

**“DECLARING LAW”: A PRAGMATIC ANALYSIS
OF LAW AS COMMUNICATION AND ITS
IMPLICATIONS FOR THE HART-FULLER
DEBATE**

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INTRODUCTION

In his 1964 work *The Morality of Law*,¹ legal philosopher Lon Fuller famously—and controversially—posited eight “legal principles,” arguing that they were constitutive of a “internal morality of law.” For law to *be* law, rules had to be: (1) sufficiently general; (2) publicly promulgated; (3) prospective in application; (4) clear/intelligible, (5) non-contradictory, (6) relatively stable or constant; (7) possible to observe; and (8) administered in a manner consistent with their purpose² (collectively, “Fuller’s Eight”). The principles were made in the context of a larger debate conducted in *Harvard Law Review*³ between Fuller, from the camp of the “secular natural law”—law as disclosed through human reason rather than divine revelation—and English legal scholar H.L.A. Hart, a legal positivist. The conversation continued both before and after *The Morality of the Law*’s publication as Fuller found himself at odds with a number of Hart’s fellow positivists, who objected to what they considered an unfounded and obfuscating confusion of law and morals. Fuller engaged in a back-and-forth with these critics for the rest of his career, refuting their points and explaining how they misunderstood or mischaracterized him, all the while refining the thrust of his contention.

At the crux of the differences between Fuller and his critics is a divergent conception of the legal context. Fuller saw law as a reciprocal enterprise between the lawgiver and the governed, a larger environment of concern than that which interested the positivists. For Fuller, a failure to meet his principles would either completely, or to a degree, result in a failure of the law’s purpose. Recast in the terms of a communicative exchange, the failure could amount to “not saying anything at all.” By looking at Fuller’s Eight through the lens of linguistic pragmatics and the field of ordinary language philosophy that utilized it so fully, this article will trace what the principles demonstrate about the parameters of legal communication.

Drawing upon the work of linguists and ordinary language philosophers J.L. Austin, Paul Grice, John Searle, and Elizabeth Anscombe, among others, the article argues that Fuller’s Eight align with maxims that conform to the cooperative principle required of valid communication, illustrate the type of illocutionary force that legal rules/principles possess, account for breakdowns that lead to infelicitous expressions of the law, and predict what

1. LON L. FULLER, *THE MORALITY OF LAW* (Yale Univ. Press rev. ed. 1969).

2. *Id.* at 39.

3. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 620 (1958).

those breakdowns portend for the relationship between the sovereign/lawgiver and the governed—or as Austin would have it, the frustration of the intended perlocutionary effect. It will also identify the kinds of speech acts/illocutionary force that legal rules constitute, and the aspects/dimensions of the law toward which those forces marshal their power. In this way, the wariness—even distrust—that Fuller’s position has been thought to have with ordinary language philosophy is shown to be unwarranted. The article posits an unexpected alliance between Fuller and ordinary language philosophy.

The article will also build upon the work of legal scholars such as David Luban, Kenneth Winston, Kristen Rundle, and M.B.W. Sinclair, who have reclaimed Fuller’s idea by clarifying both the framework in which he spoke and the objectives toward which the law was directed. These scholars’ efforts have renewed interest in Fuller for posterity’s sake and have fostered a more productive engagement of his ideas in the field of jurisprudence. The objective here is not to solve the Hart-Fuller debate, but to show another way to understand and conceptualize Fuller’s Eight in terms of the role that legal rules play within a societal context.

Part I summarizes the Hart-Fuller Debate, which is the historical background for the analysis. Part II explains the idea of law as communication and how Fuller’s Eight can be understood using the tools of ordinary language philosophy, particularly linguistic pragmatics. It concludes that law is communication, a speech act amounting to what the field would term “declarations,” with a set of maxims and conditions to their utterance created by ordinary language philosophers that parallel Fuller’s Eight. It also shows how Fuller’s Eight resonate with broader philosophical ideas that make similar arguments. Part III builds on the conclusions reached in Part II and suggests types of “illocutionary acts,” or characteristic forces, that are performed in the practice of law.

I. FULLER’S EIGHT AND THE SURROUNDING CONTROVERSY

The Hart-Fuller debate occurred the aftermath of World War II, so it is no surprise that one of the central topics in that exchange related to Nazi law.⁴ The question of “what is law?”—and consequentially, what duty does

4. Drawing comments from both Fuller and Hart was a case in which a German woman, in an attempt to be rid of her soldier husband, had reported him to the Nazis for violating their law forbidding criticism of the Third Reich. After the war was over, the woman was brought to trial for having her husband imprisoned. The question was whether the woman was required to obey the law despite its unjust nature. See sources cited *supra* note 3.

or does not arise in its observance—was of keen practical, let alone theoretical, interest. The debate itself grew out of Hart’s Oliver Wendell Holmes lecture at Harvard Law School in 1957, which was published along with Fuller’s reply to Hart in an issue of the 1958 journal.⁵

But the larger philosophical background in which the debate occurred, particularly the dimension of ordinary language philosophy, provides an important understanding of the exchange. Fuller argued from a secular natural law perspective, which distanced itself from traditional natural law’s concern with the correspondence between an immutable law of nature and civilization’s positive law. Instead, secular natural law focused on law’s purpose and on what correspondence lay between that end and a legal system or legal rule’s success/failure in achieving it.

This position was a response to the ascendancy of legal positivism,⁶ which held that law’s authenticity comes solely from its source, itself part of a larger movement away from natural law and the continental schools of thought. Under the broad camp of analytic philosophy,⁷ based in formal logic, were the logical positivists and ordinary language philosophers, who eschewed traditional philosophical inquiries—metaphysics, ethics, etc.—and concerned themselves instead with the clarification of thought and how it is expressed through language. For them, the old inquiries were non-verifiable and purely emotive. Therefore, though not without value, they had no part of an intellectual discussion. Analytic philosophy and its many branches employed logic, mathematics, and linguistics in its project. Ordinary language philosophy focused its analysis on linguistics and the explanation of what happens in the performance of speech, or “locutionary acts.”

Necessarily, Fuller’s argument in the Hart-Fuller debate drew upon a larger societal context than the fact-centered approach of Hart. Professor Brian Bix summarized the positions in the Hart-Fuller debate this way:

Hart offered an analysis of law with the purpose of maximizing clarity in discussing law in general and particularly in the moral evaluation of legal rules; while Fuller offered a moral test for applying the term “law”, based partly on usage and partly on viewing law as a form of social ordering to be contrasted with other forms of social ordering. The two positions are incompatible in the sense that

5. See sources cited *supra* note 3.

6. See generally ROBERT L. HAYMAN, JR. ET AL., JURISPRUDENCE, CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 74-80 (2d ed. 2002).

7. See generally THE OXFORD HANDBOOK OF THE HISTORY OF ANALYTIC PHILOSOPHY (Michael Beaney ed., 2013).

a particular legal system might fail to be “law” under Fuller’s analysis while it would be “law” under Hart’s analysis.⁸

In short, Hart’s analysis provided for law’s observance despite its being a morally reprehensible law—such as the Nazi example—while Fuller’s did not.

The men’s approaches further diverged upon the publication of their respective books. *The Concept of Law*⁹ by Hart, was published in 1961, with the central tenet being that laws are human-made rules without any fundamental connection with morals. Fuller’s *The Morality of Law*,¹⁰ was published three years later, and argues for an internal morality in law that effectuated its purpose, i.e., the social ordering of human conduct.

In making his argument, Fuller employed his now-famous tale of King Rex, who sought to be a great lawgiver but failed to do so in a series of successive blunders. Each of the mistakes—at times incoherent, at times retroactive, at times self-contradictory, and at times impossible to fulfill—led to a frustration of Rex’s purpose.¹¹ Fuller ended the story by setting out the eight principles derived from Rex’s failures.¹²

Professor David Luban rephrases Fuller’s Eight in a parallel set of one-word concepts. As they succinctly capture the principles and aid in the discussion, I will adopt them here:

The rule of law requires that lawmakers conform their handiwork to these canons.

1. **Generality:** Laws must take the form of general rules.
2. **Publicity:** Laws must be published and cannot be secret.
3. **Clarity:** Laws must be comprehensible and not overly vague.
4. **Consistency:** Laws must not contradict one another.
5. **Feasibility:** It must be possible for people to comply with the law.
6. **Constancy:** The law must not change too rapidly.

8. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 24 (2d ed. 2012).

9. H.L.A. HART, THE CONCEPT OF LAW (1961).

10. FULLER, *supra* note 1.

11. *Id.* at 33-38.

12. *Id.* at 5-13. In addition to the King Rex tale and Fuller’s Eight, the work is also known for its “moral scale,” which demarcated duties of obligation from duties of aspiration. The former are things the law is concerned with—a failure to meet a duty one is obligated to fulfill. The latter are not matters for the law but for societal reward. In other words, we punish running away from a duty, but we only reward exceeding a duty; no one is legally compelled to exceed a duty. See Wibren van der Burg, *The Morality of Aspiration: A Neglected Dimension of Law and Morality*, 169-92 (Erasmus Working Paper Series on Juris. & Socio-Legal Stud., Paper No. 09-03, 2009), <https://ssrn.com/abstract=1462655>.

7. **Prospectivity:** The law cannot be retroactive—it cannot today declare yesterday’s lawful behavior unlawful.
8. **Congruence:** The law must be administered and enforced as it is written.¹³

Fuller provided an important context that glossed the ethical dimension to his principles:

I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his faults.

Every departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination. Conversely, when the view is accepted that man is incapable of responsible action, legal morality loses its reason for being. To judge his actions by unpublished or retrospective laws is no longer an affront, for there is nothing left to affront—indeed, even the verb ‘to judge’ becomes itself incongruous in this context; we no longer judge a man, we act upon him.¹⁴

Professor Kenneth Winston interpreted this perspective by underscoring that Fuller was concerned with the autonomy of the governed:

Simply put, legislative enactments are baselines for self-directed conduct by citizens, providing the minimal restraints necessary for continuing interaction. Legislation properly conceived permits citizens to order their own affairs, to pursue their own good in their own way (in the words of John Stewart Mill). In this respect legislation differs fundamentally from what Fuller calls managerial direction, which provides detailed regulations for accomplishing objectives set by a political superior. To the contrary, legislation

13. David Luban, *The Rule of Law and Human Dignity: Reexamining Fuller’s Canons*, 2 HAGUE J. RULE L. 29, 2-3 (2010) (emphasis added).

14. FULLER, *supra* note 1, at 162-63.

involves complete deference to citizens' powers of self determination, and so can be said to promote their autonomy. Thus, Rex's failure to make laws is a special affront to the dignity of citizens as autonomous agents.¹⁵

But Fuller's argument did not impress Hart. In his review of the book, Hart characterized Fuller's Eight as no more than rules of efficiency, which concededly outline prerequisites for clear drafting but in no way implicate morality.¹⁶ Legal positivism's essential mandate was to separate and demarcate "law" from things that are the parameters of mere social construction, such as games and etiquette. Hart said that rules for an efficacious act of "poisoning" could just as easily meet Fuller's Eight, but it would not do to call them an "internal morality."¹⁷ Other legal positivists, as well as those from other lines of thought, joined in, rejecting what they saw as Fuller's blurring of lines between the legal and the ethical.¹⁸

15. THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER 175 (Kenneth I. Winston ed. 2001). Fuller was also at odds with the older school of legal realism, which he though had turned legal studies into a game of guessing what judges would do:

Fuller rejected this conception, primarily because it turns lawyers into masters of technique without regard to the ends they serve. Law becomes merely a means to ends that originate outside itself. It thereby excludes from the scope of professional responsibilities of a lawyer's duty to think about what the law ought to be.

Id. at 13.

