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Legislation as Commitment –

A Defence of the 'Standard Picture' of Statutory Law on the Basis of a Commitment-based Theory of Communication

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Declaration

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Abstract

According to the Standard Picture of how law works, the content of the law that is created by legal texts such as statutes and constitutional provisions is determined by the *meaning* of these texts. Most proponents of this picture claim more specifically that the relevant notion of meaning in play is the *communicative content* of legal texts and that communicative content is itself determined by considerations of the *intentions* of legal authorities. In recent years, the Standard Picture has become the subject of heated philosophical debate. Focusing on statutes as the paradigmatic type of legal texts, this thesis aims to contribute to this debate in two central ways. First, it argues that the aforementioned 'intention-based' versions of the Standard Picture lack convincing responses to three important objections that have been raised by critics. First, they lack an adequate account of how legislative bodies can be reasonably ascribed the intentions that they would need according to such versions. Second, they fail to explain important aspects of legal practice. Third, they provide at best a parochial theory of the content of the law that is generated by statutes. The second contribution is to provide a more sustained defence of the Standard Picture by developing a new 'commitment-based' version of this view. This version is based on an alternative theory of communication and claims that communicative content is not determined by considerations of intentions but rather by the *commitments* that are incurred by means of communicative acts. It is argued that this version can deal with the objections that have been raised by critics and therefore provides a more robust version of the Standard Picture.

Contents

Introduction 1

1. The Standard Picture 21

2. Meaning, communication, and intention-based versions of the Standard Picture 42

3. Objections to the Standard Picture 69

4. The commitment-based theory of communication 142

5. The commitment-based version of the Standard Picture 185

Conclusion 236

References 238

Introduction

In his seminal philosophical study of conventions David Lewis writes that "[i]t is the profession of philosophers to question platitudes that others accept without thinking twice" (1969, p. 1). Although this is probably not anywhere close to a full job description and was not intended as one by Lewis, he is surely right that at least one important task for philosophers is to critically examine views, claims or – as he puts it – "platitudes" that are taken for granted. Following Lewis's lead, in this thesis I also want to pursue the task of critically examining a view that, even if perhaps not a platitude, people often take for granted or "accept without thinking twice". In recent jurisprudential debates theorists have often – and quite fittingly – referred to this view (I will also occasionally speak of it as a "theory", "thesis", etc.) as the "*Standard Picture*" (henceforth: "SP") of how law works.[1]

What is SP? According to Mark Greenberg, answering this question is complicated by the very fact that SP is largely taken for granted (2011a, pp. 41-42). Being "treated as […] a common starting point too obvious to be acknowledged" (p. 42), it "is not articulated by its adherents" (p. 42) such that it is not clear how exactly it is to be spelled out. This problem manifests itself in the fact that, when prompted, theorists tend to formulate SP in different ways, many of which will be considered in the course of this thesis. However, since Greenberg has done more in recent years than any other theorist to draw attention to the widespread tacit acceptance of SP – as well as to its supposed defects (2011a; 2011b; 2017a; 2017b; 2020) – his own proposal is a reasonable starting point:

> A common implicit presupposition – *the Standard Picture* – is that the content of the law is just, to put it crudely, whatever the law books say. More precisely, the idea is that the content of the law is constituted by the ordinary linguistic

[1] Although "Standard Picture" is the most commonly used label (e.g., (Alexander, 2021; Baude & Sachs, 2017; Greenberg, 2011a; Smith, 2019), it is not the only one. Other labels to refer to SP or a specific version thereof are "meaning thesis" (Smith, 2016), "communication theory" (Greenberg, 2011b) or "communicative-content theory of law" (Asgeirsson, 2020; Greenberg, 2011b). I use "Standard Picture" (or rather the acronym) because it is most commonly used and because I do not want to suggest that the view must necessarily be associated with communicative content.

> meaning of the authoritative legal texts. More sophisticated versions, recognizing that there are different types of ordinary linguistic meaning, hold that the content of the law is constituted by a specific type of linguistic meaning of the relevant text. (2017a, p. 300)

The rough and general idea that SP is associated with is most succinctly captured by Greenberg's "crude" formulation, namely that the content of the law is simply whatever an authoritative legal text says it is. To illustrate this idea, consider the example of s. 1(1) of the U.K. Marriage (Same Sex Couples) Act 2013: "Marriage of same sex couples is lawful." Given that this legal text says that marriage of same sex couples is lawful, SP claims that the content of the law must also be that marriage of same sex couples is lawful, i.e., there must be a legal norm to this effect.

But although this might appear straightforward at first, Greenberg explains that the situation becomes more complicated once we try to spell out SP with a higher degree of theoretical sophistication. More specifically, because "whatever the lawbooks say" is understood in terms of ordinary linguistic meaning and because there are different kinds of ordinary linguistic meaning, sophisticated versions of SP must specify which type is relevant. (For the sake of brevity, in the following I will simply speak of "meaning", as Greenberg himself has done elsewhere (e.g., (2011a, p. 42)). The type of meaning that SP is most often associated with and that will play a central role in this thesis is meaning that is *communicated* (e.g., (Alexander, 2021; Greenberg, 2011b; Marmor, 2014), but other kinds such as 'literal' meaning are also commonly distinguished and might in principle be relied upon by specific versions of SP. Although not highlighted by Greenberg (at least on this occasion), similar complications arise with regard to all notions that are central to SP. To bring this out, it is helpful to name these notions more explicitly in a statement of what SP is a view about. SP is a view about (1) *the relation* between two aspects of an (2) *authoritative legal text*: (3) *the content of the law* that the text generates and (4) *the meaning* of this text.

That the relevant *relation* also allows for different conceptualizations is manifest in Greenberg's own characterization since he says on one occasion that the content of the law

"is" what the text says but then goes on to say that it is rather "constituted" by it (or rather by the text's meaning). Although it is intuitively clear that meaning *determines* the content of the law in some way it remains unclear how exactly this determination relation is to be conceptualized: it might be identity, constitution or perhaps even some other relation. When it comes to the relevant *authoritative legal texts* Greenberg's general statement suggests that SP applies to all such texts. However, the fact that there is a broad variety of them, such as statutes, constitutions, contracts, judicial decisions and so on, leaves theoretical room for a version of SP that is more limited. Indeed, I already want to specify at this point that this thesis only discusses SP as it applies to statutes, the probably most paradigmatic kind of legal text. This limitation will be explained and further justified towards the end of this introduction. Finally, there is probably an intuitive understanding of the notion of the *content of the law* that a text generates: the law is a normative construct, and the content of the law must therefore concern the content of this construct. We will see, however, that it is not a trivial matter to make precise what exactly this content is.

One must be aware of these complications from the very beginning but because their resolution requires a discussion that would be too extensive for the introductory purposes of this chapter, for the time being I propose to work with a provisional characterization of SP (as it applies to statutes). This characterization is meant to remain flexible with regard to how specific notions are conceptualized and is inspired by Greenberg's:

SP (provisional): The content of the law that is generated by a statute is determined by the meaning of this statute.

Let me present some evidence to indicate that SP is really widely taken for granted, i.e., that it is the "common implicit presupposition" that Greenberg claims it to be. A first observation that supports this claim is that numerous experts such as Larry Alexander (2021),

William Baude and Stephen Sachs (2017), Barbara Baum Levenbook (Levenbook, 2021), Andrei Marmor (2014, p. 14) and Dale Smith (2019) have endorsed the label "Standard Picture" for the kind of view that Greenberg discusses, i.e., they accept that SP is correctly referred to as such. One specific sense in which these theorists consider the label to be adequate is that the view under consideration is considered to be widespread among legal *theorists*. For instance, Greenberg claims that "[SP] is a picture of how law works that most legal theorists are implicitly committed to and take to be common ground." (2011a, p. 39), and Smith – referring to SP on this occasion as "the meaning thesis" – claims "that many academic commentators […] accept the meaning thesis" (2016, p. 228). In fact, SP is even said to unite many legal theorists who otherwise have fundamentally different theoretical convictions, such as legal positivists and their opponents, e.g., natural law theorists. For example, Levenbook says that it is a view "that many legal positivists – and non-positivists – accept" (2021, p. 743) and Greenberg explains that "SP is assumed – and assumed to be common ground – by many, though not all, participants on both sides of that debate" (2011a, p. 62). Importantly, many of these theorists, such as Levenbook, Smith, Baude and Sachs and, of course, Greenberg himself, accept that SP is widely taken for granted even though they themselves are highly sceptical of it. Hence, even sceptics of SP agree that most others endorse it.

But SP is not only said to be the standard view among legal theorists. For instance, Marmor refers to it more generally as "commonsense" (2014, p. 12), and Alexander claims that "the SP account […] is the account of law that most ordinary people, as well as most lawyers and judges, would, when pressed, probably give." (2021, p. 188). These statements both suggest that SP is also assumed to be the standard view among ordinary people. In addition, and perhaps more importantly, Alexander also claims that SP is widespread among legal professionals, most notably judges. Specific evidence in favour of the claim that judges do in fact endorse SP is further provided by Smith when discussing SP in the particular

context of the Australian legal system. He says, for instance, that SP is manifest in "the High Court's claim that the ultimate aim of statutory interpretation is to ascertain the meaning of the words contained in the provision being interpreted" (2016, p. 228). This claim indicates that the High Court takes SP for granted because statutory interpretation is arguably supposed to give effect to the content of the law and the High Court claims to do so by identifying the statute's meaning (2016, pp. 232-233).[2] An example of the court's statements that Smith provides in support comes from *Thiess v Collector of Customs*. Here, the court stated that "[s]tatutory construction involves attribution of meaning to statutory text"[3] and, in doing so, relied on its earlier opinion in *Commissioner of Taxation v Consolidated Media Holdings Ltd*:

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. […] Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.[4]

This strongly suggests that the High Court endorses SP because it is stated that all that is necessary to give effect to the law by means of statutory construction is to identify the meaning of the statutory text, which, according to the court, involves considering this text in its context. Given that it is Australia's apex court, the High Court's statement provides an important indication of the view that is adopted by high-ranking judges in Australia.

But claims of this type are by no means limited to Australian judges. For example,

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[2] Smith's claim and some of the statements by legal officials that will follow indicate that it is common to understand "statutory interpretation" or "construction" as a practice that is aimed at giving effect to the law and its content by identifying the meaning of a statute. I will follow this understanding in what is to come. However, I acknowledge that these terms are sometimes also used in other ways. For example, theorists such as Marmor (2014, p. 108) and Timothy Endicott (2012, p. 109) only use "interpretation" to refer to what is done or required in cases in which the meaning of a statute or other text is unclear. A related but slightly different use of the term can be found in the work of by Hrafn Asgeirsson: "legal interpretation is the act of developing the law in the face of indeterminate/inconsistent legal content or a particularly problematic result." (2020, p. 4). I take it that on Marmor's and Endicott's use "interpretation" can but does not have to develop the law because an act of interpretation in which meaning is unclear might still be aimed at *clarifying* (and hence identifying) meaning and therefore also the law. To avoid misunderstanding, in the following I will highlight potential differences in use where they appear likely and might affect the points that are made.

[3] *Thiess v Collector of Customs* [2014] HCA 12 [22].

[4] *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 [39] (citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 [47]).

prominent American judges who adopt different methods of legal interpretation regularly claim to do so in order to identify the meaning of the relevant text. To illustrate this, consider the following statements:

> We do not inquire what the legislature meant; we ask only what the statute means. (Holmes, 1899, p. 419)
>
> If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: 'Law.'" (Bork, 1997, p. 145)
>
> We can best reach the meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been present to them at the time.[5]

The first statement is made by Oliver Wendell Holmes, one of the most prominent judges in the history of the U.S. Supreme Court, in his article 'The Theory of Legal Interpretation'. Here, he expresses leanings towards what is known as a 'textualist' approach by saying that judges should not give effect to "what the legislature meant", and by which he is referring to what a legislature "wants" (1899, p. 419) or intends, but rather to what the statute (i.e., the *text*) means. This, he then claims, is determined by the sense of the text's "words according to the usage of the normal speaker of English under the circumstances" (p. 419).[6] The second statement comes from Robert Bork, former Solicitor General of the United States and judge at the Court of Appeals. Contrary to Holmes, Bork takes a manifestly 'intentionalist' position because he claims that the meaning of the U.S. Constitution, "like

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[5] *Borella v Borden Co*., 145 F.2d 63, 64 (2nd Circuit 1945).

[6] A similar statement by Holmes is quoted by Antonin Scalia: "Only a day or two ago–when counsel talked of the intention of the legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." (cited in Scalia, 1997, p. 22-23). Scalia himself is of course another highly prominent U.S. Supreme Court judge and textualist who emphasizes that interpretation is primarily aimed at identifying the meaning of a text: "By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations." (1997, p. 14); "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." (p. 23). However, I will briefly highlight towards the end of this introduction that Scalia also wants to leave some room for considerations of intention in interpretation (p. 17).

all other law", is "the meaning the lawmakers intended" and that it is this meaning which is "binding", in the sense that it is law. Finally, the last statement is from Learned Hand, another prominent judge in the history of the United States, and it displays a 'purposivist' approach because it claims meaning to be best reached by reference to the "underlying purpose" of the statute. Of course, there is a lot to be said about the dispute between textualists, intentionalists and purposivists and I will briefly come back to it towards the end of this introductory chapter. But the point that is relevant here is that despite these disagreements about what the 'actual' meaning of a legal text is and how it is to be identified, all of the above assume that what is to be identified in order to give effect to the law (and its content) *is the meaning* of statutes (and potentially other legal texts), which suggests that they accept SP.[7] Arguably, this characterization of the dispute is even accepted by Ronald Dworkin, a prominent critic of SP *avant la lettre*, who notes in his well-known discussion of the dispute between judges with textualist and intentionalist (or purposivist) leanings in *Riggs v Palmer* that they "disagree[d] about what [the statute] actually means, about what law it has made" (1986, p. 16) and that they had "a dispute about what the law was, about what the real statute the legislators enacted really said" (p. 20).[8]

I take the foregoing points and especially the fact that even critics of SP agree with them to sufficiently justify the assumption that SP deserves the label of "the Standard Picture". Obviously, this is not to say that everybody agrees with SP. Indeed, in recent years SP has become the subject of an extensive philosophical debate and I have already mentioned a number of sceptics, namely Baude and Sachs (2017), Dworkin (1986) Greenberg (2011a;

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[7] Similar considerations apply to the literal rule, the golden rule and the mischief rule that are commonly used by courts in the U.K. According to the literal rule, "[w]here the meaning of the statutory words is plain and unambiguous it is not […] for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning", *Dupont Steels Ltd v Sirs* [1980] 1 All ER 529, 542. The presumption of SP is evident in this statement. The golden rule is that "[t] he grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency", *Grey v Pearson* [1857] 6 HLC 61, 106. Arguably, SP is also manifest here because interpretations that lead to absurdity, repugnancy or inconsistency are supposed to be avoided since they are unlikely to represent what an authority meant (ibid.). Similar considerations apply to the mischief rule according to which a text is supposed to be interpreted against the background of the presumed mischief that it was meant to address, *Heydon's Case* [1584] 76 ER 637.

