**ACCESS, PROMULGATION,**

**AND PROPAGANDA**

The legal ideal of publicity relies principally on the fact of PROMULGATION, or the expectation that valid law be publicized to all those subjected to it. And historically, promulgation has always been one of the requirements of valid law. So, we should expect philosophers of law to have an explicit theory about the nature, meaning, and function of the concept. Surprisingly, this is not so. In practice, diverse legal regimes have been left to define promulgation in their diverse ways.[[1]](#footnote-1) There is no systematic attempt to explicate the concept in relation to legal theory. This is unfortunate, given the importance of the value of protected expectations to the rule of law. But it is especially unfortunate in an age of information; for if we do not know under which conditions a legal system is promulgated, then it will not be clear whether or not the reproduction of legal *mis*information is a cause for alarm (e.g., as opposed to the cost of doing business in a relatively free society).

Promulgation of law implies that the laws are known to the public, or the citizenry conceived of as a political body. At least two things are needed to secure promulgation. First -- the study of promulgation must involve an inquiry into what it takes to be able to *access* sources which disseminate knowledge of law – roughly, the conditions where it is rationally possible for citizens to know law.[[2]](#footnote-2) Second -- these sources should report correctly on the relevant kind of social institution, putting the skill of *discernment* into practice.[[3]](#footnote-3) The primary occupation of the present essay is to provide a theory of accessibility, though the two conditions are intertwined.

Both requirements for access and discernment need to approximately satisfy the conditions for intellectual good faith inquiry into a legal system (where those conditions are attempted specifications of the virtues which make cooperative discourse possible). Those conditions for good faith inquiry form a framework that specify (some of) the general traits of a legal theory for purposes of diagnosing the nature of promulgation, while also stating the respects in which legal theories have comparative advantages or disadvantages with respect to the transmission of law.

In this essay, I adopt a framework rooted in discursive norms pioneered by analytic philosopher HP Grice. I refer to the prevailing theory of access to law, the ‘no-theory theory’, and then propose two alternatives, the ‘conveyance theory’ and ‘agonistic theory’. I suggest that (at least) three kinds of models are consistent with the theories, and can potentially help us understand when law is successfully promulgated in particular legal contexts: the *spread model*, the *chain model,* and the *memetic model*.[[4]](#footnote-4) I end the paper by comparing the two theories with respect to a case study. Throughout I will show that the conveyance and agonistic theories have a serious advantage over the no-theory theory, in that they allow us to comparatively examine the epistemic weaknesses of diverse theories of law on the basis of their contents without pretending to false neutrality (i.e., by assuming that every theoretical context of interpretation is equally good).

**An Epistemology of Theoretical Disagreement**

As a project in general jurisprudence, the need for a theory of promulgation only arises if good faith theoretical disagreement is possible in the first place. Without a potential plurality of legal theories, there is no conceptually distinctive need to talk about promulgation. In this section, I offer a sketch of how we might think theoretical disagreement is possible.

Suppose you have four philosophers, A, B, C, and D, who have theoretical disagreements about law.[[5]](#footnote-5) A is a classic natural lawyer, B is a positivist, C is a pragmatist, and D is a pluralist. Each has a different depiction of law, occupying different *contexts of interpretation*, drawing upon different conceptual resources as they try to resolve questions about the nature, function, and consequences of law. Suppose their depictions of law have one *minimal* thing in common, which is the idea that laws involve rules and policies that issue from institutions that have the power to threaten formal sanction, and promulgated in principle. Suppose, also, that they are all acquainted with the same empirical facts, and each had an equivalent level of training. And, finally, suppose they will wish to find out whether some ordinance, X, counts as *legally binding,* in circumstances where the testimony of the relevant institution is ambiguous. Would their theoretical disagreement about law matter to how they judge the legality of institutional rule X, even if they are all being charitable? I think the answer is, yes, it would; for the diversity of approaches to the theoretical question of legal validity may produce potential epistemological consequences on their judgment, e.g., on how they judge the ways they can both begin and end their search in finding out what the law requires of them (among other things). Typically, we expect these disagreements to be most quarrelsome during the process of *discernment*, i.e., the level where there is a higher expectation of legal training and acquaintance with evidence (e.g., interpretation in judicial review). But we can also even expect these disagreements to have broader epistemological consequences on the sense of what forms of evidence are most salient in explanation (e.g., towards social sources, community ideals, coherence of judgment, and practical facts related to system design). This is the sense in which law must be *accessible –* it must be knowable to novice stakeholders, too.[[6]](#footnote-6) Since we can expect the inquirers to have different beliefs about the agentic obligations of novices -- e.g., the depth of probity required and intuitive conditions for exculpation – accessibility is worth caring about.[[7]](#footnote-7)

These basic epistemological questions about law are most acute when the inquirers possess relatively scant testimonial evidence from the rulers, and minimal institutional training – when, in some vague sense, the person and the sign of law are in an epistemologically frustrated relationship. But we are only interested in *good faith* frustrations. We have access to law when law is knowable, based on the resources found at hand, so long as those resources are all based in genuine efforts to understand the thing they’re talking about, and so meet the bare minimum requirements for being a rational disagreement that has any hope of rational resolution.[[8]](#footnote-8) The idea that each theory has opinions that have some *hope* of resolution is just to say that they are each speaking in *intellectual good faith* according to their own lights (i.e., severally), and at least *not* in intellectual *bad* faith by *each other’s* lights (i.e., jointly), when both encounter the same evidence.

One way of talking about a depiction of law is to examine law as a *discourse,* i.e., a distinctive pattern of linguistic performances which are demarcated according to identifiable and unique presuppositions which settle general aims and expectations for cooperative exchange of reasons.[[9]](#footnote-9) That is a mouthful, but happily, examples of discourses are familiar: morality, politics, religion, science, literary criticism, and mathematics, etc. A rational discussion of such topics depends on deployment of presuppositions for communicative exchange under the banner of a topic and its accompanying set of standards for evaluation, in a manner that can be rationally interpreted as an effort at interaction in intellectual good faith. Without some kind of theoretical common ground in the form of a shared discourse, promulgation of law will be impossible, since no-one would know anything about the nature of the phenomenon at issue, such that it could be the object of joint attention.

A central mechanism in any accounting of law is the idea of *risk*. For one thing, we are understandably preoccupied with the ways legal theory intersects with *risk of bodily harm*. But in addition, and more generally, we are also able to worry about *epistemic risk*, the risk of being in error.[[10]](#footnote-10) ‘Epistemic risk’ is a new way of speaking about a relatively common-sensical idea, which is that an infirmity of many different sorts of external conditions can lead someone to be at risk of making an error with respect to the thing they are making claims about (e.g., Gettier cases). In normal epistemic contexts, having low epistemic risk in one’s judgment implies that the knower is more or less free from bad luck – they have a justified and appropriate (e.g., reliable) belief that approaches truth. In the context of law, that implies a reasonable knower will be well-placed to accurately interpret and follow the law without either falling into ignorance or misinterpreting its requirements, possessing justified and appropriate belief that approaches truth.[[11]](#footnote-11)

The notion of risk is essentially probabilistic, and so I shall assume it can be usefully modeled in terms of Bayesian subjective probabilities. Any Bayesian estimate relies upon the existence and availability of *priors,* or unconditional credences. Priors come in many forms. To take one example: our epistemic standards (i.e., telling us what counts as knowledge) are one sort of prior.[[12]](#footnote-12) Lexical standards are another sort, i.e., concerning the knower’s assumptions about the nature of law and its constitutive features, often settled by the prevailing norms of discourse. (i.e., where discourses are a distinctive kind of linguistic performance which is regimented according to identifiable presuppositions which settle aims and expectations for cooperative exchange of reasons.[[13]](#footnote-13)) In the context of epistemic risk assessment, all priors are presumptions in any exchange that occurs in intellectual good-faith, which allow us to talk about the ways different people face different epistemic risks when they try to go about trying to form beliefs concerning knowledge of the law. We can begin to think about whether or not law is accessible once we have a settled idea about the role that theoretical posits have as priors.

Each discourse sets the prior probability assignments on some dimension(s) of comparison, on the assumption that well-behaved discourses have the following features: (i) some appropriate epistemic standard exists to demarcate justified and unjustified belief; (ii) the evidence is open to a specifiable range of permissible interpretations, and which is either near or far from meeting that standard of justification (i.e., within a margin of error); and (iii) the narrowness or wideness of the range of interpretation for the evidence, for the citizen, is anchored in an appropriate theory of expert discernment of law (e.g., during judicial review).[[14]](#footnote-14) This last point, (iii), is especially worth noting, since we have to leave ourselves open to the possibility that some discourses are just plain unacceptable, in that they increase our risk of errors when we try to figure out what the law wants from us.

Now here’s the rub: given all that, how can we even try to talk about epistemic risk in the same breath as theoretical disagreement? It seems impossible -- comparative assessments of epistemic risk only make sense when held up against the backdrop of common priors. Yet I am interested in discourses related to law, especially of the sort that would weigh in on the disagreement between A, B, C, and D, and insofar as they provide some useful means of establishing how the actual ordinances of the rulers are ACCESSIBLE, i.e., on minimal assumptions about the demands of evidence and training needed for law to be knowable. A theory of accessibility requires us to find a way to talk about epistemic risk under conditions where at least some seemingly foundational matters are up for dispute.[[15]](#footnote-15)

The question can be settled by specifying what counts as ‘intellectual good faith’ in communication.

Accessible law is knowable to its stakeholders, i.e., the people to whom the law applies – typically, citizens. In principle, if every stakeholder knew *what each law is*, then it would be promulgated. (The fact that rule X is common knowledge guarantees that X is knowable.) But this is not a realistic aspiration -- you cannot just gather up the members of a polity in a gym and read off the *Criminal Code*. It is at least possible for all citizens to be ignorant of most of the laws, and yet that law also be promulgated. So, to make sense of the idea that law is knowable, we need to suppose that, *at least sometimes*, a government can make otherwise valid law but fail to promulgate it by virtue of their failure to CONVEY information to stakeholders, and also that the public can fail to know law even though it is conveyed.[[16]](#footnote-16)

To explain what it means to ‘convey’ information to stakeholders, I need to make a brief detour into Paul Grice’s pragmatics. Grice held that linguistic (non-natural) communication happens through sophisticated signalling of intentions. So, when I communicate something to you, I must: i) intentionally signal to you a message, ii) with the intention that you recognize the signal and its contents, and iii) the further intention that you recognize that I was signalling the thing to you. He also posited that we generally achieve clarity in our interlocutory exchanges by assuming cooperation. For Grice, cooperation was judged according to four submaxims -- Quantity (e.g., “be informative”), Quality (e.g., “be reasonable”), Manner (“be clear and take your turn”), and Relation (e.g., “be relevant”).[[17]](#footnote-17) He also noted that these cooperative maxims are themselves based on assumptions of aim, coordination, and expectation – what we can call ‘strategies’ for communication.

