

**Truth in Law**

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It is the regular business of lawyers and judges to draw legal inferences. Many of those inferences look like an ordinary syllogism, whereby a conclusion is derived from some premises about the normative content of the law and statements describing facts or events. Are such syllogisms valid, do they yield conclusions which can be said to be true or false? Can we ascribe truth-value to the content of legal norms? These are the questions I want to examine in this essay. Notice, however, that I will not discuss here the question of what makes it true that a given norm is legally valid. I will assume that the legality of the relevant norms is established. My topic in this essay concerns the question of whether we can ascribe truth-value to what the law says, and what does it take to do so. As we will see, there are two separate issues involved here. The immediate and most obvious concern is about whether legal prescriptions can be assigned truth-value at all. A solution to this problem forms the content of the first part of the paper (sections 1-3). In the last part (section 4), I will explore some structural aspects of legal syllogism, suggesting that there is an interesting analogy between truth in law and truth in fiction.

### **1. Propositional Content of Exhortatives.**

An inference is valid only if the truth of its premises guarantees the truth of its conclusion. Therefore, no question of validity about an inference can arise if the premises consist of sentences or linguistic expressions that do not express a propositional *viz.* truth-evaluable, content. On the face of it, however, linguistic expressions of particular legal contents, that is, the content of constitutional and statutory prescriptions, judicial decisions, agency regulations, and the like, are not propositions. Laws do not purport to describe an aspect of the world, they do not tell us how things are, or are not; they tell us, roughly, what to do, or what not to do. Thus, the question is whether prescriptive content of the kind we find in legal provisions is the kind of content that is truth-

evaluable at all. And if it is not, then no inferences taking such prescriptions as premises can be valid.<sup>1</sup>

Before we proceed, it is important to clarify what is at stake here. I am not suggesting that in order to provide the logical framework for legal inferences, we must confine ourselves to standard propositional calculus. Logicians have long developed systems of deontic logic allowing us to formalize the logical relations between propositions that contain deontic operators, such as obligation, permission, etc. But deontic logic, or any other axiomatic system we could devise to deal with such expressions, is not the solution to our problem, only a tool we can use later. Deontic logic offers us a formalized system to deal with prescriptive sentences, *assuming* that there is some sense in which they can be true (or false).<sup>2</sup> These logical tools do not give us an interpretation of what makes prescriptions or deontic statements truth-evaluable, they assume that such an interpretation is available. But it is precisely the availability of such an interpretation that is being challenged here. In other words, the challenge is to show how legal prescriptions can have truth-evaluable content; once we have such an interpretation, we can then employ deontic logic to evaluate the logical relations between the relevant statements. So let me turn to this now.

The main plausibility of a skeptical position here can be seen by looking at statements expressed in the imperative mood. Imperative utterances, such as “Close the door!”, “Stand over there!”, etc, are not the kind of utterances that describe anything, their function is to motivate conduct, and they would seem to have no truth-evaluable content. I am not suggesting, of course, that legal norms are typically formulated as imperatives. But their linguistic or communicative function is very similar. And they are similar in two ways: First, laws prescribe modes of behavior, they do not describe how things are (or are not). There is, of course, an enormous variety of ways in which laws are formulated. Very few legal regulations are formulated as standard imperatives. Laws grant rights of various kinds, impose obligations, grant various agents, private and public, powers to introduce normative changes in the law, and so on and so forth. The unifying element, however, is conduct guidance. In

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<sup>1</sup> An early proponent of such a view was H. Kelsen, *General Theory of Norms*.

<sup>2</sup> See Jorgensen, “Imperatives and Logic”.

one way or another, legal norms and legal decisions purport to guide conduct.<sup>3</sup>

Second, when the law requires you to do something, say, that you “ought to do  $\varphi$  in circumstance C”, it purports to say that you ought to do  $\varphi$ , *and* that you ought to do it *because* the law says so. Legal requirements do not simply point out to their subjects reasons for actions that apply to them. They purport to create or impose those reasons by expressing the relevant requirement. You ought to do it because the law says so. And again, in this laws are very similar to standard imperatives. Consider, for example, the difference between the following two statements:

(1). S saying to H: “You ought to give Sarah \$100”.

(2) S saying to H: “Give Sarah \$100!”

Statements of type (1) are normally expressed to point out a reason for action that applies to H, that is, regardless of S’s saying so. By expressing (1), S would normally understood to have pointed out to H, or reminded him, as it were, that there is something that he ought to do, that is, give Sarah \$100 (say, because he promised to do it or such). The speech act itself does not purport to make any difference to H’s reasons for action (or, if you like, to the truth-value of (1)). The reason is claimed or assumed to be there, as it were, regardless of S’s utterance or speech act. On the other hand, imperative expressions like (2) necessarily imply an expectation that H regard the expression of S’s imperative as a reason for action. The fact that S had uttered (2) purports to make a difference to H’s reasons for action.

Speech act theorists have long recognized that there is a wide range of performative speech acts which are normally expressed in order to induce the hearer to perform a certain action (or refrain from action of course), and by way of recognizing the speech act itself as a reason to do as ordered, requested, etc. These include commands, orders, requests,

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<sup>3</sup> It is possible, of course, for some legal enactments to have no prescriptive content. Legislatures sometimes enact various declarative laws which have no conduct guidance element in them, such as declaring a certain bird as the official “state bird”, or something like that. Such laws, however, are pretty rare, and in any case, quite tangential to law’s main functions in society.

pleadings, invitations, questions, and many others.<sup>4</sup> Following Austin (with a slight modification,) I will call these kinds of performatives: *exhortative speech acts or exhortatives*.<sup>5</sup> Such speech acts purport to motivate conduct on part of the hearer by the very act of expressing the relevant utterance, expecting the hearer to recognize the utterance as a reason for action. As with other performatives, there might be some background conditions that are needed to secure the felicity conditions, or the success, of the speech act in question. Sometimes these background conditions consist of social conventions or rules of an institution, but I do not assume that this is necessarily the case.<sup>6</sup>

Legal instructions are typically exhortatives. In fact, they are probably paradigmatic examples of exhortatives. The enactment of a legal requirement, or the official expression of a legal ruling (say, by a court or an administrative agency) are the kind of speech acts that purport to motivate conduct on part of the addressees by way of recognizing the speech act as providing them with reasons for action. It doesn't mean that all legal prescriptions are formulated in an imperative mood, of course, or even that they are formulated prescriptively. An expression might be an exhortative even if formulated as a simple descriptive statement. Saying, for example, "It is very cold in here" might well be a request from someone to close the window, depending, of course, on the conversational background and mutual knowledge of the relevant circumstances. Similarly, a legal descriptive statement such as "It is a misdemeanor to  $\varphi$  in circumstances C" is not a description of how things are in the world, but rather, a prescription that one ought not to  $\varphi$  in C. And again, when the law says that you ought not to  $\varphi$ , it invariably implies that you ought not to  $\varphi$ , at least in part, because the law says so.