16. H.L.A. Hart, 78 HARV. L. REV. 1281 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

17. *Id.* at 1286.

18. Critics to which Fuller referred in *The Morality of Law* are collected in *Symposium On The Morality Of Law*, 10 VILL. L. REV. 623 (1965). They include Ronald Dworkin, *The Elusive Morality of Law*, 10 VILL. L. REV. 631, and Marshall Cohen, *Law, Morality and Purpose*, 10 VILL. L. REV. 640.

In a series of responses, including a “Reply to Critics” addition to the revised edition of his work, Fuller took on all comers, explaining and refining his arguments and refuting his opponents.¹⁹ Still, the consensus was against him, as much due to his style and use of contextual reference as for his insistence on a relationship between law and morals.²⁰ Professor Luban sums up the atmosphere of the era and why it was so hostile to Fuller’s claims:

English speaking philosophy of the 1960s was dominated by the Oxbridge schools of [J.L.] Austin and Wittgenstein, of which Hart seemed the jurisprudential incarnation. Those old enough to have been studying or practicing philosophy in those years well remember the sense that a revolution was on—an Oxford centered revolution that would sweep so-called traditional philosophy into the ashcan. The triumphalism of the linguistic philosophers, the utter contempt in which they held all other philosophers, and their exhilarating sense that the new methods would at last bring philosophical liberation, all meant that Fuller didn’t stand a chance. Conspicuous among the new methods was the kind of relentless anality and argumentative style that Fuller lacked Hart himself was too fine and too catholic a spirit to indulge in the kind of trashing that was the spirit of the time, but it was obvious to every self-respecting linguistic philosopher that after Hart’s book, Fuller was not someone worth taking seriously.²¹

19. Professor Luban noted that:

Many accept the idea that without these canons there can be no law at all; however, most reject the claim that the canons represent principles of morality, inner or otherwise. It is this latter claim that forms the crux of the issue between Fuller and Hart, and the dominant view seems to be that Fuller was wrong.

David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, 18 SOC. PHIL. & POL’Y 176, 178 (2000) (citing JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971), and Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 2, 195-211 (1977)).

20. Having reviewed Fuller’s work and its revisions, Professor Winston posited a restatement of Fuller’s Eight that he feels more closely approximates what Fuller meant:

1. The purpose of legislative regulation or governance by laws is to provide baselines for self-directed actions by citizens.
2. Rules that do not fulfill this purpose are to that degree not laws.
3. Rules that systematically violate the eight canons cannot function as baselines for self-directed action, therefore are not laws.
4. Since laws promote autonomy, to govern by law is to treat citizens with respect.
5. The conditions that constitute treating someone with respect constitute a morality.
6. Therefore, the eight canons constitute the morality the systematic violation of which defeats the legislators’ effort to make laws.

Winston, *supra* note 15, at 53.

21. David Luban, *Rediscovering Fuller’s Legal Ethics*, in *REDISCOVERING LON FULLER: ESSAYS ON IMPLICIT THOUGHT AND INSTITUTIONAL DESIGN* 195 (Willem J. Witeveen & Wilbren van de Burg eds., 1999). Hart’s book to which Luban is referring is *THE CONCEPT OF LAW*. HART, *supra* note 9.

Fuller was well aware of how ordinary language philosophy had dominated the times, and he also realized that those philosophers, as well as Hart himself, would consider their interests fully aligned with Hart's. Fuller acknowledged as much in his reply to critics:

I should like to supplement the account just given by referring to two intellectual influences that have, I believe, impinged upon and help to shape the thinking of the new analytical jurists.²² One of these is the common language philosophy associated with the name of J.L. Austin; The other is utilitarianism.

In general the practice of ordinary language philosophy consists in digging out and clarifying the distinctions embedded in everyday linguistic usage. In whatever field these distinctions are found, there seems to be a kind of presumption that they will prove valid and useful and that once they have been fully articulated there is no need to go further. An exemplification of the method is offered by Hart's intense interest in the distinction between "being obliged" and "having an obligation." Some useful insights have been derived through this method; there is indeed a lot of tacit and subtle wisdom concealed in the interstices of everyday speech. But the tendency of the practitioners of this method has been to regard as an end in itself what ought to be viewed as a useful adjunct to philosophical thought. As Stuart Hampshire has observed,²³ there seems to be an assumption among linguistic philosophers that distinctions disentangled from ordinary speech have a utility that is independent of the context of any particular problem and that these distinctions can be transferred freely from one problem to another. I agree with Hampshire that this is a serious mistake.²⁴

But under close inspection, the wariness that Fuller had of ordinary language philosophy, while understandable at the time, proves unfounded. Both he and ordinary language philosophers focused on societal context—on expressions, both legal and non-legal, made in a vital communal exchange. In fact, Fuller's Eight conform to, are illustrative of, and are

22. The "new analytical jurists" is a term legal philosopher Robert Summers applied to the Hart school in his article, *The New Analytical Jurists*, 41 N.Y.U. L. REV. 861 (1966).

23. Stuart Hampshire, *J.L. Austin and Philosophy*, 62 J. PHIL. 511-13 (1965).

24. FULLER, *supra* note 1, at 195-96.

supported by much of the linguistic work that made the ordinary language philosophers so influential.

If King Rex in Fuller’s tale was at fault for anything, it was for failing to speak to his subjects. Law is made using words communicated to an audience, the context of which is within the purview of language analysis. In many ways, Austin’s camp and Fuller were—however unwittingly—going about the same business.

II. FULLER’S EIGHT AND ORDINARY LANGUAGE PHILOSOPHY

We declare the law. That is a point upon which all can agree, irrespective of philosophical disposition. Whether inscribed on marble, proclaimed by town crier,²⁵ or reported through what is now an endless number of official, unofficial, print, and virtual codes, the law is and always has been a public communication of official definitions, limits, and prescriptions.

Of course, positive law can be declared through statute, through judicial holding—the “common law” in the American legal system—through some type of executive action, whether administrative or by proclamation—or through treaty. When expressed by the proper party, be it the legislature, agency, or executive, in the proper way, the declaration is law—or, in the parlance of the American system, “primary authority.”²⁶ Collectively, such declarations are the rules under which those in the jurisdiction conduct their lives. There are other legal concepts and principles that have the cast or tenor of rules, such as doctrines, interpretive canons, and presumptions, and they will figure into the analysis later. At this point, for clarity’s sake, the focus trains on declarations taking the form of the previously mentioned primary authority.

After assuming the obvious, that law is declared, another obvious assumption must be set out. The law is undoubtedly declared “by” and “to”—that is, there is necessarily a declarant and necessarily an audience to whom that declaration is declared: the lawgiver and the governed.

However, after these points of general acceptance the philosophical schools diverge. For natural law theorists, including secular natural law theorists such as Fuller, there is a foundational importance to the communication of law arising out of its societal context. It is a dialogical exchange made by what some scholars have termed the lawgiver “trustee,”

25. See JOHN MAXCY ZANE, *THE STORY OF LAW* 66 (2d ed. 1998).

26. The American legal system is the subject of this analysis, but the study here would apply to any type of declaration by any form of sovereign. Pragmatics is universal and applies to all languages uniformly; that is, the principles of the field apply to statements made in any language. Thus, the points made in this article’s argument apply to any legal declaration made by any sovereign, regardless of the legal system.

one who—barring a few exceptions²⁷—is equally bound by the law declared to the governed. The governed are themselves a set of receiving agents capable of ordering their own affairs. This societal context is a key feature, a fundamental stress, of Fuller’s work; understanding it explains why he makes his arguments about what is and is not law.²⁸

The legal positivist would not inquire into this social context; that the lawgiver has the authority to declare is the end of the question, without concern for the role from which or in which the declarant speaks. Nor would a duty to declare the law in any way or to any particular degree figure into an assessment of what is and is not law; if the recipient cannot perceive what is declared, that is of no consequence to the law *qua* law, though it may be a debit to its efficient statement.²⁹

This conceptual difference leads to a central epistemological contrast between Fuller and his critics. Without resolving that difference, the conception of law as a communicative declaration from the trustee/lawgiver to the agent/governed will be the basis of the following analysis. The stated intention of this analysis is to bring clarity to what Fuller’s Eight mean and to build on that conception to show what it is we do when we declare the law. For, tautologically speaking, law is declared through communication, and in the modern age, almost universally through language. As language is always situated within a societal context, the analyses employed by ordinary language philosophers can reveal what happens when the law is declared successfully and what does not happen when it fails. Fuller’s Eight can be employed in the same way and to the same effect. This makes the Fuller’s

27. Waiver of sovereign immunity, *infra* note 85.

28. Professor Winston makes the point about law’s societal purpose, which reinforces the conception of law as communication to the governed. It would be possible

to describe a pencil without saying that it is for writing or drawing. But it would be an impoverished description, making its very existence mysterious. The pencil with which one cannot write or draw is a defective pencil. Similarly, the official pronouncement of a legislature could be called laws even if they did not provide guidance for the conduct of citizens, perhaps because they were not promulgated or when promulgated were unintelligible, but they would be defective as laws.

Winston, *supra* note 16, at 11. Further,

[e]ven critics who concede that the eight cannons are necessary conditions of the existence of legislation assert that a theorist may recognize the necessity of those conditions without knowing what the point of legislation is. To revert to my previous example: that is like claiming to know the conditions necessary for an object’s being a pencil without knowing that a pencil is used for writing or drawing.

Id. at 50.

29. See generally sources cited *supra* note 3.

ideas strange bedfellows with the analytical tools of the ordinary language philosopher, but bedfellows nonetheless.³⁰

A. *Law and Pragmatics*

Other linguistic fields may contribute to a determination of meaning in legal rules, such as semantics and syntax, and pragmatics does not resolve any debate about what should or should not be consulted for such determinations.³¹ “Textualists” and “Living Constitutionalists” will still bring their representative arguments for and against what a declaration means, given the sources they respectively argue to be within the realm of proper consultation. But neither would take issue with the assertion that a legal rule is a communicative utterance—a declaration to the governed.

As M.B.W. Sinclair stated in a thorough explanation of how pragmatics can inform statutory interpretation:

Legislatures, when they enact statutes, are initiating communications with the person subject to their jurisdiction. The enactment of a statute is communicative behavior; Insofar as the legislature can speak, it is legislative speech.³²

While the analysis here is more philosophical in nature than practical, and broader in scope than Sinclair’s focus on legislative communication, the point holds for any legal pronouncement of a sovereign.

As the branch of linguistic study that focuses on language in a situational context, pragmatics concerns the way language is used (i.e., in conversation,

30. The analysis here is of the legal declaration itself, so only about one side of the conversational communication. How the governed “speak back” to the lawgiver is not part of the analysis, as that is done through various—mostly non-lingual modes—some peaceful, such as by means of the ballot box, the efforts of lobbyists, etc.—some not, such as revolt. But the law itself must be communicated to the governed, commonly through language—and through well-defined types of speech acts at that, which shall be established below. One of the most pertinent studies to this analysis, and one which also examines J.L. Austin’s concept of “perlocutionary” effect, is a 1985 study by then assistant professor at Indiana University. M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 PITT. L. REV. 373 (1985).

31. Corpus linguistics focuses upon derivations of meaning, so its concern is with semantics. A semantic study that acknowledges law as communication is Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication* (U.C.L.A. L. Sch. Rsch. Paper, Paper No. 10-36, 2010), <https://ssrn.com/abstract=1726567>. For other studies on law and pragmatics, see ROGER SHUY, *LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM* (1996); *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* (Lawrence Solan et al. eds., 2015). See also Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018); Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599 (2024) (both articles applying Fuller’s Eight in an administrative law analysis).