Gricean communication is too high a standard for promulgation. It is at least possible for a government to promulgate law to stakeholders even if it does not signal sophisticated Gricean intentions in the process. Instead, we should say that promulgation occurs through conveyances -- a message that signals a belief to the intended audience, *period*. That expressly includes: (a) *discreet signals*, i.e., where stakeholders don’t know it was the government that communicated the rule, and (b) *delayed signals*, i.e., where government intends for a message to achieve uptake, but stakeholders take no notice of it due to lack of solicitude, but who can correctly apprehend it upon attention. Both of these cover senses in which law is accessible to a public but not known, or known imperfectly. But one hopes they are marginal cases, and that promulgation also includes Gricean (c) communicative signals (with the proviso that successful communication of a law at any given time will only be partially distributed among stakeholders).

Conveyances only have the content that they do when a good-faith interpreter takes up an appropriate strategy for their interpretation.[[18]](#footnote-18) The cooperative strategy is only one of many. Indeed, for many purposes, failures to convey a law are also more or less identifiable as *predictable* *failures to even try* to cooperate in Grice’s sense. (The police lie about the law all the time, for example, and are permitted to do so.) In such conditions, it is a mistake to think of ourselves as in cooperative conversation, since we can’t rely on *presuppositions* of aim, coordination, and expectation – those expectations will, instead, have to be constantly updated in further communication, not as priors, but as conditional credences.

Four criteria specify the standards of inference that are necessary in order to judge some attempt at promulgation as a strategic bid at communication, and contribute to our understanding of how to keep score in our language-games in good (or non-bad) faith. Each is generally presupposed during the course of charitable interpretation, though the principles can be applied more or less strictly, depending on the particularities of their subject matter. I refer to these criteria as Integrity, Humility, Fidelity, and Candor.INTEGRITY is a dimension of evaluation rooted in the respects in which we can see a discourse as being a more or less coherent force upon the internal lives of knowing subjects. To have integrity is to maintain a coherent story, based on precedent and statute, which more or less endures. If it were phrased in terms of maxims, it might include, “Act collectively according to maxims that endure,” or “Endeavor to justify our future in light of your past, and vice-versa.” The value of integrity reflects Grice’s advice that, in conversation, interlocutors should not just abruptly “shove off or start doing something else”.[[19]](#footnote-19) For example: a legislature that overturns its laws every year can be described as one that fails to have integrity in this sense.

But, again, the value is scalar, so can be pursued to a maximum or minimum degree. At most, integrity in law demands the endurance of second-order preferences encoded in principles which persist through deliberation -- e.g., rights of political morality, or the logical application of principles embedded precedent in common-law, etc. But at the very least, the value of integration requires that a theory account for the present apparent qualities of a legal system through historical evolution based on convergence of contingent forces.[[20]](#footnote-20) Anyone who treats law as *merely* a branch of history, or *merely* an instrument of unrestrained moral inclination, will not be trustworthy as legal knowers.

The value of HUMILITY expresses the dimension of analysis where law is evaluated from the external point of view, conferring reasons for belief in proper action which could be grasped and upheld by a third-person observer who had no prior investment in definitional quarrels. It might be summarized as the Columbo principle: “direct your judgments, as far as possible, through reliance on the facts, such that you do not render judgment upon things that are not yours to legislate”. In the legal context, that typically includes maxims which counsel *deference* either to rulers or subjects: “Let the people themselves decide the criteria that determine what counts as a legal person,” or “Honor the counsel of experts, insofar as knowledge of facts bears on public policy,” or “Treat the judge’s verdict in a case as reason to think that the accused deserves the verdict as a matter of law.” Humility reflects the general expectation that interlocutors should try to be sensitive to signalling, entangled in mutually dependent moves, so far as is consistent with the potential exchange of reasons.

At minimum, a view expresses humility insofar as it is *anti-nominalist*: i.e., so long as it acknowledges that more is at stake in the characterization of legal facts than a mere dispute over nomenclature. Anyone who says that ‘law’ is *just a word –* anyone, in other words, who suffers from the *semantic sting --* is someone who can be relied upon to get the law wrong.[[21]](#footnote-21) For claim that the substance of a disagreement is merely verbal is, in some sense, an attempt at coordination; but it is not an especially rational attempt at coordination. It is rather more like an attempt at brinksmanship in bargaining, i.e., that either I am right about our shared subject matter, or our dispute is merely verbal. Recognition of the ideal of humility is just to recognize that you are not the sole participant in an exchange, and that significance is both shared and shared rationally.

FIDELITY gives expression to the idea that subjects deserve to know something about what their interests are, and deserve to know the choice of means that rulers have in trying to manage resources related to those interests. The aim of fidelity is *pursuit of the ends by appropriate deliberative means*, regardless of whether those ends be substantial requirements of justice (rights), order (rules), prudence (policy), or obedience to command (fiat). A system displays the virtue of fidelity to its maximum extent insofar as the core aims and standards of deliberation are *optimizing* as opposed to merely satisficing conditions. Someone fails to respect law insofar as they indulge in *avant garde* levels of creative discretion in the ascription of a rule to a practice or vice-versa, i.e., they enjoy powers of “strong discretion”, and are simply not bound by authoritative standards.[[22]](#footnote-22) The value of fidelity maps onto the expectation that, broadly speaking, interlocutors must have a set of shared aims and subject matter.

Finally, the value of CANDOR gives expression to the idea that the law should be transparent and not misleading – i.e., a law where “what you see is what you get”, where legal word and legal deed follow the very same line. The aim of candor is the *coordination of the facts of a practice with apprehended rules*. The value of candor is *derivative*, in the sense that it is a function of two ideals already mentioned, integrity and humility, issuing from the requirement that a conversation generally proceed in an orderly way in order to facilitate mutual expectations. Generally speaking, our conception of what is valued across time from the first-person point of view should run roughly in parallel to our conception of the facts about legal practice, observable as third-persons – our running commentary has to make the most sense of our actual legal common ground. The need for a derivative ideal of this kind is important for the purposes of diagnosis, both in law and in other discourses; for it is a fact that *every conversation is already a meta-conversation*, with a structure of presuppositions that can be potentially raised to the status of being contents at issue. During the course of everyday life, we usually accommodate shifts in presuppositions, making them seem invisible.[[23]](#footnote-23) Yet sometimes the divergence of presuppositions creates significant friction -- on those occasions, the ‘meta-conversation’ is exposed.

This is not a complete list. I assume that these criteria are individually necessary but not jointly sufficient directions for any actually existing discourse, and could be as easily applied to law as it could to any other discourse. Yet, without some desiderata that help us conceive of the bare subject matter of law, there will be no hope for a theoretical disagreement to have even a reasonable chance of being resolved, and subsequently dash any chance of figuring out which particular laws they are meant to follow given a slim evidentiary basis. At least, A, B, C, and D should all be able to expect these criteria to be honored by the rulers of a system, if there is any hope that the law is accessible, let alone discernable.

These requirements both constitute and regulate intellectual good faith participation in a discourse. By ‘good faith’, I have meant values of an interpersonal discourse which make it possible for rulers to convey law, providing conditions under which law can be rationally ‘taken up’ by citizens.[[24]](#footnote-24)

The four virtues of good faith are an attempt to lay out the essential preconditions for conversational cooperation, i.e., attempts to state the necessary conditions for the application of its maxims. But, as I have stressed, these virtues are also an attempt to set out what we care about when we set out our conditions for better or worse bids at cooperation, in such a way that would help distinguish between gradations of cooperation, which carry forward in our assessments of epistemic risk.

1. **Integrity**. All other things equal, it seems that we are in a better position to know the law when it has integrity, simply by virtue of the fact that the cooperative maxims (especially, Quality and Relation) are possible without the assumption that the topic of discussion (e.g., law) is both stable and tractable under scrutiny. (*Example*. On my reading of Foucault, the law is determined through the strategic interaction of embodied persons in a system of power-relations, and discovered through the use of his genealogical method.[[25]](#footnote-25) If this is this what law is, then it is rather difficult to know who to trust during a civil rout. Indeed, that is likely Foucault’s point -- history is full of contingencies. In that respect, his theory minimizes integrity.)
2. **Humility** involves necessary reference to evidence of facts that exist independently of merely subjective (i.e., willful) interpretation, whether that be empirical facts or logical universals -- e.g., empirically grounded predictions of the verdicts of judges or effects on bodies and behaviors. All other things equal, it seems as though we are better off as knowers when the law is humble, since one cannot even begin to consider obedience to Quality without a sense of what ordinances count as false or unjustified, by virtue of its connection to evidence. *(Example***.** It is a happy fact that most canonical theories of law are directed towards evaluative or explanatory concerns and not just semantics. Legal nihilism is not a common view amongst jurisprudes. Austin is perhaps the one theorist who has been most frequently accused of hubris, owing to his high rhetoric about competing theories as ‘nonsense’. Yet this is maybe overstating things, since many sections of his *Province of Jurisprudence Determined* show that he was ultimately concerned with the focal meaning of law, or law ‘strictly speaking’.[[26]](#footnote-26) Still, we can ask legitimate questions about whether his conception of focal meaning is well motivated, in such a way that would distinguish it from technical meaning.)
3. **Fidelity**. An especially complex system of laws, with procedural rules that are finely tuned to meet the unique demands of diverse substantial contexts, would be a system that displayed the maximum honor to the value of fidelity. Yet, because the conditions for success in satisfying various goals are often based on controversies that fall short of common knowledge, they involve forms of nested reasoning with a bafflingly large division of labour. Hence, it is all-other-things-equal better if the demands for fidelity rest in the middle, satisficing range. Without a satisficing conception of fidelity, a legal system runs the risk of undermining Manner and Quality. (*Examples*. There are two ways of imposing epistemic risks through fidelity -- through (a) excessive fidelity, or (b) deficit thereof. It is rather easy to identify such theorists at the level of *discernment* – e.g., Dworkin’s theory embraces a ‘unique right answers’ or perfectionist thesis, while Karl Llewelyn endorses strong discretion. For a theory of *access*, Aquinas endorsed a conception of law that was moored in a rich multilayered conception of the good and the right, chiefly accomplished through reference to divine law.)[[27]](#footnote-27)
4. **Candor** is at its minimum when integrity is disproportionate to humility – either because a legal theory posits rules that are indifferent to observable practice, or because reasons play a relatively small role in establishing what counts as law. To the extent that integrity and humility have a proportionate fit, the system can be said to have honored the value of candor at its maximum. Without candor, we can hardly begin satisfy expectations of Quantity, either as sovereign or subjects, because there will be no sense of what must count as a minimally good explanation of how law works. (*Examples*. In this area, for reasons mentioned, we might include Foucault, who proposed a vision of law that could not ever be accused of being obvious. Similar observations could be made, broadly speaking, for critical theories of a certain kind. e.g., on one reading of Marx, the law lacks any integrity, being a superstructure that operates as a function of the frictions of the material-economic base; and yet he takes full advantage of the legal concept of property, and deploys it in a relatively sophisticated conception of value in exchange, in a manner that suggests at least some legal phenomena have robust explanatory role. And, sure enough, one cannot accuse Marxian theory of being obvious or candid in the relevant sense.)