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<sup>4</sup> For a very useful taxonomy of such speech acts see Bach & Harnish, *Linguistic Communication and Speech Acts*, at 47-55.

<sup>5</sup> Austin called them "exercitive" (*How to Do Things With Words*, at 151) while Bach & Harnish labeled them, more sensibly perhaps, as "directives" (see their *Linguistic Communication and Speech Acts*, at 47). I refrain from using Bach and Harnish's terminology because "directive" has become the standard way of referring to authoritative speech acts, and I want to keep to the broader category that includes speech acts which are not necessarily authoritative.

<sup>6</sup> On the question of whether performative speech acts necessarily rely on a conventional setting there is an ongoing debate in the literature. I have weighed in on this debate in my *Social Conventions* (at pp. 118-130) In any case, not all performative speech acts are exhortatives.

Now, assuming that laws are typically exhortative speech acts, the relevant question here is whether exhortatives have truth values? One may doubt that there is a problem here. For inferential purposes, it might be thought, we can just stipulate an operator, such as “Make it the case that \_\_\_”, followed by the content of the relevant exhortative. Thus, for example, consider an imperative statement:

(3) (S to H): “Close the door”

Now, the idea is that we can assign truth-value to (3) by the formula:

Make it the case that {H closes the door}

Notice that the truth-value is not assigned to the content in brackets, since it would entail that the imperative is true if H closes the door and false if H doesn't, which is not what we are after; the truth-value of an imperative cannot depend on compliance with it. Furthermore, notice that something like an “ought” operator will not do, because an imperative might be true (if there is a sense in which it is), as such, even if it is false that one ought to do as instructed. Thus, the idea is that we assign truth value to – “make it the case that \_\_\_” such that it is true if an imperative with the content that follows the operator has been issued or expressed, and false if not. For logical-inferential purposes, this should work. But we would still need some interpretation of what makes it the case that the relevant propositions are true (or false). Is it simply the fact that the imperative has been expressed? Maybe it is, but we need some explanation for why it is the case and under what conditions. In other words, we need an interpretation of the *truth-conditions* of such statements. The fact that we can translate imperative statements and, presumably, other types of exhortatives, to propositions by stipulating some operator which can be assigned a truth-value does not answer our question. We need to know what is it that *warrants* ascribing truth (or falsehood) to exhortatives of various kinds.

For the sake of simplicity, I will henceforth focus on some simple exhortatives, like orders or commands expressed in the imperative mood. The assumption here is that if we can provide an interpretation of ascribing truth values to imperatives, with suitable modifications other types of exhortatives could be treated similarly. Now, a natural way to interpret the propositional content of imperatives is to suggest that such content is self-referential. When S says to H: “Close the door!”, the propositional content expressed is about the wishes of S; it expresses

something about the mental state of the speaker, such as “S wants/wishes H to close the door and wants/wishes H to recognize the expression of this wish as a reason for H to comply”. This is undoubtedly a propositional content, of the standard descriptive kind. The proposition refers to the speaker’s state of mind. In other words, when people express a request or an order or such, they normally express a wish or desire that something happen and the expectation that the addressee sees the expression of the request or the order for what it is, namely, as a motivational reason to act in a certain way.<sup>7</sup> That is, at least in standard cases. I will deal with some non-standard examples shortly.

To be sure, I am not suggesting that the self-referential content is what the imperative *means*; an imperative statement means what it states, namely, “close the door”, or “pass me the salt”, etc. In other words, imperative sentences are not semantically reducible to their self-referential propositional contents. The propositional content in play is what makes an imperative true, or false, as the case may be. But can it be false? If an imperative expresses self-referential propositional content, then every *sincere* expression of an imperative would constitute a true proposition. If by saying “close the door” I express the proposition that I want you to close the door (and I want you to recognize my expression of this order as a reason for you to do so), how can such propositional content turn out to be false? Presumably, under normal conversational assumptions and given some conditions of sincerity, it cannot. But this is not a serious worry. There are similar phenomena (identified by Lemmon and others<sup>8</sup>), of sentences rendered true by their expression alone, such as “I’m talking to you right now” or, more interestingly, the expression of a promise. When a speaker says, under normal conditions, “I promise to  $\varphi$ ”, the speaker has made a statement that is true, and it is true in virtue of the fact that it has been uttered. It cannot turn out to be false, even if the speaker did not really intend to keep the promise. By saying “I promise to  $\varphi$ ” (in a standard conversational context), the speaker expressed

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<sup>7</sup> The main difference between an order and a request consists in the difference in the kind of reasons for action the expression is expected to generate. Orders purport to generate protected reasons for action (or obligations), whereas requests would normally be regarded as generating a regular reason for action. The details are not easy to work out, but they do not affect the present argument.

<sup>8</sup> See Lemmon, “On Sentences Verifiable by their Use”, and Bach & Harnish “How Performatives Really Work?”.

the fact that she undertook a commitment and it is the undertaking of a commitment in virtue of expressing it, hence true.<sup>9</sup>

I am not suggesting that there is no room for failure. An expression of an imperative may fail to convey a propositional content in the circumstances of its utterance. The order to close the door, for instance, presupposes that there is a door in the vicinity to be closed; if the presupposition is obviously false (say, I ask you to close the door while taking a walk in the meadows, with no door anywhere around), then it is quite possible that the utterance fails to convey a meaningful propositional content. I think that this is typically a pragmatic failure; we know what the sentence means, and what would it take for it to be true; the failure consists in lack of relevance. The speaker uttered something that is not relevant to the conversational situation. But perhaps there are other ways to explain what kind of failure is involved here, I will not insist on this.

