be had in the case of a statute’s propositional content and its legal content. If that’s right, then the difference in properties between the two types of content simply seems too significant for the determination relation to be as ‘tight’ as constitution requires. Which leaves me with a view on which the legal content of a statute or constitutional clause is *grounded in* – rather than constituted by – its communicative content.

C. The ‘Necessity’ of the Communicative-content Thesis

For ease of exposition, I have allowed myself to simplify the discussion by abstracting away from particular modes of expression, but the version of the communicative-content theory proposed here specifically concerns statutes and constitutional clauses, so I will have to say something about the nature and role of (direct) linguistic expression and how it fits into the framework I have outlined.

As I have indicated, authority doesn’t require linguistic expression, as such. Nor does authoritative expression, by itself, create legal content. However, although the conventional – and thus contingent – rules at the foundation of a legal system cannot change the fact that law is authoritative, they can operate on such expression in at least two fundamental ways. I have put this in terms of the constitutive rules of the system determining ‘what counts as law’s expression’, but there are two distinct – albeit closely related – aspects to this notion. On the one hand, conventional rules make it the case that authoritative expression produces law; on the other hand, they determine what forms of expression count, and whose. In determining what forms of expression count, and whose, modern legal systems generally establish a specific body of officials primarily tasked with creating law and certain procedures by which these officials settle on direct linguistic means of expressing their collective lawmaking choice.

Legislation, thus, on this picture, is (*contra* Bach and Harnish (1979)) fundamentally a speech act of *two* types: it is both an effective and a directive, to borrow terminology from speech act theory.⁶⁴ Effectives are conventional and so the

⁶⁴ See also Searle (1976) 22. For further discussion, and critique of the kind of view proposed here, see Allott and Shaer (2018).

effective aspect of legislation does not – as such – depend on the communicative intentions associated with the utterance (although it does arguably depend on at least some minimal intention to make law); directives are communicative and thus the directive aspect does depend on such intentions. In relation to the legislation's effective aspect, it is important to (re)emphasise here that although convention determines that linguistic expression (following a specified procedure) counts as the right kind of expression for the purposes of law, that does not mean that the expression itself is determined by convention. That is, legal systems can shape the way in which they institutionalise authoritative expression in a myriad of ways, but they cannot change the directive nature of the relevant speech act. And directive speech acts, as such, do depend on communicative intentions, both in that the speech act succeeds (in some relevant sense) by virtue of intention recognition and – what matters more to us here – in that the content of the utterance is its communicative content. And – on the picture I favour – its communicative content, roughly, is the content that a competent, rational hearer would take the speaker to be intending to communicate in uttering the relevant words.

I'll say more about communicative intention in section III.E below, but we now have the main pillars of the argument for the communicative-content thesis, which we can summarise in the following way (for the sake of brevity, I do not present it as not a non-enthymematic deductive argument):

P1. It is among the essential functions of law to help subjects better comply with the reasons that apply to them and the law does so by expressing views about how its subjects ought to behave.

P2. When the law expresses a view about how its subjects ought to behave, the law creates an abstract normative entity (legal obligation, permission, power, etc, or some constellation thereof) that corresponds directly to the content expressed.

P3. The legal content of the law's expression about how its subjects ought to behave just is the abstract normative entity created by the law's expression.

C1. The legal content of the law's expression corresponds directly to the propositional content expressed.

P4. If C1 and the constitutive rules of a system determine that direct linguistic forms of expression, such as (the enactment of) statutes and/or constitutional clauses, count as law's expression, then the legal content of such expression corresponds directly to the propositional content expressed.

P5. The propositional content expressed by direct linguistic forms of expression is its communicative content (determined by reference to what a competent, rational hearer would take the speaker to be intending to communicate in uttering the relevant words).

C2. If the constitutive rules of a system determine that direct linguistic forms of expression, such as (the enactment of) statutes and/or constitutional clauses, count as law's expression, then the legal content of such expression corresponds directly to its communicative content (determined by reference to what a competent, rational hearer would take the speaker to be intending to communicate in uttering the relevant words).

Given the modal status of P1–P5, we can even take C2 to be a necessary truth, despite the fact that the communicative-content thesis, as stated at the outset of the chapter, is now conditioned on the existence of statutes and constitutional clauses. If what I have said is correct, it is a necessary truth, then, that if the law expresses views about how its subjects ought to behave via direct linguistic communication, then the legal obligations, powers, permissions, etc that those expressions contribute to the relevant body of law correspond directly to the communicative content of the relevant utterances. Accordingly, for those systems in which statutes and/or constitutional clauses count as law's expression, their legal content corresponds directly to their communicative content.