[8] *Riggs v Palmer*, 115 NY 506 (1889).

2011b; 2017a; 2017b; 2020), Levenbook (2013; 2021) and Smith (2016; 2019; 2021). They are further joined by theorists such as Larry Solum (2013), Nicos Stavropoulos (2013) and several others. On the opposite side, we have a camp of declared philosophical proponents of SP (on top of the many who simply take it for granted). To be sure, the exact approaches that are adopted in this camp diverge in various respects (many of which will be discussed in this thesis), but theorists who can be associated with it include Alexander (2021) and Marmor (2014), as well as Hrafn Asgeirsson (2016; 2020), Richard Ekins (2012), Jeffrey Goldsworthy (Ekins & Goldsworthy 2014; Goldsworthy 2019) Stephen Neale (unpublished a; unpublished b) Scott Soames (Soames, 2009; 2011; 2013) and others. Given that there is a rich existing literature on SP, the critical examination to be provided in what follows is certainly not meant to be the first of its kind. Instead, my ambition is to build on the ongoing debate and to contribute to it in two central ways. First, I want to argue that although existing proponents of SP have successfully addressed some of the objections that sceptics have put forward, there are still some important objections that their accounts cannot successfully deal with. Second, I want to provide a more sustained defence of SP by developing a new version of it that can resist these objections.

To get a first grasp of what this new version shares with existing versions and how it differs from them, it must be kept in mind that most existing versions spell out the notion of meaning that is at play in SP in terms of what a statute *communicates*. I refer to this type of meaning as “communicative content” and to versions of SP that invoke it as “communicative versions of SP”. The version of SP that is proposed in this thesis is also a communicative version of SP. However, it departs from existing communicative versions when it comes to the question of how communicative content is determined. Existing communicative versions of SP rely on theories of communication where communicative content is determined by the *communicative intention* of the speaker (or, alternatively, the communicative intention that is most reasonably attributed to the speaker; more on this alternative below). The notion of

a communicative intention is explored further in later chapters but for the time being it can be thought of as the intention to convey something to one's addressee.[9] Theories of communication that explain communicative content in this way have been developed by the philosopher of language Paul Grice (1989) and his followers (e.g., (Bach & Harnish, 1979; Neale, 1992; Schiffer, 1972; Sperber & Wilson, 1995; Strawson, 1964) and will be referred to as "intention-based theories of communication". Accordingly, communicative versions of SP that rely on such theories of communication will be referred to as "intention-based versions of SP". Such versions claim that the content of the law that is generated by a statute is determined by the communicative intention of the legislature (or the communicative intention that is reasonably ascribed to the legislature). To illustrate this with our example from above, the claim is that for the content of the law that is generated by s. 1(1) of the Marriage Act to be that marriage of same sex couples is lawful, the legislature must have (or be reasonably ascribed) the intention to communicative that marriage of same sex couples is lawful.

As noted, the existing, intention-based versions of SP will be argued to be vulnerable to a number of important objections that have been put forward by sceptics. These objections will be explained shortly. But instead of taking them as reasons to reject SP, as sceptics have done, I argue that they motivate a version of SP that relies on an alternative type of theory of communication. The central notion in this type of theory is *commitment* and I will therefore refer to it as a "commitment-based theory of communication".[10] For now, commitment can be thought of as a normative constraint on people's behaviour and

[9] Where it is of no particular importance if the relevant intention is communicative or not or where context makes it clear that I am referring to communicative intentions rather than other kinds of intention, I will often simply speak of "intentions".

[10] The division between intention-based theories and commitment-based theories of communication and corresponding versions of SP should of course not be understood as excluding the possibility that a theory that belongs to one of these camps invokes both notions in its explanation, communicative intention and commitment. Indeed, we will see that this is not uncommon (e.g., proponents of intention-based versions of SP such as Asgeirsson (2020) and Goldsworthy (2019) also invoke the notion of commitment). What divides the accounts is rather which notion they claim to be the central notion in the determination of communicative content.

according to commitment-based theories of communication it is the commitment (or commitments) that is undertaken or incurred through a communicative act that determines its communicative content. One prominent proponent of a commitment-based theory of communication is Robert Brandom (1983; 1994) but there are also many others (e.g., Alston, 2000; Carassa & Colombetti, 2009; Clark, 1996; 2006; Drobňák, forthcoming; Garcia-Carpintero, 2015; Geurts, 2018; 2019a; 2019b; Habermas, 1998; Kukla & Lance, 2009; Lance, 2001; Lance & Kremer, 1994; Loeffler, 2017; Michael, 2022; Scharp, 2008; Walton & Krabbe, 1995; de Brabanter & Dendale, 2008). A version of SP that relies on a theory of this type will be called a "commitment-based version of SP" and it claims that the content of the law that is generated by a statute is determined by the commitment that is incurred in virtue of this statute. Or, to put this in terms of our example, according to a commitment-based version of SP for the content of the law that is generated by s. 1(1) of the Marriage Act to be that marriage of same sex couples is lawful the legislature must incur a commitment to act on the proposition that the marriage of same sex couples is lawful. This doctoral thesis develops such a version and argues that it allows for a more robust defence of SP than the existing, intention-based versions.[11]

This was a very brief outline of what this thesis is meant to achieve.[12] My objective for the rest of this chapter is to make this outline more concrete by providing summaries of the five chapters that contain the main arguments of the thesis and by clarifying what lies

[11] I do not purport to be the first to apply a commitment-based theory of communication to legal language and discourse. For example, theorists such as Matthias Klatt (2008), Damiano Canale (2017) and Giovanni Tuzet (Canale & Tuzet, 2007) have made use of Brandom's theory in this way. However, to my knowledge, existing approaches have not discussed the commitment-based theory of communication in relation to SP, let alone tried to defend SP on this basis or argued against conceptualizing SP in terms of an intention-based theory of communication. My view also differs from these views to the extent that it considers a broader variety of contributions to commitment-based theorizing about communication.

[12] Note that although I have never defended an intention-based version of SP as such (or SP more generally), in some of my previous publications I have used intention-based theories of communication to analyse certain aspects of the communicative content of legal texts and the content of the law that they generate (Shardimgaliev, 2016; 2019; 2020). As should be clear, I no longer believe that this is the most adequate theory of communication for that purpose, but my hunch is that the main conclusions that are reached in these publications might also be reached on the basis of a commitment-based theory of communication. However, it must be left for another occasion to explore whether this is in fact true.

beyond the scope of the current study. I start with the summaries. Chapter one provides a more precise characterization of SP though it leaves discussion of the notion of meaning to later chapters. More specifically, after further specifying the difficulties that are associated with the task of characterizing SP and explaining how I want to go about this task, the chapter focuses primarily on the notions of the *content of the law* that is generated by a statute and the *relation* between this content and the statute's meaning. The *content of the law* that a statute generates is argued to consist in the content of the legal norms (i.e., the content of legal rules, obligations, rights, etc.) that a statute creates, rather than in legal norms themselves, as theorists sometimes claim. I also argue that we can remain flexible to a certain extent with regard to the exact *relation* that holds between meaning and the content of the law, as long as it is ensured that meaning determines the content of the law in such a way that there is a correspondence (or 'equivalence' or 'matching' etc.) between them (here, my approach resembles those of Asgeirsson (2020) and Smith (2016; 2019)).

Chapter two turns to the notions of meaning and communication and starts by outlining Paul Grice's influential theory of both. This outline serves to introduce intention-based theories of communication and to highlight different varieties of meaning that can be distinguished alongside communicative content, such as sentence meaning or semantic meaning. I argue that these other varieties are unattractive candidates for the notion of meaning at play and highlight that most proponents of SP tend to rely on the notion of communicative content. I also explain that although these proponents adopt intention-based theories of communication, they are divided on the question whether the determinant of communicative content is an *actual* communicative intention or rather the communicative intention that would be *ascribed* to the speaker by a reasonable hearer. Finally, the chapter explains central features of intention by drawing on Michael Bratman's (1987; 1999) influential theory of this phenomenon.

Chapter three introduces the main objections levelled against SP and discusses to

what extent intention-based versions can deal with them. Due to limitations of space the chapter cannot survey all the objections that have been raised, so instead I focus on those that are most important or prominent. (I also deal with some other objections while explaining how SP is best understood). The chapter starts with a discussion of two challenges that are argued to be unwarranted. The first is that SP commits a category mistake and the second is that SP makes it hard to see how the legal norms of a legal system could be ensured to be morally binding. Explaining why these objections do not undermine existing versions of SP does not only serve the purpose of defending SP but also of presenting tools that are available for dealing with such objections. I then turn to three objections that are more problematic for intention-based versions of SP. The first, which I refer to as "the objection from collective intentionality", holds that there is no plausible account of how legislative bodies could be reasonably claimed to have the communicative intentions that are postulated by intention-based versions of SP.[13] The main reason is that such bodies usually consist of large numbers of people who do not share the relevant intentions with regard to the statutes they enact. Rather than being a single objection, the second is rather a family of objections that I refer to as "objections from legal practice". These objections attempt to show that there are existing legal phenomena that make it the case that the content of the law that is generated by a statute does not correspond to its communicative content. Finally, the third objection is what I call "the objection from parochialism" and it is that SP is not a universal but at best a parochial theory and therefore only of limited philosophical interest. [14] More specifically, the objection is that there is a standing possibility that legal systems have a feature (e.g., they contain a rule) that makes it the case that the content of the law that is generated by a statute does not correspond to its communicative content.

[13] I will explain that accepting this objection does not necessarily commit me to an implausible scepticism about legislative intentions or collective intentions more generally.

[14] As I will explain in the first chapter, the requirement here is not necessarily to show that SP applies to every statute without exception but rather to provide an argument why it would hold across legal systems.

Chapter four introduces the commitment-based theory of communication on which my own version of SP relies. I start by explaining the notion of commitment and highlight its main features, such as that it does not require awareness or endorsement of the commitment by those who are constrained by it and that for an agent to incur a commitment it must be appropriate to attribute that commitment to the agent. I then explain the role of commitments in the analysis of communication by drawing on commitment-based theories of communication.

Chapter five uses commitment-based theorizing about communication as a basis for an alternative version of SP and argues that this version can successfully deal with the three objections to intention-based versions raised in chapter three. First, I argue that the objection from collective intentionality is, as such, not a problem for the commitment-based version of SP because this version does not require any intentions but only commitments on the side of the legislature. Of course, this raises the analogous question: are legislative bodies not also incapable of undertaking the necessary commitments, due to the fact that they consist of many members with diverging opinions? I argue that there is no such problem because incurring a commitment neither requires awareness nor endorsement of the commitment and because the legislature is appropriately ascribed the relevant commitments in virtue of the legislators' commitments to act in accordance with legislative procedures and other legal norms. Second, I respond to objections from legal practice by explaining how commitment-based theories of communication can deal with the phenomena that sceptics invoke in a way that is compatible with SP. Finally, I explain that the commitment-based version of SP can be defended against the objection from parochialism because the features of a legal system that would supposedly falsify SP affect the commitments that are incurred through statutes (i.e., their communicative contents) in such a way that they correspond to the contents of the laws that are generated after all. A brief conclusion summarizes the main results of the thesis.

Having sketched what I intend to do, it is also important to be clear about what lies

beyond the scope of the current study. In particular, there are four important limitations of the thesis. The first, mentioned briefly above, is that I only discuss SP to the extent that it applies to statutes and not to other legal texts, such as constitutions, judicial decisions, wills, contracts, etc. To be clear, I share the optimism of other theorists (e.g., (Alexander, 2021)) that SP can be shown to hold for various types of legal texts, and especially those that are very similar to statutes, such as constitutions (or constitutional clauses). However, different types of legal texts raise different and rather specific issues with regard to the content of the law that they generate, and it would go beyond the scope of this thesis to do justice to the specific features of these other types.[15] Moreover, in light of recent discussions I am also genuinely unsure whether SP can be extended to *all* types of legal texts. For instance, consider the example of judicial decisions. On the one hand, Greenberg (2011a, p. 75) has argued that although it is not always clear what the content of the law is that is generated by judicial decisions, one problem is that it is usually said to be determined by the reasoning or rationale that underlies the decision rather than the particular meaning of the text. On the other hand, Alexander (2021, pp. 192-193) has argued that SP is compatible with all major theories about the content of the law that judicial decisions generate. I find it hard to take a position on this issue because – as both recognize – it is contested what exactly the content of the law of a judicial decision is and because, despite its efforts to establish the compatibility of SP with all major approaches, Alexander's discussion is rather tentative. Since similar considerations also apply to other legal texts, I prefer to remain agnostic on the exact scope of SP.

At the same time, the limited focus on statutes is justified by a number of important considerations. First, it is arguably the most paradigmatic type of legal text, second, other

[15] For a discussion of specific features of some legal texts (and oral contracts), as well as the extent to which these features might be explained by SP, see (Solum, 2013). Solum also points out that SP would not be plausible as a theory of the content of the law in general (pp. 517-518) and the perhaps most obvious reason is the existence of customary law which is a type of law that exists in virtue of customary practice and not in virtue of a text or some other entity with linguistic meaning.

discussions of SP focus on this type of text as well (Smith, 2019, p. 507), and third, as Greenberg puts it, "[a]reas of law that are heavily statutory are the obvious home for the SP" (2011a, p. 75) since statutes are supposedly the source of law for which it is most plausible that the content of the law that they generate are simply "whatever the lawbooks say". Hence, demonstrating that SP holds for statutes is already sufficiently important in its own right not only because it would explain the content of the law of a paradigmatic and often discussed type of legal text but also because a failed attempt to demonstrate this would give us a reason to doubt that SP can be extended to legal texts to which it supposedly applies less straightforwardly. At this point, it is also useful to make my use of the term "statute" explicit. I use "statute" to refer to statutory provisions, i.e., the use of a particular sentence in a written enactment of a legislative body. In this sense, statutes are of course usually enacted as part of larger acts of a legislative body that contain numerous statutes. For example, s. 1(1) of the Marriage Act is a statute in this sense.[16]

The second limitation concerns the debate between textualists, intentionalists and purposivists that was touched upon earlier. Although I do not want to downplay the significance of this debate, I will not attempt to relate my discussion or the version of SP that is developed to this debate in any direct way. This is partly due to considerations of space but also to the fact that it often remains unclear which exact claims are made by the proponents of these different interpretive approaches, where exactly the disagreement lies and perhaps even if there is any substantive disagreement at all. More specifically, while I think that the remarks that have already been made make it sufficiently plausible that all parties to the debate consider the identification of meaning to be essential in giving effect to the law, it is not clear what exactly the different camps consider meaning to be or how they

[16] A minor complication to this way of presenting SP is that it is occasionally also spoken of as a view about the meaning of statutory *enactments* rather than statutes as such (e.g., (Marmor, 2014, p. 12; Smith, 2019, p. 506). The difference is between the meaning of a *text* (i.e., the statute) and the meaning of the *act* by means of which the text is enacted (i.e., the statutory enactment). In most cases, this does not make any real difference to the points that are made but when the difference becomes relevant, I will make this explicit and argue why it is more reasonable to present SP as a view about statutes rather than statutory enactments.

go about identifying it.[17]

Consider, for example, that although it is clear that textualists put a strong focus on the meaning of legal texts it is not always clear what exact type of interpretation they are calling for and whether it is really incompatible with considerations of intention. While textualism is sometimes associated with literalist interpretation (Scalia, 1997, p. 23), textualists might also follow Holmes and try to identify how normal speakers of English would use a sentence (a use which might be non-literal) but also, as textualist Antonin Scalia has more recently proposed, "look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris." (1997, p. 17). This does not only show that textualism can be (and has been) associated with importantly different interpretive methods but also that it might be conceptualized in a way that comes rather close to intentionalist and purposivist approaches. Similarly, while it is agreed among intentionalists that interpreters should look for some kind of legislative intention, it is not clear, for instance, if the intention is to be identified only on the basis of statutes (and other texts that have been enacted as the result of some relevant procedure) or if considerations of legislative history (e.g., Hansard, travaux préparatoires, etc.) are also permissible.[18] While the latter position might be hard to justify from a legal perspective the former might blur the line between intentionalism and textualism, since textualists might not have to oppose inferences about intentions on the basis of a text, as we have just seen. As far as purposivism is concerned, it is also not entirely clear how the notion of a purpose is to be distinguished from the notion of intention that textualists and

[17] I adopt a similar approach towards the rules of statutory interpretation that are used in the U.K., i.e., the literal rule, golden rule and mischief rule that were mentioned above. The reasons for this are similar but my impression is also that it is less controversial to say that these rules are supplementing each other in the pursuit of meaning rather than representing mutually exclusive approaches to statutory interpretation.