As noted above, the first three virtues -- fidelity, integrity, and humility -- reflect variables that were noted by Grice himself: i.e., presuppositions of aim, expectation, and coordination (respectively).[[28]](#footnote-28) But I have added a fourth virtue, candor, which is a necessary addition for the current project. For Grice’s project was to distinguish between the ways we understand *what is implicated* in relation to *what is said*.[[29]](#footnote-29) Our task in investigating promulgation is to understand *what is conveyed in good faith --* regardless of whether the conveyance was implicated, said, or what have you.[[30]](#footnote-30) It is instead a conversation about focus – i.e., to distinguish between those contents that are at issue in the conversation from those which are only at issue in the meta-conversation, i.e., the conversation about what the aims, standards, and procedures of the conversation ought to be. That distinction, in turn, only requires us to take notice of the ways that the (roughly) stable aspects of discourse (“integrity”) interface with apparent bids at coordination in the moment (“humility”), especially in cases of potential dissonance which would trigger a search for clues of meaning by the interpreter’s empathetic inner detective. In such cases, the listener faces a choice of either going along with the confusing terms of the discussion (keeping the meta-conversation in the background), or problematizing the terms of the discussion by making confusions plain (raising the meta-conversation to the level where its contents are at-issue).[[31]](#footnote-31) Problematization, or raising the meta-conversation to the level of being at-issue within the conversation, demonstrates more candor rather than less, in the context of responding to the sort of cognitive dissonance that might prompt a listener to go searching for implicit content.

The scheme of virtues is also useful in practical legal contexts, entirely putting aside questions related to promulgation of law. Consider, again, the case of ‘conflict of interest’. In clear cases, it will be obvious what actions will truly risk a loss of loyalty in a solicitor-client relationship. But in opaque cases, our first answer to ‘are you at risk of loss of loyalty?’ is not going to be settled by reference to common facts that would by assessable by the maxim of quality. It must instead be answered by some working concept of what it means to have integrity, or what it means to keep faith with your client, confined by requirements of competence -- such that a particular action or inaction would qualitatively alter the relationship between solicitor and client. Intellectual good faith requires us all to always try to satisfy those virtues, and also, to always succeed in finding some overlapping agreement over what it would mean to satisfy them, resulting in priors that we can use in the assessment of epistemic risks.

Another reason to think that this schema is an advantage is that it does not need to operate over all and only Gricean intentions. Indeed, in the limiting case, we might consider a whole range of interesting perlocutionary acts that convey only a dogwhistled message, issuing from unsophisticated communicative intentions. e.g., *mere clues* about the state of policy offered from unnamed sources, or a sudden ostentatious change in police tactics, signalling at the very least a change in local strategies (if not outright changes in policy, principle, and rule).[[32]](#footnote-32) And, pulling the circle together -- each theory of law demands relatively more or less evidence to interpret in good faith, and has correspondingly different ideas about what to make of unsophisticated (indeed, natural) signalling. A final point, relevant to the philosophy of law, is that the categories invoke ideals that are already laden in the aspirations of many traditions of legal theory, perhaps most explicitly and succinctly articulated by Lon Fuller’s classic taxonomy of failures to make law.[[33]](#footnote-33)

The main disadvantage of this framework is that it starts with a relatively tractable and potentially formal discussion of quantifiable epistemic risk, and ends up in qualitative territory, i.e., evaluating different choices of priors in terms of virtues which settle issues in the pragmatics of discourse. But this is simply a reflection of *how it goes* with priors in Bayesian reasoning.

**Theories of Accessibility**

Without any pretense of this being an exhaustive list, there are at least three approaches you might take towards the accessibility of law:

* One might want to adopt a ‘*no-theory theory’*, that a law is accessible if and only if the relevant legal institutions say so.
* One might want to adopt the ‘*conveyance theory’*, according to which a law is accessible just in case it is conveyed in a way that demonstrates respect for its audience.
* Finally, one might want to adopt the ‘*agonistic* *theory’*, stating that law is accessible just in case it conforms to the prevailing ideologies of a population.

The prevailing conception of promulgation is what I call the ‘NO-THEORY THEORY’. On this view, there is no advantage in trying to address the particular epistemic requirements of legal theory; for *a law is accessible so long as the relevant legal theory says so (or relevant legal institutions say so).* Attempts to spell out some such theory of promulgation are attempts at redundancy. And the no-theory theory enjoys a default position in philosophy of law, simply by virtue of the fact that there is, as a matter of fact, no theory out there to be found.

On this theory, as far as I can tell, the standard of justification that a legal regime has to meet for promulgation just is the standard of good faith they have to meet for legislation -- *period*.[[34]](#footnote-34) A government has conveyed a message to the public just in case they have met those discursive conditions by their own lights. Hence, even if, curiously, every single actual subject is ignorant of the passage of new legislation, the relevant legal rule might still count as promulgated, just because the legislature was a legitimate representation of the people.[[35]](#footnote-35) Law, insofar as it is law, sets its own epistemic standard.

There are some reasons why the ‘no-theory theory’ might be thought to be the reigning champion. For one thing, the no-theory theory at least respects the right of institutions to autonomously determine the conditions of their own success, instead of leaving it into the hands of partisan theory. It also (correctly) understands that the promulgation of law is sensitive to the contents of legal theories in practical application -- so, e.g., it understands that what counts as promulgation for medieval law under a Thomistic system will not necessarily, in effect, be identical to promulgation of law in a democratic republic under positivism. Quite so. And this is just to say that the no-theory theory honors both the conceptual autonomy of legal systems, and its hegemonic authority to judge all issues in its domain.

Yet the no-theory theory is defective in at least four respects. First, and most importantly, it absolves itself of any responsibility to pay attention to the *central themes* of a theory of accessibility, i.e., that it ought to explain the epistemic relationship between a good-faith subject, the signal, and the distance between them. Second, it exaggerates the significance of a true premise (i.e., that promulgation is context-sensitive) and infers a false conclusion (i.e., that there is nothing generally informative to say about the ways that a legal theory affects uptake). Third, and as a result, it forces us to assume that the burdens of legal education rest on laypeople *by default* -- a potential epistemic injustice. Fourth, it is highly unobvious that the default position can be determined by a legal theory or regime *full stop*, in isolation from questions raised by social epistemology, insofar as the idea of ‘knowability’ is taken seriously.

That does not mean the no-theory theory cannot be defended. So, for instance, the no-theory theorist could simply reject the requirement of conceptual autonomy, arguing that the legal systems have their own specific internalized conception of epistemology which is *incommensurable* with any others. If that is right, then it would be a hallucination to say that promulgation is a single virtue of all canonical legal theories have in common, contrary to appearances. There is, instead, ‘promulgation-for-us’, and ‘promulgation-for-you’, and so on. If that is the situation we are in, there is little hope for our friends A, B, C, and D to arrive at any genuine agreement without resorting to irrational means. This is good reason to seek alternatives.

Our negative comments about the no-theory theory above ought to function as positive restrictions on our choice of alternatives. A theory of access ought to articulate a concept of knowability that applies to diverse legal regimes and outputs various assessments of epistemic risk. So, the concept has to be compatible with a plurality of different answers to foundational questions about law – e.g., the ones held by A, B, C, and D. In that sense, it has to be *conceptually modest* in the ways that it identifies areas of commonality between discourses about law -- i.e., without rejecting any legal theory outright and absolutely, even if it might seem outlandish on first blush. Since the four criteria apply to all discourses, they are appropriately modest in that sense. Also, a theory of access must treat promulgation seriously, i.e., as a *relatively* *autonomous* conceptual domain, in the sense that it must acknowledge the comparative differences between theories for the sake of offering a critical diagnosis of their epistemological strengths and weaknesses (as far as they relate to standards of knowability). This can be accomplished by noticing the degree to which the criteria are deployed, such that they add differential weight to estimations of epistemic risk as priors.

In effect, a theory of access ought to be powerful enough that it is able to yield judgments about whether or not the rulers have been successful at conveying law. Ideally, it might yield four sorts of judgment:

(i) A theory should recognize that, in some conditions, the amount of epistemic risk is TOLERABLE, and therefore yield a judgment that law is accessible, hence promulgated. Failures to cooperate along these lines may or may not be judged as failures to cooperate, though they must be judged as positive strategic attempts to coordinate. A conveyance is tolerable in this respect so long as the assumptions of good faith reduce the epistemic risks of subjects to a point where the range of interpretation of some piece of evidence fully meet or exceed the standard of justification.

(ii) It must, under other conditions, observe that epistemic risks are INTOLERABLE, producing vulnerabilities in the population that might interfere with uptake. Which is to say, some conveyance is intolerable so long as the conditions of good faith result in a situation where the range of interpretations straddle the standard required for justification; and, finally,

(iii) It must recognize conditions for promulgation FAILURE for some subset of conditions where epistemic risks are intolerable, i.e., which *must* be judged as failures to convey law. In this way, the assumptions of good faith are grossly inadequate, in such a way that the range of interpretations fail to meet the appropriate standard of justification.

(iv) It must recognize that, under some unfortunate conditions, the epistemic risks in the situation are INDETERMINATE -- i.e., all our attempts at modelling risks of error cannot help but result in judgment of promulgation failure. Those conditions are, roughly, whenever the margin of error provided by a theory of law, and applied at the judicial level, is sufficiently severe that our estimation of risk cannot help but be intolerable, come what may.

So long as the theory is conceptually autonomous from our favorite story of legal validity, the distinction between (1), (2), and (3) should arise from epistemological considerations related to justification of beliefs from evidence, not just by fiat from a theory of law. Though, of course, theories of law add weight to our risk estimates, that normative weight is only partial.