D. A (Worthwhile) Digression on Legal Positivism

Before I conclude with some remarks about communicative intention in the legislative context, I want to digress briefly, in order to address a significant worry related to the view I have outlined. The worry, perhaps raised most forcefully by Plunkett (2019), is that in relying on a foundational premise about the nature of authority, the view cannot really count as positivist.⁶⁵ Facts about authority – ie, facts about what it really is – are presumably appropriately classified as robustly normative facts, so if such facts are at the foundation of an account of the way in which legal content is grounded, it seems tempting to conclude that legal content is grounded in robust normative facts. While the issue is downstream from my immediate concerns in this chapter, a slight digression is still in order, I think. I do not have space to address the worry fully here, but I will sketch three promising ways to respond to it, at least as it arises in relation to the framework I have outlined above.

I should begin by noting that although it is for some purposes unproblematic to say – as I have – that law institutionalises authority, a more transparent way to express what I mean would be to say that legal systems institutionalise authoritative speech acts (well, authoritative expressions, more broadly, but for ease of exposition, I will focus here on speech acts). Setting aside wholesale scepticism about

⁶⁵ See Plunkett (2019) 118–30. Plunkett raises the worry both in the context of Raz's own theory, specifically, and in the more general context of legal positivist theories relying on claims that are arguably best characterised as robustly normative.

authority, authoritative speech acts have some interesting, non-accidental relation to authority. It is hard to determine exactly what that relation is, but as a starting point we can say that authoritative speech acts in some relevant sense ‘track’ facts about authority, where such facts are facts with robust normative import and tracking indicates a non-contingent explanatory relation between those facts and the relevant type of speech act. It seems plausible enough to say – again, setting aside wholesale scepticism about authority – that authoritative speech acts are what they are in some relevant sense *because* authority is what it is. Arguably, for example, it is non-accidental both that authoritative speech acts presuppose *standing* and that they involve an intention that the utterance be accepted as a binding reason by the addressee (to do as directed).⁶⁶ *That’s how authority works*, we might say.

Assuming that facts about authority are robustly normative, is this enough to say that authoritative speech acts – and thereby legal content – metaphysically depend on robust normative facts? It’s hard to say, but for our purposes here, an analogy will suffice to show that we seem to have good reason to think that it isn’t. Consider belief-forming processes. It is common to claim that such processes are constitutively sensitive to some epistemically significant feature, such as truth, justification, or what have you, yet few would hold that particular beliefs resulting from these processes metaphysically depend on truth, justification, etc. The relationship, while non-accidental, does not seem like outright metaphysical dependence – at least not of the sort we are concerned with here. Analogously, even if authoritative speech acts constitutively track facts about authority, that does not entail that the legal content they (under certain conditions) ‘produce’ metaphysically depends on robust normative facts, at least not in a way that threatens positivism. The most plausible explanation, I think, is that ‘tracking’, here, does not amount to grounding.

In case we are not satisfied with this response, however, and think that the relationship between robustly normative facts about authority and facts about authoritative speech acts does amount to grounding, the best way to respond to the worry is to consider the rather complex grounding story involved. On the proposed view, each particular instance of legal content is immediately grounded only in the (directly corresponding) communicative content. This grounding relation, in turn, is grounded in the system’s rule(s) of recognition along with the relevant speech act token. The worry, of course, is that the fact that the relevant speech act token is grounded in robust normative facts about authority means that this somehow ‘transmits’ to the resulting legal content, such that legal content is mediately grounded in robust normative facts. The conventionality/institutionality provided by the rule(s) of recognition, however, explains why this is not the case. In ‘producing’ legal content, the relevant rules of the system do not operate on the

⁶⁶ See eg Bach and Harnish (1979) 47–51.

underlying robust normative facts (assuming for the sake of argument that this is the right way to characterise things) – rather, they operate on the speech acts ‘directly’, and this is enough to block the potentially problematic inference.