[18] The consideration of texts such as Hansard in addition to the statutory text is not necessarily at odds with SP. The reason is that the claim that is made by SP, namely that the content of the law that is generated by a statute is determined by the meaning of the statute, is compatible with the claim that the meaning of the statute also depends on other texts. For instance, the other texts might be said to form part of the context that determines the meaning of the statute.

intentionalist might be looking for and if it can be distinguished from them at all.

In addition to this, it is also not clear to what extent the different approaches also provide – or are to be seen as providing – instructions as to what is to be done in cases in which meaning, and therefore also the content of the law, is indeterminate. For example, Asgeirsson (2020) discusses the possibility that textualism might be adopted as a theory of the meaning and content of the law that a statute generates while intentionalism might be adopted as a theory of how cases ought to be decided when the relevant statute does not have a clear meaning and legal content (a case in which some considerations of legislative history might be permissible). It is clearly beyond the scope of this thesis to provide answers to all these questions and therefore I will not make any direct attempt to work out the implications of my discussion for these interpretive approaches and the debate between them.[19] This is of course not to say that there are no implications or that I will not discuss any matters that are relevant to these approaches. For instance, in the course of the discussion I consider notions such as literal meaning, objectively ascribed intent vs actual intent, legislative history, and purpose (though sometimes only very briefly). But since it is not entirely clear which role these notions play in the different approaches, I leave it for future research to work out the exact implications of my discussion.

The third limitation concerns what I call "theories of the nature of law." Standard examples for such theories are the legal positivist theories of John Austin (1995) or H.L.A. Hart (2012), the natural law theories of Thomas Aquinas (2000) or Lon Fuller (1964), the interpretivist theory of Dworkin (1986) or the legal realist account of Holmes (1987). Theories of the nature of law are concerned with fundamental questions about law such as the following. What (if anything) is essential about the law? Is there a conceptual relation between law and morality? What are the grounds of law and the criteria of legal validity?

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[19] For some discussions of SP in the context of this debate, see (e.g., (Asgeirsson, 2020; Greenberg, 2020; Neale, unpublished a).

What (if anything) distinguishes legal norms from other norms? And so on. Such theories are considered on a number of occasions throughout the thesis, and I will try to explain some of their central features where they are relevant to the discussion, but I want to be clear at the outset that SP is not a theory of the nature of law but rather a theory of the content of the law that is generated by statutes (and perhaps other legal texts). SP is therefore usually not understood to compete with theories of the nature of law (Greenberg, 2017a, pp. 279-280; 2017b, pp. 112-114) but rather to supplement them, as indicated by the fact that SP is widely taken for granted by many legal theorists, including theorists from fundamentally different camps. (I return to this point in the first chapter).

The limitation of this thesis with regard to theories of the nature of law is that, in light of the wide acceptance of SP by legal theorists, for the most part I do not argue but simply assume that SP is broadly compatible with various theories of the nature of law and that it is therefore also likely that the correct theory of the nature of law will turn out to be compatible with SP.[20] For the same reason I also assume and do not try to demonstrate that theories of the nature of law that present themselves as being incompatible with SP are false. The most prominent theory of this kind is Dworkin's (1986) interpretivist theory but there are also others, such as Greenberg's (2011a; 2017a; 2020) Moral Impact Theory.[21] The obvious problem with engaging in a discussion as to which theory of the nature of law is correct is again that this would go far beyond the scope of this thesis. I also do not know of any method that would be sufficiently succinct to show that the theories that take SP for granted are in fact compatible with SP.[22] Given the impossibility of pursuing these tasks I consider the

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[20] A notable exception to this is my discussion of the objection that SP makes it hard to see how the legal norms of a system could be ensured to be morally binding. This objection will be considered because it has been directly used against SP by Greenberg and because he claims the hypothesis about the nature of law on which the objection relies to be "relatively uncontroversial" (2011a, p. 90) among legal theorists.

[21] For a brief overview of Dworkin's theory and the main points of criticism, see Smith (2007). For a brief outline and criticism of Greenberg's theory, see (Alexander, 2021).

[22] Greenberg claims that the theory of the nature of law that most proponents of SP are likely to appeal to is Hartian positivism but also claims that this theory is in tension with SP (2017a, pp. 305-308). Greenberg's argument is that Hart's theory requires that most judges need to accept SP (or even a specific version thereof) for it to be the right account of the content of the law in their legal system, but this is supposedly not the case for certain legal systems such as the U.S., because judges fundamentally disagree on this issue. As I do not

wide acceptance of SP by legal theorists to be sufficient to ground the assumption that SP is compatible with the theory of the nature of law that turns out to be correct. Moreover, while it is not meant as a knockout argument against theories of the nature of law that are incompatible with SP, it is reasonable to say that the wide acceptance of SP by legal theorists and practitioners makes such theories appear less attractive from a methodological point of view. For it is arguably a methodological desideratum that a theory of the nature of law does not imply that most legal experts, including those that are charged with identifying and giving effect to the law (i.e., judges), are misguided about the content of the law, at least if there are no other compelling reasons to reject SP. Hence, a convincing defence of SP also provides a reason against adopting theories of the nature of law that are incompatible with it.[23]

The last limitation that I want to highlight is that the thesis does not attempt to demonstrate in any conclusive way that the commitment-based theory of communication is the correct general theory of communication or even that it is generally superior to intention-based theories of communication. Just as with theories of the nature of law, there is a large and ongoing discussion concerning these questions in the philosophy of language and it

specifically rely on Hart's theory in this thesis, I do not intend to engage with this argument in any detail, but I do want to make a couple of brief points in response that provide further reasons to hold that the argument should not worry us too much, here. First, in a recent defence of SP Goldsworthy has convincingly responded that "there is much more agreement among judges and lawyers than Greenberg acknowledges" (2019, p. 178) and that Greenberg's claims concerning the extent of judicial disagreement are "greatly exaggerated" (p. 177). Second, it is not entirely clear if Greenberg's claim about judicial disagreement is compatible with his claim that SP is widely accepted, considered above (though see the points in the next footnote). Finally, note that the supposed existence of widespread interpretive disagreements among judges is often invoked as a much more general objection against Hart, i.e., one that is independent from SP, because his theory is allegedly incapable of explaining such disagreements. This objection is due to Dworkin (1986, pp. 1-45) and often goes by the name of the "Argument from Theoretical Disagreement". However, this objection is highly controversial, and positivists have proposed various strategies to deal with it. For a survey of this literature, see (Levenbook, 2015). For my own attempt to defend Hart's theory against Dworkin's argument, see (Shardimgaliev, 2020).

[23] Though note that Greenberg argues that his theory might explain why at least "something in the neighbourhood of the Standard Picture" (2017a, p. 301) might be compatible with (or even a consequence of) his theory. Greenberg (2011a, p. 72) and other theorists (e.g., (Smith, 2016, p. 230) also claim that the explicit endorsement of SP by judges should not be taken as decisive evidence that they actually adopt or endorse it because there might be – and, according to them, really is – a difference between what judges *say* and what they actually *do* when they decide cases. They further claim that their actions are a more reliable indicator of their actual views. While there might indeed be such a difference, in the absence of good reasons to the contrary we should be methodologically averse to think that it is pervasive, for it requires the assumption that most judges are generally confused about their own practice.

would go far beyond the scope of this thesis to establish either of the two claims.[24] Rather than pursuing this task, the thesis attempts to draw out the implications that these theories have when they are used as theoretical bases for SP. More specifically, the aim is to put a new version of SP on the table that relies on a theory of communication that differs from the one relied upon by the currently prevalent intention-based versions and to explore whether this alternative theory enables us to do a better job in defending SP. However, similarly to what I have said about theories of the nature of law, I also take the capability of a theory of communication to uphold SP to be a methodologically attractive feature because of the wide acceptance of SP. This further entails that it is methodologically unattractive if a theory of communication does not have this capability. Hence, if correct, the argument that is pursued provides an argument from statutory law in favour of the commitment-based theory and against the intention-based theory as the better theory of communication.

The limitations just highlighted underline an important point that should be kept in mind throughout, namely that the aim is *not to provide a full defence of SP*, as this task could not be possibly achieved within the scope of one thesis. Rather, the defence only covers statutes and is *conditional* to the extent that it must be compatible with the correct theory of the nature of law and the commitment-based theory must turn out to be the correct theory of communication. It is of course not trivial that these conditions hold but in light of the fact that the theories of the nature of law and of communication remain highly disputed terrains, I think that there is an important intellectual value in an analysis that considers whether SP could be defended *if* the necessary theories turned out to be correct. And, if what I have said about the methodological virtue of upholding SP is right, then the discussion will in turn also provide us with at least some new reasons to think that the relevant theories concerning communication and the nature of law are in fact correct.

[24] However, I refer the reader to a survey of the literature on this dispute that I have recently provided in collaboration with colleagues (Borg, et al., 2021).

1. The Standard Picture

In the introduction SP was provisionally characterized as the *view that the content of the law that is generated by a statute is determined by the meaning of this statute*. This chapter aims to provide a more precise understanding of SP that serves as the basis for the further discussion. The chapter is divided in three sections. The first section highlights the complications that are associated with characterizing SP and explains how I want to go about this task. The two other sections discuss how two central notions are best understood: *the content of the law* that a statute generates and the *relation* that holds between the content of the law and meaning. (The notion of *meaning* is the subject of the following chapters). I argue that the notion of the content of the law should be understood as the content of legal norms that are created by statutes rather than legal norms per se, as theorists sometimes claim. Further, following Asgeirsson (2020; see also Smith, 2016; 2019) I argue that a general characterization of SP can remain agnostic to a certain extent on the particular relation that is involved (such as identity, constitution, etc.) and only needs to specify that the meaning of a statute determines the content of the law in such a way that there is a correspondence (or 'equivalence' or 'matching) between the two. The notion of correspondence is not itself a relation of determination and will be understood in a somewhat intuitive way. The conclusion draws together the main results in a new and more specific formulation of SP.

1.1. Characterizing the Standard Picture: the difficulties and the approach

In the introduction it has been noted that as a result of the fact that SP is often taken for granted rather than made explicit it is not clear how exactly it is to be spelled out (Greenberg, 2011a, pp. 41-42). This problem manifests itself in the fact that different theorists characterize SP in different ways, none of which has acquired canonical status. To illustrate this and to bring out more specific difficulties in characterizing SP on the basis of existing

approaches, consider again Greenberg's characterization and two alternatives that are provided by Marmor and Smith:

> A common implicit presupposition – *the Standard Picture* – is that the content of the law is just, to put it crudely, whatever the law books say. More precisely, the idea is that the content of the law is constituted by the ordinary linguistic meaning of the authoritative legal texts. More sophisticated versions, recognizing that there are different types of ordinary linguistic meaning, hold that the content of the law is constituted by a specific type of linguistic meaning of the relevant text. (Greenberg, 2017a, p. 300)

> The simple, or 'standard' view that I strive to defend here can be stated as follows: the collective action of legislators enacting a law is a collective speech act, whereby some content is communicated that is, essentially, the content of the law voted on. This communicated content is the legal content of the act. (Marmor, 2014, p. 12)

> The SP claims that a legal text's linguistic content – or the introduction of a legal text with that linguistic content – is what *makes it the case that* the text has a certain legal effect (i.e. it makes it the case that the text contributes to the content of the law in the way it does). As a corollary, the SP claims that a text's legal effect 'matches' its linguistic content. (Smith, 2019, p. 506)

Although at least some shared understanding is clearly manifest in these characterizations – an understanding that I take to be roughly captured by my provisional formulation of SP – they also differ in important respects. To begin with, theorists are not always using the same terminology. Consider, for example, what can be seen as the *explanandum* of SP. While all of them refer to it at some point as "the content of the law", Marmor also speaks of "legal content" and Smith of "legal effect". Indeed, as we will see in the next section, these are not even all the labels for the explanandum that are used by theorists. The same goes for the *explanans*. Greenberg, for instance, refers to it as "whatever the law books say" or "ordinary linguistic meaning" and Smith calls it "linguistic content". In addition to such terminological and perhaps merely superficial differences, there is also divergence when it comes to the substance of SP. As already noted, Greenberg points out that "there are different types of ordinary linguistic meaning", and that different versions rely on specific types. This is manifest in Marmor's specific reference to "communicated content" which is one such type and which, of course, will be of primary concern to this thesis. Finally, there are also

imprecisions concerning the subject matter of SP. For example, I already noted that Greenberg says at one point that the content of the law "is" whatever the law books say but then claims that it is "constituted" by what they say (or their ordinary linguistic meaning) without specifying which relation is relevant. Smith, on the other hand, speaks of a relation where the linguistic content "makes it the case" that there is some legal effect, such that the linguistic content "matches" the legal effect. Smith points out later that "[i]t is unclear how we are to understand the claim that a text's legal effect matches its linguistic content." (2019, p. 507) and discusses some potential candidates but without fully resolving the issue. This allows for various different conceptions of the relation between meaning and the content of the law, such as identity, constitution, 'matching', etc. and therefore reveals a potential difference in understanding concerning the substance of SP that is not directly addressed or at least not resolved.

Given that SP is often characterized in different ways and that no characterization is generally accepted, we are faced with the problem that we cannot simply rely on an established characterization and therefore an own characterization must be developed. I want to make three points about the way in which I go about this task. First, providing an own characterization of course does not mean that this has to be done in isolation from others and, indeed, I want to do so by means of a critical examination of existing approaches, an examination that is sensitive to the difficulties just highlighted. However, limitations of space make it impossible to do justice to all the characterizations of SP that already exist and therefore I rather develop my own version by discussing representative samples of statements from existing accounts. A more comprehensive sense of some of the details of existing accounts will also emerge from the discussion in the following chapters.