32. Sinclair, *supra* note 30, at 374.

spoken or written), rather than its grammatical structure (syntax) or meaning (semantics). What is being done when we communicate—and more specifically for the purposes here, when we communicate the law—is within the province of pragmatics. The foundational inquiry in this area is the principle of communication itself.

1. *Fuller's Eight, the Cooperation Principle, and Conversational Maxims*

Linguistics, a field in which ordinary language/analytic philosophy takes such a keen interest, requires an understanding of basics and the precise use of words. Sometimes what seems assumed or obvious must be stated. Philosopher J.L. Austin, in his seminal work on pragmatics, set out the following necessary foundation:

[T]o say something is in the full normal sense to do something--*which includes the utterance of certain noises*, the utterance of certain words in a certain construction, and the utterance of them with a certain "meaning" in the favourite philosophical sense of that word, i.e., with a certain sense and with a certain reference....The act of "saying something" in this full normal sense I call, i.e., dub, the performance of a *locutionary act*, and the study of utterances thus far and in these respects the study of *locutions*, or of the full units of speech.³³

Perforce, there must be an utterance—a "locution"—for any communication, let alone a legal one. The law must be "spoken," "uttered," sufficiently to the governed. To state another obvious but necessary fact—a fact that follows from the foundational requirement of a locution and is entailed within it—the law must be publicized. "Publicity" is the second listed among Fuller's legal principles. Just as locution is a presupposition of communication, so is the legal principle of publicity a presupposition to the communication of law.³⁴

Once this self-evident but requisite groundwork is set—that the law must be declared publicly for it to be any type of communication at all—the analysis can turn to some major contributions of Austin's fellow British

33. J.L. Austin, *Lecture VIII*, in *HOW TO DO THINGS WITH WORDS* 94-95 (J.O. Urmson ed., 1962) (emphasis added).

34. See the discussion of publicity in the context of John Searle's illocutionary act classification, *infra* note 56.

philosopher Paul Grice: the “cooperation principle” and conversational maxims.

According to Grice, for a conversation to take place, the participants must cooperate *with* each other by providing certain information *to* each other:

Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction. This purpose or direction may be fixed from the start (e.g., by an initial proposal of a question for discussion), or it may evolve during the exchange; it may be fairly definite, or it may be so indefinite as to leave very considerable latitude to the participants (as in a casual conversation). But at each stage, *some* possible conversational moves would be excluded as conversationally unsuitable. We might then formulate a rough general principle which participants will be expected (*ceteris paribus*) to observe, namely: *Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged. One might label this the Cooperative Principle.*³⁵

Grice formulated these conversational requirements as four “maxims,” with attendant “submaxims,” which carried with them a purposive, rational set of expectations that have analogs in non-conversational settings.³⁶ I set them out below:

- a. Maxim of Quantity: The conversant responds with the amount of information—no more and no less—that is called for.

35. H.P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS 3: SPEECH ARTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975) (emphasis added).

36. *Id.* at 47. Under the Quality Maxim, he included a “supermaxim”: “Try to make your contribution one that is true.” *Id.* at 46. Under the Relation Maxim, his supermaxim is “Be perspicuous.” *Id.* In Fuller’s *Anatomy Of The Law*, he uses an illustration from Wittgenstein in which a teacher asks an aide to show the children a “game,” and is flabbergasted when the aide shows the children how to gamble. FULLER, *supra* note 1, at 63. Professor Luban characterized Fuller’s point this way: “[L]egal rules cannot explicitly exclude all aberrant interpretations in advance, and [Fuller] concludes that relying on the governed to follow rules presupposes shared notions of the limits of legal decency and sanity. Governance through rules implies that the governed and the governors belong to the same interpretive community and have roughly equivalent powers of intellect and will. Luban, *supra* note 19, at 187.

Submaxims:

Make your contribution as informative as is required (for the current purposes of the exchange).

Do not make your contribution more informative than is required.³⁷

Expectation: “If you are assisting me to mend a car, I expect your contribution to be neither more nor less than is required. If, for example, at a particular stage I need four screws, I expect you to hand me four, rather than two or six.”³⁸

In his study of how Gricean maxims apply to statutory interpretation, Professor Sinclair made the point that with regard to a statute’s enactment—and by extrapolation, to any legal declaration—there is a difference in what is being quantified. It is not a matter of total “shared information,” but a matter of total “controlled behavior.” In other words, the concern is over the total amount of behavior encouraged or circumscribed, not the total amount of the expression used to do it. Thus, he fashions a legal maxim of quantity for legislative speech based on Grice’s first maxim: *Make Each Provision Cover All, but Only, the Persons and Actions You Intend it to Cover*.³⁹ Precision as to these matters is also a matter of clarity, which makes them appropriate concerns for the Maxim of Manner, discussed below.

- b. Maxim of Quality: The conversant responds with true information.

Submaxims:

Do not say what you believe is false.

Do not say that for which you lack adequate evidence⁴⁰

Expectation: “I expect your contributions to be genuine and not spurious. If I need sugar as an ingredient in the cake you are assisting me to make, I do not expect you to hand me salt; if I need a spoon, I do not expect a trick spoon made of rubber.”⁴¹

37. Grice, *supra* note 35, at 47.

38. *Id.*

39. Sinclair, *supra* note 30, at 393-97.

40. Grice, *supra* note 35, at 46.

41. *Id.* at 47.

The focus of this maxim highlights a point relevant to the jurisprudential concern about the nature of legal declarations, which will be the subject of the next section. But it is necessary to anticipate some of that argument here. The communication of law is not descriptive, and therefore not subject to true/false determinations. To confuse descriptive, or as J.L. Austin termed them, “constative” statements,⁴² with statements that are prescriptive—non factually concerned—is to commit the descriptive fallacy. A legal rule such as “Citizens of Oceania are entitled to vote in elections” creates the class of voters, but it is not a statement that can be adjudged true or false. When the law is declared in the proper context, it belongs to a special class of speech acts, as will be discussed in the next subsection.

Despite that fact, as Professor Sinclair pointed out in his legislative analysis, there are dimensions of the iteration that correspond to quality. For instance, we require a legislative act to be consistent—i.e., not contradict itself: “[A]s the enactment of a statute proceeds, there will develop a body of legislative utterances that will ever more closely constrain the possible subsequent provisions. Such provisions cannot require inconsistent actions. This is quite closely analogous to the shared information that participants in a conversation have, develop, and refine.” He posits two legal qualitative maxims for legislative speech: *Do Not Enact A Provision That Can Be Shown Not To Further The Legislative Purpose*, as purposiveness constrains legislative utterances just like truth constrains conversation in general; and *Do Not Enact A Provision When There Is No Adequate Evidence That It Furthers The Legislative Purpose*.⁴³

c. Maxim of Relation: The conversant responds with relevant information.

Submaxim: Be relevant.

Expectation: “I expect a partner’s contribution to be appropriate to immediate needs at each stage of the transaction; if I am mixing ingredients for a cake, I do not expect to be handed a good book, or even an oven cloth (though this might be an appropriate contribution at a later stage).”⁴⁴

Here the maxim is most akin to what we would nominate as the “topic” and “scope” of a law, the parameters of which are set by its purpose.

42. Austin, *supra* note 33, at 3.

43. Sinclair, *supra* note 30, at 387.

44. Grice, *supra* note 35, at 47.

Professor Sinclair notes, “Common sense tells us that the maximal purpose of [law is] promoting public welfare,” and [that purpose] “applies to all statutes, not specifically to [[a] particular one at hand.”⁴⁵ He adds that even though it can be hard to formulate the purpose of a particular statute, “it is clear that there’s always a purpose to be found. ‘We require legislatures to live up to a certain standard of rationality.’ Thus, we would not accept pointless or spurious statutory enactments out of ‘legislative caprice.’”⁴⁶

d. Maxim of Manner: The conversant responds in a way that is expected.

Submaxims:

- Avoid obscurity of expression.
- Avoid language that is difficult to understand.
- Avoid ambiguity.
- Avoid unnecessary verbosity.
- Be orderly.

Expectation: I expect a partner to make it clear what contribution he is making, and to execute his performance with reasonable dispatch.⁴⁷

Professor Sinclair illustrates the important difference between standard communication, which tends to be inexact, connotative, and imaginative, and the legislative communication, which must be precise: “the communicative function of the legislation is much too important to permit any but the most straightforward language.”

He also brings up a fourth maxim, posed by linguist Jens Allwood—the “postulate of adequacy,”—“utilize language maximally.” This he explains as follows: “use words the literal meaning of which gets closest at what you mean. Not using a certain word which is available is often just as indicative as to what you mean as the actual word you have used.” He says this postulate is “essential to the possibility of reasonable, legislative communication. If we could not, absent clear contrary indicia, rely on the

45. Sinclair, *supra* note 30, at 389.

46. *Id.* (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 225 (1962)).

47. *Id.* at 47.

legislature to have intended exactly the choice words it made, we could have no basis for understanding its enactments.”⁴⁸

Taken together, an observation of the Gricean maxims conforms to the cooperative principle. Considering the argument trajectory by this article’s thesis, and recalling that the “publicity” principle has already been shown to be a foundational presupposition to any communication, let alone a legal one, it remains to establish a correspondence between these four Gricean maxims and Fuller’s Eight.⁴⁹ I set out this correspondence below:

a. Maxim of Quantity and Fuller’s principles of generality and congruence

Grice’s Quantity Maxim is concerned with coverage—i.e., the amount of information related. Professor Sinclair’s refashioning of the maxim holds that in law it is a matter of properly quantifying the level of controlled parties and behavior. Therefore, all behavior *that* must, and all actors *who* must, be included within the application of the legal rule should be so included; conversely, all that must and who must be excluded should be so excluded. Stated another way, the rule should be as thorough regarding the acts and actors as is necessary to accomplish the purpose, but no more so (a failure in which would also create problems about relevance and manner).

It is here that Fuller’s principle of “generality” applies, though not exclusively here. According to Fuller, laws must take the form of general rules. They do not address specific facts or persons in the way of a bill of attainder, nor in the way of what was formerly known as a “citizen suit.”⁵⁰ They are equitable in that they apply to all, or to put things more precisely, to any person within the rule’s jurisdiction implicated by the abstract actions that are the subject of the rule. But more importantly, and in keeping with the larger social context in which the lawgiver declares the law to the governed, Professor Luban points out that the generality of a rule’s statement “distinguish[es] the law-giving enterprise from managerial control.”⁵¹ The generality of a law distinguishes the legal declaration from the legal directive, and the governor from the manager.

48. Sinclair, *supra* note 30, at 392 (quoting Jens Allwood, *Negation and the Strength of Presuppositions*, 2 LOGICAL GRAMMAR REP. 3 (1972)).

49. The points here are made about *a* legal declaration as well as to *all* legal declarations, so to *a* law as well as to *all* laws. Fuller meant his comments to apply to any legal instantiation as well as to the entire legal system within which it exists.

50. See A.G. Harmon, *Interested, but not Injured: The Compromised Status of Qui Tam Plaintiffs Under the Amended False Claims Act and the Return of the Citizen Suit*, 34 PUB. CONT. BAR J. 423 (2014).