To sum up so far, the suggestion is that in standard cases, an imperative statement expresses some propositional content about the speaker's intentions, wishes or desires, which is typically rendered true by its expression alone. With some appropriate modifications, this is true of exhortatives in general. Exhortatives are the kind of speech acts by which the speaker intends to motivate some action (or inaction, of course) on part of the hearer by way of recognizing the expression as a motivating reason for action. It is a crucially important feature of exhortatives that the first person pronoun is always implicit in the expression of the exhortative, it always makes a difference who the speaker is, so to speak. When I make a request, for example, it is an essential feature of the expression that it is my request, that it expresses my wishes, intentions, or such.<sup>10</sup> Though rarely made explicit, the first person pronoun is what the exhortative is about, as it were; it makes a quasi-descriptive statement about the speaker's state of mind. Evidence of this we can see by juxtaposing an exhortative with the negation of its implied propositional content. Thus consider the following pairs of statements:

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<sup>9</sup> I have explained this in greater detail in my *Social Conventions*, at 120ff.

<sup>10</sup> There are cases, of course, when one can express the exhortative of another; I may have been ordered to order you to  $\phi$ . I don't think that such cases pose any particular problems. Typically, the second order is a description of the first, the utterance serves as a means of conveying somebody else's wishes etc.



- (a) Close the door & It is not true that I want you to close the door.
- (b) Please lend me \$10 & It is not true that I have a wish/desire to borrow \$10 from you.
- (c) You may leave the room now & it is not true that I have an intention to have/let you leave the room now.

As these pairs of conjunctions show, the juxtaposition of an exhortative with the negation of its implied propositional content, referring to the speaker's state of mind, makes no sense. The conjunctions are incoherent or, at best, perplexing. The expression of an exhortative conveys a certain propositional content that cannot be contradicted without assuming that the exhortative has not been expressed sincerely. When you express an exhortative, *under normal circumstances and sincerely*, you have expressed some propositional content that is rendered true by its expression alone. Once again, I am not suggesting that exhortatives are semantically reducible to the propositional content they express. The suggestion is that such content follows from the kind of speech act exhortatives are and their communicative function. The whole point of an exhortative is to get the hearer to recognize the speaker's state of mind and thereby motivate the hearer to act in certain ways. Exhortatives differ, of course, in the ways in which the speaker's intentions or wishes etc. are taken to be reasons for action and the kind of reasons they are.<sup>11</sup>

All this is true in standard cases, where exhortatives are expressed sincerely and the speaker means what she says. But this is not always the case. There are some non-standard cases where the content communicated by an exhortative speech act implicates (or aims to implicate) something different from what it says. Consider, for example, Susan telling her husband Bob, "Sure, you can go to the football game tonight, I don't mind". Let us assume, however, that Susan does mind, actually, and would much prefer Bob to stay at home with her. There are two ways to deal with such cases, depending on the nuances of the conversational context and similar pragmatic factors. One possibility here is that the condition of sincerity is not fulfilled. Susan's expression was not

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<sup>11</sup> In fact, they may differ in other respects as well. For example, some exhortative speech acts, such as a command or a prohibition, typically presuppose some particular standing of the speaker *vis a vis* the hearer, such as an authoritative position, while others may not require/presuppose any particular standing. See Bach & Harnish *Linguistic Communication and Speech Acts*, at 47-55.

made sincerely. She expressed a permissive speech act but without the requisite sincerity. Another possibility, however, is that in the context of this conversation, given background knowledge of the parties concerned, the expression conveys a different (actually the opposite) content from what the sentence literally means. And this is not unique to exhortative speech acts. There are many instances in which people intend to assert something different from what they literally say, and often this intention is easily recognized by the hearer. A familiar example is the case when, say, Susan asks Bob “have you eaten breakfast?” Under normal circumstances, we would not have thought that Susan wants to know whether Bob has ever eaten breakfast, but whether he had breakfast that morning, or such. In short, like with other forms of linguistic expressions, the assertive content may be affected by various pragmatic features of the conversational situation and in ways which make the content asserted by the utterance different from what it literally states.<sup>12</sup>

Admittedly, there are more complicated cases as well. Suppose, in our example above, that Susan’s permission to let Bob go to the football game does assert what she literally says, and thus, it does convey an intention to let Bob go to the football game, but in fact, Susan also hopes (perhaps against all odds) that Bob will not go.<sup>13</sup> Can we say that Susan’s permissive speech act expresses her wish or intention that Bob go to the game? That might seem incorrect, because we assume that she actually entertains the wish or the hope that he not go. This is a tricky case, but I think the plausible solution here is to maintain that Susan’s communication intentions are in conflict with her hopes or desires. In other words, I think that Susan’s exhortative speech act does express the propositional content that she intends to let Bob go to the game, though she hopes that the opposite will happen. And this is not totally irrational, or unique to exhortatives. A similar problem is familiar from cases in which an agent tries to do something that he knows that he cannot do, or tries to do something because he was told to do it and hopes to show that he cannot. For those who hold the view that trying to do something necessarily involves intending to do it, a similar type of conflict is present in such cases. The intention is in conflict with a hope or an expectation or such. Needless to say, this is not the place to deal with intentions to try

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<sup>12</sup> Elsewhere I tried to explain in some detail why this does not often happen in the law. See “The Pragmatics of Legal Language”.

<sup>13</sup> Or, here is a similar example: I tell you “go ahead, punch me in the nose!”, hoping, of course, that you will not do so.

and how to accommodate these counter examples.<sup>14</sup> My point is that it is not necessarily irrational to express a wish or intention that is in conflict with a hope or desire; and some exhortative speech acts may involve such conflicts. People can intend to convey one thing and hope that the opposite happens. The propositional content, however, is not determined by hopes or desires that accompany the expression. The fact that the speaker entertains hopes or expectations that differ from what she asserts does not, by itself, affect the truth-evaluable propositional content she conveys.

## 2. Truth-evaluable content of laws.

Let us now return to the legal context. When I ask you to close the door, I express a complex wish: I express my wish that you close the door and my wish that you recognize my expression of this wish as a reason to do so. The suggestion so far has been that the propositional content of exhortative utterances consists in the appropriate description of this complex state of mind. Now suppose that the context is slightly different. There is a sign on the entrance door to our department's main office saying: "No entrance after 6PM". Let us regard this sign as a kind of legal or quasi-legal instruction. Well, what makes it a kind of legal instruction? Presumably, the fact that whoever put up that sign was authorized to do so. Suppose it is the department chair. In terms of the propositional content of the instruction, there is no difference between the chair's instruction conveyed by the sign on the door, and his instruction expressed orally, to each one of us one by one. Imagine that instead of putting up the sign, the department chair stood there and issued the same instruction to each of us orally. The propositional content would be exactly the same. It is, of course, just much more efficient to convey that content by putting up the sign.