Second, while I think that a theoretically useful characterization should remain faithful to the general idea that is associated with SP, I do not think that its primary aim should be to capture the exact beliefs of its adherents or the characterizations of SP that they

would give themselves. Indeed, in light of the foregoing considerations it seems unlikely that people have a precise view in mind in the first place or that this view is shared in its entirety by all of them. Instead, I agree with Greenberg when he says that “the picture is a picture—an organizing scheme—rather than a precise doctrine” (2011a, p. 42). More specifically, it seems that what is shared is a rough and pre-theoretical idea: the idea that is manifest in the characterizations that have been considered above and that I take to be roughly captured by my provisional characterization of SP. The notions that are part of this idea allow for different conceptualizations and I think that the aim of providing a characterization that is theoretically useful should be to conceptualize or ‘fill in’ in these notions in a way that is sufficiently precise for the purposes of theorizing and, at the same time, plausible. To illustrate what I mean, consider the notion of meaning. As Greenberg explains, theoretically sophisticated versions of SP recognize that there are different types of meaning and that such versions invoke a particular type in their characterization of the view, such as communicative content. However, this does not mean that people must generally think of meaning as communicative content or even be able to distinguish it from other kinds of meaning, such as sentence or semantic meaning. It is just an attempt of theorists to fill in the notion of meaning that is part of the pre-theoretical idea in order to conceptualize the view in a more precise and informative way. This does not need to be a quest for absolute precision and might leave certain issues unaddressed that are not essential, but it should nonetheless be specific enough to allow for reasonable evaluation (e.g., allow for falsification). Further, for reasons of charity this conceptualization should be guided by the attempt to present SP as a plausible claim. For instance, an argument in favour of conceptualizing meaning in terms of communicative content rather than sentence meaning would be that the latter option leads to claims that are clearly false while the former does not.

Finally, although my own ambition is to provide a version of SP that applies without

exceptions I follow Smith and other theorists in allowing for versions of SP according to which "a statute's legal effect is typically, not always, constituted by its linguistic content" (Smith, 2019, p. 502). In other words, I allow for the possibility that SP contains an implicit qualification of typicality that makes it compatible with a limited number of exceptions. Allowing for such exceptions is again motivated by the fact that SP is adopted as a rough idea that might not extend to all cases. It should be clear, however, that the permissibility of exceptions must not be overstretched and that the existence of a larger class of cases that are incompatible with SP's main claim would cast doubt on its adequacy and explanatory value. Please also note that a typicality qualification is compatible with the requirement – mentioned in the introduction – that SP does not make a parochial claim, because the claim that SP holds universally is compatible with the claim that it is universally true that the content of the law that a statute generates is typically determined by its meaning. The objection from parochialism is rather that there is no reason for thinking that SP holds across legal systems and does not only contingently apply to some of them. I develop this objection in chapter three.

1.2. The explanandum of the Standard Picture

A useful starting point for characterizing SP is to explain what SP itself is supposed to explain. As noted, different theorists refer to its explanandum by using different terms, such as the "legal content", "content of the law" or "legal effect" of a statute and, in fact, these are not even the only terms that are used. Stavropoulos, for example, speaks of "legal impact" (2013, p. 248) and elsewhere Greenberg also calls it "contribution to the law" (2017b, p. 107). For reasons that will become clear shortly, my preferred expressions are "the content of the law" and "legal content", but I will occasionally also use other expressions, especially when commenting on the views of those who use them. With this terminological clarification out of the way we can ask: what is the legal content of a statute? Unfortunately, in line with the

observations from the previous section, there is no agreed upon answer to this question and, as Asgeirsson observes, it is also "not always clear what people mean when they talk about the legal content of a statute" (2020, p. 7). To illustrate this, consider the following sample of statements:

> "the legal content of […] a provision […] is its contribution to the law – ie a legal obligation, power, permission, etc (or set thereof)." (Asgeirsson, 2020, p. 8)
>
> "The content of the law consists of obligations, rights, powers, and the like." (Greenberg, 2017b, p. 110)
>
> 'Legal content' is a precise way of labelling the content of the legal norms the text produces. (Solum, 2013, p. 480)
>
> By using the phrase 'legal content,' I mean to refer to the content of legal norms. I use the word 'norm' because of its generality. There are (at least) several types of legal norms: we talk of rules, standards, principles, obligations, mandates, and so forth. (Solum, 2013, p. 507)

Before further commenting on these statements, I first want to highlight that I follow Solum's proposal to use the term "legal norm" to refer to the broad variety of normative entities that are claimed to be brought about by means of statutes. This covers all the entities that these theorists mention, such as legal obligations, rights, rules, principles, powers, permissions and potentially others. Further, when using examples of specific legal norms, I will primarily refer to legal rules, obligations, and rights because I take them to be paradigmatic normative effects of statutes, but my remarks should be understood to apply to other legal norms as well.

Let me now turn to three observations about the preceding statements. First, although all theorists consider legal obligations when speaking about the relevant legal norms their lists are otherwise quite diverse. One way to explain this diversity at least in part is that theorists are using different terms to refer to the same norms. It is arguable, for instance, that "permissions" and "rights" roughly pick out the same norms. At the same time, this explanation is unlikely to work for all the norms that are explicitly referred to, such as the rules, standards, and principles that Solum considers. Perhaps a better explanation for this

diversity comes from the second observation which is that all theorists provide lists that are not exhaustive. This opens up the possibility that they mostly agree with each other on the legal norms that are at issue but just happen to single out different norms as examples. In fact, I take this indeed to be the case because discussions concerning SP usually do not involve disputes about the specific legal norms under consideration. To be clear, I do not claim that there are no disagreements among theorists as to what the right accounts of *specific norms are*. Especially when it comes to legal obligations there has been some discussion in relation to SP as to how, for instance, they relate to moral obligations (e.g., (Greenberg, 2011a)). Some of these disputes will be touched upon later but the main points here are that debates concerning SP rely on a rather intuitive and general understanding of which legal norms are relevant and that this issue is not a primary concern.[25]

The third and most important observation is that theorists have diverging views on the question whether the explanandum of SP are legal norms *as such* or only the *contents* of these norms. For instance, while Solum holds the latter when he says, "[b]y using the phrase 'legal content,' I mean to refer to the *content* of legal norms." (2013, p. 507)[26], the other two opt for the former when they claim that "[t]he content of the law consists of obligations, rights, powers, and the like." (Greenberg, 2017b, p. 110), and that "the legal content of […] a provision […] is its contribution to the law – ie a legal obligation, power, permission, etc." (Asgeirsson, 2020, p. 8). This is problematic because it leaves us without a clear notion of what it is that SP explains. To illustrate what the problem is, consider again the example of s. 1(1) of the Marriage Act. When enacted, this statute introduced a variety of legal norms, such as a legal rule that marriage of same sex couples is lawful, and the corresponding legal obligations and rights to act on the proposition that marriage of same sex couples is lawful.

[25] One specific point that will be discussed at some length is that Asgeirsson (2020) proposes to conceptualize the legal norms in question as pro tanto legal norms rather than all-things-considered legal norms. However, for the sake of exposition, I will wait until chapter three to explain this specific aspect of his theory.
[26] Emphasis added.

However, these legal norms are not the same as their content which is the proposition that marriage of same sex couples is lawful. If the content of the law is understood as the content of legal norms, then SP only needs to explain what determines the relevant proposition (or whatever else the content of a legal norm might be; see below). But if the content of the law is understood as legal norm(s), then SP must explain what determines legal norms (in addition to what determines their contents), i.e., SP must explain what makes it the case that the relevant legal norms hold.

Theorists rarely make this distinction explicit, let alone discuss it, in relation to SP, though Asgeirsson's (2020, p. 7) brief discussion provides a notable exception. His reason for thinking of legal content in terms of legal norms as such is that a statute (or its enactment) does not only provide legal norms with a content but that it also creates these norms, such that the statute's effect on the law is more appropriately considered to include that the legal norm as such comes into being. And while other theorists do not draw the distinction explicitly, my general impression is that there is a tendency to agree with Asgeirsson and Greenberg that it is rather legal norms as such that should be explained by SP. Baude and Sachs, for instance, also characterize SP as "the view that *we can explain our legal norms* by pointing to the ordinary communicative content of our legal texts." (2017, p. 1086).[27] Contrary to this tendency, I want to side with Solum and argue that the content of legal norms is a more plausible candidate for the explanandum of SP. To begin with, although Asgeirsson is certainly right that it is also part of a statute's effect to create legal norms I do not think that this compels us to consider legal norms to be the relevant explanandum for two reasons. First, we do not necessarily have to think of the explanandum in terms of an "effect" (as noted above) and, second, even if we do think of it in this way, I do not see why we would necessarily have to hold that SP explains the 'full' effect of a statute. In other words, why could SP not only explain a part of a statute's legal effect, namely the content that legal

[27] Emphasis added.

norms come to have?

Instead, I think that a more compelling argument can be made against the claim that the explanandum of SP are legal norms as such, an argument that is based on the noted point that SP is widely taken for granted by legal theorists from different camps such as positivism and natural law theory. If this is correct, then there are at least three reasons why it is implausible to think of SP as an explanation of legal norms rather than their content. First, these theories already provide their own explanations of how legal norms as such come about, such that it would not be clear what purpose SP would (or could) serve on their accounts if it was taken for granted as a theory of legal norms. Indeed, SP would rather be at odds with such theories if it provided an explanation of legal norms. The second and related point is that positivists and natural law theorists do not exclusively or even primarily engage with questions of the meaning of legal texts in developing their explanations of legal norms, such that SP cannot be what is taken to explain these norms. Finally, there is no agreement or widely shared view among these theorists as to what explains or makes it the case that certain legal norms such as obligations obtain. Hence, being widely accepted, SP cannot be the view that provides such an explanation.

To illustrate these points, consider some very rough outlines of some prominent theories of the nature of law and their views on legal norms such as rules and obligations. The first is Hartian positivism (2012). Hart explains the existence of a legal obligation by reference to a valid legal rule that makes the relevant conduct obligatory. Further, the existence and validity of the legal rule itself is explained by the existence of a fundamental rule: the rule of recognition. The rule of recognition specifies the criteria of legal validity that need to be satisfied for a rule to exist in a legal system and the existence of the rule of recognition itself is explained by the fact that it is recognized or accepted by the legal officials of that system. Hart's theory claims to secure the conceptual independence between law and morality that is usually said to define legal positivism by highlighting that the criteria

of legal validity that are accepted by legal officials do not have to – although they might – contain a moral criterion (e.g., a standard of justice) that a legal norm must satisfy to be a legal rule of the system in question. Whether the rule of recognition of a particular legal system contains such a criterion is a merely contingent fact that depends solely on whether this criterion is accepted by legal officials.

Compare this with the opposing claims of natural law theories. These theories claim that there is a necessary or conceptual connection between law and morality and sometimes (though not always) use this as a basis to impose the requirement that for there to be a legal norm the norm or the system of which it is part must *necessarily* satisfy certain moral criteria (Crowe, 2016). These might either be substantive moral criteria (such as standards of justice) or, along the lines of Lon Fuller (1958; 1964), procedural or formal criteria which he claims to constitute "the inner morality of law". These procedural criteria can include, for instance, that most of the rules in the legal system do not have retroactive application or that the rules do not constantly change. If these criteria are not satisfied, then the system in question is not a legal system (or at least not in the full sense of the term) and its rules will not be legal rules. The foregoing remarks about natural law theory indicate that diverging views on what makes it the case that a legal norm obtains do not only exist between the camps of positivism and natural law theory but also within these camps. For an example to the same effect from positivism consider the difference between Hart's and Austin's account (1995). On Austin's so-called "command model" there is no talk of the rule of recognition. Instead, legal rules and obligations are said to be created by the commands of a sovereign where an individual (or body of individuals) is the sovereign of a population if the population habitually obeys the commands of this individual and the individual does not habitually obey the commands of anyone else.[28]

[28] Greenberg claims that SP derives from a "command paradigm" (2011a, p. 43) and the way he presents this paradigm has obvious similarities to Austin's theory. However, while it might be true that SP derives from a model or paradigm of this kind, we should not assume any strong conceptual link between the two given that

Although these outlines are rough, they underline that if SP were an explanation of legal norms, it is neither clear how it could be reasonably taken for granted by theorists who defend such theories nor what purpose SP would serve on their theories. More specifically, these theories do not only already provide explanations of legal norms, but their explanations also do not appeal to the notion of meaning as a central explanatory notion. Instead, they primarily rely on such things as the practice of legal officials, moral criteria, or the commands of sovereigns.[29] And although the theories might appeal to the notion of meaning at other points, the fact that the outlines that were provided do not appear inadequate is sufficient to show that these theories claim there to be much more to the explanation of legal norms than just meaning. Hence, if proponents of theories of this kind were to take SP for granted then it would be unreasonable and implausible to treat SP as an explanation of legal norms because these theories would be incompatible with SP, for SP would purport to explain such norms exclusively on the basis of the meaning of legal texts. Finally, the outlines demonstrate that different proponents of theories of the nature of law have fundamental disagreements about what explains legal norms, so it would be highly problematic to say that proponents of this type of theory take SP for granted as a view that explains legal norms. To avoid potential misunderstanding, I want to highlight that the claim here is not that proponents of the theories that have been outlined necessarily take SP for granted or are otherwise committed to it (even though there are reasons to hold that at least some of them are (Greenberg, 2011a)). It is rather that their theories serve as examples to illustrate the more general points that theories of the nature of law already provide explanations of legal norms, that they do so without any significant reliance on the notion of meaning and that

many theories of the nature of law reject the command paradigm (and specifically Austin's theory; see, e.g., (Hart, 2012)) but are likely to endorse SP.

[29] The claim is not that these theorists do not speak of meaning at all or do not have any disagreements on the question of what meaning is. For example, an important aspect of Fuller's attack on Hart was the claim that the supposed shortcomings of Hart's theory of legal interpretation "result ultimately from a mistaken theory about the meaning of language generally" (Fuller, 1958, p. 668). The point is merely that no reference to meaning is necessary to set out the main claims of their explanations of what makes it the case that legal norms obtain.

they disagree about these explanations, such that it is generally implausible to say that they could take SP for granted as a theory of legal norms, whether they endorse SP or not.[30]

For these reasons I propose to conceive of SP not as a theory of legal norms but rather as a theory of the content of these norms. This does not only suggest itself by way of exclusion of one of the two possibilities but also because SP is more straightforward if it is understood in this way. For example, on this construal it is much easier to explain how SP can be taken for granted by scholars who otherwise defend fundamentally different theories such as positivism or natural law theory. The idea is that although they have different views on what explains or determines legal norms, they take for granted that the content of those norms is determined by the meaning of statutes. Indeed, this would also explain why the distinctive tenets of different theories of the nature of law can be explained without a reference to the notion of meaning: it is simply taken for granted in these theoretical frameworks that the content of legal norms is determined by the meaning of statutes. Their theories can then be understood as accounts that explain why these contents become the contents of legal norms: the contents satisfy the criteria of legal validity, which might be that the contents correspond to the linguistic meanings of statutes that are enacted in line with the rule of recognition or that they are the meanings of the commands of a sovereign, etc.