51. Luban, *supra* note 19, at 192.

Further, when the law is stated generally, it speaks to all the governed. That class might be large: all the citizens of the nation; or it might be small: all the citizens of the nation who are real estate agents. But it is a pronouncement not only to those who *are now* but also to those who *would be* or *could be* in the class on some future occasion.⁵² It is universal in its application, regardless of the size of the universe.⁵³

Fuller's principle of "congruence" also applies here, in that in addition to the "equitable" quality of laws declared in general terms, there is an "egalitarian" quality in including not only the governed as actors contemplated under the rule but the lawgiver as well. Congruence requires that the law be administered as written. Once again, Professor Luban makes the point:

[Congruence] demands that [governors] treat . . . rules as binding on themselves as well as on the governed, in the sense that they will not depart from the rules that they have announced. The commitment to bond the governed through general rules that also bind the lawmaker establishes the moral relationship of reciprocity between governors and the government. These two canons are moral commitments that define the enterprise as law giving rather than something else.⁵⁴

In this way, Fuller's principles of generality and congruence limit the actions orators contemplated in the legal declaration. Charges of "overbreadth," "underinclusiveness," "selective prosecution," "inequity," etc. are common complaints of litigants about laws, and the tenor of their complaints sounds in the same nature as a failure to observe this cooperative

52. This point is supported by Professor Luban:

[P]lainly Fuller was not simply talking about the logical form of laws—that (in logician's terms) they fall within the scope of a universal quantifier. The requirement means that a law, as distinct from a one-time directive, uses categories that include numbers of similarly-situated individuals whose identities are not known in advance, or at least are not relevant to the law's purpose, rather than categories that contain only persons whose identities are known, and knowledge of whose identities determines what the law says. Understood this way, the canon of generality is indeed a content-based requirement.

Luban, *supra* note 13, at 7. Luban quotes John Finnis on this point: "Adherence to the Rule of Law (especially the eighth requirement of conformity by officials to pre-announced and stable general rules) is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government's freedom of maneuver." Luban, *supra* note 19, at 189 n.30 (quoting JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 274 (1980)).

53. A lack of "prospectivity," Fuller's concept for non-retroactivity, could lead to a lack of generality if it is meant to target a certain class. The caveats of retroactivity and its curative capacity are noted in *The Morality of the Law*. FULLER, *supra* note 1, at 74.

54. Luban, *supra* note 13, at 192.

maxim. As previously stated, a lack of precision here affects clarity as well, overlapping with the legal maxim of manner discussed below.

b. Maxim of Quality and Fuller’s principles of consistency and feasibility

Recollecting J.L. Austin’s admonition against the descriptive fallacy, and keeping in mind Sinclair’s comment about the need for consistent laws as an analog to truth relative to prescriptive statements, Fuller’s principles of “consistency” and “feasibility” correspond best here. An attempted declaration that is inconsistent with its own terms is of insufficient quality to register as a cooperative communication. In the same vein, one with which the governed cannot comply—however consistent, clear, generally stated, etc. it may be—is infeasible. It has no communicative value.⁵⁵

Nonsense is not communication, let alone legal communication of a declarative kind. These two legal principles also belong to the consideration of the manner maxim, discussed below. Complaints of “illogic” and “mistake” are typical of the litigants’ plea in this area.

c. Maxim of Relation and Fuller’s principle of generality

Unlike the Maxim of Quantity, which has been discussed with regard to the aggregate of actions and actors covered by the legal declaration, the Maxim of Relation is concerned with the topic and its scope relative to a purpose. In the legal context, the maxim of quantity covers the kinds of persons and actions contemplated, whereas the maxim of relation covers the topic itself. What the law declares must be relevant to its objective, which defines the topic. And as a supermaxim, that topic must be one related to matters of public import, i.e., social concern.

Just as with the legal Maxim of Quantity, Fuller’s principle of “generality” is implicated. The law must be stated to apply generally to all people, including the lawgiver, but it must also be a matter of general societal concern. A private purpose cannot be the subject matter of a law.

To clarify, the law must state to whom it applies and what behavior is covered (the quantity maxim, corresponding to generality and congruity),

55. See Timothy Stostad, *An Unobeyable Law Is Not a Law: Lon Fuller’s ‘Desiderata’ Reconsidered*, 7 DREXEL L. REV. 365 (arguing that most of the other principles can be subsumed under the sixth—that law not be infeasible). Regarding a debate on formalism and what legal iniquities are/not forestalled by Fuller’s Eight, see John Gardener, *The Supposed Formality of the Rule of Law*, in LAW AS A LEAP OF FAITH 195, 205-11 (2012); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5 (2008).

and be directed toward some public/societal concern (corresponding to generality).

Again, complaints related to “breadth” and “inequity,” much like those referenced above in the quantity analysis, would be representative cooperative failures.

d. Maxim of Manner and Fuller’s principles of clarity, consistency, and constancy

This maxim is perhaps the most transparently correspondent with Fuller’s principles in that “clarity,” “consistency,” and “constancy/stability” are implicated. “Clarity” and “Constancy/Stability” are what I term “gemini” concepts, as they mirror and subsume each other (in that what is unstable cannot be seen clearly; what is unclear lacks a stable focus). If a statement is so infeasibly stated that it lacks coherence, that principle would also be covered here.

It is a presupposition that the law be declared in a public manner. Another point follows from it: that the publication be sufficient. This echoes Allwood’s Postulate of Adequacy. Without sufficient/adequate publication of legal rules that are clear, consistent, relatively constant, etc. the manner maxim is not observed. The law must be spoken to be heard; it cannot be whispered.⁵⁶

Professor Luban points out that observance of these principles uncharacteristic of managerial direction. While Fuller conceded that the principles of clarity, consistency, and feasibility are indeed principles of efficacy in a managerial relationship, they are something more in the context of law—virtues of the lawgiver that are “at the heart of the relationship” with the governed.⁵⁷ Complaints of “vagueness,” “lack of notice,” and “no due process,” are representative of the failure to observe the manner maxim, among others.

Fuller’s Eight correspond with the Gricean maxims, which ensure the cooperation principle, and translate to a valid declaration of the law by the lawgiver to the governed. In so doing, they meet the larger objective that Fuller expressed in this way:

56. Publicity is both a presupposition to any declaration, as it is a presupposition to any conversational communication at all, but it is also a gemini concept with clarity and is a condition to a successful declaration of the law. In addition, anticipating the Searlean analysis of the next subsection, for a law to be heard, it must be publicized in an adequate way to those who are bound by the propositional content of the declaration. As such, it is entailed in the essential condition to the speech act of a legal declaration.

57. Luban, *supra* note 19, at 191.

[The] government says to the citizen in effect, “These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.” When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen’s duty to observe the rules.⁵⁸

That rupture occurs through breakdowns in the cooperative principle. Professor Kenneth Winston made a comment in a similar vein, but he also emphasized the difference between law and the kind of managerial direction that Fuller said did not amount to law.⁵⁹

In summary, Fuller’s Eight correspond to the Gricean maxims of conversational communication in the legal context. They are what make the legal declaration understandable to the governed. To the degree the legal system is noncompliant, the law is not “said.”

This groundwork on the communicative concept in the legal context—a relation of the rules to the governed as autonomous agents—is a prerequisite to the next analysis, a determination of what has before now been assumed: Legal rules amount to a particular kind of speech act.

2. *Fuller’s Eight and Speech Acts*

In order to proceed with the analysis, an explanation of speech acts is necessary. J.L. Austin has already been introduced above with regard to his explanation of “locutions” and “locutionary acts,” as well as for the distinction between constative and prescriptive statements. To recollect the latter point, Austin is quoted here:

[I]t has by now been shown piecemeal or at least made to look likely that many traditional philosophical perplexities have arisen through a mistake—the mistake of taking a straightforward statements of fact utterances which are either (in interesting non grammatical ways) nonsensical or else intended as something quite different.⁶⁰

58. FULLER, *supra* note 1, at 39-40.

59. Winston, *supra* note 15, at 175. Professor Luban makes a supporting point: That generality and congruence—the former insisting that lawgivers act generally, the latter that they are bound by the law themselves—show a commitment to the bond of reciprocity, which makes the relationship a legal one rather than something else. Luban, *supra* note 19, at 192. In sum, the generality and congruence maxims prevent the law from degenerating into particularized ad hominem targeting.

60. Austin, *supra* note 33, at 3.

He then sets out his groundbreaking definition of “performatives,” which he illustrates, auspiciously, with a reference to “operative language” in law:

We shall take, then, for our first examples some utterances which can fall into no hitherto recognized grammatical category save that of “statement”...: all will have, as it happens, humdrum verbs in the first person singular present indicative active. Utterances can be found satisfying these conditions, yet such that

- A. they do not “describe” or “report” or constare anything at all, are not “true or false”; and
- B. the uttering of the sentence is, or is a part of, the doing of an action, which again would not normally be described as saying something....⁶¹

What are we to call a sentence or an utterance of this type? I propose to call it a *performative sentence* or a performative utterance, or for short a performative....

A number of other terms may suggest themselves, One technical term that comes nearest to what we need is perhaps “operative”, as it is used strictly by lawyers and referring to that part, i.e., those clauses, of an instrument which serves to effect the transaction (conveyance or whatnot) which is its main object, whereas the rest of the document merely recites the circumstances in which the transaction is to be effected.⁶²

While Austin opted against the term “operative” and settled on the term “performative” as the best name for the concept,⁶³ the point he makes by way of the legal instrument example is illuminating.

Performatives in general, and as the above example shows, legal performatives in particular, effectuate the subject covered in the locution. Austin made distinctions in the parts of a contractual agreement. There are the representative statements that precede the agreement—the “preamble” (naming the parties and date, etc.) and “recitals” (the “whereas” explanations of the reason for the agreement) of a contract—as well as the parts of the instrument that set out the terms of how/when/where the

61. *Id.* at 4-5.

62. *Id.* at 6-7.

63. *Id.*

performance is to take place and the representations of status. Then there is the part that actually *performs* the agreement, i.e., what is known in contract drafting as the “subject matter performance” provision: “The parties hereby agree as follows: A hires B to work as a landscaper on Blackacre and B agrees to work as a landscaper on Blackacre.”⁶⁴ The following example serves the purpose here:

A client asks his accountant whether he needs to report cash income on his income tax return for the year, to which the accountant could reply: “Do you want to get audited?”⁶⁵ If later the accountant regrets his sarcasm made to a paying client, he might say “I’m sorry for being a jerk.”

Here, the accountant is not only *saying* something—the words of the apology; he is actually *doing* something—making the apology itself. This statement involves two things: the locutionary act (what is said) and the illocutionary act (i.e., what is done; here, the apology). Together, the locutionary act and the illocutionary act form a “speech act.”

It is important to emphasize the point that a performative is a self-contained, fully-realized existential act. In performatives, the praxis *is* the “esse”; the praxis *is* the “res.”

Several points must be made about the execution of performatives at this stage. Performatives can be explicit or nonexplicit. If explicit, a performative verb is used in its performative sense: “I promise to give you \$100.” “Promise” is a performative verb in that it involves a voluntary act that can only be expressed in words, can be used with the performative indicator “hereby,” and—as in this contractual example—is expressed in its “performative sense”: A positive, present tense statement of a first-person agent referring to a specific event.⁶⁶

If nonexplicit, there is a difference in form, but not in effect: “You’re it,” if uttered by player in a game of tag to another tag player performs what amounts to a “declaration” under philosopher John Searle’s classification of

64. In contractual drafting, this provision would be known as a special kind of subject matter performance provision, a “self-executing” provision, which makes the point about performatives, in that the words effectuate the deed in reflexive fashion. See TINA STARK, *DRAFTING CONTRACTS* 50 (2014).

65. The example is used to show indirect speech acts and implicature in two articles: A.G. Harmon, *Back from Wonderland: A Linguistic Approach to Duties Arising from Threats of Physical Violence*, 37 CAP. U. L. REV. 27, 34 (2008) [hereinafter Harmon, *Wonderland*], and A.G. Harmon, “Should” or “Must”? *Distinguishing Mandates from Guidelines in Tort Claims Contexts*, 118 W.V. L. REV. 100 (2016) [hereinafter Harmon, “Should” or “Must”?].