These considerations, now made explicit, should allow us to finally arrive at the following conceptual gambit: the CONVEYANCE THEORY of access. On this view, a law is accessible, for some signal (p) and some law (q), so long as signal (p) conveys the law (q) provided that: (**1**) subjects *assume* that the rulers believe they communicated a law in good faith (e.g., according to a rule of recognition); (**2**) subjects have a sincere reasonable belief that the rulers are not conveying (q) in intellectual bad faith, according to subjects’ own lights (e.g., according to some identification rule, which is assumed to approximate the rules of recognition); (**3**) the evidence on hand supports (**2**) on the assumption of (**1**).[[36]](#footnote-36) In other words, access to law demands that subjects assume their rulers believe of themselves they are trustworthy messengers about law, and on that basis, that subjects be able to infer from the evidence that their rulers are trustworthy messengers about the contents of that particular law (according to their own lights). A corollary of the assumption in (**1**) is the idea that any theory of law that produces an indeterminate epistemic risk estimate will be dis-preferred, relative to other theories. Notably, (**2**) does not require the subject to infer that the rulers have *complex* Gricean intentions to communicate meaning (e.g., thata legislature intended for their signalling of x to produce some effect in subjects by means of the subjects recognizing that intention), since it is *at least possible* for the information to be conveyed without the legislature putting any intentional effort into making it known (e.g., in discrete law, or delayed law). And yet the beliefs that the people have about the significance of (p) must be more justifiable than not.

The difficulty is in making sense of the nature of that reasonable belief, on the assumption that the evidence in itself (p) is only a slight indication of a message (q). We can imagine, for any number of contexts, there may be a number of models that might specify the standards of reasonable belief. The important point, for now, is that facts about promulgation are also evaluations of how things are run.

Yet there is at least one serious alternative to the conveyance theory which is worth considering, which I will refer to as the AGONISTIC THEORY.[[37]](#footnote-37) It involves the union of three theses in social and political philosophy:

1. *Power-knowledge thesis*. The conveyance theory operates on the assumption that promulgation and authority can be analytically distinguished as inputs into a qualitative estimation of epistemic risk. But there is a sense in which the two related phenomena – of knowing (*savoir*) and power (*pouvoir*) – cannot be pulled apart. In this sense, one cannot speak of *conveyance* of law without also necessarily talking about *conscription* to it.
2. *Agonistic conception of power*. That is to say, agents are always in a constant struggle, actively seeking to maximize their own ability to do stuff, and to be established as being the ones through whom stuff gets done. Contrary to appearances they are never passive receivers.
3. *Performative conception of theory*. If we take (a-b) seriously, then every theory of promulgation is itself just propaganda.

Thesis (c) directly challenges the conveyance theory. For the conveyance theory asserts that it is possible for us to offer a rational reconstruction of the ways we interpret our presuppositions in communication, in such a way that allows us to assign epistemic risk. The idea is that the attempt to set out the conditions for good faith interaction can make a difference to a critical evaluation of publicity, understood as a value that is honored by all legal systems. The agonistic conception of theory denies that there is any such thing as a rational diagnosis of that kind. It replaces ahistorical rational reconstruction with historical analysis (or “genealogy”, for Foucault). Instead of cooperation, there is a struggle for power over the terms of the conversation. Instead of general epistemic risk, there is only local risk of harm, based on the perception of the ways that a population strategizes.

As I see it, the two theories are irreconcilable on an epistemological level. The conveyance theory asserts that it is difficult to decouple the virtues of integrity, humility, and candor from aspects of the human condition which are worthy of concern in their own right -- i.e., the continuity of past and future, sensitivity to error, and desired equivalence between assertion and assent (respectively). We ‘keep score’ in our conversations about knowledge of law by reference to the ways we interpret these virtues – without these rough-grained overlapping virtues, there’s no way to talk about epistemic risk across conversational contexts. The agonistic theory replies -- yes, exactly. It proposes that these virtues are only special cases of strategic aims in the pursuit of power in one very particular sort of liberal doctrine, and hence denies that there are any such thing as cross-contextual epistemic risk assessments. You have your picture of law, I have mine, and both are just part of a game of power and ideology. The only way to judge someone’s intellectual good faith is to see whether their strategies are worth having.

Let me see if I can put this approach in its best light.

As we saw above, one of the assumptions of the conveyance theory is that it ought to be conceptually *modest* -- i.e., it has to assume that theoretical disagreements are possible in good faith. As a result, the very idea of sovereign supremacy is not dismissed out of hand -- rather, it is relegated to a particular kind of legal theory. In this way, to echo one memorable quote from Foucault, the conveyance theory does not ‘cut off the king’s head’ in its fundamental political convictions. Rather, it treats the theory of power as an auxiliary hypothesis in a theory of law, of which there are potentially several.

However, the very idea of conceptual modesty might seem so ecumenical that it borders on servility. Suppose that we were to say that institutional facts about power are prior to our conception of how to best keep up with the practice of conversational score-keeping. In that case, we would have to define ‘good faith interaction’ very differently from how we understood it in the conveyance theory. We would have to dispense with the requirements of integrity and humility (neither of which are particularly strategic), and would have to interpret power-seeking as an overriding aim of discourse. Finally, suppose that power in a civil context is *always an active struggle* (or a strategic choice to withdraw in light of some broader struggle), and never passive subordination. If that were the case, then any legal theory that was not already conditioned to these facts about power would be considered to be in bad faith, while everything else would just be another bid in the ongoing dominance game.

In effect, then, one might propose an alternative theory of promulgation which says law is accessible just in case: (**1’**) a population conditionally acted as if they believe that it is beneficial to recognize some arbitrary stimulus (p) as a law (q); and (**2’**) were able to recognize themselves as empowered agents in arguing for the link between (p) and (q). In that case, it would not make a theoretical difference to the promulgation of law if at *some particular historical moment* the strategic beliefs about the demands of the law happened to conform to the actual demands of the king. For the underlying explanation of that collective decision to conform to royal decree tells us that, under slightly different conditions, power could have been placed elsewhere. In this way of speaking, law is accessible just in case it conforms to the most congenial ideologies of a population, insofar as those ideologies can effectively coerce and cajole the offices of government.

There are good reasons to find the agonistic theory of accessibility unattractive. The first and possibly most important objection is that, when it comes to the agonistic theory, the intuitive idea of ‘accessibility’ (i.e., kind of open flow of information from government to citizen) is abandoned, and replaced by a theory that says law is accessible just in case people effectively want it to be. This looks like a perverse result. If this is what the agonistic theory wants to say, then one might just as easily accuse the agonistic theory of *changing the subject* away from accessibility to something else.

And yet there is more to it than meets the eye. For there is no question as to whether or not the *rhetoric* of accessibility has effects on power, especially in mitigating or enhancing claims of responsibility. (e.g., ‘plausible deniability’ is often an effective rhetorical defense.) The agonistic theory’s gambit is that it treats this empirical fact about how people get away with the things they say as if it were constitutive of accessibility. And there might be something to the agonistic theory’s hypothesis, if we are empirically-minded and care about ordinary language use. For if we decide that an examination of the concept of ‘accessibility’ must reflect the ordinary strategies that people use when talking about the notion, then we have to incorporate all significant articulations of the idea, no matter how perverse they seem *apriori*. So, the agonistic theorist could argue that they do not change the subject, so much as take it seriously.

Overall, I see far more promise in the conveyance theory than the agonistic one. Some of my objections are ethical, and some political. But, in the diagnosis of promulgation, I confess that it is a candidate theory.

Our task now is to look at how the theories interact with our reasons for cases. At the end of the day, the choice between the agonistic theory and the conveyance theory depends on their power to make sense of the idea of accessibility when applied. To understand which is preferable, one must see how they relate to different models, and then apply the lessons to particular legal cases.

**Models of Justification**

Taking the conveyance and agonistic theories as points of departure, we are now in a place to think about the different kinds of models that would account for the nature of the reasonable belief that operates in (**2**) and (**2’**).

1. SPREAD MODEL*: good faith beliefs are reasonable just in case the subjects find that the signs that express the demands of law are close-by.*

This view belongs at least in rough outlines to Jeremy Bentham.[[38]](#footnote-38) On this very demanding model of a legal environment, a system of law has shown respect for the people just in case its rules have been *spread* across the population, intelligible without the need of any human intermediary.[[39]](#footnote-39) Call this ‘*spread model’*. On this account, promulgation of law requires nothing less than a comprehensive symbolling system, where the laypeople are directly presented with the general foundational maxims or principles of law, and where particular laws (and their rationales) are advertised in salient contexts. On this view, a significant distance exists between the conditions of good faith and the standard of justification, such that must be covered by the evidence. Anything less than that would be unreasonable, on this view. The system is Protestant in spirit, as the citizen has unmediated access to the general demands of the sovereign office.

On the spread model, assuming that evidence in itself does not do much to bridge the gap, we have access to law just in case the following contextual features succeed:

1. Enough *stakeholders* (s) have signs close-by;
2. These stakeholders operate in a *normal communication environment* (n).

Notably, judicial officials have no necessary role in interpreting the law, and the offices of government have little or no role in dispensing advice concerning the body of laws. Law is promulgated just in case it is, broadly speaking, known.[[40]](#footnote-40) Although there is perhaps a sense in which discreet and delayed law could still exist, they would differ from properly communicated law as a matter of degree, not kind.

The spread model demands quite a lot from the government, and helps itself to several normative and explanatory assumptions. It assumes that the codes of the sovereign will in fact be well-reasoned in accordance with the appropriate theory of law operating in the jurisdiction, in such a way that the dictates of the rulers will more or less protect the expectations of the public (e.g., utilitarian legal positivism, for Bentham), or at least have an intelligible basis in policy or principle. That can only be secured by strict *codification* of laws, which (when assembled) must be austere, coherent, and complete. For another thing, the spread model assumes that a settled code will converge upon obvious right answers when a case is inevitably put before the judiciary, in such a way that all hands could acknowledge the correct theory of discernment and recognize how it applies to a case. Yet, in fact, there is always a danger of misinterpretation of the rules by the courts, or by the people -- there are no guarantees that popular knowledge of the right theory of interpretation under judicial review will protect anyone’s expectations of what statutes demand. And, finally, the spread model provides anyone who is in ignorance of the law with a legitimate excuse for non-compliance, just in case they have plausible deniability.