Now, it is possible, of course, that personally, the department chair could not care less whether anyone is allowed to enter the office after 6PM or not. The instruction reflects his official wish, not necessarily his personal one. There is nothing unusual about that; people often express a certain content in their official roles, which may not reflect anything they personally believe or wish. And this phenomenon is not unique to exhortatives or authoritative roles. For example, customer rep-

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<sup>14</sup> See, for example, Yaffe, *Attempts*, ch 2.

representatives you call up would often tell you that they thank you for your call and appreciate your business. They don't mean to speak for themselves, but for the company they represent. And of course, you would be terribly mistaken to assume otherwise. The same holds about legal and other official authorities. They don't necessarily speak for themselves, personally, that is. Official exhortatives reflect, as they should, the wishes and intentions of persons in their official roles, *qua* officials, and this is normally how we understand such locutions.<sup>15</sup>

Let us take this one step further. Suppose that for some reason the issue is somewhat controversial in the department. Thus the department chair holds a department meeting about this little controversy, and after some back and forth, a resolution is reached not to allow people to enter the office after 6PM. And thus the sign is put up. Would this make any difference with respect to the propositional content of the instruction? Whether the instruction expresses the view of a single "legislator", so to speak, or a collective decision of a multitude, should not make a difference to what the propositional content of it is. But what if different members of the department meant slightly different things when they voted for the resolution? Perhaps some of them thought that the instruction only applies to students, while others assumed that it applies to faculty members as well. These are two different contents, both (let us assume) consistent with an ordinary understanding of the instruction under the relevant circumstances. Which one is it? Can we tell?

Here's what we can say: exhortatives, just like any ordinary proposition, would have some propositional content that is determined by the relevant expression in the context of its utterance, and some content left undetermined or unspecified. Suppose, for example, that somebody points to a particular door and says

(4) "That door cannot be opened."

Clearly, this is a descriptive sentence with some propositional content, which is true or false. But the utterance also leaves some content undetermined; does it mean that the door is locked, or is it jammed? The proposition is consistent with both of these options and, by itself, it does not pick out either. (Unless, of course, the context of the utterance clarifies which option it is; e.g. the utterance might have formed part of a conversation about the poor maintenance of the building, suggesting in

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<sup>15</sup> This is nicely explained by Dan-Cohen in "Interpreting Official Speech".

this case that the proposition asserts that door is jammed, not that it is locked.) And this is true of most utterances expressed in an ordinary conversation, whether the utterance is a straightforward proposition, an imperative, or some other kind of expression. Typically, some content is determined by the expression in the context of its utterance and some content may be left unspecified.<sup>16</sup>

But we have not yet answered the question. And the question is about the relevance of the intentions of the speakers. What we have in the case of the departmental decision is a form of a collective speech, whereby different participants have somewhat different communication intentions about the content of the collective expression. The question is whether these different states of mind affect the propositional content of the collective utterance or not? And here is where we might get in some trouble. In the case of an ordinary propositional statement, the propositional content expressed is typically determined by a combination of the meaning of the words (and syntax) uttered, and some pragmatic determinants in play, such as common knowledge of the relevant contextual background, presuppositions, the maxims governing the conversation, etc. The speaker's intention or state of mind, *by itself*, does not determine what he said. In our example of (4), the speaker may have intended to say that the door is locked. But it is not necessarily what he said. (Unless, of course, some particular contextual background makes it clear that it is what the speaker asserted.)<sup>17</sup>

It might seem, however, that the case with exhortatives is different. If the propositional content of an exhortative is, as I suggest, self-referential, describing the speaker's state of mind, then one might have to conclude that the relevant state of mind is what *determines* the propositional content asserted. And this would be a problematic result. For example, it would entail that in the example of the collective speech, where different participants have somewhat different intentions, wishes, etc., the propositional content would vary with the particular participants involved; that seems like a mess.

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<sup>16</sup> For a much more detailed analysis see, for example, Soames, *Philosophical Essays*, Vol. 1, ch 10. Note that I focus here on assertive content, and for simplicity's sake, do not discuss the kind of content that is implicated, though not quite asserted. On the ways in which implications work in the legal context I have elaborated in my "Can The Law Imply More than It Says?"

<sup>17</sup> Following fairly standard nomenclature, I use the terms "what is said" and "what is asserted" as synonyms, referring to the truth-evaluable content of an expression in a given context.

The conclusion does not follow, however. Just as people can fail to express the exact content of their communication intentions in the case of a regular propositional statement, so they can also fail to express the content they had wished to express in the case of exhortatives. The truth-evaluable propositional content consists in what *is said or asserted* by a speaker in a given context, not by what the speaker intended to say. I am not suggesting that communication intentions are irrelevant; far from it. Under normal circumstances, in an ordinary conversational context, it is precisely the communication intentions of the speaker that we try to grasp by figuring out what is said (and perhaps implicated, etc). But speakers can fail to convey all that they had intended to convey. The speaker's intention, by itself, does not constitute what has been said or asserted. The assertive content of an utterance is determined by what *a reasonable hearer*, knowing the relevant conversational background and context, would infer about the speaker's communication intentions from the words or sentences uttered in that context. A purely subjectivist view about assertive content, namely, that it is fully determined by the communication intentions of the speaker, would entail that one can never be quite sure about what has been asserted by an utterance; after all, we can never be quite sure about what the speaker may have intended to convey. This sounds implausible. Any plausible conception of what assertive content is must make room for the possibility that a speaker can fail to assert by her utterance all that she intended to convey.<sup>18</sup>

Now the question is whether this is different with exhortatives: if the propositional content of an exhortative consists in the appropriate description of the speaker's state of mind, does it mean that the speaker's overall intentions in expressing the exhortative statement are constitutive of the content asserted by it in the particular context of the utterance? The answer is negative. Some intentions are constitutive, of course, but not all. Suppose, for example, that a student walks into my office and I tell him "please close the door behind you". It would be surprising if the student concluded that my request was that he lock the door, even if, for some strange reason, it is precisely what I intended to ask. If I had that intention, I simply failed to convey it. The expression of an exhortative is not an invitation for the hearer to guess what the speaker intended. It is an expression of a wish, and just like any other expression, it can fail to convey the full content intended by the speaker.