An analogy might be useful here. Let us assume that (in some jurisdictions) *marriage* institutionalises a social-psychological phenomenon (or cluster thereof) which ‘tracks’ something of robust normative significance – say, committed, caring, and perhaps intimate partnerships. And that, further, this ‘tracking’ is robust enough for it to be plausible to say that the way we think and behave with respect to such partnerships (ie the social-psychological phenomenon) is partly grounded in their value. Declaring their commitment, for example, is something people in such relationships tend to do (at least in some cultures), and arguably for good reason. Moreover, such declarations, moreover, may be a constitutive part of the conditions for its institutional ‘counterpart’, ie, a valid marriage; in England and Wales, for example, exchanging vows is a ceremonial requirement. Does it follow that each particular marriage is partly grounded in the robust normative facts about committed and caring partnerships? I don’t think it does, the reason being – as indicated above – that the conventional rules that ‘produce’ marriages operate directly on the social-psychological phenomenon, that is on the practice of declaring commitment (where applicable), rather than on the robustly normative facts that partly ground them (if they do). A similar story goes for legal content, on the assumption – made here for the sake of argument – that robust normative facts partly ground the nature of authoritative speech acts.

We might still be worried that the above responses don’t change the fact that there is clearly *some* significant reliance on robust normative facts. Perhaps such facts do not explain the obtaining of legal content, but they do seem to play some role in explaining its ‘shape’ – that is, that it directly corresponds to the communicative content of the relevant utterance. So perhaps facts about authority and the foundational conventions of the relevant legal system jointly ground the fact that specific kinds of utterances ground the fact that (the resulting) legal content is grounded in the communicative content of the utterance?

I think that’s roughly correct, but still not enough to make trouble for positivism. The key, I think, is to recognise that not every fact that plays a grounding role in relation to some other fact is a ground of that fact. More specifically, I think that the following principle is false: if the fact that A grounds the fact that <the fact that B grounds the fact that <the fact that C grounds the fact that D>>, then the fact that A grounds the fact that D. In the context of facts about authority and the obtaining of legal content, this is indeed the case: facts about the nature of authority, along with the fact that relevant rules of recognition obtain, ground the fact that speech acts of a certain sort ground the fact that their communicative content ground the fact that a corresponding legal norm obtains. Phew! As a result, we do *not* get the implication that facts about the nature of authority ground the fact that a particular legal norm obtains, although they of course play an important role in the overall explanation of why legal norms obtain and, in particular, why they have the content that they do.

I should note that my claim that the above principle is false is not pulled out of thin air – an analogous principle for so-called *structuring causes* fails as well.⁶⁷ Consider a twist on the classic Dretske-type example of a thermostat controlling a furnace. The furnace may ignite (effect 1) because something in the thermostat triggered it, say, a switch closing the relevant circuit (triggering cause 1). But the structural conditions that enabled the triggering to happen, and the effect to come about, also had a cause – say, the engineer’s hooking things up in the relevant way (structuring cause 1). Both are causes of the furnace igniting. The engineer’s actions (structuring cause 1/effect 2), in turn, were triggered by certain stimuli (triggering cause 2), given her mental state. The structural conditions provided by the engineer’s mental state, in turn, of course also had a cause (structuring cause 2). And so on. What matters for us here is that the cause of the engineer’s mental state (structuring cause 2) is neither a structuring cause nor a triggering cause of the furnace igniting (effect 1).

We might of course posit some additional type of cause to cover such relations, but better, I think, to conclude that it is not a cause of the furnace igniting, while of course acknowledging its causal relevance. We can say that causation ‘peters out’, in some relevant sense, while causal relevance (arguably) does not.⁶⁸ Similarly, in the case of legal content, we can acknowledge the metaphysical relevance of robustly normative facts about authority without having to thereby accept that such facts ground facts about legal content. This response to the grounding worry of course requires the dependency explanation to be complex enough for grounding to peter out ‘in time’, and it may thus not work for all jurisprudential accounts that rely on claims about authority, but it is in any case a promising strategy for the view presented here, I think.

E. The Problem of Collective Communicative Intention

So far, I have taken for granted the notion of law expressing things by means of linguistic communication. In this final subsection, I want to say a bit about what I take this to involve, and stake out a middle ground between sceptics about legislative intent and those who think we can provide a robust explanation of the way in which the intentions of lawmakers ground communicative content (and thereby legal content).

Sceptics about legislative intent tend to focus either on the metaphysical or the epistemological issues relating to collective intention.⁶⁹ Some argue that the very

⁶⁷ For the classic account of triggering vs structuring causes, see Dretske (1988) and (1989).