There are some reasons why the spread model might be useful in articulating promulgation for a context with respect to some laws. To its credit, the spread model seems to resonates with the idea that a republic ought to be constituted in such a way that it is structured as a *nation of laws and not persons*, in the sense that its subjects are to be governed by codes which are (in a sense) independent of the willful interpretation of particular persons. Moreover, for those of us who expect that the value of respect implies a value towards respecting subjects who are epistemically risk-averse, this model might seem appealing.

Yet, for any legal context that is governed by the spread model, the range of legal theories which provide potentially tolerable epistemic risk is whittled down to a narrow range. The inability of the common-law tradition to explain itself to everyone on plain terms was, by and large, the nature of Bentham’s complaint against the common-law tradition – he sought to dismantle it. Also, presumably, the spread model will be broadly inconsistent with the mid-career (i.e., ‘*Discipline & Punish’* era) Foucauldian picture of law, for whom the law is only properly evaluated with the combined tools of the social sciences and accounted for in a strategic interaction of bodies and behaviors, in something like a low-scale civil war of all against all.

Nor (it would seem) could one conceive of law as promulgated under a simplified vision of legal realism, given that it is not remotely obvious to most lay-folk how to predict the decisions of the judiciary for any particular case unless they had some interpretive theory in tow. Nor, presumably, could law be promulgated if its theory of discernment required a perfectionist jurisprudence, which may flout the ideal of protected expectations.

In the absence of resources to promulgate particular laws, the spread model might find that the constitutional aspects of law can only be promulgated insofar as the demands of the rulers piggyback on ordinary (ostensibly natural) states of affairs. So, Austin’s positivistic conception of law -- i.e., habits of deference to a ruler -- can likely be observed well enough for the folk to be able to say, “Law is whatever the sovereign says it is”, which at least settles the constitutional question (if nothing else). And perhaps some political theories of law, e.g., Carl Schmitt’s, would likely also appeal to the spread model as well, so long as they try to explain the normativity of conventions in terms of the orthodox political mythology.

1. CHAIN MODEL: *good faith* *beliefs are reasonable just in case subjects find experts are close-by and available to give reports.*

This second view tries to soften the hard edges of the spread model by acknowledging that the evidence of what law requires is sometimes far from convenient, and yet that the rulers have nevertheless provided sufficient indication of what it requires to demonstrate respect subjects as knowers. According to this view, promulgation occurs insofar as laypeople *know who to defer to* in matters of legal concern -- to whom they should look to have their expectations calibrated. This is just to say that we must believe that there is a *chain of deference* that holds between a population and its legal rulers, and that sources of dissemination function as an intermediary between subjects and their rulers. On this view, there is *not one, but two* overlapping efforts to know law, with two different but complementary standards: first, there is the lower justificatory standard that has to be met by the people in figuring out who counts as an expert (e.g., typically, the officials themselves), and then a higher standard that the experts have to meet to know the law. It is, if you like, a bureaucratic or Catholicized view of social epistemology, depending on an intellectual division of labor.

To be more specific, the chain is intact insofar as subjects have access to sources of promulgation which recommend a rule, such that the following requirements are satisfied:

1. *Stakeholders* (s) have enough legal experts (e) at hand, and sufficient evidence to know that they are credible experts of law (“*meta-expertise*”);
2. Those *experts* (e) know the appropriate theory of *discernment,* with signs of the law close-by *to them*;
3. Both laypersons and experts operate in a *normal communication environment* (n).

Here, much like the spread model, (1) includes reference to the appropriate picture of law whatever it may be. But, unlike the spread model, the chain model allows that actual knowledge of the whole of the law might not be comprehensively known by laypersons. Instead, a feature of (2) is its reliance on a body of experts who themselves may discern the demands of law, typically by a combination of advanced training and by knowing the details of rules of interpretation and deliberation during the process of judicial review. Notably, the chain of deference is supposed to be a chain of *rational, intentional* deference. To have access to the law is to have access to a regimented set of standards in the evaluation of who counts as a genuinely knowledgeable official under some description.

Does the spread model constitutively disavow any particular legal theories? i.e., does it entail an authoritarian model, as opposed to a communitarian one? I would like to think that the answer is no. For our central preoccupation is the transmission of information about law, whatever form it takes; so, the issuances of legal officials to subjects need only take the form of *binding* *advice*, not necessarily command. In this respect, promulgation may involve the transfer of mere ‘soft law’, not ‘hard law’ with peremptory force, depending on your legal theory.[[41]](#footnote-41)

Why would anyone hold the ‘chain model’? There are at least three main advantages. First, the chain model treats laypersons as autonomous epistemic agents, not as cultural dopes, since it gives the law a human voice which is capable of answering actual questions. Second, it allows us to avoid demanding that laypersons either have full knowledge of the penal code. All we need to say is that they knew who to ask. Third, and as a result, the model provides a legal theory (or legal culture supported by a theory) with an independent basis for holding laypeople accountable for breaking the law in spite of their ignorance, without necessarily grounding that maxim in moral intuition (whose independence as a criterion is up for debate).

Why not take up the chain model? It might be felt that the deferring party gives too much ground to expertise, in cases where no such expertise ought to exist. So, consider Bentham’s codification project -- on first blush, it seems that he would object to the chain theory, since he wanted to do away with the lawyer class. For anyone who finds this aspect of Bentham’s positivism appealing, that may seem like reasons to think that the chain model is of very little use. But, in fact, that objection is too quick; for, indeed, Bentham himself wished to replace legal professionals with a comprehensive pedagogical institution of teachers and lawyer-poets.[[42]](#footnote-42) His problem was not with *experts*, it was with the peculiar form of *disorganized* expertisefound in customary law.

A deeper problem with the model is that it leaves the ‘chains’ undertheorized. For, hidden within the first maxim of the chain model, (1), is the expectation that we can solve the so-called ‘expert problem’ in social epistemology (i.e., the problem that novices face when trying to identify credible experts).[[43]](#footnote-43) To have that, the novices must have a kind of *meta-expertise*; the puzzle is in finding a criterion for finding experts that does not itself presuppose that the novice has expert knowledge.[[44]](#footnote-44) I think this problem is easy to overexaggerate; for the methodological suggestion of this paper is that, whatever they decide, the laity must have at least minimally satisfactory training rooted in a minimally adequate conception of discourse (not disintegrated, hubristic, insouciant, or taciturn) which ostensibly resonates with the prevailing conception of law within a particular legal culture. This minimal amount of training is inadequate as a *solution* to the novice-expert problem, of course, as it leaves the layperson vulnerable to a rather large range of epistemic risks.[[45]](#footnote-45) That is, they are still potentially vulnerable to being snookered by discredited agents whose infamy falls short of formal expulsion -- e.g., the corrupt officer with a shiny badge, the dishonest lawyer who is on the take, and so on. But in these conditions, there is nothing else to say except that the legal culture itself is on the hook for providing sufficient and exhaustive evidence about who counts as credible, for all those citizens who are capable of blunderproofing their judgments. If that evidence of who counts as an expert is not at hand, then the risk of error shall be so great as to make estimates of credibility indeterminate; in which case, the ‘chain’ of deference shall be broken.

1. MEMETIC MODEL: *good faith* *beliefs are reasonable to subjects in an unsatisfactory environment only if sources with clout are close-by.*

In the previous two models, the assumption was that the communications environment was normal (n): all participants had shared resources, conventions, and common ground that were normally sufficient to secure linguistic cooperation. In contrast, this final model assumes that our communications environments can be *unsatisfactory*, irrespective of whether or not they are normal. And then the question is -- what mechanisms or processes could possibly maintain the rule of law, if communication with the sources of law are occluded? One natural suggestion is to propose (in the spirit of classic common-law) that in such environments the practice of law is systematically delegated to a body of *pseudo-experts,* who have sufficient clout to exercise provisional discretion in making up the demands of law. Here, there is no deference from subjects to experts, so much as deference by one ordinary level of subjects to another extraordinary set of subjects, on the understanding that the sovereign will take the latter seriously when or if they have the chance to perform judicial review. This is a Thrasymachusian conception of promulgation, in the sense that certain systems of governance operate through the testimony of those who have internalized discipline and the power to impose same.

One way of thinking, metaphorically, about this idea of promulgation is to conceive of it as the dissemination of memes. The idea of a meme is itself a contentious (and fanciful) intellectual construct, but the vague idea is easy to pinpoint: a meme is an idea that spreads, and spreads insofar as it resonates successfully enough to be reproduced. So, in the first instance, each meme issues from the official source of law (legislature, executive, judiciary), but then ‘spreads’ its conception of what law wants independently and autonomously from what it can properly discern from the government, until eventually overruled. Hence:

1. Enough *stakeholders* (s) have legal sources close-by (experts or signs);
2. At least some of those stakeholders and experts operate in a *satisfactory communication environment* (m);
3. Of those (s) who operate in an unsatisfactory environment (~m), a sufficient number have access to sources in a satisfactory environment with *clout*.

This view might *seem* incompatible *in principle* with other theories of law. To be sure, it is, in rough outlines at least, a ‘legal-pluralist-friendly’ conception of access. And, to be sure, it is very seriously incompatible with Bentham’s codification project, and with the tradition of civil law generally. But the case should not be overstated. From the outset, I have supposed that all hands may agree that law is an institution with powers of formal sanction; and it is difficult to imagine an institution that is not constituted by relations of power. Nor is it necessarily inconsistent with sovereign supremacy, since the legitimate sources of law can always disavow and annul any pundits.

It may appeal, of course, to those who believe that they are respected as knowers even when they face significant epistemic risks. ‘Common sense’ epistemologists may find themselves amenable to this approach. Yet the main downside, of course, is that a system that displays these properties, to the extent that it does, is a system of *private governance*. It is sharply, and perhaps defiantly, out of step with the historical aspirations of liberal democratic theory, which prefers to conceive of promulgation as the sort of thing where all subjects have *equal* access.

**Case study**

This is just a small sample of potential models for the standard of reasonable belief, and may fit diverse legal environments and institutions. But how do they fare, in the context of theory, and to what extent are we willing to stomach the results insofar as they apply to cases? I will consider an especially vivid case of apparent promulgation failure related to the 2010 G20 Summit in Toronto.