[30] Although he does not address these points specifically, my impression is that Greenberg tries to get around problems of this kind by saying that SP also explains legal norms as such but that it does so at a different level than theories of the nature of law (2017a, pp. 279-280; 2017b, pp. 112-114). More specifically, he distinguishes between what he calls "theories of law at the fundamental level" and theories at less fundamental levels, including "theories of law at the surface level". SP is identified as a theory of law at the surface level while what I have called "theories of the nature of law" are identified as theories of law at the fundamental level. What distinguishes theories of law at the fundamental level from theories at higher levels is that only the former provides the fundamental determinants of legal norms, i.e., determinants that do not determine legal norms in virtue of some other determinant. On Hart's theory, for instance, this fundamental determinant would be the acceptance of legal officials because there is nothing beyond this acceptance that determines legal norms. SP could be combined as a theory of law at the surface level with a Hartian theory because SP would hold in virtue of the fact that the legal officials of a system accept that SP holds. Unfortunately, it is hard to assess to what extent Greenberg's theory might help against the problems that I have presented because it is quite underdeveloped. For instance, he does not specify how many levels there are and in what sense theories at the surface level could be considered actual theories or explanations if they only explain legal norms at the surface. A related and more general point is that even on Greenberg's proposal it is accepted that SP cannot provide a full explanation of legal norms because it has to rely on more fundamental theories. This raises the question what exactly SP contributes to the overall explanation and for reasons to be developed in the following paragraph I think that is more sensible to think of SP as contributing a concrete explanation of the contents of legal norms rather than some superficial explanation of legal norms more generally.

Thus understood, SP also does not compete with theories such as positivism or natural law theory but provides a necessary supplement to these theories, namely an account of the content of legal norms.

I finish this section with two clarificatory remarks, one on the notion of *content* that is at play when it comes to the notion of the content of legal norms, and the other on the explanatory scope of SP. When explaining the distinction between legal norms and their contents, I have spoken of content primarily in terms of propositional content. This type of content can be generally thought of as the content of that-clauses, or – more technically – in terms of truth-conditions that can be cashed out in terms of possible worlds. But while it seems appropriate to think that the content of some legal norms such as rules is propositional it is not clear that this can be easily extended to all legal norms. For instance, while it seems natural to say that we have a legal rule that marriage of same sex couples is lawful it seems less natural (or even ungrammatical) to say that we have a legal obligation or right (?) *that* marriage of same sex couples is lawful. This complication has been avoided above by saying that there is a legal obligation or right to act on the proposition that marriage of same sex couples is lawful. And although this seems theoretically permissible the more natural manner of speaking would rather be to say that we have legal obligations and rights to treat marriage of same sex couples as lawful, or something along these lines. Hence, the content of such legal norms would be an action type rather than a proposition. SP should allow for such alternative types of content and therefore I want to remain neutral on the particular type of content that is at play and allow that it depends on the particular case or the particular norm. I primarily speak of propositions and action types in the following, but these should only be understood as examples.

The other clarification concerns the explanatory scope of SP. Because SP is a theory of the legal contents of statutes – irrespective of whether these contents are understood as legal norms or the contents of these norms – SP does not have any explanatory burden in

cases in which a statute does not create any legal norms. For this reason, SP is not undermined by cases in which a legislature enacts a statute with a particular meaning but in which this statute has no legal content. For instance, this can happen in cases in which a statute does not satisfy the criteria of legal validity and therefore does not create any legal norm, but still has meaning, such as a statute that is unconstitutional. This feature of SP is also emphasized by Smith: "[SP] is a claim about statutes that have legal effect (claiming that their legal effect is constituted by their linguistic content), not a claim about statutes that have no legal effect due to the operation of an invalidating law." (2019, p. 509).

1.3. The relation between a statute's meaning and its legal content

Having specified that the "legal content" or "content of the law" that SP explains is the content of legal norms, I now turn to the relation that holds between the content of legal norms and meaning. I already noted in the first section that there is no widely accepted and clear opinion on how this relation should be conceptualized. Although I aim to shed further light on this issue, I want to be explicit at the outset that I will not be able to fully resolve it here but rather argue that our characterization of SP can remain open to a certain extent with regard to the particular relation that is involved.

It is widely acknowledged and intuitively clear that the relation that is at play in SP is a relation of metaphysical determination (Asgeirsson, 2020, p. 26; Levenbook, 2021, p. 742; Smith, 2019, p. 507). However, there are different kinds of metaphysical determination relations and to get a sense of the probably most salient candidates for the purposes of SP I want to start by briefly summarizing the most recent and detailed discussion of this issue, the one provided by Asgeirsson (2020). Asgeirsson considers four main candidates: identity, constitution, grounding, and supervenience.[31] He is not fully explicit how he understands

[31] Asgeirsson (2020, p. 26) briefly explains that the relevant relation is not causal because causation is not a form of metaphysical determination. My impression is that this opinion is shared by other theorists (e.g., (Greenberg, 2011a, n. 1) who have commented on SP, so I will not discuss causation as a candidate here.

these relations and often seems to rely on conceptions that are standard in the philosophical literature. Identity, for example, is usually understood as sameness ("To say that things are identical is to say that they are the same." (Noonan & Curtis, 2018)), constitution as the relation between something and its parts or the relation of an object and what it is made of (Evnine, 2011; Johnston, 2008) and supervenience as the relation of two classes of properties or facts where class A supervenes on class B only if there cannot be a difference in A without a difference in B (Leuenberger, 2008).[32] Asgeirsson (2020, pp. 32-33) rejects all three candidates in favour of a grounding relation.

He rules out supervenience-based versions of SP on grounds such as that supervenience claims have "explanatory shortcomings" (p. 8), for example because they only establish that there is a relation between two classes of properties but without explaining the underlying structural connection that makes this the case. His main argument against identity and constitution-based versions is that these relations are allegedly too 'tight' for the purposes of SP (pp. 32-33).[33] Roughly, the problem is that, at least on his account, legal content consists of legal norms while meaning (Asgeirsson focuses on communicative content) is often understood in terms of entities that are not norms, such as propositions, information, etc. As such, meaning and legal content have importantly different properties which undermines the claim that the relevant relation is identity and Asgeirsson also claims that this makes it rather doubtful that legal content is constituted by meaning. The reason is that even constitution supposedly requires that the constituting entity shares many of the properties of the entity that it constitutes (e.g., a statue and the lump of clay that constitutes

Asgeirsson (2020, p. 26) also notes that the relation cannot be elimiative because SP is not sceptical of legal content but that it could be reductive. However, since he seems to understand the two as explanatory relations and not as relations of determination, he does not consider them much further because they might be compatible with various determination relations. I agree with this approach and will follow it here, as well.

[32] Constitution does not necessarily require that an object must necessarily be made of more than one part or that it must be material (Evnine, 2011; Johnston, 2008).

[33] Another argument against an understanding of SP in terms of identity that Asgeirsson (2020, p. 8) considers is that, thus understood, SP cannot account for various phenomena from legal practice. I discuss phenomena of this kind in chapter three.

it) which is likely not to be the case for norms and propositions or other types of content (pp. 32-33). However, Asgeirsson is also clear that he does not take this to provide "anything like a conclusive argument against constitution-based versions" (p. 32) because it remains somewhat unclear how many properties must be shared by two entities in order for them to be able to enter into a constitution relation. As noted, Asgeirsson himself proposes to think of the relation in terms of grounding (p. 33), but, as far as I can see, he does not provide an explicit definition of how he understands this notion. This makes it somewhat difficult to assess this proposal because, as Kelly Trogdon has observed in a recent introduction to grounding, "[t]here is a burgeoning literature on grounding" (2013, p. 97) and it is unclear whether the term is used univocally or rather in multiple ways in this literature which refer to "multiple dependence notions marking different phenomena." (2013, p. 98). It is therefore not entirely clear to me how the notion of grounding should be understood in this context, and I take this to be the perhaps most difficult aspect of a grounding-based explanation. However, for current purposes it might already be sufficient to note that Asgeirsson (2020, pp. 32-33) takes grounding to be a metaphysical determination relation that does not require the extensive sharing of properties that comes with identity and constitution-based views but that nonetheless provides an explanation that is sufficiently robust.

I think that Asgeirsson's discussion provides a very helpful overview of the potential candidates for the determination relation, but I must highlight that – in line with Asgeirsson's conceptualization of legal content – it is a discussion that conceptualizes the explanandum of SP in terms of legal norms. However, if what I have argued in the previous section is correct, then the question at hand should rather concern the relation between meaning and the content of legal norms. This reconceptualization of the question makes it is worth checking if 'tighter' determination relations such as identity or constitution might not be viable candidates after all because they seem, at least prima facie, to be metaphysically closer to meaning. For example, if we assume that the contents of legal norms are propositions or

action types and the same holds for the meaning of statutes then this might allow us to think of the determination relation that is involved in SP as one of *identity*, i.e., legal contents and meanings could simply be claimed to be one and the same proposition or action type. And if the possibility to conceptualize the relation in terms of identity is back on the table, so is the less demanding notion of constitution.

However, although it might be tempting to associate the identity claim with SP because of its straightforwardness and simplicity, I think that this picture would be too simplistic. There are several reasons for this but here I just want to mention two. First, it is problematic to simply assume that the content of a legal norm and the meaning of the relevant statute are both propositions or action types. For instance, it might be that the meaning of a statute is a proposition but that the legal norm that it creates has an action type or a content of another type as its content. For example, the meaning of a statute might be *that* marriage of same sex couples is lawful but the legal norms that it creates will also include the obligation *to* treat the marriage of same sex couples as lawful. Intuitively, we want to say that such a case is still compatible with SP but in that case meaning and the content of the legal norm would not be identical, if only because propositions are not action types. (This also holds if we think of the legal obligation as one *to act on a proposition*, for acting on a proposition is still an action type and not a proposition). Another reason is that while the content of a legal norm might be a proposition (or some other type of content) and the relevant meaning of a statute might also express a proposition, on many relevant accounts the proposition expressed is not all that there is to meaning. For example, we will see in the next chapter that on some accounts of communicative content, which is the most relevant type of meaning for our purposes, it does not only consist of a proposition but can also involve a propositional attitude that is supposed to be held towards that proposition by the addressee, such as a belief or intention. Directly related to accounts of communicative content are accounts from speech act theory according to which the meaning of a

communicative act does not only consist of a proposition but also of an illocutionary force, such as the force of assertion, promise or warning, towards that proposition (Green, 2020).[34].

These considerations might also exclude constitution as the relevant determination relation, but, similarly to Asgeirsson, I find it difficult to say if this is indeed the case because it is not clear which and how many properties the two types of content would have to share for them to be able to enter into a constitution relation. However, I might be more optimistic about the prospects of conceptualizing the relevant relation in terms of constitution than Asgeirsson for two reasons. One is that the reconceptualization of legal content in terms of the content of legal norms arguably leads to a situation where legal content is more likely to share many of the properties of the relevant notion of meaning. The second is that I am less sure that the constituents of an object necessarily have to share many properties with the object that they constitute. Consider, for instance, that a house has the properties of being hollow and of being something that people can live in without the walls (and perhaps other objects) that constitute it having to be hollow and something that people can live in. Although I acknowledge that this issue might be controversial, I think that considerations such as these at least suggest that constitution can also occur in the absence of extensive sharing of properties.

The foregoing discussion has presented some of the potential candidates for the determination relation that is involved in SP and highlighted some difficulties that are associated with these candidates. In the face of these difficulties, I must admit that I am genuinely unsure as to what is the best candidate for the determination relation that is involved in SP. While I agree with Asgeirsson that supervenience and identity are rather unattractive, I think that grounding and constitution are more plausible candidates but due

[34] Green (2020) provides a useful and recent survey of speech act theory. Classical contributions to speech act theory have of course been made by theorists such as John Langshaw Austin (1962), John Searle (1969), and Kent Bach and Robert Harnish (1979). I take the basic notions of this literature (such as illocutionary force) for granted and come back to more specific or controversial ideas at later points.

to the unclarities that are associated with these notions I find myself unable to give a conclusive argument in favour of one of them. However, although I think that it is important for our understanding of SP to have discussed different candidates and to have narrowed their number, I do not think that it is necessary to take a position on the question which exact determination relation is involved in order to give a sufficiently informative characterization of SP. To explain why this is so, consider another statement from Asgeirsson:

> it is not always clear exactly what relation proponents of the theory take to obtain between the two types of content. It might be a metaphysically 'tight' relation like identity or constitution, or it might be a slightly 'looser' relation like grounding or supervenience. What they share, however, is the view that the legal content of a statute or constitutional clause in some relevant sense *directly corresponds* to its communicative content. (2020, p. 7)

Here, Asgeirsson recognizes that the exact position that proponents of SP take is not always clear and that it can be spelled out in different ways, but he emphasizes that what they all share is the claim that the two contents must directly correspond to each other in some relevant sense. As far as I can see, he does not define the relevant sense of correspondence and seems to proceed by relying on a rather intuitive notion. A similar strategy is adopted by Smith when he says that "SP claims that a legal text's legal effect '*matches'* its linguistic content" (2019, p. 506)[35] but acknowledges that "[i]t is unclear how we are to understand the claim that a text's legal effect matches its linguistic content." (2019, p. 507). After a tentative discussion of Asgeirsson's and Greenberg's accounts he proceeds to a critical evaluation of SP but without committing himself to a specific notion. In earlier work, Smith puts the matter slightly differently, namely in terms of equivalence: "a statutory provision […] – according to the meaning thesis – has a legal effect that is *equivalent* to its linguistic content" (2016, p. 245).[36] Again, it is not specified what exactly the relevant notion of equivalence is.

One way to make sense of such intuitive notions as correspondence, matching or

[35] Emphasis added.
[36] Emphasis added.

equivalence would of course be to think of them in terms of identity, i.e., by saying that legal content and meaning correspond, match or are equivalent if they are the same. However, we have already seen that this is too restrictive because there are cases in which the relevant contents at least intuitively correspond in the relevant sense without being identical. This suggests that there must be a different way to understand these notions and there is even a strong intuition that sameness must play some role, but I find myself incapable of providing such an account and I therefore propose to proceed – like other theorists – by relying on an intuitive understanding of the relevant notions. More specifically, I will primarily follow Asgeirsson and speak of correspondence in the following. But although other theorists and I do not provide an exact definition of correspondence, I want to finish by offering at least some clarificatory remarks on this notion to give an idea of how it is understood. To begin with, correspondence is not itself understood as a metaphysical determination relation but as the result of such a determination relation. It is understood in the sense in which two buildings have corresponding heights but without there being a deeper metaphysical reason for why this is the case. More specifically, the idea in relation to SP is that the meaning of a statute determines the content of the resulting legal norm in such a way that the content of the legal norm corresponds to the statute's meaning. I take it that this is also how Smith understands his notion of matching when he says that "SP claims that a legal text's linguistic content […] is what *makes it the case that* the text has a certain legal effect" (2019, p. 506) and that "[a]s a corollary, the SP claims that a text's legal effect 'matches' its linguistic content." (p. 506). Thus understood, SP can remain agnostic on the specific determination relation that is involved.