66. See generally Austin, *supra* note 33, at 3. Note that declarations do not have to be explicit. While bad drafting of a formal legal rule may result in using the future tense—“The law of this jurisdiction shall be as stated in the Restatement of Contracts section...” or some other non-present tense indicative form—if all felicity conditions are met (see below), the utterance would only result in the declaration being made in an indirect way, in an irregular syntactic form. Austin makes this point with the various ways a speech act’s force can be expressed grammatically. *Id.* at 57.

speech acts set out below; its nonexplicitness is irrelevant to the performance.

The use of performatives in legal instrument set out above—accomplished by the telltale word “hereby,” which performs the crucial legal “magic” of summoning the agreement into existence—is but one example of performatives in law. Others can be found in testamentary documents—“I hereby bequeath Blackacre to my heirs and assigns”; or in enabling legislation⁶⁷—“Congress shall have power to enforce...”; or in establishing an agency—“There is established a Department of Homeland Security, as an executive department of the United States within the meaning of title 5 of the United States Code.”

Examples are not limited to documentary use either. Another comes from the field of evidence, which in fact illustrates the matter best. Further, the example is once again auspicious in that Austin himself uses it to illustrate performatives.⁶⁸

Under the American system, “hearsay” is an extra-judicial statement offered in evidence to prove the truth of the matter asserted; it is, of course, inadmissible at trial. “X said he saw the Ford run the red light” is hearsay if offered to prove that the Ford ran the red light.

But an uncodified exception to the hearsay rule is the “verbal acts” exception, also known as “operative legal facts.” My colleague, Professor Clifford Fishman, a noted authority in the law of evidence, provides the following example:

The classic example is the formation of a contract. How do two parties form a contract? By saying the words (orally or in writing) that form the contract.

X says to Y: “I agree to pay you \$100 dollars if you deliver Blackacre to me within the next 30 days.”

Y responds: “I accept your offer and agree to deliver Blackacre within the next 30 days.”

67. See MICHAEL HANCHER, *SPEECH ACTS AND THE LAW* 253-55 (1980) (examining enabling clauses as speech acts); see also CHARLES CLARK, *How to Do Things with Law: Applying J.L. Austin's Speech Act Theory to the Law*, 14 WASH. U. JUR. REV. 377 (2022).

68. Austin makes a comment on the overlay between law and performatives: “[I]t is worth pointing out—reminding you—how many of the “acts” which concern the jurist are or include the utterance of performatives, or at any rate include the performance of some conventional procedures.” Austin, *supra* note 33, at 19.

Y delivers Blackacre. X does not pay. Y sues X.

At trial, Y seeks to testify as to what X and Y said to each other. X objects on the grounds of hearsay.

What X and Y said to each other certainly fits the basic definition—Y is indeed offering proof of what X said to prove that X in fact said it. But the law holds their exchange is admissible in evidence because forming a contract is *a verbal act, i.e., an act that has legal consequences, which can only be formed by an exchange of words.*

Hearsay objection overruled.⁶⁹

It is to this point that Austin refers in his seminal work when he says the following:

It is worthy of note that, as I am told, in the American law of evidence, a report of what someone else said is admitted as evidence if what he said is an utterance of our performative kind: because this is regarded as a report not so much of something he *said*, as which it would be hearsay and not usable as evidence, but rather as something he *did*, an action of his. This coincides very well with our initial feelings about performatives.⁷⁰

The “verbal act” is not hearsay because it is not a repetition of words asserted to prove the truth of the matter asserted. It is instead a fully-realized event achieved through words.

British philosopher Elizabeth Anscombe, who wrote in the fields of language philosophy and philosophy of mind, observed what happens in the operation of performatives—particularly apt for the performatives in the

69. Fishman adds: “Taking an oath to tell the truth is another legal act: when W swears to tell the truth, this has legal consequences. If W lies under oath, W can be prosecuted, regardless of whether W intended at the time to lie.”

The law also recognizes a subcategory, the verbal part of an act: X gives \$ 1000 to Y. Later, X sues to get it back. The case boils down to: [W]ith what words and with what understanding did X give the money to Y. Was it a gift? A loan? A retainer to Y for doing work which Y never did? The repayment of a loan that Y had earlier given to X? At trial, X seeks to testify that when he gave the money to Y, X said: ‘I am lending you this money, but you must repay me within a year.’ Y objects: hearsay! X’s words accompanying the transfer of the money appear to be hearsay, but the law says no: the words spoken by X when X performed the act constitute the verbal part of the act, because they define the legal significance of the act itself.” See CLIFFORD FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 24:28 (7th ed. 2004).

70. Austin, *supra* note 33, at 13.

legal context. Her work *Intention*⁷¹ set out to clarify the relationship between “action” and “will,” and her explanation of the differences between expressions of belief, desire, and declarations was the basis from which John Searle formed his work on illocutionary acts.⁷²

Anscombe noted that beliefs seek to match what is in the mind to a state of affairs in the world—recast as a “words to the world” orientation (or a “direction of fit”) to a language philosopher. Desires, on the other hand, seek to match the state of the affairs in the world to something in the mind—recast as a “world to the words” orientation to the language philosopher.

But declarations *alter* the world through their utterance. They *make* something in the world, which is a “world-to-words-to-world” orientation of fit, or a “double direction” of fit.⁷³

All these examples support a conclusion, stated here: The communication of legal rules belongs to a special class of speech act, one that “creates” as and through its speaking. That class is called a performative: The locutionary act (the speaking of the words) actually performs the illocutionary act (i.e., the act of *doing* something).

Professor Luban’s comment upon Fuller’s “King Rex” story illustrates the illocutionary force that Fuller argued all law should have, as law is a thing that creates by the very act of its expression. King Rex’s various failures parallel the conditions for a successful “performance” of law: “Fuller is simply pointing out that whatever King Rex did when he issued directives in a fashion that entirely lack the characteristic excellences of the lawgiver’s craft, he was not subjecting human conduct to the governance of rules. He was not *making* law.”⁷⁴ In short, Rex was not “doing” anything.

71. G.E.M. ANSCOMBE, *INTENTION* (1957).

72. JOHN SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 7 (1983).

73. JOHN SEARLE & DANIEL VANDERLAKEN, *FOUNDATIONS OF ILLOCUTIONARY LOGIC* 3 (1985).

74. Luban, *supra* note 19, at 184. (emphasis added). Professor Kristen Rundle supports this contention in her detailed study of Fuller’s writings. He conceived of the law as “craft”:

As Fuller puts it, if any metaphor of elevation is appropriate, his eight principles should be called ‘lower’, rather than ‘higher’, laws, ‘like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it’.

KRISTEN RUNDLE, *FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L. FULLER* 93 (2013).

And in his letter to philosopher Dorothy Emmet, he stated

if I could have called my book, instead of *The Morality of Law, The Morality of Lawing*, much of the misunderstanding might have been avoided’, because while the word law ‘calls to mind books lying inertly on shelves’, ‘lawing’ calls to mind ‘people in interaction with one another, and that picture in turn would suggest reciprocal responsibilities if the interaction is to proceed properly.’

Id. at 119.

The *type* of illocutionary act performed by the communication of a legal rule is the next part of the analysis. Austin classified illocutionary acts, which carry what he called “illocutionary force,” in the following way: Verdictives, Exercitives, Commissives, Behabitives, and Expositives. He goes into great detail explaining the five classes, but sums them up as follows:

[W]e may say that the verdictive is an exercise of judgment, the exercitive is an assertion of influence or exercising of power, the commissive is an assuming of an obligation or declaring of an intention, the behabitive is the adopting of an attitude, and the expositive is the clarifying of reasons, arguments, and communications.⁷⁵

Austin’s classification and attendant commentary is useful, especially insofar as he distinguishes between verdictives and exercitives using legal analogies.⁷⁶ However, Austin’s pupil, the American philosopher John Searle, criticized and refashioned his teacher’s system in his own work on illocutionary acts.⁷⁷ His classification is the more widely referenced and will be used in this article. The following scheme on law and pragmatics is employed here to illustrate the concepts and the associated illocutionary acts:⁷⁸

1. Representatives: A statement by which speakers commit themselves to the truth of the proposition made. E.g., “The sky is blue.” (Under this category would fit illocutionary acts such as asserting, confessing, admitting, forecasting, etc.)

75. Representative examples of verbs that Austin provides as falling these categories are: Verdictives: hold (as a matter of law), assess, characterize, estimate, find (as a matter of fact), understand, convict; Exercitives: appoint, excommunicate, order, warn, proclaim, command, announce, declare; Commissives: promise, covenant, intend, plan, pledge, bet, oppose; Behabitives: apologize, thank, congratulate, resent, welcome, blame; Expositives: accept, concede, agree, withdraw, rejoin, remark, doubt. *Supra* note 33 at 152-61. For a complete list of speech act verbs, see ANNA WIERZBICKA, *ENGLISH SPEECH ACT VERBS: A SEMANTIC DICTIONARY* (1987).

76. Austin again used a legal example for illustration: as official acts, a judge’s ruling makes law; A jury’s finding makes a convicted felon; An umpire’s giving the batsmen an outcome or calling a fault or a no ball, makes the batsman out, the service of fault, or the ball or no ball. It is done in virtue of an official position: but it still purports to be correct or incorrect, right or wrong, justifiable or unjustifiable in the evidence. It is not made as a decision in favor against. The judicial act is, if you like, executive, but we must distinguish the executive utterance, “you shall have it,” from the verdict, “it is yours,” and must similarly distinguish the assessing from the awarding of damages.

AUSTIN, *supra* note 33, at 153.

77. John R. Searle, *A Classification of Illocutionary Acts*, 5 *LANGUAGE SOC’Y* 1, 2 (1976).

78. Harmon, *Wonderland*, *supra* note 65, at 34.

2. Directives: A statement by which speakers intend to get their hearers to do something. E.g., “Go to the grocery store for me.” (Under this category would fit illocutionary acts such as insisting, demanding, requesting, advising, etc.)
3. Commissives: A statement by which speakers commit themselves to certain expressed acts. E.g., “I’ll help you with your homework.” (Under this category would fit illocutionary acts such as promising, vowing, pledging, etc.)
4. Expressives: A statement by which speakers convey their internal psychological states or feelings. E.g., “You have my sympathy for your loss.” (Under this category would fit illocutionary acts such as apologizing, congratulating, condoling, objecting, etc.)
5. Declarations: A statement by which speakers change the status of some entity. E.g., “You’re under arrest.” (Under this category would fit illocutionary acts such as christening, surrendering, excluding, bestowing, etc.)

As is obvious by now, my use of the variants of “declare” in this article when referring to legal rules is not connotative or accidental. Legal rules are present tense locutions issued by a lawgiver to the governed within its jurisdiction, and thereby nonexplicitly (though explicitness is not forbidden) “create,” i.e., “perform,” the proposition that is the subject of the locution.⁷⁹ As such, the illocutionary act, or force, most representative of the law is a “declaration.” When expressed through various types of primary authority, this becomes clear:

Legislative Act: “First Degree Murder is the act of...”

79. This analysis is of legal rules declared in their customary form. It is not concerned with how to extrapolate legal rules from opinions or a line of cases, nor does it consider whether/when certain doctrines or standards have become, de facto, rules of a jurisdiction. Those are interesting and valuable inquiries but are set aside for the sake of this analysis, an enterprise in determining how Fuller’s Eight can be conceived as corresponding to the analytical tools of ordinary language philosophy and the philosophical points that are born in consequence. For an analysis of legal taxonomies based on types of rules, see Emily Sherwin, *Legal Taxonomy*, 15 *LEGAL THEORY* (2009).

Common Law Acceptance: “This jurisdiction now adopts the Restatement Rule of Tortious Interference.”

Administrative Regulation: “All bridges, as defined by this section, are to be constructed of material that is...”