During the period of June 2010, eight square city blocks of downtown Toronto were designated ‘public works’ by the provincial government. The interdiction zone was set up in order to secure the grounds and immediate area of the G20 meeting and to protect the attendees. The zone was physically enclosed in a metal fence, ostensibly marking its boundary. Police restricted entry into and out of the interdiction zone, and were given enhanced civic powers related to warrantless search and use of force.[[46]](#footnote-46)

These extra powers were put in force by a regulation of the Act passed by the Ministry. Conventional opinion is that the relevant regulation (233/10), the *Designation of Public Works,* was lawful. The regulation was a precise specification of an old, obscure, and little-used statute, the *Public Works Protection Act* (*PWPA*).[[47]](#footnote-47) The *PWPA* derived from legislation enacted for the purpose of restricting access to official spaces during the Second World War, e.g., courthouses and power plants, so that they would not be subjected to sabotage by the Axis or its sympathizers. Surprisingly, all sidewalks and roadways in Canada automatically fell under the scope of the *PWPA*. In this respect, the *Regulation* only explicitly activated those powers already found in the *Act*.[[48]](#footnote-48)

The regulation to the *Act* (233/10) was published in two official government venues, the *Ontario Gazette* and the *Ontario* *e-Laws* website. However, both venues are problematic. The publication in the *Gazette* only *appeared after the Regulation itself had lapsed,* so obviously can’t qualify as prior notice in any sense. At best, the law can only be thought to have been promulgated through *e-Laws*. However, *e-Laws* is a legal search engine and database, not designed as a bulletin or periodical which serves notice through outreach.

The *Regulation* applied narrowly to certain public areas of Toronto. For that reason, the main stakeholders of that *Regulation* were those in the vicinity of Toronto for that period.

To put it mildly, it is not obvious that the *PWPA* was constitutional under the Canadian *Charter*.[[49]](#footnote-49) It is also not clear that the *Regulation* was consistent with the purposes of the *Act*.[[50]](#footnote-50) But putting both aside, the legal status of the *enforcement* of the *Regulation* is murky. For example, strictly speaking, the government set the legal jurisdiction of the interdictionzone *at* a particular line of enclosure which was cordoned off by a metal fence. However, the Chief of Police exaggerated the legal edge of the interdiction zone as five meters out from the physical enclosure – the ‘five metres rule’. When confronted with the rule by the media after the end of the conference, the Chief acknowledged the misrepresentation.[[51]](#footnote-51) The five-metres rule was not in the jurisdiction set by the *Regulation*.[[52]](#footnote-52)

Many of the events surrounding the G20 summit occurred on territory where the law did ostensibly apply. However, the grounding of the *Regulation* in the *PWPA* was not effectively conveyed to citizens or officers on demand.[[53]](#footnote-53) Because the security related to the event required a massive coordinated effort of many government enforcement agencies, the chain of command was opaque to insiders.[[54]](#footnote-54) When one officer was confronted by a civilian with the *Canadian Charter of Rights and Freedoms*, the officer replied on video: “This ain’t Canada anymore.”[[55]](#footnote-55)

The result of this regulation was one of the largest mass arrests in Canadian history. Thousands of citizens were subjected to extreme treatment by the authorities e.g., teargassing and kettling. Roughly 1,100 citizens were arrested and detained. Many were housed in atrocious conditions. Many of the people involved with the G20 incident expressed confusion about the legality of their situation, both in terms of the content and validity of the *Act*. The confusion was comprehensive, covering (a) citizens, (b) media, and (c) enforcement officials. Indeed, the scope and grounds of the legal provision were only made clear to stakeholders after the *Regulation* was advertised in the news-media and after the mass arrests.

The *Regulation* lapsed at the end of the Conference. Afterwards, public opinion and media reporting after the incident were split. One major Canadian editorial programme (*The Fifth Estate*) summarized popular opinion towards those who were arrested and detained: “You should have stayed at home”.[[56]](#footnote-56) Some journalists who participated in the event decried the extreme use of force as police brutality. [[57]](#footnote-57)

The judicial and governmental post-mortem was damning. The official opposition argued that the government had indulged in “secret law”.[[58]](#footnote-58) The ombudsman of Ontario of the time, André Marin, argued that the law was technically (but badly) promulgated.[[59]](#footnote-59) Former Chief Justice Roy McMurtry condemned both the *Regulation* and the *Act*.[[60]](#footnote-60)

In 2015 the *PWPA* was repealed by the government.

In the interim, some of those few protesters who were brought up on charges were ordered by the Court not to speak to the press as part of their bail conditions.[[61]](#footnote-61)

Those are the pertinent facts of the case so far as I understand them. Now we are obliged to address the issue head-on: was the G20 Regulation promulgated? There are at least five possible options, seen below (Fig. 1):

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| --- | --- | --- | --- |
| Fig 1. | Spread model | Chain model | Memetic model |
| Conveyance theory | I | II | IV |
| Agonistic theory |  | III | V |

(I)

For the spread model, there is no sense in which this case was promulgated. On this view, it is *simply irrelevant* that the *Regulation* appeared somewhere in the depths of the *e-Laws* database, since all hands agree that signs of the *Regulation* were nowhere close-by to any of the stakeholders. It follows that, even the ombudsperson erred in his judgment about the promulgation of the law. It was *not even technically* disseminated*.*

 One of the features of the spread model is that it requires a normal communications environment. In this case, the environment was relatively chaotic. So, again, one must infer that the law was not accessible.

It is worth emphasizing that *only* the conveyance theory is able to use the spread model. For *the spread model has no place in the agonistic theory*. Recall, the spread model is a connection between sign and interpreter; social questions are abstracted away, or treated as strictly irrelevant to the question of whether or not some content is accessible. This model of justification is perfectly intelligible to the conveyance theory, since that theory really only requires the right sort of reasonable attribution of content to the right sort of sign. In contrast, because the agonistic theory is steeped in the social, it cannot take the spread model seriously.

The downside of the spread model is that it does not realistically conform to Canadian law. In *R v Nova Scotia Pharmaceutical Society*, the Canadian *Charter of Rights and Freedoms* was interpreted in terms of the doctrine of fair notice.[[62]](#footnote-62) In that decision, the Court determined that promulgation occurs when *substantial* and *formal* termshave been met (roughly, conditions of access and discernment). ‘Substantial’ fair notice is treated in terms of the presuppositions of the prevailing conventional morality of the country which allow a reasonable person to judge that certain conduct is subjected restriction by law. But if the spread model were correct, then the substantial aspect of fair notice could only be relied upon in a Benthamite codification utopia. I think it is fair to say that Canada’s legal regime falls short of Bentham’s standards.

(II)

If we pass on to the chain model, we find there are robust grounds to say that this was a case of promulgation failure. However, the reasoning that leads to the conclusion is somewhat different from that we found in the spread model. The failure of access described here does not issue from the fact that citizens had no sources of law close-by, since – unlike the spread model – the chain model recognizes that there were. The differences owe to the fact that the chain model relies on the idea that these sources were *experts*: e.g., the media, professors, enforcement officers. And there were plenty of them.

Instead, the failure of access issued from the fact that these experts *had no knowledge to impart,* due to ignorance of the *Regulation*. There were, perhaps, some experts who knew of the *Regulation* – maybe the ones who were in the room when it was passed. And maybe one of these people with insider knowledge even shared their knowledge to someone else. But if so, there is no evidence to believe that these notional experts possessed of insider knowledge were close-by the stakeholders in a sufficient number to make a difference. Nor, on the face of it, is there any sense that such experts were in a normal communications environment.

So, the chain model permits a judgment that the law was inaccessible. Insofar as the conveyance theory regards the chain model as a standard for setting what counts as respect for knowers (B), it is obliged to recognize the very serious ways in which the experts were not able to deploy their skills of discernment in good faith.

A complicating factor, in this case, is that the Chief of Police *misrepresented* the law’s demands with the five-metre rule, resulting in officially induced error. That itself put stakeholders at greater epistemic risk, in retrospect. In prospect, the evaluation is somewhat less clear; if citizens had discovered the misinformation during the event, it could be reasonably expected to question the credibility of officers of law to report correctly on matters of law; but they did not.

Be that as it may, we are not left tongue-tied when we evaluate the case. For whatever we say, during the course of the conversation, we will need to talk about the failures of fidelity and candor in the system; and the Chief’s express lack of remorse (he wanted to “keep the criminals out”), and an absence of material consequences for the misrepresentation, overall reflects a legal system better characterized in terms of hubris than humility.[[63]](#footnote-63) And the misrepresentation of the five-metres rule still matters to the integrity of law -- accuracy and sincerity are themselves generally the sort of things one discovers only in hindsight, but the damage to the conditions for trust were breached with the falsehood, not its discovery.

So, even if we didn’t already know that the five-metres rule involved an officially induced error, we would still have reason to suspect that the legal environment placed stakeholders at intolerable epistemic risk. The misrepresentation failed to demonstrate respect to stakeholders and experts as knowers. Insofar as this is true, the conveyance theorist who uses the chain model has very serious reasons to doubt that promulgation was successful, or even attempted. The *Regulation* was not even conveyed discreetly, or on delay, so much as it was not accessible at all.

 On the other hand, there is also a minor sense in which we can say that this was not a promulgation failure. We can, after all, appeal to the factthat the law appeared in the *e-Laws* database. If you contort your concept of the integrity of law, then we might be able to say that this bare step is enough to treat the law as accessible. And it cannot be denied that there were at least a few experts close-by: e.g., the Chief of Police likely knew the contents of the *Regulation*, regardless of what details he actually conveyed.

Still, on-balance, this seems like thin soup. At best, it seems minimally plausible to say that the rule was officially or technically discernable to experts of a certain kind (and insufficient size). Yet the question of discernment is not strictly appropriate to a discussion of accessibility of law. And, worse, it is doubtful that pedantic qualifications of this sort will demonstrate respect for even the sensitive and discerning expert that was operating during the lifetime of the *Regulation.*

If one doubts the particulars of the conveyance theory, or think that I have given the government a hard time in this particular case, one ought to ask the one question that overrides them all, and which the conveyance theorist tries to establish as best they can. *Were stakeholders in a tolerable state of epistemic risk, when making judgments about what the law required of them*? Do we believe, in other words, that the *Regulation* was *blunderproofed?* If an officer of law asserts a legal absurdity like, “This ain’t Canada anymore,” you need not wonder long.

(III)

Switching over to the agonistic theory and chain model, we are obliged to ask: who ended up with the most power in this particular kind of information game?