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<sup>18</sup> See, for example, Soames, *Philosophical Essays*, chs 10 & 11.

So now you can see where I am heading: the same goes for collective speech. Not all the intentions participants to a collective speech might entertain with respect to its content are determinants of the content asserted by the collective expression, whether the expression is an exhortative or not. Collective speech, just like an individual's expression, can leave some relevant content unspecified. In this respect, exhortative speech acts are not different from straightforward utterances of propositions.<sup>19</sup>

Let me add an important clarification: the discussion above is confined to the question of what is the asserted, truth-evaluable, content of exhortatives. It does not have any direct bearing on the question of how to interpret such expressions when some doubts arise about their contents or application to some problematic case. The latter crucially depends on the hearer's relevant interests or, more precisely, the reasons to pay attention to the utterance. It is quite possible that a hearer would be interested in, or have reasons to figure out, the speaker's intentions, hopes, or expectations, etc., even if they were not quite asserted – or even implicated -- by the speaker in context of the utterance. We often want to know more than what the speaker said or asserted (or implicated). And even in the legal context, such knowledge might be quite relevant to the correct interpretation of the law. But these issues go beyond the focus of this essay. I do not propose a theory of legal interpretation here. My only concern is to provide an account of legal speech acts that would allow us to ascribe truth values to the contents expressed by them. How to complete such content when it is unspecified by the relevant utterance is a separate, and much broader issue, involving many considerations that will not be discussed here.

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<sup>19</sup> One might think that collective speech is different, because we might have cases in which the collective expression does not actually reflect anyone's intentions or preferences. Suppose, for example, that the participants in the faculty meeting had different views, some preferring that nobody allowed in after 4PM, others only after 8PM, etc., and the final resolution is a compromise that does not reflect any particular person's wishes or preferences. But these kind of examples are very misleading. Once a proposition is put to a vote, and gains majority support then, at the very least, it gains the collective intention of the majority that it be adopted, which is to say, there is a collective communication intention expressed by the resolution voted on. The fact that each one of the voters would rather have voted on different resolution is beside the point.

### 3. Imperatives without imperator?

Many legal philosophers and legal scholars reject the view that the content of the law is determined by the intentions of the law makers. There are many variants of such views, and some of them are clearly not relevant to our present discussion. In particular, the age old debate about the potential relevance of legislative intent in statutory and constitutional interpretation is not about the question of what constitutes the propositional content of legal norms. It is a debate about how to interpret the law, that is, complete it, when some relevant issue is left underdetermined or unspecified by the pertinent legal norm in question. As I said in the concluding remarks of the previous section, this is a debate that is not affected by the issues under consideration in this essay.

The relevant objection to the thesis suggested here concerns the question of what is it that constitutes the truth-evaluable content of legal regulations. Some legal philosophers claim that even when the content of a legal norm is clear enough, it is not clear because we know what the law makers intended to convey. The content of the law, they claim, is not determined by the communication intentions of its law makers. But again, it is important to distinguish between two very different, almost diametrically opposed, types of claims here. Some argue that law's overall content is not confined to norms that result from authoritative speech acts; norms or requirements can be legally valid, form part of the law, even if no authority has ever issued them. (A view famously advocated by R.M. Dworkin). Others, however, concede that law is always a result of authoritative proclamations, but they deny that the content of those proclamations is determined by the communication intentions of the law makers. Both of these views, if correct, would raise some problems for the thesis I suggested in sections 2 & 3. So let me take them up, although in reverse order.

Textualism is taken to be the view holding that the content of a law is determined by what the law means, and not by what the law makers intended to say. I have already indicated that in one sense this is true, but in another, quite implausible. Let me clarify. Textualists sometimes give the impression that it is their view that one can understand what the law requires simply by knowing the literal or lexical meaning (and presumably syntax) of the words and sentences in question. But of course, from a philosophical perspective, this makes very little sense. The content determined by the literal meaning of words and sentences in a natural language is rarely sufficient for grasping what was actually said on an



occasion of speech. Such semantic content is, of course, an essential vehicle for conveying communicative content, but the content conveyed is often pragmatically completed, and/or enriched, by various contextual and other factors. Textualists, however, may be willing to take a further necessary step. Justice Scalia, for example, often talks about legal content as determined by what “words mean in the context”.<sup>20</sup> In other words, Textualists seem to admit that the same sentence or expression may mean different things, that is, assert different content, in different contextual settings.

But then one should wonder, why would context make any difference, if not for the purpose of determining the communication intentions of the relevant legal authority? Normally we employ contextual knowledge and other pragmatic determinates in order to grasp what is the content that the speaker intended to convey under the specific circumstances of the utterance. The assumption that we can somehow account for the assertive content of a linguistic expression without paying any attention to speaker’s communication intentions makes very little sense. On the other hand, I think that Textualists are right to assume (if they do) that intentions, by themselves, do not determine what the expression actually asserts. As I mentioned earlier, a purely subjectivist view about assertive content is equally implausible.

So here is where I think we stand: Textualism cannot be plausibly interpreted to maintain that the assertive content of a legal text is detachable from the communication intentions of the authority who issued the regulation. Generally speaking, understanding what someone said is precisely the attempt to understand what they intended to communicate. Textualists would be quite right to maintain, however, that assertive content is partly determined by some objective features of the conversational situation. What is said by an utterance consists in the kind of content that a reasonable hearer, sharing the relevant background knowledge etc., can infer from the utterance in the context of its expression. In other words, Textualists are quite right to assume that a speaker can fail to convey all that she wanted to convey, and we must always make room for that.

The main import of textualism, however, is not about the question of what constitutes assertive content or what makes legal prescriptions true. Textualism’s main point is about the ways in which legal con-

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<sup>20</sup> Scalia, *A Matter of Interpretation*, at 23-25.

tent can be legitimately completed (by judges) when the relevant expression is incomplete or otherwise leaves some content unspecified. As I said earlier, this is a separate issue that I will not consider here.