⁶⁸ Note that this is different from the (complementary) kind of petering out proposed by Moore (2009).

⁶⁹ For a range of well-known sceptical arguments, all discussed by Ekins (2012), see eg Radbruch (1910), Radin (1930), Dworkin (1986), Shepsle (1992) and Waldron (1999). In ch 6, I discuss some related worries, as they arise in debates about textualism.

idea of collective intention is incoherent – to borrow a familiar phrase, the legislature is a ‘they’, not an ‘it’. Others argue that even if small, close-knit groups can have collective attitudes, the same does not hold for legislatures, due in significant part to the adversarial nature of the legislative institutions in modern democratic societies. And yet others argue that even if legislatures could have such attitudes, the actual, messy context of legislation in anything resembling contemporary legal systems would make it impossible for us to reliably ascertain the content of such attitudes. (The latter two points are not always clearly distinguished.)

Much has been written in response to these worries, most of which I will not address here, but I want to highlight – and contrast my own view with – one of the most thorough replies on offer, made recently by Richard Ekins.⁷⁰ Ekins argues that despite the messiness of legislative reality, legislators still manage to act in concert so as to produce certain crucial group attitudes, which – importantly – do not reduce to any aggregation of their individual intentions; on his account, the legislature is distinctively an ‘it’, not a ‘they’, then. And these attitudes, Ekins seems to think, are generally determinate enough to robustly ground communicative content, evidenced, for example, by his argument that the law contains a myriad of cases in which the legislature manages to communicate something (and thus make law) beyond the literal content of the enacted text.

In (very) simplified terms, Ekins’s main move is to argue for a general philosophical account on which individual intentions can ‘interlock’ in ways that ground group intentions, and to show how that account applies to the legislative context in a way that explains how the legal content produced by the enactment of text corresponds to the legislative act’s objective communicative content, ie, the linguistic content that a reasonable member of the relevant audience would, knowing the context and conversational background, associate with the enactment. The key, he argues, is to recognise that individual legislators have (among other things) certain so-called *we-intentions*, individual intentions about a common goal and how to jointly achieve it.⁷¹ In the legislative context, Ekins says, the relevant *we-intentions* produce (again, among other things) an irreducible, general intention to follow certain established procedures which constitutively determine what counts as more particular joint action (in the service of the common goal, which on Ekins’s account is to legislate for the common good). Thus, when a proposal successfully completes the (locally determined) legislative procedure, its enactment counts as an intentional act of the legislature, irrespective of individual legislators’ intentions (or lack thereof) on that particular occasion. Individual legislators may or may not contingently have such particular intentions, but *vis-à-vis* the legislative act itself, that’s neither here nor there, Ekins thinks; it’s part of the legislature’s general intention that legislative procedure is adopted as a way for legislators to jointly evaluate and select a proposal, the content of which is to be understood in

⁷⁰ For a condensed statement of the view, see also Ekins and Goldsworthy (2014) 64 ff.

⁷¹ For more detail, see Ekins (2012), in particular chs 3 and 8, and Bratman (1999) chs 5–8.

terms of its potential future promulgation. The content of legislation is thus determined by the linguistic content that a reasonable member of the community at large would, knowing the context and conversational background, associate with the enactment. This, I hope, is a faithful – if woefully brief – description of the main contours of Ekins's view.

On this occasion, I can neither do the issue nor Ekins's laudably detailed arguments justice, but I do need to say something about legislative communicative intention(s) and in the service of doing so I think it is useful to flag some main points of agreement and disagreement with him. First, although I disagree with Ekins about the nature of the function at the root of the explanation for how the enactment of a text contributes to the content of the law via legislative procedure, we seem to agree that the existence and content of law (originating in the legislature) is explained in crucial part by the combination of some necessary function of legislation and certain contingent procedures adopted and used by the legislative body to accomplish that function. On the account I favour, law's function (to help subjects better comply with the reasons that apply to them) entails that, necessarily, lawmaking is an expressive act, while which forms of expression counts, and whose, is a contingent matter, settled by the legislative procedures adopted in each system. However, unlike on Ekins's picture, on my account, the content of the legislature's utterance is not determined by any particular communicative intention, grounded in a standing intention along with specific, unanimously adopted legislative procedures. For reasons duly emphasised by the sceptics, I think that – at least in the actual world – there is insufficient agreement regarding what legislators take themselves to be doing in following legislative procedure to warrant the conclusion that the content of legislative changes in the law, and their promulgation, fully corresponds to the objective communicative content associated with the enactment of the text. That is, in the actual world, I don't think it's true that legislators conceive themselves to be jointly evaluating and voting on a proposal to be understood in terms of its potential future promulgation – at least not to the extent required by Ekins's own framework.