To review:

* The chief of police’s strategy was to misrepresent the scope of the law. The misrepresentation was successful in controlling bodies and behaviors in the context he cared about at the time, and exposed as untruth by his own admission. Despite receiving widespread media criticism, he served out his term until retirement in 2015. He is currently a decorated Member of Parliament as part of the official opposition, where he serves in the government’s *Cabinet* as the *Minister of Public Safety and Emergency Preparedness*.[[64]](#footnote-64)
* Street-level police subsequently gave a mixture of correct and incorrect legal advice. They enforced a rule that most observers agree was not law (the ‘five-meters rule’). Their strategy was one of deference to the Chief of Police.
* Various public servants condemned the *Regulation*, leading to the repeal of the *Act*. Former Chief Justice Roy McMurtry condemned both the regulation and the Act.[[65]](#footnote-65) The Ombudsperson of Ontario, André Marin, condemned the Act, the *Regulation*, and its implementation.[[66]](#footnote-66)Their strategy, jointly and severally, was defiance.
* It was not uncommon to find that media reporting of the event was negative, with some journalists testifying to police brutality. Journalists involved in covering the incident report being unable to corroborate the legality of the *Regulation* during the period.
* Most of those who were arrested and detained during the conference were released without charge. The strategy of an aggregate is hard to express, but we can say that it was a mixture of defiance, indifference, and accommodation to the commands of enforcement officials.

In the long run the agonistic theory and chain model ought to conclude that the law was not accessible – but only because the story we tell about the legitimation of the law just didn’t pan out. Given Canadian complacency, the government’s *Regulation* was a ‘nice try’ (so to speak) -- but, ultimately, history judges it otherwise. So, perhaps the long-run strategy wasn’t successful, and therefore, historically, we must say the *Regulation* was not accessible.

However, in the short-run, the agonistic theory would have the freedom to say that the law was accessible. The reason: although the *Regulation* was not clearly conveyed to the population, and although it was read by the Chief of Police in ways that have no legal effect (e.g., the five-metres rule), the *Regulation* also provided adequate legal grounds to effectively militarize the interdiction area for the time-period it covered.

Of course, these two positions are contradictory. The issue at hand is, “Was this law accessible or not?”, and the agonistic theory would have us say that is was both was and it wasn’t. For the integrity of law does not factor into the agonistic theorist’s inner deliberations, just who gets away with what and how. Instead, in the short term, the agonistic theory would have us say that the law was accessible, and in the long-term, it was not. But that just goes to show that the theory revels in idea that there is no point in making assessments of epistemic risk and hoping for clear answers that are not themselves steeped in strategic assessments.

(IV)

Both the chain and spread models ask us to only consider something promulgated just in case all hands are in a satisfactory communications environment. But this is, perhaps, too quick. Perhaps we need to acknowledge that a communications environment is often quite defective or unusual. So, the memetic model demands two things from people in an unsatisfactory communications environment: first, that stakeholders *could* get advice from experts *with clout*, and second, that those experts with clout themselves exist in a satisfactory communications environment. The appeal to clout is necessary in order to break through the noise.

 In any number of cases, for the conveyance theory, the verdicts of the memetic model could be vastly different from those of the chain model. The memetic model provides an extra layer of consideration, allowing for conditions that are less than perfect. So, we can imagine cases where some rule is accessible by the chain model but not the memetic one -- e.g., in cases of especially boring law, where all hands exist in a normal communications environment but where the experts are not especially well ‘networked’. We can also imagine a reverse case – cases of whiz-bang law, e.g., where the communications environment is unsatisfactory, but concurring experts do have clout.

However, in this case, and in terms of the conveyance theory, the judgments of both models are similar.

On the memetic model, the mass ignorance of the arrestees did not even bear on the question of whether or not the *Regulation* was accessible or not. Mass confusion is irrelevant – the intuitions behind the ‘spread model’ are repudiated. The question, instead, is whether there were experts with clout close-by to offer remedy.

The media and street-level police had clout, and were, in some sense, more experts in law than the average person. Yet it is unclear that the quality of their knowledge was able to satisfy our expectation that they be capable of demonstrating appropriate respect for citizens as knowers. It is unclear whether these parties could attest to the validity, contents, and scope of the *Regulation*. It is decidedly unclear that some officials behaved in good faith -- e.g., the un-Canadian officer, or the Chief of Police – but we are more interested in how these events reflect the ways a legal system relates to its stakeholders. And it is not clear that the system operated in good faith on the evidence.

To be sure, it is entirely possible that some experts did exist that could have testified to the contents of the *Regulation*. Yet there was not a sufficient number of them with clout to convey the information to citizens -- certainly not enough to override the misinformation from the Chief of Police, with respect to the five metre rule. So, again, the conveyance theory cannot escape the conclusion that the law was not accessible except in a formal or technical sense, which is irrelevant to judgments of the accessibility of law.

(V)
The memetic model is deployed somewhat differently in the hands of the agonistic theory. According to the agonistic theory, the street-level officers were the experts, to the extent that their conduct was consistent with the *Regulation*. They, being police, had clout. It is immaterial whether or not they conveyed respect for knowers, on the agonistic theory, and irrelevant whether we say stakeholders were put at epistemic risk. The fact is that the police successfully received orders that were (more or less) lawful, through a recognizable chain of command, from duly authorized parties. And they promulgated that law *de facto*, at the point of the baton.

But, again, this success only applied in the short-term, and one can easily see a possible world that is not terribly distant from our own where the legislation was never repealed. In that world, one might expect the citizens and government of the state to be satisfied that some rule is accessible just in case the police say so, and insofar as citizens expect the government to pursue conventional demands of peace and order. But not this world, at least not for now.

Overall, I prefer the conveyance theory. It makes better sense of the legal ideal of publicity by treating it as something other than just theoretical fiat or a grand chessboard. It acknowledges certain context-invariant virtues which (prior to interpretation) allow for broad comparison of legal-theoretic contexts, and (after analysis) establish fine-grained structure to those contexts. It argues that we can make summary evaluations of epistemic risk for legal systems, in a way that sets up a motivated discussion of which legal theories do better service to the value of publicity. And it provides a space for epistemic justice, insofar as we need to go about examination of what it means to respect a population as knowers.

Still, the important question is -- what do we make of the very idea of a theory of promulgation? It should be acknowledged that even the potentially misguided answers of the agonistic theory supply some basis for legal argument concerning access to law. The ‘no-theory theory’ does even less. My hope is that, by giving a name to the *status quo* view, and articulating philosophical alternatives, we will be in a position to generate a system of productive insights in an underdeveloped area of legal philosophy.

1. e.g.: R *v* Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606; Great Britain, Committee for Promulgation of the Statutes, *Report from the Committee* (Great Britain House of Commons, 1796). [↑](#footnote-ref-1)
2. Claire Grant, “Promulgation and the Law,” *International Journal Of Law In Context*, (2006): 321-331. [↑](#footnote-ref-2)
3. A ‘source’ of promulgation means a site, venue, or vector by which a legal rule is disseminated, where legal content is reproduced, not necessarily the legal authority itself. [↑](#footnote-ref-3)
4. There are at least three grades of inquiry -- frameworks, theories, and models. At the most general level, a framework provides an essential vocabulary and salient set of questions for some domain of discussion, in order to evaluate how well inquiry is getting on. Theories provide sets of systematically interconnected judgments that (purport to) answer some set of questions introduced in a framework, and which (ostensibly) help us to explain some phenomenon of interest. And models are descriptions of ideal cases, used either in order to think through the ways that a theory might be brought to bear on narrow contexts, or in order to produce a clear description of a relatively complex reality. Frameworks and models are always suited for a purpose or set of purposes and so judged as more-or-less useful, while theories are meant to be judged directly for their validity, truth, or rightness. [↑](#footnote-ref-4)
5. Some deny that there is any merit to these sorts of disagreements, e.g.:

Brian Leiter, “Explaining Theoretical Disagreement,” *Philosophical Issues: A Supplement to Nous* 76, (2009): 64-79.

To the extent that this is correct, the ‘no-theory theory’ is all we need. [↑](#footnote-ref-5)
6. The literature on physical accessibility seems to have more in common with civil engineering than philosophy. e.g.:

A Karlqvist, "Some theoretical aspects of accessibility-based location models," in *Dynamic Allocation of Urban Space,* eds. A Karlqvist, et al. (Lexington, Mass: D C Heath, 1975). [↑](#footnote-ref-6)
7. Officially induced error being a prime example, as in:

R v Clifford, 2014 ONSC 2388. [↑](#footnote-ref-7)
8. As a complement to the conception of “bad faith” in:

Berislav Marušić, *Evidence and Agency* (New York:OUP, 2015). [↑](#footnote-ref-8)
9. Crispin Wright, *Truth and Objectivity* (Cambridge:Harvard). [↑](#footnote-ref-9)
10. The notion of epistemic risk issues from Pritchard’s (2016) paper. My conception differs from his in that it is modified by discursive context. However, since I think we can compare contexts, my hope is that our views can be reconciled.

Duncan Pritchard, "Epistemic Risk," *The Journal of Philosophy* 113, no. 11 (2016): 550-571. [↑](#footnote-ref-10)
11. The centerpiece of the idea of epistemic risk is its ability to substitute ‘approximate truth’ for ‘truth’, without turning into a fallibilist about knowledge. From a moderate skeptic’s point of view, truth is essential to knowledge, yet is elusive in practical contexts as we try to go about the business of knowing things. [↑](#footnote-ref-11)
12. I owe this thought to Brendan Fitelson. [↑](#footnote-ref-12)
13. Grice, HP. 1975. "Logic and conversation." In *Syntax and semantics, volume 3: Speech acts*, by P & Jerry Morgan Cole. New York: Academic. [↑](#footnote-ref-13)
14. Though the concept of ‘epistemic risk’ is of recent vintage, the rough idea echoes earlier insights in legal philosophy. e.g., Fuller’s unfortunate King Rex:

Lon Fuller, *Anatomy of Law (*Middlesex: Pelican Books, 1971). [↑](#footnote-ref-14)
15. This is not, incidentally, a special case related to the issue of promulgation or accessibility. It is a general problem. Consider, e.g., the notion of ‘conflict of interest’, for a solicitor. In cases of conflict of interest, the lawyer has a risk of losing loyalty to their client. Introspectively, it seems that what counts as ‘loyalty’ is not a fixed notion, mapping directly onto situations in the world. It is a matter of interpretation -- there are clear cases of disloyalty, and many penumbral ones, which depend on intermediary values which affect our conditional judgments. So, two different people may disagree with what counts as disloyalty, and therefore, seemingly, have incommensurable risk-assessments. [↑](#footnote-ref-15)
16. In contrast to Gricean communicative intentions:
HP Grice, “Meaning,” *The Philosophical Review* 66, no.3 (Jul.1957). [↑](#footnote-ref-16)
17. Grice, “Logic.” [↑](#footnote-ref-17)
18. HP Grice, "Logic and conversation,” in *Syntax and semantics, volume 3: Speech acts*, eds. Jerry Morgan & P Cole (New York: Academic, 1975). [↑](#footnote-ref-18)
19. Grice, “Logic,” 48. [↑](#footnote-ref-19)
20. Michel Foucault, *Discipline and Punish: The Birth of the Prison,* (New York: Vintage Books, 1977) at 395-6. [↑](#footnote-ref-20)
21. Ronald Dworkin, *Law's Empire,* (Cambridge: Harvard University Press, 1986). [↑](#footnote-ref-21)
22. Roger Shiner, “Hart on Judicial Discretion,” *Current Legal Problems* 40*,* no. 1 (2011). [↑](#footnote-ref-22)
23. A ‘meta-conversation’ refers to the hypothesis that we are always engaged in an exchange of implicit presuppositions which partially establish our shared common ground. For example, see:

Rae Langton, “Beyond Belief: Pragmatics in Hate Speech and Pornography,” in *Speech and Harm: Controversies Over Free Speech,* eds*.* Mary Kate McGowan & Ishani Maitra,(Oxford:Oxford, 2012). [↑](#footnote-ref-23)
24. I have overlooked subjective conditions related to the requirements of good character that might be reliable preconditions for reasonable uptake; these, I suppose, fall under the heading of ‘good will’. I have also focused on the intellectual aspects of good faith and not the sentimental aspects, not because sentiments are *un*important to promulgation and epistemic risk (e.g., as far as they bear on motivated inference), but only because I am less confident that I have sorted through the complexities of the relationship between the sentiments and uptake.