Further, correspondence (as I understand it) includes cases in which the relevant content types differ but in which what they require or refer to overlaps in some sense, such as in the case in which there is a legal norm *to* treat marriage of same sex couples as lawful and a statute with the meaning *that* marriage of same sex couples is lawful. The same goes

for cases in which the meaning of a statute does not only include the relevant content but also things like a propositional attitude or illocutionary force while the legal norm does not. At the same time, it should also be obvious that in cases in which the content of a legal norm and the meaning of a statute are both propositional (or both action types) and the relevant propositions are not the same, there is no correspondence. For example, if the statute means that the marriage of same sex couples is lawful, but the resulting legal rule is (for some hypothetical reason) that shops must remain closed on Sundays, or that the marriage of lesbian but not gay couples is lawful, or even that the marriage of same sex couples and non-same couples is lawful then there is no correspondence because the relevant propositions are not the same.

Conclusion

I conclude this chapter with my own proposal for how SP ought to be generally understood:

> **SP: The content of the legal norm (or norms) that is created by a statute is determined by the meaning of this statute in such a way that the content of the legal norm corresponds to the meaning of the statute.**

This formulation reflects the two main points of this chapter which are that SP is a theory of the content of legal norms and not a theory of legal norms as such and that a characterization of SP can remain agnostic on the particular determination relation that is involved as long as it accounts for the condition that the meaning of a statute and the content of the legal norm that it creates correspond. This general formulation of SP does not yet specify a particular notion of meaning and my task in the following chapter is to distinguish different notions and to explain which of them is most appropriate for the purposes of SP.

2. Meaning, communication, and intention-based versions of the Standard Picture

It is time to turn our attention to the explanans of SP: the notion of meaning. More specifically, the purpose of this chapter is to distinguish different notions of meaning, explain why the notion of meaning on which most recent theorizing concerning SP has relied is communicative content, and explain the intention-based theories of communication on which this theorizing is based. The chapter is divided in three sections. Section one recapitulates Paul Grice's famous theory of meaning and communication. Starting with this theory will not only help distinguishing different notions of meaning but also explain the standard intention-based theory of communication. In section two I briefly explain why two particular notions of meaning, namely sentence meaning and semantic meaning, are implausible candidates for the explanans of SP. Section three introduces the recent versions of SP according to which the relevant notion of meaning is the communicative content of a statute. I explain that although these versions of SP all rely on intention-based theories of communication they are divided on the question what exact role intentions play in determining communicative content. The central question here is whether communicative content is determined by the actual intentions of a speaker or rather the intentions that are reasonably ascribed to a speaker. Here, I also explain the notion of intention by drawing on Michael Bratman's influential theory of this phenomenon.

2.1. Grice's theory of meaning and communication

Paul Grice's (1989) theory of meaning and communication has not only been extremely influential in linguistics and philosophy of language but also in the debate concerning SP, so it is useful to start by outlining his theory. Due to limitations of space my outline will not

cover all aspects of Grice's theory but only focus on its central claims and especially those aspects that are relevant to SP.[37] Perhaps most importantly, due to the noted point that SP concerns *linguistic* meaning (e.g., (Greenberg, 2017a, p. 300; Smith, 2019, p. 506)) I will not discuss Grice's theory to the extent that it applies to non-linguistic meaning.[38] "Linguistic meaning" is understood here as the meaning of linguistic entities, i.e., entities that involve language. When it comes to the meaning of linguistic entities, Grice distinguishes two main types: sentence meaning and speaker meaning (or "speaker'*s* meaning").[39] As the name suggests, sentence meaning is the meaning of a sentence, where "sentence" is not understood as the use of a sentence on a particular occasion (i.e., an utterance), but as an abstract entity, i.e., what is used on these different occasions. Speaker meaning, on the other hand, is what speakers mean when they use sentences on particular occasions, i.e., what speakers mean with their utterances. To illustrate the distinction, suppose that a speaker says, "Antonio is Italian". Here, the speaker uses the sentence "Antonio is Italian", the sentence meaning of which is that Antonio is Italian (or rather that people come to believe that Antonio is Italian; see below). This sentence meaning might correspond to what the speaker means by using the sentence (i.e., the speaker meaning *might* be that Antonio is Italian), but the speaker might also mean something different by using it. For instance, she might utter the sentence in response to the question "Is Antonio a good cook?" and mean that he is indeed a good cook, i.e., its speaker meaning might be that Antonio is a good cook (cases of the second kind are considered in more detail below).

According to Grice, speaker meaning is more basic in the order of explanation, and he proposes to analyse it in terms of a specific type of intention that has come to be known

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[37] For a more detailed outline, see my recent co-authored article (Borg, et al., 2021).

[38] Two examples for non-linguistic types of meaning are the meaning of gestures (where they are not part of a sign language) and what Grice calls "natural meaning" (1989, p. 213). Natural meaning is at play in statements such as "Smoke means fire." and involves a natural or direct causal relation. A theorist who has tried to explain legal content in terms of natural meaning is Heidi Hurd (1990), but since her account does not fall under SP due to its reliance on a non-linguistic type of meaning I do not consider it here.

[39] This is the standard terminology in the recent literature but note that Grice himself occasionally used other terms (e.g., "utterer's meaning").

as "communicative intention".[40] Because the steps by which Grice (1989, pp. 217-220) arrives at his final analysis of communicative intentions are rather well known and not particularly important for our purposes, I will not present them here but only consider his final analysis which can be paraphrased as follows (pp. 217-220):

A speaker means something by producing an utterance if and only if she has the intention

1. to produce an effect in her audience
2. that the audience recognizes this intention (i.e., 1.)
3. that the effect comes about in virtue of the audience's recognition of this intention.

More succinctly, a communicative intention is the *intention to produce an effect in an audience by means of the audience's recognition of this very intention*. This analysis does not yet specify *what* a speaker means. Grice therefore adds that "to ask what [the speaker] meant is to ask for a specification of the intended effect" (p. 220). This effect will be different depending on the particular illocutionary act that she intends to perform. Grice primarily focuses on assertions for which he claims that the intended effect consists in the audience's formation of a belief. Hence, if the speaker intends her utterance of "Antonio is Italian" to induce the belief in her audience that Antonio is Italian then this will be the content that she means to get across. However, Grice also briefly indicates that for directives the intended effect might be that the audience performs (or intends to) perform an action of some sort (p. 105; 111). Hence, Grice's account is an account of the sort that was mentioned at the end of the last chapter according to which meaning does not only consist in a proposition or an action type but also in the (propositional) attitude that is intended to be adopted towards it, such as a belief or an intention. For the sake of simplicity, in the following I will omit the reference to a specific propositional attitude where it is not necessary.

Having provided his analysis of speaker meaning, Grice uses it to analyse sentence

[40] Grice's own label was "M-intention" (where "M" stands for "meaning" (1989, p. 123)).

meaning. According to him, "what sentences mean is what (standardly) users of such sentences mean by them; that is to say, what psychological attitudes towards what propositional objects such users standardly intend […] to produce by their utterance" (p. 350; see also p. 355). Hence, the idea is that sentence meaning is determined by the speaker meaning that is standardly or conventionally associated with the use of the relevant sentence. A sentence such as "Antonio is Italian" is therefore said to have its meaning, namely that addressees come to believe that Antonio is Italian, because this is what people conventionally mean when they use this sentence. It is in this sense in which speaker meaning is prior to sentence meaning in the order of explanation on Grice's account.

What is perhaps even more important about Grice's analysis of speaker meaning for our purposes than its use in analysing sentence meaning it that it is also claimed to be central to the analysis of communication. This is already hinted at by Grice (e.g., (1989, p. 88) himself, but, as far as I can see, the first to make this fully explicit is Peter Strawson who says that Grice's analysis of speaker meaning is "undoubtedly offered as an analysis of a situation in which one person is trying, in a sense of the word 'communicate' fundamental to any theory of meaning, to communicate with another." (1964, 446). As far as I can see, the reason why theorists consider his analysis of speaker meaning to provide the basis for a theory of communication lies in the idea that communication is only successful if a speaker manages to make her audience understand what she meant (Bach, 1987, p. 142). If so, then Grice's analysis of speaker meaning provides us with the necessary and sufficient conditions for the successful occurrence of a communicative act: the speaker must have a communicative intention when producing an utterance and this communicative intention must be correctly identified by the intended audience. Further, on this account the content of a successful communicative act is metaphysically determined by the speaker's communicative intention because for some content to be successfully communicated it must be meant by the speaker and recognized as such.

This explanation of what metaphysically determines communicative content also comes with an account of utterance *interpretation*, i.e., an epistemological account of how the communicative content of an utterance is (best) identified. Utterance interpretation is of course said to consist in the attempt to identify the communicative intention of the speaker and the main consideration in this process is that a communicative intention has the feature that it is *intended to be recognized*. The addressee of an utterance can therefore usually expect that the speaker tries to make her utterance such that the communicative intention can be identified. In order to achieve this, interlocutors are claimed to rely on the set of information that is already shared between them, as it can only be expected that a hearer will take some information into account in trying to recognize the speaker's communicative intention if this information is mutually available to both of them. This set of information is often characterized informally as what is "taken for granted" or "presupposed" by the participants to the conversation (e.g., (Stalnaker, 1999, p. 84)). Although it is not considered in detail by Grice, the relevant set of information has been the subject of much theorizing that followed him and theorists have introduced different labels for it, such as "mutual knowledge" (Bach & Harnish, 1979; Schiffer, 1972) or "common knowledge" (Huvenes & Stokke, forthcoming; Lewis, 1969), but in the following I will refer to it as "*common ground*", as I take it to be the most established label nowadays (Clark, 1992; 1996; Stalnaker, 2002; 2014).

I also prefer this label because it does not suggest that the information that is shared must be mutually known, as other labels do, or even that it must be mutually believed. Robert Stalnaker (1999; 2002), whose account of common ground has presumably been most influential in recent decades, argues that such claims are problematic because there are cases in which information is taken for granted in a conversation without being true (i.e., without being known) or mutually believed by interlocutors. For example, two children might take for granted that Santa Claus exists, or two philosophers might take a proposition for granted

for the sake of the argument without actually believing it. Instead, Stalnaker proposes that common ground is best thought of in terms of the thinner notion of mutual acceptance, where "[t]o accept a proposition is to treat it as true for some reason." (2002, p. 716). While I agree that Stalnaker's notion has theoretical advantages, in the following it will not be necessary to associate intention-based theories of communication with any of these particular notions and I use "common ground" in a way that remains largely agnostic on this issue.[41] However, one feature that I *will* associate with common ground to the extent that it is employed by an intention-based theory of communication is that for a proposition (or something else) to be common ground interlocutors must mutually expect that the proposition is cognitively available to the interlocutors in the sense that it will (or is likely to) be taken into account in the formation and recognition of communicative intentions. If a speaker did not expect this to be the case, then she could not reasonably assume that it would be taken into account in the recognition of her communicative intention and the same considerations apply from the perspective of the addressee (Stalnaker, 2014, pp. 35-42).

Let me make three more points about the notion of common ground. First, due to the fact that the information in the common ground is the information that is relevant to interlocutors in conveying and recognizing communicative content, theorists generally consider it to provide a more specific characterization of the familiar notion of the *context* of a speech situation (e.g., (Clark, 1992; 1996; Stalnaker, 1999; 2002; 2014)). I will therefore use "context" and "common ground" interchangeably. Second, common ground can contain various types of information. Standard types are information about the physical environment in which a conversation takes place but also the information that has already been exchanged by interlocutors in the course of previous conversations, or information that interlocutors mutually share in virtue of their belonging to different communities (Clark, 1992). To

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[41] In chapter four I discuss a problem that is associated with these notions of common ground and explain that it is understood differently on commitment-based theories of communication.

illustrate information of the last type, consider, for instance, that it is common ground among chess players what castling is or that it is common ground among English speakers that they conventionally use “house” to refer to houses. The third point is a generalization of the observation just made and it is that common ground also contains information about the conventional uses of linguistic expressions, i.e., linguistic conventions, that determine their sentence meaning. This underlines that sentence meaning plays an important role in the process of conveying and recognizing communicative intentions. The idea here is that if it is common ground that a sentence such as “Antonio is Italian” is conventionally used to convey that Antonio is Italian then this will provide the speaker with a salient means to let the addressee recognize the communicative intention to get this across (Bach, 1987, p. 151).

However, it has been noted that speaker meaning, and therefore also communicative content, does not have to correspond to the meaning of the sentence that is used, and it will be useful to consider next how this possibility is explained on Grice’s theory, as it will allow us to distinguish between two specific types of communicative content. These two types are what Grice (1989, pp. 22-40) refers to as “what is said” and “what is implicated”, or “implicature”. On Grice’s original account (p. 25), what is said roughly corresponds to the sentence meaning of an utterance, but it is more specific in cases in which the sentence contains context-sensitive expressions such as indexicals (“I”, “he”, etc.) and ambiguous terms (“bank”, “crane”, etc.).[42] So, for example, while the sentence meaning of “I went to the bank” is that the speaker*, whoever it is who is using the sentence*, went to a financial institution *or* a riverbank, what is said by a particular speaker, S, who uses this sentence on a particular occasion will either be that *S went to a financial institution* or that *S went to a riverbank*. In other words, contrary to sentence meaning, what is said requires that context-sensitive expressions such as indexicals and ambiguous terms are ascribed specific meanings

[42] Indexicals and ambiguous terms are Grice’s main examples, but it remains somewhat unclear how broad he takes the relevant class of context-sensitive expressions to be.

in the respective conversational contexts by means of reference ascription and disambiguation. To do this, interlocutors need consider the common ground, i.e., they need to consider, for instance, who the speaker is and if the shared subject of the conversation are finances or rivers, etc., such that one of the two meanings of "bank" is salient as what is meant and can be recognized as such.

An implicature, on the other hand, occurs when a speaker conveys something indirectly, i.e., by saying something else. As example for this phenomenon is the case in which a speaker utters "Antonio is Italian" in response to the question if Antonio is a good cook. *What is said* by the speaker on this occasion is that Antonio is Italian, but the *implicature* is that Antonio is a good cook. Grice developed a sophisticated theory of how implicatures can be conveyed, but for our purposes a rough outline is sufficient.[43] Grice's main idea is that communication is a practice in which it is usually expected that interlocutors are cooperative, as captured in his famous Cooperative Principle: "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." (1989, p. 26). To flesh out this principle, Grice presents four categories of cooperative communication: quantity, quality, relation, and manner (pp. 26-27). The category of quantity relates to the amount of information that is to be provided, the category of quality primarily relates to the truth of what is conveyed and the evidence that one has for it, the category of relation concerns the relevance of one's utterance to the current exchange, and the category of manner relates to how one's utterance is presented. Further, Grice specifies what is required under certain categories by formulating maxims of conversation. For example, the main maxim under the category of quality is to try to say something true and the only maxim under the category of

[43] For example, Grice (1989, pp. 25-26; 37-38) distinguished a variety of different types of implicatures, such as conversational and conventional implicatures or particularized and generalized conversational implicatures. Because these distinctions are of no special importance here, I will not discuss them further. An influential discussion of implicatures in legal texts that also considers these distinctions has been provided by Marmor (2008; 2014, pp. 35-60; more on this account below). For my own discussion of Marmor's account, see (Shardimgaliev, 2019).

relation is to say something that is relevant. Since the Cooperative Principle and the maxims of conversation are considered to be shared presumptions in conversation, they also constitute part of the common ground and therefore the context of a conversation.