Now, at the other end of this debate, we find the view that denies, on general jurisprudential grounds, that law is confined to norms and regulations issued by legal authorities. According to Dworkin, for example, a certain normative content may form part of the law even if it does not emerge from an authoritative proclamation. Needless to say, this is not the place to present the full complexities of Dworkin's views about the nature of law and subject them to scrutiny. I have argued elsewhere, on grounds which have nothing to do with the questions we discussed here, that it is implausible to maintain that norms can gain legal validity without being authoritatively enacted as such. Only authoritative decisions make law.<sup>21</sup> However, for the purposes of the present discussion, it may be worthwhile to examine some aspects of this debate regardless of the wider jurisprudential issues involved. In other words, the question is whether we can have an exhortative content that does not express anyone's views about what ought to be done; are there imperatives without imperator?

It might be tempting to think that the answer must be affirmative; after all, we do not think of moral norms or moral requirements as the kind of prescriptions that express anyone's wishes about what ought to be done. Or, at least, many philosophers think that this is the case, and I have no argument with that. So here is one way to see the difficulty. Take a certain prescriptive content, say

(5) "A is required to  $\varphi$  in circumstances C",

and assume that it is both a legal requirement and a moral one. In other words, assume that the exact same conduct is both morally required and prescribed by a legal authority in a given legal system. Let's call them as (5M) and (5L), respectively. Shouldn't one expect that the truth-evaluable propositional content of these two prescriptions, the moral and the legal, are to be exactly the same? After all, the conduct required by (5M) and (5L) is, ex hypothesis, identical.

The answer has to be negative; the propositional content of moral prescriptions is, essentially, different from that of legal prescriptions,

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<sup>21</sup> See, for example, Dworkin *Law's Empire*, and my response in *Philosophy of Law*, chapter 4.

even if the two prescriptions in question prescribe exactly the same kind of conduct. The truth of a moral requirement, I take it, has nothing to do with the views, intentions, or wishes of the person who expresses the requirement.<sup>22</sup> In saying that A is required to (or should, etc.)  $\varphi$ , one is typically pointing to the fact that A has reasons to  $\varphi$ , to some facts that count in favor of  $\varphi$ -ing, or such. But this cannot be the case with respect to the truth-evaluable content of a legal requirement. As we noted earlier, the expression of exhortatives is crucially different, in that it always invokes, albeit implicitly, the first person pronoun; it matters who the speaker is. Whenever the law tells you to do something, it also tells you that you should do it because *the law* says so. And this is the sense in which legal prescriptions are paradigmatic examples of exhortative speech acts.

For another way to think about this, suppose, for example, that (5M) is true, and suppose that (5L) is the counterpart legal norm in a legal system S1, but not in a different legal system S2. Whatever else is the case, we should be able to explain in what sense (5L) is true if S1 governs and false if S2 governs, despite the fact that (5M) is true in both cases. In other words, whatever it is that would make (5M) true has nothing to do with the speaker who expresses it; whereas it is impossible to say whether (5L) is true or not, without knowing who ordered (5L), in what context, etc.

Needless to say, this is not the place to suggest an analysis of the truth conditions or moral prescriptions. My only point here is that it is impossible to account for the truth-evaluable content of legal norms without reference to the origin or character of the norm as a legal one, namely, without taking into account that the same prescriptive content might be true in one legal system and/or at a given time and place, but not another. Law is one of those domains in which the *saying so* (by the appropriate agent under the appropriate circumstances) *makes it so*. In the next section I explore another aspect of this phenomenon, with relation to a structural aspect of legal syllogisms.

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<sup>22</sup> Of course, some philosophers deny this; I am not arguing against expressivism here, just assuming that the objection comes from non-expressivists. Expressivism, or any similar view about the nature of morality, would have no quarrel with the views I defend here.

#### 4. The Lewis Fallacy.

Let me begin with an analogy from truth in fiction. Sherlock Holmes, we are told in the Arthur Conan Doyle mysteries, lived at 221B Baker Street in London. Let us assume, therefore, that there is some sense in which (6) is true:

(6) Sherlock Holmes lived at 221B Baker street, London

David Lewis tells us that the building at 221B Baker street in London at the time was a bank.<sup>23</sup> Let us therefore assume that at the relevant times, (7) is true:

(7) The building at 221B Baker street, London, is a bank.

The inference from (6) and (7) would seem to be:

(8) Sherlock Holmes lived in a bank

But of course (8) is clearly false. What has gone wrong here? Lewis tells us that we made the mistake of moving from a *prefixed* to an *un-prefixed* context. (6) is true only if it is prefixed by an operator such as “In the fiction *F*..”; whereas (7) is true only if taken as un-prefixed (in the real world, as it were). Thus, unless (7) is prefixed by the same operator “in fiction *F*..”, you cannot conclude that (8) is true in the fiction; and because (6) is true only if it is prefixed, you cannot conclude that (8) is true in an un-prefixed sense. Surely, this is quite right (and I will refer to this problem as the *Lewis fallacy*).<sup>24</sup> But now consider a legal example:

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<sup>23</sup> Or, as Lewis, says, there may not have been a building there at all. See “Truth in Fiction”, at 262.

<sup>24</sup> See “Truth in Fiction at” at 262. A number of publications criticized Lewis’s suggestions in this paper, though not on this particular point. See, for example, Byrne, “Truth in Fiction: The Story Continued”. Some philosophers are inclined to deny that fiction has any straightforward propositional content. An alternative view (e.g. Kendal Walton’s, 1990) regards fictional texts as invitation for the hearer to pretend that they believe what is said, or something along those lines. I am not claiming or assuming that these views are wrong. To account for what counts as propositional content of fiction, we would need to tell a much more complicated story. None of this, however, affects my arguments here. I am only using truth in fiction as an example of a prefixed context.

(6\*) It is a misdemeanor, punishable by a fine of up to \$100, to use a wireless telephone while driving a motor vehicle without a hands-free device.

(7\*) John was talking on his wireless telephone, without a hands-free device, while driving his car.

The inference from (6\*) & (7\*) is

(8\*) John committed a misdemeanor punishable by a fine up to \$100.