Another tacit requirement of intellectual good faith is that, when successful, it suggests participants be in a position to take up a *minimal explanatory effort*, i.e., an effort to explain what law is and what it demands. So, an effort should count as minimally satisfactory insofar as the novice has the capacity to make judgments about civil affairs that are free of errors of an especially egregious kind, which we might call ‘*blunders’*. Here, a blunder is distinguished between *mere mistakes* or *errors*, in that its irrationality does not owe to mere failures in collecting data, but rather to defects of intentionality. That, in turn, means they must possess some obvious virtues of epistemic agency -- e.g., responsiveness to reasons, interprets evidence in proportion to data, and an inclination to take responsibility for judgment, etc. But these, too, are aspects of the good will. [↑](#footnote-ref-24)
25. Foucault, Michel. 1977. *Discipline and Punish: The Birth of the Prison.* New York: Vintage Books. [↑](#footnote-ref-25)
26. Dworkin, Ronald. 1986. *Law's Empire.* Cambridge: Harvard University Press.

Austin, John. 1995. *The Province of Jurisprudence Determined.* Cambridge: Cambridge University Press. [↑](#footnote-ref-26)
27. Aquinas, Thomas. 1944. *Basic Writings of Saint Thomas Aquinas.* Edited by Anton C. Pegis. Vols. I-II. New York: Random House. [↑](#footnote-ref-27)
28. Grice, 1975, ibid. [↑](#footnote-ref-28)
29. The idea was to notice that what is said amounts to being a system of entailments; that the literal meaning of what is said is a sophisticated *general* intention of a speaker to communicate, and where implicatures are found in specific contexts by the use of similarly sophisticated intentions. To be sure, not everyone is entirely satisfied with Grice’s distinction between these two classes of speech, owing to some unclarity over whether (and on what conditions) some verbal offerings can be taken back (i.e., *cancelled*). See:

Gregor Walczak, “On explicatures, cancellability and cancellation”, *Springerplus* 5, no. 1 (2016) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4949192/> [↑](#footnote-ref-29)
30. Our task is not necessarily to do with the transmission of Gricean *meaning*, if we take meaning to be *definitely* *natural* or *non-natural*. [↑](#footnote-ref-30)
31. SE Murray treats not-at-issue content as being tacit proposals for updating common ground for the sake of structuring contexts. The notion of ‘meta-conversation’, as I use it here, assumes something like Murray’s articulation of the idea.

Sarah E Murray, “Varieties of Update,” *Semantics and Pragmatics* 7, no. 2 (2014). [↑](#footnote-ref-31)
32. Grice, 1957, ibid. [↑](#footnote-ref-32)
33. Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", *Harvard Law Review* 71, no. 630 (1958).

Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). [↑](#footnote-ref-33)
34. In a useful but neglected essay from last century, Gilbert Bailey observed that “the history of promulgation does not fit snugly into a set of syllogisms”, since promulgation is content-sensitive. Fair. But *pace* Bailey, I think the relationship between the two domains is not so *ad hoc* as to avoid a theory.

Gilbert Bailey, “The Promulgation of Law,” *The American Political Science Review* 35, no. 6 (1941) at 1064-65. [↑](#footnote-ref-34)
35. This is the ‘fiction of constructive presence’, and enjoyed support from both Austin and Blackstone. See Bailey, *supra* note 30, and some useful related discussion in:

Christopher Kutz, "Secret Law and the Value of Publicity," *Ratio Juris* 22, no 2 (2013) at 197-217. [↑](#footnote-ref-35)
36. ‘Identification rules’ are Jules Coleman’s criteria for accepted public standards for the identification of offices.

Jules Coleman, “Reason and Authority,” in *The Autonomy of Law: Essays on Legal Positivism,* ed. R. George (Oxford University Press, 1995). [↑](#footnote-ref-36)
37. It is inspired by a particular strand of thought in mid-career ‘genealogy-era’ Foucault, as depicted in Thomas Lemke’s narration. See:

Thomas Lemke, *Foucault’s Analysis of Governmentality: A Critique of Political Reason* (New York:Verso, 2019) at 86-124. [↑](#footnote-ref-37)
38. Jeremy Bentham, "Papers Relative to Codification and Public Instruction," in *The Collected Works of Jeremy Bentham* (Charlottesville: Clarendon, 2000). [↑](#footnote-ref-38)
39. Gerald Postema, *Bentham and the Common-Law Tradition* (Oxford:Clarendon, 1986) at 425. [↑](#footnote-ref-39)
40. Treat “close-by” as an indexical term. [↑](#footnote-ref-40)
41. Andrei Marmor, “Soft Law, Authoritative Advice, and Nonbinding Agreements,” *Cornell Legal Studies Research Paper* No. 17-24, updated May 14, 2017, [https://ssrn.com/abstract=2968128](https://ssrn.com/abstract%3D2968128) [↑](#footnote-ref-41)
42. Bailey, “Promulgation,” 1072. [↑](#footnote-ref-42)
43. Miranda Fricker, "Rational Authority and Social Power: Towards a Truly Social Epistemology,” in *Social Epistemology: Essential Readings*, eds. Alvin Goldman & Dennis Whitcomb (New York: Oxford University Press, 2011) at 54-70. [↑](#footnote-ref-43)
44. Harry Collins, “Rejecting knowledge claims inside and outside science,” *Social Studies of Science*, 44 no.5 (2014). [↑](#footnote-ref-44)
45. Some of which are helpfully surveyed in:

Alexander A Guerrero, “Living with ignorance in a world of experts”, ed. Rik Peels, in *Perspectives on Ignorance from Moral and Social Philosophy* (New York:Routledge, 2016). [↑](#footnote-ref-45)
46. *Public Works Protection Act*, RSO 1990, c P.55, s 3. [↑](#footnote-ref-46)
47. *Public Works Protection Act*, RSO 1990, c P.55, *Designation of Public Works*, O Reg 233/10. [↑](#footnote-ref-47)
48. Andre Marin, *Caught in the Act: Investigation into the Ministry of Community Safety and Correctional*

*Services' conduct in Relation to Ontario Regulation 233/10 under the Public Works Protection Act,* Ombudsman Report, Ombudsman Ontario (2010) at §132-3. [↑](#footnote-ref-48)
49. Marin, “Caught,” §10. [↑](#footnote-ref-49)
50. Marin, “Caught,” §11. [↑](#footnote-ref-50)
51. Adam Radwanski, “A Timeline on the G20 Five-metre rule that didn’t exist,” *The Globe and Mail,* July 1 2010, <http://www.theglobeandmail.com/news/politics/adam-radwanski/a-timeline-on-the-g20-five-metre-rule-that-didnt-exist/article1626001/>

Marin, “Caught,” §186. [↑](#footnote-ref-51)
52. Gerry McNeilly, *Policing the Right to Protest: G20 Systemic Review Report,* Systemic Review, Office of the Independent Police Review Director (2012). [↑](#footnote-ref-52)
53. Marin, “Caught,” §12-16. [↑](#footnote-ref-53)
54. Robyn Doolittle, “Chain of command questioned in G20,” *Toronto Star,* July 10, 2010, http://www.thestar.com/news/gta/torontog20summit/article/834287--chain-of-command-questioned-in- g20 [↑](#footnote-ref-54)
55. mikesmusings, “This isn’t Canada anymore.” Youtube Media, 13 Sept 2010, <https://youtu.be/E7tE-BArgHM> [↑](#footnote-ref-55)
56. CBC News, The Fifth Estate, “*You Should Have Stayed At Home,”* Youtube Media, 3 Sept 2014,http://www.youtube.com/watch?v=sX0BbLc\_PIk [↑](#footnote-ref-56)
57. Richard Brennan, “Toronto Journalist Witnessed ‘Police Brutality’ at Toronto G20,” *Toronto Star*, December 6, 2010, <http://www.thestar.com/news/gta/g20/2010/12/06/toronto_journalist_witnessed_police_brutality_at_toronto_g20.html> [↑](#footnote-ref-57)
58. Legislative Assembly of Ontario, *Debates, Second Session, 40th Parliament*, 2013 at 1497-1513. [↑](#footnote-ref-58)
59. Marin, “Caught.” [↑](#footnote-ref-59)
60. Hon. Roy McMurtry, *Report of the Review of the Public Works Protection Act,* Review, Minister of

Community Safety and Correctional Services (2011). [↑](#footnote-ref-60)
61. Toronto Star, "G20 protests: gag order goes too far," *Toronto Star,* Oct 17, 2010, http://www.thestar.com/opinion/editorials/2010/10/17/g20\_protests\_gag\_order\_goes\_too\_far.html [↑](#footnote-ref-61)
62. *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606. [↑](#footnote-ref-62)
63. Marin, “Caught,” §186. [↑](#footnote-ref-63)
64. “The Honourable Bill Blair,” Justin Trudeau, Prime Minister of Canada, accessed Feb 2 2020, <https://pm.gc.ca/en/cabinet/honourable-bill-blair> [↑](#footnote-ref-64)
65. McMurtry, “Report.” [↑](#footnote-ref-65)
66. Marin, “Caught.”

. [↑](#footnote-ref-66)