Grice goes on to explain that implicatures can be conveyed because speakers can expect hearers to work out what is implicated on the basis of what is said, the Cooperative Principle and other features of the context in which the utterance is made. From the perspective of the addressee our example would then roughly be explained as follows. A salient part of the context of the speaker's utterance "Antonio is Italian" is that the speaker is responding to the question whether Antonio is a good cook. However, if the speaker merely meant what she said, she would not be cooperative because the proposition that Antonio is Italian does not provide a relevant answer to the question whether he is a good cook. Working on the assumption that the speaker is not uncooperative and observes the maxims, the hearer can therefore infer that the speaker did not only mean to convey what she said but also something else, something that does provide a relevant response to the question. And since it is common ground – and therefore part of the context – that Italians have a world-class reputation for their cuisine, it is more than likely that the speaker meant that Antonio is a good cook.

Let me finish this section by highlighting that although Grice's general distinction between what is said and what is implicated as two types of communicative content has been broadly accepted, his particular notion of what is said has come under significant pressure (e.g., (Borg, 2004, pp. 110-131; Recanati, 2004, pp. 5-22)). Two features make this notion problematic. On the one hand, for some content to be said there must be a communicative intention to that effect because otherwise the content could not be communicated. On the other hand, what is said is closely aligned with the sentence meaning of the uttered sentence and is only considered to depart from it where a constituent of the sentence such as an ambiguous or indexical term requires contextual considerations to determine a more specific

meaning. The problem is that there are many cases where what the speaker intends to convey does not correspond to what is said thus understood but also does not seem to be the kind of indirectly conveyed content that is associated with implicature. For example, consider a case in which a mother tells her son who cries because of a minor cut on his arm: "You are not going to die."[44] The problem is that although what is said as Grice understands it is that the son is not going to die (i.e., that he is immortal), she clearly does not intend to convey this but rather that the son is not going to die *from that cut*. Hence, on Grice's notion of what is said the mother would not be saying anything on this occasion which does not seem to provide a natural or satisfactory notion of what is said. Instead, it appears more natural to say that the mother is saying that the son is not going to die from that cut which leads to a notion of what is said that is less closely aligned with sentence meaning than Grice assumed.

As a result, some theorists have distinguished the Gricean notion of what is said from what is sometimes called a "pragmatic notion" of what is said (Borg, 2004; Recanati, 2004).[45] This notion allows context to inform what is said not only in cases in which this is required by a context-sensitive term but also in cases in which the meaning is modified by context itself as it were. For instance, "You are not going to die." does not contain a term or expression that would necessarily require a specification such as "from this cut". This specification is rather imposed by the context, as it is common ground that people are not immortal. In the following, I will refer to cases of this kind as instances of "pragmatic enrichment" (see, e.g., (Asgeirsson, 2020, p. 1) for the same terminology). To distinguish Grice's notion of what is said from the pragmatic notion, it is sometimes referred to as a *semantic* notion and since it has become rather common to think of what is said as a pragmatic notion, in the following I will restrict my use of the term to this pragmatic sense and refer to the semantic notion simply as "semantic meaning". Since semantic meaning is

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[44] The example is due to Bach (1994).

[45] Other terms for a pragmatic notion of what is said (or at least something similar) that have been used in the literature are "conversational impliciture" (Bach, 1994) or "explicature" (Sperber & Wilson, 1995).

not always part of what a speaker intends to convey with her utterance, I will not necessarily consider it to be a part of the communicative content of an utterance but reserve this category for implicature and what is said in the pragmatic sense.

His notion of what is said is of course not the only aspect of Grice's account that has met with criticism. In fact, virtually every aspect of his theory has been the subject of critical examination, including his analysis of speaker meaning (e.g., (Schiffer, 1972; Strawson, 1964)), sentence meaning (e.g., (Platts, 1997, pp. 89-90)), implicature (e.g., (Sperber & Wilson, 1995)), and many others. However, due to considerations of space I will not go into details of these disputes because they will not play a major role in the following discussion and only consider departures from Grice's original intention-based theory to the extent that they have been considered relevant to theorizing about SP.

2.2. Varieties of meaning and the Standard Picture

Having explained Grice's theory of meaning and communication, we can return to the question how the notion of meaning that is at play in SP is best characterized. The distinctions that have been made between different notions of meaning (or content) in the previous section can be represented as follows:

- sentence meaning
- semantic meaning
- what is said
- implicature

(what is said + implicature) → - communicative content (speaker meaning)

Before presenting the prevalent versions of SP according to which the legal content of a statute is determined by the communicative content of a statute in the next section, in this section I first want to explain why associating SP with sentence meaning or semantic meaning would be implausible.

Let me start with sentence meaning.[46] The problem with the proposal that legal content is determined by sentence meaning is that statutes, like utterances in ordinary conversations, often contain context-sensitive expressions that require appeal to the context in which the sentence is used to deliver a linguistic meaning that is not indeterminate between the potential referents and senses of the expression (e.g., (Allott & Shaer, 2017; Ekins & Goldsworthy, 2014; Solum, 2013). Hence, a version of SP that appeals to sentence meaning would make the clearly implausible claim that the legal contents of all statutes containing such terms are indeterminate to the extent that the meaning of these terms is indeterminate. To illustrate this, consider s. 1 of the London Development Agency Act 2003: "This Act may be cited as the London Development Agency Act 2003 and shall come into operation at the end of the period of two months beginning with the date on which it is passed."[47] To begin with, both "this" and "it" are indexical expressions ("this" is also a demonstrative) and therefore context-dependent, such that the sentence meaning of the sentence is indeterminate between any possible referent for this term, a set that is infinitely large. However, the content of the legal effect of s. 1 is clearly more determinate than that because both "this" and "it" refer to the London Development Agency Act 2003 itself. Further, "period" is clearly ambiguous between various senses, including a length or portion of time, the punctuation mark, and the menstrual period such that the version of SP under consideration would claim that the legal content of s. 1 is indeterminate between these senses. However, the legal content of s. 1 is clearly more determinate and only corresponds to the first of these senses. Such examples are obviously very common and therefore sentence meaning is clearly an implausible example for the notion of meaning that is at play in SP.

Before moving on to semantic meaning, I must clarify that such arguments from

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[46] A suggestion to the effect that legal content is determined by sentence meaning has been made by Jeremy Waldron (1999, pp. 129; 142-143). For a critique of Waldron's account that is much more detailed than the one to be provided, see (Ekins, 2012, pp. 180-217).

[47] Emphasis added. The example is borrowed from Allott and Shaer (2017, p. 97).

indeterminacy are not based on the overly demanding requirement that there must be a determinate answer to every legal question that arises in relation to a statute's legal content. SP is fully compatible with the fact that the norms that are created through the enactment of statutes are regularly indeterminate and do not regulate every case that might be relevant to it (Marmor, 2014, p. 12; Soames, 2013, p. 604). In fact, as it is commonplace that the meaning of linguistic and communicative contributions is regularly indeterminate, SP can only be correct if the legal content of statutory enactments is also regularly indeterminate. Rather, the underlying thought is that versions of SP that appeal to sentence meaning fail because they are unable to account for statutes whose legal contents are clearly more determinate than their sentence meaning. Here it also relevant that SP does not have the implication that cases in which the meaning of the relevant statute, and therefore also its legal content, is indeterminate judges cannot reach a decision. The reason is that SP is fully compatible with the view that in cases in which the legal content of a statute is indeterminate judges can reach a decision by, for instance, exercising their discretion and developing the law in a way that is sufficient to settle the case (more on such cases in the next chapter).

Let me now consider the notion of semantic meaning. Because semantic meaning appeals to contextual information in cases in which the sentence that is used contains the kind of openly context-dependent expressions that are problematic for a version of SP that relies on sentence meaning, a version that relies on semantic meaning would not be undermined by statutes that contain such terms. However, such a semantic version of SP would still be faced with other difficulties. To illustrate this, consider the following two examples, both of which are taken from the work of Ekins (2012, pp. 200-202). The first is an Alberta bylaw that requires that all drug stores "shall be closed at […] 10pm on each and every day of the week" and the second is s. 57 of the UK Offences Against the Person Act 1861 that states that "[w]hosoever, being married, shall *marry* any other person […] shall be

guilty of felony".[48] The problem with the example of the Alberta bylaw is that its semantic meaning only requires that drug stores shall be closed at 10pm but not that they shall *remain* closed until the morning, even though this is clearly what its legal content is.[49] Similarly, in the second example the semantic meaning of "marry" is that of joining in marriage but this cannot have any corresponding legal content because it is impossible under UK law to join in marriage with some other person if one is already married. Instead, the legal content of this statute is that a person who is already married commits a felony if he or she *goes through the ceremony of marriage* with some other person. These examples show there are statutes whose legal contents do not correspond to their semantic meanings but rather to the pragmatic enrichments of this semantic meaning, i.e., to what is said by these statutes in a pragmatic sense.

Now, it might be argued that such examples are rare in statutory language and say that they are therefore not at odds with SP as it allows for exceptions.[50] To undermine the plausibility of such a defence, Ekins (2012) and Nicholas Allott and Ben Shaer (2017) provide several examples of this phenomenon from statutory law which they take to suggest that it is quite common. However, focussing on Ekins's work, Asgeirsson (2020, pp. 112-118) has recently argued that the evidence on this point is not as clear as it is claimed to be. For example, consider the case of *Rex v Harris* in which the question was whether a statute that made it an offence "to stab, cut or wound" any person applied to a case in which the

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[48] Emphasis added.

[49] As decided in *Rex v Liggets-Findlay Drug Stores Ltd* [1919] 2 WLR 1025 (cited in (Ekins, 2012, p. 201)).

[50] Marmor is sometimes associated with a view along these lines (e.g., (Allott & Shaer, 2017) because – working with a semantic notion of what is said – he claims that "cases in which it is quite obvious that the content the legislature prescribes is not exactly what it says […] would be very rare" (2008, p. 429). Although we have noted that Marmor adopts a communicative version of SP his account might be held to be broadly compatible with such a semantic version of SP because he might claim that the meaning that is communicated by a statute usually corresponds to its semantic meanings. However, I think that we should be hesitant to associate Marmor's account with such a semantic version. The reason is that Marmor does not claim that it will be rare that a statute's legal content will depart from semantic meaning but that it will be rare that it is *obvious* that this is the case. Indeed, Marmor holds that it will often be the case that it is indeterminate whether the legal content of a statute corresponds to semantic meaning or a different type of meaning such as a pragmatic notion of what is said or implicature. As such, his view does not seem to be that the legal content of a statute usually corresponds to its semantic meaning. A view that some has important similarities to Marmor's is presented by Asgeirsson (2020) and will be considered shortly.

defendant had bitten off the tip of the victim's nose.[51] Ekins (2012, pp. 200-201) argues that the legal content of this statute is different from its semantic meaning because it supposedly does not apply to all occasions in which someone stabs, cuts or wounds someone else but only to those where a weapon or other instrument is used for that purpose. In making this claim, Ekins relies on the fact that this was how the statute was interpreted in *Harris*, such that the biting off of someone else's nose was not considered to be an offence under this statute. However, Asgeirsson (2020, pp. 115-116) responds that it is far from clear that this is the legal content of the statute by pointing out that the decision in *Harris* relied on a decision in a similar case (the defendant had bitten off the tip of someone's finger) in which the issue was very controversial: only seven out of the thirteen judges who were involved in the decision held that it is restricted to cases in which an instrument is used. According to Asgeirsson, this is due to the fact that the statutory context is not sufficiently determinate in this case to warrant a conclusion either way: that there is an implicit contextual restriction to the use of an instrument or that there is no such restriction. Asgeirsson also shows convincingly that many of the other examples that Ekins invokes are similarly problematic and that they rather suggest that it is indeterminate whether the legal content of the respective statute corresponds to its semantic meaning or to a pragmatic enrichment thereof.

However, the conclusion that I want to draw from this, and that it is also drawn by Asgeirsson (2020, p. 119), is that even if it is correct that it is often indeterminate whether the legal content of a statute corresponds to its semantic meaning or to a different type of meaning, this still makes semantic meaning an implausible candidate for the determinant of legal content. The problem is exactly that it would not be the case that the legal content of a statute corresponds to its semantic meaning but rather that it would be indeterminate whether this is the case. I want to be explicit, however, that I do not want to make any strong commitment with regard to the empirical question whether the legal content of a statute

[51] *Rex v Harris* (1836) 7 C & P 446.

regularly and determinately departs from its semantic meaning or whether it is often indeterminate if it does. More empirical research is needed on this point, and I consider the following discussion to be compatible with both possibilities.

I take the foregoing to provide sufficient reasons for not conceptualizing SP in terms of semantic meaning. However, note that a version of SP that relies on this notion would also be undermined by the frequent occurrence of cases in which the legal content of statutes corresponds to implicated content or where it is indeterminate whether it corresponds to such a content. It is currently a matter of debate whether statutes (and other legal texts) convey implicated content and whether they do so determinately. Some theorists, such as Allott and Shaer, claim that "legal instruments rarely if ever have implicatures as part of their utterance content" (2017, p. 95). If this is correct, then this would not pose any further problem for semantic versions of SP because statutes would not have any implicated content that their legal contents could correspond to (determinately or indeterminately). However, other theorists such as Marmor (2008; 2014) have claimed that it is often indeterminate whether statutes implicate some content and whether this content corresponds to their legal content. The indeterminacy as to whether some content is implicated is again said to be partly due to indeterminacies about statutory context but also due to the alleged fact that legislation is a "strategic" (Marmor, 2014, p. 7) form of discourse. By this they mean that it is somewhat indeterminate to what extent the Cooperative Principle and the maxims are observed in this specific communicative setting. As far as I can see, the latter view currently has more explicit adherents than the former (e.g., (Poggi, 2011; Skoczen, 2019)) and if these theorists turn out to be right, then the semantic version of SP would be further undermined. However, the amount of evidence that is available with regard to this issue is rather thin and the arguments that are provided are controversial, most notably whether legislation is in fact a strategic form of communication (see, e.g., (Endicott, 2014).[52] In the following, I will therefore not

[52] For my own critical discussion of Marmor's view, see (Shardimgaliev, 2019). In this article I also provide

rely on considerations from implicated content in statutory law.