Executive Order: “On the first day of January...1863, all persons held as slaves within any State shall be then, thenceforward, and forever free.”⁸⁰

Treaty: “Japan grants, and the United States of America accepts, the right... to dispose United States land, air and sea forces in and about Japan.”⁸¹

All legal declarations are performatives, whether explicit or implicit, in that they “call into being” the thing prescribed. When declared within the situational context of a communicative relationship that observes the Gricean maxims—with which Fuller’s Eight are parallel and correspond—the communication is valid.

While laws are most typically declared, they also fall into another category. To understand how, it is necessary to consult a separate contribution of John Searle to speech act theory, indirection.

Searle pointed out that speech acts can be performed indirectly when the syntactic form of the locution fits one classification but carries the illocutionary force of another.⁸² Returning to the sarcastic accountant example: Instead of replying to his client with “I’m sorry for being a jerk,” which is an explicit performative expressive, he might say “I always stick my foot in my mouth.” The syntactic form is that of a representative—a statement he asserts as a fact—but it carries the *force* of an indirect apology, which is an expressive.⁸³

80. Proclamation 95—Regarding the Status of Slaves in States Engaged in Rebellion Against the United States (Emancipation Proclamation). January 1, 1863.

81. Security Treaty between the United States and Japan, September 8, 1951.

82. John R. Searle, *Indirect Speech Acts*, in SYNTAX AND SEMANTICS 3: SPEECH ACTS 59, 71 (1975).

83. Indirection here is akin to a similar concept in Grice’s work. Grice noted that when a conversant intentionally answers in a way that “flouts a maxim”—i.e., contributes to a conversation in an unexpected way intended to imply something else, this indirection will “raise the implicature.” Grice, *supra* note 36, at 41-58. For example, if X tells his wife that Y is coming for dinner, and his wife replies, “I better lock up the liquor cabinet,” she is flouting the manner of relation—speaking of some matter ostensibly unrelated to Y’s impending visit, but one she knows X will understand. She raises the implicature that Y has a drinking problem. See Harmon, *Wonderland*, *supra* note 65, at 37-39.

The application of this concept to the analysis here is as follows: Laws are not only explicit declarations, but they are also indirect commissives, in that the lawgiver not only declares the law but also commits itself to enforce that law. Intention—both to recognize the state declared and to ensure the stated circumstances are observed—is a condition to any declaration, as shall be seen in the next subsection and as has been discussed vis-à-vis Anscombe’s work. There is no point in making hollow prescriptions. To do so is an abdication of the lawgiver status.

To illustrate this point, reference is made to the “Take Care” clause of the US Constitution, Article IV,⁸⁴ which requires the executive to “Take care that the laws be faithfully executed.” This is an explicit declaration (creating the duty), an explicit directive (charging the executive with the duty) and an indirect commissive (committing the lawgiver to the policy declared). The lawgiver can also explicitly/directly commit itself in treaties or by waiving its immunity.⁸⁵ Fuller’s legal principle of “congruence”—that the law be administered as written—corresponds to this implied commitment.⁸⁶

However, it is one thing to determine the kinds of illocutionary acts performed when the law is declared; it is another to understand how, and if, that performance is executed. Since laws are prescriptive, not descriptive, they cannot be true/false. But they can fail, either partially or sometimes even completely, in their performance. Austin determined that such prescriptive statements have conditions to their performance, which he called “felicity conditions.”⁸⁷

The following examples are particularly fitting as all the illustrations relate to declarations:

If someone other than an ordained priest or minister attempted to baptize a child with the words "I name thee Mary Anne," the act of "declaring" would fail, since a requisite condition is absent [i.e., the

84. U.S. CONST. art. IV.

85. The Tort Claims Acts is an example. The sovereign is characteristically immune from liability for injury. But in some instances, such as intentional acts or the violation of a mandate, it will permit citizens to bring actions against it. By waiving its immunity, it commits itself to a vulnerability it would not otherwise tolerate. Note that through modals and collocations, etc., a locution can be expressed so that it is merely advisory, making it a representative. A legal rule is never only a representative; it is also a declaration and an indirect commissive. See Harmon, “*Should*” or “*Must*”?, *supra* note 65, at 1008.

86. Congruence is not related to 1) a conversational presupposition (publication); or 2) a felicity condition (clarity, non-contradictory, not retroactive, about public subject matter, etc.) but it does correspond to an obligation to carry out the law as written according to its terms.

87. Austin seems to have meant “fulfilled” or “realized” by this term.

declaration must be made by an authorized party]; the utterance is said to be “invalid” or “infelicitous.” These requisite conditions are called “felicity conditions.” and they correspond as follows [for a valid “confession” in a religious sense]:

1. Preparatory Conditions: Condition(s) that precede the utterance. E.g., for a valid confession (in the religious sense), the penitent must have done something wrong under the code of his faith.
2. Sincerity Conditions: Conditions that relate to the speaker’s state of mind. E.g., for a valid confession (in the religious sense), the penitent must be truly sorry for the wrong he has done.
3. Essential Conditions: Conditions that require the utterance be recognizable as the type of illocutionary act in question. E.g., for a valid confession (in the religious sense), the penitent must express his contrition in a confessional booth or some other dedicated space [that the parties comprehend to be dedicated for the confession], to a priest, using language or formulary phrases that imply regret -“I confess that...”
4. Propositional Content Conditions: Conditions that relate to the proper context of the statement. E.g., for a valid confession (in the religious sense), the penitent’s utterance must predicate the penitent’s past act--“I’m sorry that I lied to my wife.”⁸⁸

If any one of the conditions is not satisfied, the performance is infelicitous. Now, the utterance may be “more or less” felicitous, in that the priest may absolve the speaker, all other conditions satisfied, even if the speaker is not truly sincere. States of mind are expressed through stative verbs, of which only the speaker can know the veracity. Austin called such an instance an “abuse” because the act is performed but does not live up to the conditions.

But sometimes the locution fails altogether as an illocutionary act, in what he called a “misfire.” That would be the case in a situation where the conversants are building a house, and a construction worker asks his colleague for “absolution” for behavior that he intends to indulge in that coming weekend. While this is an extreme example that fails all the conditions, the point is clear. The worker has not made a confession; he may have made something else—an indirect boast, which is a type of

88. Harmon, *Wonderland*, *supra* note 65, at 42-43.

representative statement, or even an indirect commissive to undertake the indulgences, or an indirect expressive about his zeal to indulge himself—but not a confession. If a confession is what he intended, he has succeeded in saying nothing at all.

Just as with the Gricean maxims, Fuller’s Eight correspond to Austin’s felicity conditions for declarations in the legal context:

Prep Condition: The lawgiver must be a sovereign by right, in office, and speaking *ex cathedra* (also relating to the Essential Condition below), which would translate to the legislature acting as a legislature, the governor acting as governor, etc.

However, for Fuller, another aspect of the lawgiver that is a preparatory condition for declaring law is that the lawgiver act in the capacity of “trustee,” or steward, for the governed. There is a fiduciary duty between them that could be abused or abdicated if not met. The trustee lawgiver should say clear, cogent, consistent, feasible things for the beneficiary and be bound by the statement himself (“general” in the egalitarian sense)—and be equitable toward all benefited (“general” in the equitable sense). Professor Kristen Rundle has highlighted this dimension to Fuller’s understanding of the lawgiver’s role:

[I]ndeed, Fuller suggests that the possession of lawgiving power, discharged through observance of his eight principles of the internal morality of law, concerns ‘a relationship with persons generally’, and so is something that demands more than mere forbearance on the part of a lawgiver.⁸⁸ It instead requires the direction of human energies toward ‘a specific kind of achievement’: one that appeals ‘to a sense of trusteeship and to the pride of the craftsman.’⁸⁹

Professor Rundle points out that in a letter from Fuller to his sparring partner, H.L.A. Hart, Fuller accedes a willingness to replace his term “morality” of the law with “ethos, conscientious attitude, or trusteeship.” This reinforces the aspect of lawgiver in the preparatory condition above.⁹⁰ She explains that “Fuller’s principles articulate an ethos of lawgiving that gives practical expression to the morally significant idea that distinguishes

89. RUNDLE, *supra* note 74, at 42-43.

90. Professor Rundle states that “Hart’s omission of or refusal to engage with Fuller’s claim that the internal morality of law appeals to a sense of ‘trusteeship’, [Hart had deleted the latter term when quoting Fuller] . . . had the effect of misrepresenting Fuller’s overall position.” *Id.* at 109.

rule through law from rule by men: an internal, non-optional commitment to respecting the legal subject as an agent.”⁹¹

Another dimension to the ex-cathedra requirement for the preparatory condition can be found in Searle’s contextual conditions for declarations, which highlight the recognized “extra-linguistic” institution that provides the environment for the locution:

In general, these sorts of declarations require the following four features: (1) An extra-linguistic institution. (2) A special position by the speaker, and some hearer, within the institution. (3) A special convention that certain literal sentences of natural languages count as the performances of certain declarations within the institution. (4) The intention by the speaker in the utterances that his utterance has a declarational status, that it creates a fact corresponding to the propositional content.⁹²

Here, the institution is the legal system.

Sincerity Condition: The sincerity of the intention—though its lack will not frustrate the performance but be an abuse of it—would be determined by the egalitarian and equitable senses of Fuller’s “generality” and “congruence” principles (in that all of the governed equally, *including the lawgiver*, barring instances of immunity, are bound the law). Compliance with the determinants of the Essential Condition, as set out below, would indicate sincerity as well. The sincerity of an incoherent, infeasible law is dubious to say the least.

Essential Condition: Fuller’s legal principles of “clarity” and “constancy,” (the gemini concepts) as well as “consistency” and “feasibility” are obvious analogs to the essential condition’s requirement that the expression of the declaration be recognizable as such. As noted above, it is also important that the lawgiver speak ex cathedra, as lawgiver, either indicating this explicitly or through the typical manner/channels of communicating ex cathedra legal declarations: E.g., the reported case, the codified legislative enactment, an official compendium of regulations.

91. *Id.*

92. John Searle, *How Performatives Work*, 12 LINGUISTICS & PHIL. 535, 548 (1989).

Propositional Content Condition: The content cannot be retroactive, therefore meeting Fuller’s “prospectivity” principle, and must relate to matters of social/public import, not private concern, implicating Fuller’s “generality” and “congruence” principles as well. “Congruence” is also indicated as the law is both declaration and indirect commissive.

While failing the sincerity condition would not frustrate or necessarily doom the legal declaration, it is readily seen how failures as to the other conditions would indeed do so. Fuller acknowledged that laws could conform to a greater or lesser degree with his eight legal principles, and that a legal system could be fully realized and apposite to the degree that it does.⁹³

So, declarations that are performatives, such as laws, have conditions to their intended force. Laws exist within a societal context, as communications from a lawgiver to the governed and must observe the expected maxims in a cooperative fashion to be understood. To reiterate, they may succeed or fail in meeting these standards to varying degrees—sometimes to the point that they are not communications at all. All of this corresponds with Fuller’s point about the functionality of the law as determinative of its essence.

In the *Morality of Law*, Fuller says that the concept “steam engine” overlaps with that of a “good” steam engine. A steam engine is defined by its ability to make steam usable. As such, what it *is* and what it *does* also become what I have called gemini concepts.

In one of his works on Fuller, Professor Luban illustrates this point:

Touring a house, I notice an odd-looking bump on the wall. It can be wiggled from side to side, but wiggling it does nothing whatsoever. I’m puzzled. Suddenly I recognize that the bump is a broken light switch. This is one single recognition, not two: to identify the bump as a light switch is simultaneously to identify it as a defective light switch. If I have no idea that a light switch that does not turn the lights on or off is defective, I lack the concept light switch altogether.... As I interpret them, such phrases instead assert that to recognize something as a steam engine or a light switch is already to recognize what it ought to do, to recognize a built-in standard of success or

93. FULLER, *supra* note 1, at 197-98.

failure. Success or failure at what? At being a steam engine or a light switch--at being what it is, one might say.⁹⁴

To recognize something's purpose is to know what it is. The further it falls shy of that purpose, the less it is what it is supposed to be. As Fuller's Eight correspond with the conditions and maxims that ordinary language philosophers used in their analysis of language's achievement of its purpose, so they calibrate how closely law achieves the purpose for which it is meant: In Fuller's terms, “the enterprise of subjecting human conduct to the governance of rules.”⁹⁵

One final support for this understanding of Fuller's Eight can be found in Austin's third conceptual contribution in his major work—a concept that returns the analysis to where it began: the cooperation principle of a communicative exchange.