Now of course, the legal expression used in (6\*), “it is a misdemeanor to  $\varphi$  ...” should be construed here as an exhortative, actually expressing the prescriptive content that one ought not to  $\varphi$ , or something along those lines. Even so, the inference seems to be a perfectly valid. In fact, it is the kind of inference that is characteristic of countless legal syllogisms. But, on the face it, we have committed here the Lewis fallacy of moving from prefixed to an un-prefixed context: (6\*) must be prefixed by an operator such as “In the legal system  $L$ ... (at time  $t$ , location  $x$ , etc.)...”, whereas (7\*) would seem to be un-prefixed, it is a straightforward description of an event that happened in the world. So how can we correctly infer (8\*)? Notice that it doesn’t help to construe (8\*) itself as prefixed or contained under “In legal system  $L$ ....”, which is probably the right way to interpret the conclusion. Sherlock Holmes did not live in a bank either prefixed “in Fiction  $F$ ...” or un-prefixed. So if the inference about Holmes’s lodging is unwarranted, so should be the inference about legal results such as (8\*), whether the conclusion is understood as prefixed or not.<sup>25</sup>

Why should we think that (6\*) must be taken to be prefixed? Although not expressed in these terms, the idea that sentences expressing the content of a legal norm refer to something that is true, if it is, only from a certain point of view, that is, from the perspective of a given legal

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<sup>25</sup> It is tempting to think that the problem here is easily avoidable if we formulate the legal inference in conditional terms. We can reformulate (6\*) as saying that “If  $X$  does  $\varphi$ ,  $X$  is punishable ....”; then (7\*) can be construed as a statement to the effect that the antecedent obtains, and (8\*) would thus follow as a valid conclusion. The problem is that this move avoids the problem only if (6\*) is construed as a predictive statement and (8\*) as a factual-predictive conclusion; otherwise, we are back to the same problem of mixing a prefixed conditional with an un-prefixed antecedent. Either way, as we shall see shortly, the antecedent has to be incorporated into the prefixed context.

system, has been widely accepted in jurisprudence, if not earlier, at least since Kelsen has brought this to our attention.<sup>26</sup> In other words, a sentence like (6\*) expresses a particular legal requirement or prescription which must be a requirement or prescription of a particular legal system in place. When people say that “X is the law”, they necessarily mean to say that X is the law of some legal system or other at a given time and place. A given norm is a legal one iff it forms part of a particular legal system and only as part of that system, at the time and place where it applies. Therefore any statement that expresses the content of a particular legal requirement conforms to a formula that must be prefaced by “*According to the law in S at time t...*”. It makes no sense to talk about particular legal requirements or legal contents unless they are taken to be prefixed. Now, of course, there are many other ways to formulate this simple idea, without using Lewis’s terminology. We can speak in terms of “true *in S* at time *t...*” or “it is the law in *S* at time *t*”, or any other formulation which would express the same idea, namely, that the truth about the content of legal norms is necessarily relative to some system or other. This is what I mean by suggesting that legal statements are necessarily prefixed.

Now, you might think that there are prefixes which create a Lewis-type fallacy, and others which don’t. And that is quite right. Let me call them *closed* and *open* prefixes, respectively. Open prefixes are such that they can occur in valid arguments with un-prefixed statements to yield valid conclusions. For example, “According to the laws of nature ...”<sup>27</sup>. So what is it about closed prefixes that they create the Lewis fallacy? One suggestion might be to look at the semantics of the prefix. It is probably implicit in the semantics of scientific prefixes – “According to the laws of nature...” -- that they range over un-prefixed statements to yield valid conclusions. Whereas it is part of the meaning of a prefix such as “according to fiction *F...*” that it ties the truth-value of the statement to be contained within a world demarcated by the prefix, that is, the

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<sup>26</sup> Kelsen, of course, expressed this idea in terms of the necessity of presupposing the Basic Norm. See, for example, Kelsen, *The Pure Theory of Law*. Joseph Raz endorsed a similar view, expressed by his notion of “statements from a legal point of view”; see his *The Authority of Law*, pp. 153-157. And see my *Philosophy of Law*, ch 1 where I explain this in much greater detail.

<sup>27</sup> According to some meta-ethical views, the same holds for “according to morality...” But of course, this is highly controversial in meta-ethics. Modal operators, such as “it is necessarily the case that ...” might be another example of open prefixes.

world of fiction  $F$ . This is probably true, but it may not be enough. Still, you may wonder, what makes it the case that some prefixes are closed? The suggestion that I will endorse and try to support throughout this essay is that some prefixes are such that they designate a *constitutive relation* to the truth-values of the statements prefixed by them. A statement is true in a fiction, if it is, because the fiction states it. The saying so makes it true, so to speak. If a fictional text says that “the moon is green” then it is true, *in that fiction*, that the moon is green, and it is true *because the text says so*. Similarly, a prefix of a game, say, “according to [the rules of] chess it is the case that  $p$ ”, makes it the case that  $p$ , or that  $p$  is true, within the game. And of course,  $p$  is true in chess (if it is) because its truth is constituted by the rules of the game.

In short, closed prefixes are those (but probably not only those) in which a constitutive relation obtains between certain essential features of the world/context designated by the prefix, and the truths of the statements expressed about that world/context. So now I hope we can see why it would make sense to assume that the legal prefix is also closed. A certain legal content is true, if it is, in a given legal system  $S$ , (at time  $t$ , etc), because the law in  $S$  *says so*. A legal prefix, in other words, is closed because it ties the truth-values of statements prefixed by it to the world designated by the prefix itself. In this respect, law is very much like fiction, or structured games; saying so, in the appropriate ways, makes it so in the relevant context.

A natural solution to the Lewis fallacy in the legal case would be to maintain that the entire inference – (6\*) to (8\*) -- is contained within the prefixed context, which is what makes the inference valid. The idea is that the minor premise, (7\*) is also prefixed. In other words, (8\*) follows as a valid conclusion only if (7\*) is understood as prefixed by the operator “According to the law in  $S$  ...”. If and only if the action committed by John amounts to “using a wireless telephone while driving” *from a legal point of view, or in the eyes of the law, or such*, then (8\*) follows.

Before I try to explain this in greater detail, let us return to Sherlock Holmes for a moment. Consider the following inference:

- (9) Sherlock Holmes lived in London.
- (10) London is a city in the United Kingdom
- (11) Sherlock Holmes lived in the United Kingdom.

We have the same structure here as in (6) to (8), but a very different result. (9) is clearly prefixed by “In the fiction *F*....”, whereas (10) seems to be un-prefixed, it is just a fact in the real world that London is in the UK. The conclusion, however, is quite right. Any sensible reader of the Conan Doyle mysteries would have assumed, and rightly so, that Sherlock Holmes’s escapades take place in the UK.<sup>28</sup> And, crucially, this would be the case even if the United Kingdom (or England, or Great Britain) is never explicitly mentioned in the text. So what is it that makes the inference of (9) to (11) valid, as opposed to (6) to (8) which is not?