Moreover, even if they did, the type of group intentions at play would not suffice to ground any particular communicative intentions. A legislature's intention that the result of their adopted procedure – the content of which is determined by the content that a rational and competent reader would associate with the proposal – *count as* the content selected and promulgated does not magically create a communicative (group) intention in any particular case. At best, the legislature's general intention is an intention to be treated as having a particular communicative intention on specific occasions, which – granted – may create a *fictional* intention, but it does not suffice to ground any actual intention of that sort. However, as I read him, Ekins is after something more robust – an actual intention irreducibly grounded in the *we-intentions* of individual legislators (along with legislative procedure). This, I assume, is what – as a general matter – he thinks it takes in order for an utterance to have content.

On the picture I favour, however, the legislature does not need to have any actual communicative intentions. Conventional rules determine that the legislature's expression counts as law's expression and that the legislature is in control of the procedure by which it selects the linguistic items used on particular occasions of expression, but the content of the resulting law is not constitutively determined by any actual intention of the legislature, or of individual legislators; rather, it is determined by the content to which the legislature – by way of rationality – commits itself in selecting and promulgating a particular text via its adopted procedures. And the content to which it thereby commits itself is – as a general linguistic matter – the linguistic content that a reasonable member of the relevant audience would, knowing the context and conversational background, infer that the legislature intended to communicate, in selecting and promulgating that text.⁷²

It is worth emphasising that while communicative content – on my account – is in some sense 'objective', I still think that communicative intentions are indispensable. I understand how it may seem that by embracing an objective account of communicative content, one significantly demotes the notion of communicative content – if the norms of rationality, along with any further particular norms present in the relevant context, do most of the work in determining the content of any given utterance, then why do we need to refer to communicative intentions at all? Why not just say that the relevant norms fix the content of the utterance?⁷³ The answer, I think, is that in doing so we would simply be talking about something other than meanings/communicative content. At least at the level of theory, communication necessarily involves reference to such intentions – that's just how communication works, on my view. We can of course often bypass such reference for practical purposes, but once we do so in a robust, metaphysically committed way, I think we are simply doing something other than 'gauging' meaning. We can of course still talk about interpreting acts and about assigning them significances, but I take that to be an analytically distinct activity.

Since communicative content is still determined – partly, but crucially – by reference to actual communicative intentions, the sceptics' worries will have some significant consequences for how determinate we should take legislative content to be. I will discuss pragmatic indeterminacy in some detail in chapter five, but let me say that due in part to the issues highlighted by the sceptics, and in part to worries about lack of pragmatically relevant information in the legislative context,

⁷²I should note that some – arguably, eg, Harnish (2005) – take appeal to normative notions like *commitment* to mean that the relevant speech cannot be categorised as communicative. But while that may be true in the sense that the success conditions in some sense no longer depend on correct uptake, it is still the case that the content of the speech act depends on warranted inference about the speaker's communicative intentions, which – I think – makes it communicative in a sufficiently robust sense (so as to merit the label).

⁷³For worries in this vein, see eg Greenberg (2010) and Levenbook (ms).

I think that indeterminacy in legislative communicative content is fairly widespread, even when the enacted text contains no extravagantly vague terms. In particular, *contra* Ekins, I do not think that (determinate) non-literal legislative speech is as widespread as he seems to think. In fact, I think it is relatively rare. That does not mean, however, that I think the law is limited to the literal content of the language used. As I will argue in chapter five, the law is often indeterminate between its literal content and some pragmatic enrichment thereof; and even in those cases in which it seems clear that the legislature intended to communicate something non-literal, it is still often indeterminate what that enriched content is. To some, this no doubt seems like a problematic picture of law, both descriptively and normatively, but I hope to show that the legislative context actually doesn't fare all that much worse than ordinary conversation in either respect. Indeterminacy, as it happens, is fairly widespread in communication generally; what matters more is that we have strategies for managing it.