Distinct from the locutionary act and the illocutionary act is the “perlocutionary effect” of an utterance: Saying something will often, or even normally, produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons. It may be done with the design, intention, or purpose of producing those effects.⁹⁶

In other words, the perlocutionary effect focuses upon the hearer. If the declarant felicitously warns, the hearer is meant to be warned; if the declarant felicitously threatens, the hearer is meant to be threatened, etc.—regardless of whether the range or feelings/understanding/actions meant to be elicited register that way.⁹⁷

Austin was trying to get at the completion of the communicative cycle, and he inevitably considered the audience in his work. In the legal context,

94. Luban, *supra* note 19, at 185. Professor Luban calls concepts that define objects by the functions they serve in fulfilling purposes as “purposive concepts.” *Id.* at 184.

95. FULLER, *supra* note 1, at 162.

96. Austin, *supra* note 33, at 101.

97. Austin introduced the term “uptake” in his work on perlocution:

Unless a certain effect is achieved, the illocutionary act will not have been happily, successfully performed. This is not to say that the illocutionary act is the achieving of a certain effect. I cannot be said to have warned an audience unless it hears what I say and takes what I say in a certain sense. An effect must be achieved on the audience if the illocutionary act is to be carried out. How should we best put it here? And how can we limit it? Generally, the effect amounts to bringing about the understanding of the meaning and of the force of the locution. So the performance of an illocutionary act involves the securing of *uptake*.

Id. at 116–17. See L. McDonald, *Your Word Against Mine: The Power of Uptake*, 199 SYNTHESE 199, 3505–26 (2021). Searle comments:

In the case of illocutionary acts we succeed in doing what we are trying to do by getting our audience to recognize what we are trying to do. But the ‘effect’ on the hearer is not a belief or a response, it consists simply in the hearer understanding the utterance of the speaker.

JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 47 (1969).

the felicitous declaration of the law *to* the governed is meant to have the perlocutionary effect of apprising them of the rules under which they are and will be governed. If the law is not felicitously declared, or the conversational maxims not observed, the lawgiver is uncooperative. The law cannot have its intended and necessary effect. What is incomprehensible, infeasible, retroactive, etc. cannot register. In some cases, this failure is so complete that it might as well not have been said. Luban's metaphor returns: The light switch is a light switch because it makes light. The declaration is what it is supposed to be to the extent it fulfills its purpose vis-à-vis the governed.

B. Fuller's Eight as Reconceived Rejoinder

One of the major assertions of this article is there exists an unexpected alliance between Fuller's Eight and the field of pragmatics, a primary tool of ordinary language philosophers. Having shown how Fuller's Eight align with the theories of those philosophers, this section summarizes the conclusions reached and explores how Fuller's position might employ them in a rejoinder.

First, proceeding from the premise that law is a proclamation, it follows that proclamations are communication, and that communication must be publicized, as publication is entailed in the very meaning of communication. Further, communication is impossible and nonsensical outside a societal context. That societal context involves the sovereign lawgiver and those under its jurisdiction, the governed. This much is presumed.

Second, as law is a communication between the lawgiver and the governed, the Gricean conversational maxims that ensure his principle of cooperation between the conversants apply. Those maxims—quantity, quality, relation, and manner—are fundamental to communication; without them, it breaks down and at some point is frustrated altogether. Fuller's Eight correspond to these maxims, ensuring that the communication of legal rules is accomplished; a failure in their observance, however great or small, defeats that communication.

Third, legal rules are performative utterances that create the law in their speaking, which amounts to the illocutionary act of "declaring." Reality is altered to the degree the illocutionary act is performed successfully as a declaration. Conditions to that successful performance exist related to the circumstances preparatory to the locutionary act, the sincerity of the locution, its recognizability as a declaration, and its propositional content. Again, Fuller's Eight correspond to these felicity conditions; without their being met, the law is to that degree unperformed.

Fourth, every communication has a purpose, and effectuating that purpose corresponds to its being what it is. The law’s purpose is to communicate the rules that govern a society and by which that society may order its existence as a group of autonomous agents. A failure to declare successfully undoes that purpose.

As to this last point, Fuller might argue that if law is only a set of institutionalized directives, backed up by a threat,⁹⁸ then it is merely a one-sided affair. In that event, there is no need for the audience to hear or comprehend—no effect to be taken—as it is of no consequence to the law as law. A position that these conditions and maxims amount to only the efficacious statement of the law cannot admit that what is unseen or incoherent or targeted at private circumstances and private actors is not law. Such a position is at odds with what language is meant to do, and as the point of this article is to show that law is a communication between the lawgiver and the governed—a two-way affair—that position is at odds with and frustrates that purpose.

This point applies regardless of whether the content of the law is wise or foolish. Legal philosopher Robert Summers, explained it this way:

Sufficient compliance with the principles of legality necessarily guarantees, to the extent of that compliance, the realization of a moral value, even when the content of the law involved happens to be bad period that moral value is this: the principles of generality, clarity, prospectivity, and so forth, secure that the citizen will have a fair opportunity to obey the law. Admittedly, the choice may be a choice to obey an evil law, but the citizen will at least have had a fair chance to decide whether to do so or not, and to act accordingly. This is in itself moral, even though, overall, what the state happens to be doing to the citizen through the substance of the law is immoral. Observe that if the principles of legality were violated, there could be a dual moral objection: this citizen could be subjected to an evil law and could lack any fair opportunity to know of it in advance and act accordingly. Indeed, to punish or sanction a citizen for not following an evil (or even a beneficent) law that is unfollowable is also unjust. And injustice is indisputably immoral. (Fuller did point out that when his eight requirements are not sufficiently met, the citizen can have

98. The legal philosopher John Austin (not to be confused with J.L. Austin), who is most associated with the positivist school of thought in jurisprudence, considered the law a matter of command backed up by punishment. See ROBERT L. HAYMAN ET AL., *JURISPRUDENCE, CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM* 81 (2d ed. 2002).

no meaningful basis on which to discharge any general moral obligation he might otherwise have to obey the law).⁹⁹

Notions of fair notice and due process resound in this statement.

As to the first three points, Fuller might respond to the charge that his eight principles are mere drafting tools with a rejoinder that they are crucial determinants of the law's formal expression of itself. As the law can only be performed through language, they are fundamental to its existence. He conceded, and never argued, that a law or legal system might be more or less fully realized, depending on how well the principles are observed—nor did he doubt that some of his principles are more critical to the legal project than others. Whether this makes Fuller's Eight “moral” insurance or not remains an open question, but it makes a strong case that they are life insurance.

Fuller might also employ the pragmatic analysis set out above to answer the charge that his principles could just as easily be used to make a well-drafted guide for poisoning, or assassinating, or blackmailing.¹⁰⁰ In *The Morality of Law*, Fuller responded that the integrity of the law, the universality of legal standards, and legality itself are threatened by even an “efficiently stated” infringement.¹⁰¹ But using the analysis above, more could be said.

Any statement—however efficiently stated—of poisoning, or assassinating, or blackmailing, etc.—would not be a felicitous declaration, as laws must be; nor would it be a performative, as all declarations are. The statement would be a set of directions—both a representative and a directive. Representatives and directives are descriptive, not prescriptive, and therefore subject to true/false determinations. The directions could be

99. ROBERT S. SUMMERS, LON FULLER, 37-38 (1984).

100. FULLER, *supra* note 1, at 201. The symposium issue of the Villanova Law Journal in 1965 contained articles from Marshall Cohen, using the assassination example, and Ronald Dworkin, using the blackmailing example. See sources cited *supra* note 18. Hart's example is from his review of *The Morality of Law*. Hart, *supra* note 16, at 1286.

101. FULLER, *supra* note 1, at 201-03. He also made the point that the term “efficacy” in the hands of his critics gets expanded so far that it becomes a moral argument. *Id.* Professor Luban explains Fuller's incredulity at this line of attack:

What strikes Fuller as perverse about the accusation that he has confused morality with efficacy is that he regards the choice to govern through law rather than managerial direction as a sacrifice of efficacy for moral ends . . . Fuller finds the poisoning and blackmail analogies perverse because they assume that an evildoer would for some mysterious reason choose as an instrument of evil a relatively ineffective tool—a tool, moreover, that is relatively ineffective because it displays precisely the kind of moral regard for its victim that an evildoer lacks.

Luban, *supra* note 19, at 189.

wrong and shown to be so. Declarations are not subject to true/false determinations.

In addition, directions are not of public import, which is violative both of the Gricean “legal” maxims of quantity and relation—in that they are not “general”—and Austin’s felicity conditions of sincerity and propositional content. The critics’ examples are of private application to a peculiar set of facts, not one of general impact. They also violate the preparatory condition in that the speaker is not a sovereign speaking *ex cathedra* on a matter of public concern. Even if the sovereign was malign—not a trustee, as Fuller would insist must be the case—the issuance of the directive would not be of general import except in the preposterous instance of a jurisdiction of poisoners in the state of Borgia.

While this line of argument is helpful to Fuller, he never acknowledged or employed it directly despite how consistent his points were with the trajectory. Fuller’s Eight are also redolent of other arguments—and older arguments.

Professor Luban has made the argument from the standpoint of professional ethics:

I have been claiming that Fullers morality of law is a set of excellences that belong to the professional ethics—the role-morality—of lawmakers. This is specifically true of the inner morality of law: Fullers eight cannons of lawmaking. It is significant, after all, that Fuller introduces the cannons with the parable of [K]ing Rex, who aims to make his name in history, as a great lawgiver an entirely aretaic ambition. As Fuller tells the story, moreover, Rex’s failures led him repeatedly to reflect not on the concept of law, but on his own personal failings—further evidence that Fuller focuses on the legislator, not the legislation. If sin is a sinking into nothingness, then we can understand Fuller’s famous conclusion that Rex “never even succeeded in creating any law at all, good or bad” in a somewhat nonstandard light. It becomes an observation about the role-morality of law-giving rather than an analytical claim about necessary conditions on the very concept of law.¹⁰²

Conceiving the absence of the good as a negative, rather than a positive, reality reaches back to Neoplatonic metaphysics and can be traced down through Augustine¹⁰³ and on—the conceptual consequence being that at

102. Luban, *supra* note 19, at 184-85.

103. AUGUSTINE, *CONFESSIONS*, vii.xii.18 (Henry Chadwick, trans., 2009).

some point, compromises become existential. Compromises in the communication of the law result not just in “no law,” but in “no thing.” The converse concept would be virtue, a focus of traditional natural law.

In Book II of *The Nicomachean Ethics*, Aristotle states: “Virtue, then, is of two kinds, intellectual and moral. Intellectual virtue owes both its inception and its growth chiefly to instruction, and for this very reason requires time and experience. Moral goodness, on the other hand, is the result of habit.”¹⁰⁴ The process of law, when fully realized, is achieved through the habit of its practice—and Fuller’s Eight describe the ways of conducting that practice to achieve that excellence.