The solution has to be this: Although (10) seems to be an un-prefixed proposition, in the context of this inference it is not; (10) is incorporated in the fiction by implication. The assumption here is that fictions typically incorporate by implication an indefinite, though limited, number of facts (or factual assumptions) about the world, at least those that are relevant, and can be assumed to be salient and well known to potential readers. Every reasonable reader of the Sherlock Holmes mysteries can be expected to know that London is a city in the UK, and thus, even if the text does not mention this explicitly, it can be regarded as incorporating it by implication. (Assuming, of course, that there is nothing in the text to suggest otherwise.) Thus we avoid the Lewis fallacy; the entire inference of (9) to (11) should be regarded as contained within the prefixed context. Similarly, even if the mysteries never refer to Sherlock Holmes’s nose, we can assume that he had one (and only one), in virtue of the stated fictional fact that he is a man. These kind of unmentioned facts can be said to be incorporated in the fiction by implication and thus, for inferential purposes, they can be regarded as prefixed statements.

Now let us return to the legal case. Can we similarly say that the inference from (6\*) to (8\*) is valid because (7\*) is incorporated into the legal context by implication, and thus the inference as a whole is con-

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<sup>28</sup> To be sure, I am not suggesting that it is impossible to offer an interpretation of the Holmes stories according to which they take place in a parallel universe, or on planet Krypton, etc., where London is not in the UK. I am suggesting, however, that those of us who assume that the Holmes mysteries take place in England would not be making any obvious mistake. And that’s all we need for now. If you have doubts about the example, others can be thought of, e.g. that Sherlock Holmes had a nose, or a brain, etc.



tained within the prefixed context? The problem with this solution is that it would require us to assume that all the facts in the world are incorporated into the law by implication and contained within its prefixed context. Since any fact or event in the world might be relevant to some legal inference or other, there cannot be a limit to the kind of facts that are contained within the prefixed context of the law. Notice that this is definitely not the case with fiction. There are countless inferences that would not be warranted about Sherlock Holmes, even if they rely on true facts (e.g. consider our first example about the bank on Baker street.) In the case of fiction, we are willing to attribute some factual assumptions to be incorporated within the fictional world, as it were, only under certain conditions; such as certain assumption of common knowledge, salience, relevance, lack of any contrary indication in the text, etc.<sup>29</sup> In the legal case, however, there seems to be no room for such constraints. Which, again, would seem to suggest that we must assume that the law incorporates by implication all the actual facts in the world.

Now, there is a sense in which that is true, but to make it plausible, we must note a crucial constraint: facts have to be incorporated into the law by some stipulation or other. To be sure, I am not suggesting that every legal inference has to incorporate the facts it relies upon to be prefixed by an explicit statement to that effect; that usually happens when the legal classification of the relevant facts is controversial. Otherwise, the stipulation is mostly implicit or presupposed.<sup>30</sup> Notice, however, that even if the legal classification of the relevant facts is not contested or controversial, such classifications are always *contestable*. In principle,

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<sup>29</sup> These conditions can be controversial, of course. For example, in one of the Holmes stories, *The Adventure of the Speckled Band*, the culprit is a snake, a Russell viper, that has climbed a rope to kill his victim. As it happens, the Russell viper is not a constrictor and cannot climb ropes. Does it matter? Is this the kind of fact readers of Holmes mysteries are supposed to know? Also, note that the extent to which unstated facts are incorporated in a fiction by implication is partly genre-dependent. Some fictional genres, such as realistic novels or detective stories, etc., are such that they tend to be rather generous with implicit incorporation of unstated facts, while other genres, such as surreal fiction, probably less so.

<sup>30</sup> Lawyers often talk about this issue in terms of “finding of facts”; they recognize that legal inferences have to rely on legal finding of facts, that is, facts legally established for the purposes of the relevant inference. However, this notion of an authoritative finding of fact is ambiguous between the finding that something actually happened in the world, and the finding that it conforms to the relevant legal categorization of it. My discussion in the text concerns the latter issue.

it is always possible to contest the incorporation of an alleged fact into the legal syllogism by claiming that in the eyes of the relevant law, E [the action or event in the world] does not *count as* X [the fact as required by the law]. Either way, the stipulation is constitutive. In other words, whenever we have a legal argument of the form --

(a.) According to the law in  $S$  (at time  $t$  etc.) {if X [fact] then Y [legal result]}.

(b.) X

(c.) According to the law in  $S$ , {Y}.

-- the minor premise, (b.), is also prefixed. Typically, we just assume that to be the case, we often take it for granted in the relevant conversational context. But the presupposition is essential. In other words, the complete inference here has another premise, often hidden (*viz.*, presupposed), that the act or event in the world (un-prefixed) *counts as* X, legally speaking. Thus the complete inference looks like this:

(a.) According to the law in  $S$  (at time  $t$  etc.) {if X [fact] then Y [legal result]}.

(b1.) E [something that happened in the world]

(b2) According to the law in  $S$ , E counts as X,

therefore, X

(c.) According to the law in  $S$ , {Y}.

An objection comes to mind here. Consider the case of John using his mobile phone while driving. One is very tempted to say that, given the legal requirement of (6\*), John committed a misdemeanor whether it is authoritatively determined that he did, or not. After all, we want to say that he committed the offense even if he is never caught; he violated the law. Quite right. Nothing in what I suggest here, however, prevents us from alleging that John committed an offense even if he is never caught. The only point to bear in mind is that when we make such a claim, we presuppose that the minor premise is incorporated into the legal context; that is, we presuppose that in the eyes of the law or, from a legal point of view, he used a mobile phone while driving (and thus to

have committed an offense).<sup>31</sup> In other words, the inference from (6\*) and the relevant facts entails (8\*) only if (7\*) is legally stipulated, that is, incorporated within the prefixed context. Not all that much unlike in fiction, saying so in the law makes it so; and perhaps more than it might have seemed obvious.<sup>32</sup>

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<sup>31</sup> Suppose, for example, that John talked on his mobile phone using the phone's built-in speaker, thus not holding it up to his ears; surely he can contest the stipulation of the minor premise here, arguing that what he did does not count as violating the law. And a court may need to decide on that.

<sup>32</sup> I am grateful to, Scott Soames, Gideon Yaffe, Mark Schroeder, Joseph Raz, Ron Garet, and the participants of the Analytical Legal Philosophy Conference (San Diego, April 2011) for very helpful comments on earlier drafts.

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