Fuller’s Eight also show the contours—the formal properties of the law—that conform to Aristotle’s formal cause. This also brings into relief his final cause, the end to which the law is directed: the communication of rules by which the governed are to set their lives.¹⁰⁵ Virtue ethics¹⁰⁶ also resonate with Fuller’s Eight—as in that system virtue is a good in itself, not simply a means by which good is achieved. Virtue ethicist Alasdair MacIntyre’s articulation of the central importance of acting in such a way that we are intelligible to each other is the same as Fuller’s concern for a communal compact between the governor and the governed.¹⁰⁷

This reflexive quality of virtue parallels the reflexive nature of legal declarations as performatives when felicitously communicated: They are the “well-made” thing, virtuous in the perfection of their form—a concept that even finds its expression in artistic theories, such as Aristotle’s *Poetics*¹⁰⁸

104. ARISTOTLE, *NICOMACHEAN ETHICS* (J.A.K. Thomson trans., 1976).

105. 2 ARISTOTLE, *METAPHYSICS* bk. V (H. Tredennick trans., 1989).

106. Virtue ethics contrasts with consequential/utilitarian ethics, focusing on results of behavior as determinative of ethical behavior. See generally *VIRTUE ETHICS AND MORAL EDUCATION* (David Carr & Jan Steutel eds., 1999).

107. Stanley Hauerwas comments on MacIntyre’s point in this regard:

In “The Intelligibility of Action,” an article written in 1986, [MacIntyre] argues that essential to our learning to act is that we learn to behave in a way that others can construe our actions as intelligible. In other words, the intelligibility of an action depends on the narrative continuities in an agent’s life. Yet the ability to narrate my life depends on having narratives available that make my peculiar life fit within narratives of a community that direct me toward an end that is not of my own making. The intelligibility of my life, therefore, depends on the stock of descriptions at a particular time, place, and culture. I am, at best, no more than a co-author of my life.

Stanley Hauerwas, *The Virtues of Alasdair MacIntyre*, *FIRST THINGS* (Oct. 2007). Hauerwas also makes the point that MacIntyre’s work in the area is centrally formulated around and draws upon Wittgenstein’s concern for what is necessary to make our actions intelligible to ourselves and others—which is the same concern that linguists share with Fuller when it comes to the deployment of language. *Id.*

108. MONROE BEARDSLEY, *AESTHETICS: FROM CLASSICAL GREECE TO THE PRESENT* 55-56 (1966).

and in the necessities of integrity, proportion, and clarity to beauty as expressed by Jacques Maritain in *Art and Scholasticism*.¹⁰⁹

But while he did not go as far as he might, Fuller’s contribution to the communicative parameters of the law—when seen through the lens of pragmatics—establish a great deal and can contribute even more.

III. TYPES OF LEGAL DECLARATIONS.

Having established that laws are declared by the lawgiver to the governed, with a concurrent commitment on the part of the lawgiver to execute them, the nature of the legal declaration can be examined more fully. Just as Searle restated Austin’s illocutionary acts classification and illustrated the various acts that belong to each class, so the same can be done for the special kind of declaration—the legal declaration—that has been the focus here.

The following is a proposed list of legal declarations by type of illocutionary act, each characterized by what the legal rules are “doing” when declared. They are expressed in the conventional way, using the present participle, to emphasize the constitutive “action” that is being performed by the rule. Of course, the list is subject to revision, as additions, subtractions, conflation, distinctions, qualifications, etc. are all part of a pragmatic analysis’ fluid nature. Examples certainly may, and probably do, belong to one or more categories; a general legal rule is itself all at once a declaration, commissive, and representative all at the same time.

My suggested eight types of legal declarations are listed below, explained with examples as to the method behind the taxonomy, and exemplified in cursory, not exhaustive, fashion. There may be a reason for listing the types in a particular order, or the order may be of no consequence at all, but at this point it is not intentional or designed.

I include concepts that are not rules, per se, but amount to doctrines or canons, etc.—*things that are not rules when undeclared*, though they can *become* rules when declared by a lawgiver (e.g., pronounced by a court in a negligence action: “This jurisdiction recognizes the doctrine of *res ipsa*”).

109. JACQUES MARITAIN, *ART AND SCHOLASTICISM* 20 (1949):

If beauty delights the mind, it is because it is essentially a certain excellence or perfection in the proportion of things in the mind. Hence the three conditions assigned to it by Saint Thomas: integrity, because the mind likes being; proportion, because the mind likes order and unity; lastly and above all brightness or clarity, because the mind likes light and intelligibility. A certain splendor is indeed according to all the Ancients the essential character of beauty . . . but it is a splendor of intelligibility: *splendor veri*, said the Platonists; *splendor ordinis*, said Saint Augustine, adding that “unity is the form of all beauty”; *splendor formae*, said Saint Thomas with a metaphysician’s precision of language . . .

loquitur, the long-established rule in cases such as the one before it today that . . . ”). When still in their doctrinal state, unlike being “kicked into action” by a declaration, such concepts are what Ronald Dworkin would call “principles,”¹¹⁰ as distinct from “rules.” The latter are dispositive while the former contribute to a rule’s dispositive nature. I include them in the list not only because they can be rules when so declared, but also because they help outline the types described.

Eight types of Legal Declarations:

- A. Allocating Declarations
- B. Assessing Declarations
- C. Guarding Declarations
- D. Managing Declarations
- E. Conserving Declarations
- F. Incentivizing Declarations
- G. Repairing Declarations
- H. Observing Declarations

- A. Allocating: These rules work to apportion risk, power, or duty between: parties in an action; branches of government; courts in a judicial system, etc. Some state of equilibrium is achieved through their application.

Examples:

- Duty
 - Burden of Proof
 - Care
- Power
 - Deference
 - Conflicts Rules
 - Subsidiarity
- Risk
 - Act of God/ Force Majeure
 - Assumption of Risk
 - Joint Liability
 - Rescue Doctrine
 - Respondeat Superior

110. See generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

- Strict Liability
- Vicarious Liability

B. Assessing.¹¹¹ These rules provide the tools necessary for assessing circumstances.

Examples:

- Degree:
 - Culpability
 - Magnitude
 - Conviction
- A Fortiori
- Capacity
- Evidentiary Rules:
 - Materiality
 - Reliability
 - Relevance
 - Expertise
 - Parol evidence
- Judicial Notice
- Presumptions
- Proximate Cause
- Reasonableness
- Textual Canons
- Time (Laches)
- Totality of Circumstances
- Weighing/Balancing

C. Guarding: These rules prevent some kind of plunder, whether intentional or unintentional, that could be achieved through legal auspices. They guard the weak (physically, mentally, financially, educationally, minority, unpopular, etc.) and the state from being exploited by means of the legal system.

Examples:

- Bankruptcy

111. Professor Winston notes that Fuller’s alternative to the positivist conception is nicely illustrated for the office of judge in his work *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376-95 (1946), in which he imagines a group of shipwrecked men on a desert island. The judge learns how to be a judge due to sociological restraints. Winston, *supra* note 15, at 27.

- Barratry/Champerty
- Competence/Capacity
- Contract Boiler plate—acts of God, mortmain, parole evidence rule
- Discretionary Bar (of Tort Claims actions)
- Disgorgement
- Duress
- Ethical:
 - Admission to Practice
 - Administration of Practice
 - Client Interaction
 - Third-Party Interaction
 - Misconduct
 - Conflict of Interest
- Estoppel
- Immunity/Privilege
- JNOV/Abuse of Discretion
- Public Disclosure Bar (of whistleblower actions);
- Quantum Meruit/Unjust Enrichment
- Statute of Frauds
- Statute of Limitations/Laches
- Unconscionability/Adhesion

D. Managing: These rules keep the law from expanding beyond the limits of practicability/manageability. They also provide order and functionality to the law.

Examples:

- Equivalence (these also perform a type of equitable function, in supplying the missing aspect of some rule that is needed to redress a civil injustice):
 - Constructive Discharge
 - Retaliatory Discharge
 - Anticipatory Breach
 - Substantial Performance
 - Abuse of Process/ Malicious Prosecution
 - Res Ipsa Loquitur
 - Adverse Possession (also a Guardian rule)
 - Adequacy of Consideration.
- Efficiency

- Precedent
- Approximation
- Access to Courts (Standing, Ripeness, etc.)
- Political Questions
- Severability
- Substantive Canons (e.g., Constitutional Avoidance)
- Waiver
- Class Action
- Injunctive Relief Thresholds (Inadequacy, Immediacy, etc.)
- Forum
 - Jurisdiction and Conflicts
- Process
 - Administrative Procedure
 - Civil Procedure
 - Criminal Procedure
 - Notice
- Recognition of Necessary Power
 - Police Power
 - Eminent Domain

E. Conserving: These rules prevent waste or disuse of societal resources, whether they be financial or material.

Examples:

- Adverse Possession
- Escheat
- Mitigation
- Statute of Limitations/Laches
- Rule Against Perpetuities
- Testamentary Rules

F. Incentivizing: These rules encourage behavior that is deemed good for law and society or both.

Examples:

- Good Samaritan
- Privilege/Immunity
- Qui Tam
- Tax Incentives Rules

G. Repairing: These rules provide the ends and means for redressing wrongs against individuals or the state.

Examples:

- Damages
 - Compensatory
 - Consequential
 - Mitigation
 - Nominal
 - Punitive
- Equitable
 - Clean Hands
 - Declaratory Judgment
 - Estoppel
 - Injunction
 - Laches
 - Reformation
 - Rescission
 - Specific Performance
 - Unconscionability
 - Unjust Enrichment/Quantum Meruit
- Penal/Sentencing
 - Deterrence
 - Rehabilitation
 - Respect for Law
 - Restitution
 - Retribution
 - Separation

H. Observing: These rules work to preserve the integrity of the person, the state, or the judiciary. Rather than protect against manipulation of the process, which is the focus of Guardian Rules, they demarcate limits, the transgression of which amounts to direct assaults upon a person or an institution.

Examples:

- of the Person (Property, Torts, Criminal, Constitutional Law)
- of the Entity (Business Organization Law)

- of the State (All “Offense Against State” rules, e.g.,
Treason, Criminal Law, etc.)

One last conclusion is based on the above list. As the practice of law is a task performed by way of “doing” the aforesaid acts, some direction or objective toward which those tasks are aimed can be extrapolated. They too align with Fuller’s argument. The eight acts highlight dimensions or aspects of the law, making it clearer, more stable, more efficient, more vital, and more deferential toward autonomy.

Hence, acts that clarify the law reflect an illuminative aspect—as transparent, distinct guides marshal behavior.¹¹²

Similarly, acts that stabilize the law reflect a preservative aspect—as continuity aids the governed in planning their lives.

Acts that administer the law reflect an economic aspect—as efficiency aids in legal execution.

Acts that incentivize socially constructive behavior reflect a generative aspect—as law is a social mechanism within a living polis.

And acts that recognize the autonomy of the governed as free agents reflect an observational/deferential aspect, acknowledging law exists for the governed, not vice versa.

CONCLUSION

In summary, Fuller’s Eight lend themselves to the same insurance of conversational communication as the pragmatic tools of ordinary language philosophers. As the objective of law being the communication of rules by the lawgiver to the governed about how to order their lives, the guidance is of foundational value. That also seems to be Fuller’s appreciation of his argument, as he ends his work in fact with communication as the central theme:

Communication is something more than a means of staying alive. It is a way of being alive I believe that if we were forced to select the principle that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellows. On the one hand, communication is one crucial means for human survival, but on the other hand, survival is only meaningful if for the sake of communication If I were asked . . . to discern one central indisputable principle of what may be called substantive

112. I distinguish stability and clarity but consider them gemini concepts and recognize they could be conflated.

natural law—Natural Law with capital letters—I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire.¹¹³

And this amounts to final charge of which communicative channels—language—are the propositional content, stated in the form of a directive, explicitly performed.

113. FULLER, *supra* note 1, at 186.