2.3. Communicative and intention-based versions of the Standard Picture

In light of the foregoing arguments, it is not surprising that most adherents of SP have come to adopt communicative versions, i.e., versions that conceptualize the notion of meaning in play as communicative content. Communicative content can account for statutes that contain context-sensitive expressions, pragmatic enrichments, and even implicated content because it encompasses both implicature and content that is captured by a pragmatic notion of what is said. In addition, a communicative version can also deal with cases in which it is indeterminate if the legal content of a statute corresponds to the semantic content of a statute, what is said in a pragmatic sense, or even what is implicated because all of these can be the communicative content of an utterance and this communicative content can itself be indeterminate between these varieties of meaning. It can be indeterminate, for instance, if a statute that made it an offence "to stab, cut or wound" any person communicated that stabbing, cutting, or wounding a person is generally an offence or if it must involve a weapon or some other kind of instrument.

We have already seen that Marmor explicitly commits himself to a communicative version of SP when he says that "the collective action of legislators enacting a law is a collective speech act, whereby some content is communicated that is, essentially, the content of the law voted on." (2014, p. 12). Other examples of explicit statements to this effect can be found, for instance, in the work of Asgeirsson who says that he holds "an account of legal content on which the legal content of a (valid) statute or constitutional clause directly corresponds to its communicative content." (2020, p. 6), or Soames who says that "the content of the law includes everything asserted and conveyed in adopting the relevant legal

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evidence that suggests that sufficiently determinate implicatures are rather common in judicial opinions but since this thesis concerns statutes, I will not discuss it here.

texts" (2009, pp. 408-409). These scholars are only representative of many others, as we will see shortly. It is important to note that endorsing a communicative version of SP does not necessarily commit one to a particular theory of communication or communicative content (Smith, 2019, p. 504). This is manifest in the fact that there is a division between versions of SP that rely on what they call *subjective* and *objective* theories of communication. While both claim that the notion of communicative intention is central, subjective accounts are more directly and closely aligned with the Gricean theory of communication to the extent that they claim the communicative content of a statute to be determined by the *actual* communicative intention of a legislature. Two theorists who subscribe to such a subjective theory are Ekins and Neale. Drawing on Grice's work, Ekins claims that "[t]he legal content that the legislature acts to introduce […] is what it intends to introduce" (2012, p. 211) and that "interpreters identify the legal changes that the legislature has acted to introduce by understanding the intended meaning of the statutory text" (p. 116). And Neale, a declared proponent of a Gricean theory of meaning, claims that "the basic goal of anything deserving to be called 'statutory interpretation' is the process of identifying the directives the legislature intended to be communicating by way of enacting and publishing statutes" (unpublished b). This strongly suggests that the directives thereby identified are considered to correspond to the content of the law that is created through statutes because, as noted in the introduction, statutory interpretation is commonly understood as being aimed at identifying and giving effect to the content of the law.[53]

The objective model, on the other hand, holds that the communicative content of a statute is not determined by the actual communicative intention of an authority but rather by the communicative intention that would be ascribed to the authority by a reasonable hearer.[54]

[53] Greenberg (2011b, pp. 231-232) and Marmor (2014, p. 21) interpret Neale's account in the same way.

[54] Referring to work by theorists such as Jennifer Saul (2002) and Stephen Schiffer (1972) Emma Borg has suggested in personal communication that Grice might also be interpreted as holding an objective intention-based theory rather than a subjective one. I, for my part, find it rather unclear if these theorists really ascribe an objective view to Grice – or at least if they do so consistently. For example, Saul says that on Grice's notion of what is said "psychological reality is not a requirement" (2002, p. 347) but also that "Grice requires that

One of the arguments that is put forward by proponents of the objective theory is that it accounts more plausibly for our intuitions about communication. For instance, consider an example from ordinary conversation by Marmor (2014, p. 20) in which a speaker says "Please, close the window!" but intends her addressee to close the door (e.g., due to a slip of the tongue). It neither seems plausible to say that the speaker does not communicate anything in this case nor that the speaker communicates that the addressee should close the door rather than that he should close the window. The more general point that such objective theorizing about communication highlights, I take it, is that defining communication and communicative content exclusively in terms of the successful recognition of speaker meaning does not sufficiently take into account such facts as that the interlocutors can fail to choose their words appropriately or to assess what can be reasonably said to be common ground. For even if there are such failings it is often appropriate to say that a specific content is communicated that the speaker does intend and therefore that communication has taken place, even if it is not (entirely) successful in the sense that the speaker did not get the content across that she intended. Marmor therefore argues that communicative content should be

> defined objectively as the kind of content that a reasonable hearer, with full knowledge of the contextual background of the speech, would understand the speaker to have intended to convey, given what the speaker expressed, the relevant contextual knowledge, and the relevant conversational norms that apply. (2014, p. 19)[55]

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what is said must be meant by the speaker. This, for Grice, is a matter of speaker intentions." (p. 351). What is more important, however, is that this exegetical issue does not necessarily have to be resolved for the purposes of this thesis because the central conclusions do not rely on it. More specifically, since I will argue that both subjective and objective intention-based versions of SP are undermined by the objections that are raised, it doesn't play an important role if Grice's theory of communication is understood in subjective or objective terms. The purpose of introducing Grice's theory was primarily to present the general claims of a standard intention-based theory and I presented it as a subjective account because I take this to be the more common interpretation and the one that is shared by theorists in the literature on SP. For instance, Marmor says that "[a]ccording to a Gricean view, the communication intentions of the speaker are entirely constitutive of such content. *Whatever the speaker actually intended to say is the content asserted*." (2014, p. 19, emphasis added; for similar views, see, e.g.: (Ekins, 2012; Ekins & Goldsworthy, 2014)). I will stick to this interpretation in the following, but I invite the reader to keep in mind that this is not essential for the main arguments and that those who prefer an objective interpretation are free to make the necessary substitutions.

[55] To be more precise, Marmor's claim here rather concerns "assertive content" by which he is referring to what is said. Marmor does not speak about communicative content more generally in this context because, as noted above, he takes legal texts rarely to have any clearly communicated content that goes beyond what is said.

A similar view is adopted by Goldsworthy whose version of SP distinguishes "between legislators' actual intentions […] and the legislature's apparent intentions as 'expressed' or 'manifested' by readily accessible and contextual evidence." (2019, p. 180). Goldsworthy argues that "objective communication theory" (p. 181) which favours such "expressed" or "manifested" intentions, is more plausible. And, most recently, Asgeirsson has also adopted an objective account on which "communicative content, roughly, is the content that a competent, rational hearer would take the speaker to be intending to communicate in uttering the relevant words." (2020, p. 34).[56]

A notion that is of course central to the objective view is the notion of a reasonable or competent hearer and, as we will see in the next chapter, it is not always clear how this hearer should be characterized when it comes to statutes. However, one way that can serve as an example and that has been proposed by Marmor is that "the relevant reasonable hearer, in the context of statutory interpretation, is an adequately informed legal hearer, so to speak—namely, one who is well informed about all the background legal landscape and the technicalities of legal jargon." (2014, pp. 116-117). This characterization highlights that the hearer in question is an idealized hearer. The extent to which the hearer is idealized can vary between different accounts and is rather significant in Marmor's case because the hearer is supposed to know *all* the legal landscape by which Marmor is likely to be referring to the entire corpus juris of a system, and all the technicalities of legalese. Clearly, not even the most sophisticated legal experts can fully satisfy this standard. Idealizations of this kind potentially raise difficulties for objective views because it is far from obvious why it is

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[56] A theorist whose account does not always fall clearly into either of those camps is Soames. According to him, in interpreting the law we should look

> for *what the lawmakers meant and what any reasonable person who understood the linguistic meanings of their words, the publically available facts, the recent history in the lawmaking context and the background of existing law into which the new provision is expected to fit, would take them to have meant*. This […] is the content of the law as enacted. (2013, p. 598)

Soames does not seem to notice that what lawmakers meant and what a reasonable person would take them to mean can come apart.

appropriate to identify communicative content with the communicative intention that an idealized hearer, rather than the actual hearer, would ascribe to the speaker (e.g., (Greenberg, 2020, pp. 121-122)). My aim here is not to pursue or develop this objection but merely to highlight that objective theories might be subject to theoretical problems, just as subjective ones (as indicated by Marmor's example).[57] Since I will eventually try to show that both types of account are undermined by objections to SP, I will not try to settle the dispute between them or to identify which of them is the more plausible one.

While the foregoing remarks show that there is a divide between objective and subjective views, I already noted that both kinds put the notion of a communicative intention at the core of their explanation of communication and communicative content. More specifically, it is a communicative intention that – when reasonably ascribed or actually present – is said to determine communicative content and that must be recognized to identify this content. This is why I identify both kinds of theories as intention-based theories of communication and to versions of SP that rely on such theories as intention-based versions of SP. As far as I can see, and as illustrated by the statements that have been considered in this section, all recent communicative versions of SP have adopted intention-based theories of communication and are therefore intention-based versions of SP.

I would like to complete my introduction of intention-based versions of SP with remarks on two further subjects: their accounts of statutory interpretation and the underlying notion of intention. There are overlaps and divergences between subjective and objective intention-based versions of SP when it comes to the question of how statutes are to be interpreted. Since subjective and objective accounts have diverging views on what determines the communicative content of a statute, and therefore also its legal content, they have diverging views on the question of what is to be identified in interpretation: either an

[57] Ethan Nowak and Eliot Michaelson (2021) have recently argued that there is no plausible way to flesh out the notion of an ideal listener that accounts for our communicative practices (most notably reference). I am sympathetic to their argument, but I will not press this point here.

actual communicative intention or the communicative intention that would be ascribed to the legislature by a reasonable hearer. Despite this difference it is likely that the interpretive process will overlap to a certain extent because it is reasonable to suppose that what a legislature actually intended to convey is what a reasonable hearer would understand it to convey because the fact that a communicative intention must be intended to be recognized suggests that it is to be recognized by means of reasonable inferences. Further, because communicative intentions – whether actual or ascribed – are supposed to be recognized, both types of accounts will claim statutory interpretation to draw on the common ground of the conversation. However, depending on who the relevant hearer is taken to be, i.e., the actual or an idealized one, there might also be important differences between the interpretive approaches of subjective and objective theorists. Most importantly, characterizing the hearer will have an impact on what the common ground is taken to be that constitutes the context against which statutes are to be interpreted. For example, if an objective theorist has a highly idealized view of the reasonable hearer, then information might be considered to be part of the common ground that the actual addressees (e.g., legal laypeople) of a statute might not plausibly possess.

Let me now say something about the notion of intention. To begin with, what is at issue in both subjective and objective intention-based version of SP is a complex and broadly Gricean communicative intention, i.e., an intention to produce an effect in virtue of the recognition of this very intention.[58] This is important because speakers can of course have all kinds of other intentions that do not determine communicative content (Neale, unpublished a). For example, a simple intention to achieve something (such as to obtain a philosophy degree or impress another person) does not play any role in determining

[58] I say "broadly" because there have been proposals to make certain amendments to Grice's original analysis of communicative intention (e.g., (Neale, 1992; Schiffer, 1972; Strawson, 1964)) and a proponent of an intention-based version might prefer to adopt such an alternative analysis. As far as I can see, adopting one of these alternative analyses would not significantly affect the arguments that are pursued in this thesis.

communicative content. Similarly, speakers often intend to communicate some information but also have an additional intention that is not intended to be recognized (Grice, 1989, p. 221). For instance, one might intend to communicate to someone else that Antonio is a good cook and thereby also intend that the addressee tries one of Antonio's dishes but if the latter intention is not a communicative one (i.e., not intended to be recognized) it will not determine the communicative content of the utterance. However, non-communicative intentions might still play a role in the process of interpreting an utterance, namely when the intention is part of the common ground of the interlocutors. As Grice already pointed out, a man who manifestly intends to put out a fire and calls for a "pump" will not be asking for a bicycle pump (1989, p. 222). Where it is necessary to highlight the difference, in the following I will refer to intentions that are not communicative as "non-communicative" intentions. However, where the difference is not particularly important or the kind of intention that I am referring to is clear from the context I will continue by speaking of "intentions" simpliciter.

A more fundamental question that needs to be addressed is what an intention actually is. Despite the centrality of this notion to intention-based theories of communication it is interesting that proponents of such theories tend to take it take for granted and do not attempt to explain it in detail. For example, in his original discussion Grice merely says that his use of the notion of intention is "fairly free" (1989, p. 221), that he does "not hope to solve any philosophical puzzle about intending" (pp. 221-222) and that "no special difficulties are raised by [the] use of the word "intention" in connection with meaning." (p. 222).[59] Further,

[59] I must not avoid mentioning that Grice (1971) eventually did provide an analysis of intention, even though it was only many years after he developed his theory of meaning and he did not directly relate his analysis to this theory. Bratman helpfully summarizes the analysis as follows:

> [Grice] introduces a general notion of willing, a notion which has the feature that I will that I *A* wherever I either intentionally *A* or intend to A later. In the present-directed case, I will that I *A* now (in Grice's sense) just in case I endeavor now to *A*. Grice then goes on to claim that my intention to *A* is my willing to *A* together with my belief that, as a result, I will *A*. (1987, p. 158)

Bratman (1999, p. 31) explains that this account is problematic because the condition that intention involves a belief that one will actually do what one intends to do is too strong. For example, one might intend to buy a

although there has been a lot of discussion about his analysis of *communicative* intention and its particular clauses, philosophers of language have not done much to explain what exactly an intention is in general. With some exceptions to be considered more closely in the next chapter (Ekins, 2012; Ekins & Goldsworthy, 2014) this tendency can also be observed in many discussions around SP.

While theorizing on the basis of an intuitive notion of intention might be unproblematic as long as we consider individual speakers and ordinary conversation, something more specific is required for the purposes of this thesis because we will see that the notion of intention raises special problems when it comes to legislative bodies. At the same time, given the large amount of literature on intention and its difficult character it would go beyond the scope of this thesis to provide a full-fledged philosophical account of this notion, so I believe that the following is a reasonable strategy.[60] I propose to make a distinction between the intentions of individuals which I refer to as "personal" intentions and which I consider to be the basic type of intention, and the intentions of collective agents, such as small groups but also corporations and legislative bodies. I will discuss the notion of collective intentions in the next chapter, but here I lay the basis for this discussion by highlighting two important features of personal intentions and by explaining how they are accounted for on the currently dominant account of such intentions: Bratman's (1987; 1999) planning theory of intention. If not otherwise specified, in the rest of the chapter I will use "intention" to speak of personal intentions and not of collective or communicative intentions.

Personal intentions are standardly associated with (at least) two important features: being *mental or psychological* (I will use the two terms interchangeably) states and being *normative* states (Setiya, 2018). That intentions are generally considered to be mental states

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book on one's way home from work but not quite believe that one will do so because one tends to be absentminded after a long working day and try to get home as quickly as possible. Since I agree with Bratman's critique, and because his own account has been much more influential, in the following I will not further consider Grice's account but rather focus on Bratman's theory.

[60] For a recent survey of the philosophical literature on intention, see (Setiya, 2018).

is underlined in Kieran Setiya's (2018) recent Stanford Encyclopedia article on intention. Although he observes that "[t]here is a deep opposition […] between accounts that take intention to be a mental state in terms of which we can explain intentional action, and those that do not." (2018) he highlights that the latter view is only held by a minority and that there is a "prevalent acceptance of intention as a mental state" (2018). To my mind, this mainstream understanding also pervades the literature on intention-based theories of communication. It is manifest in Grice's own work when he speaks, for instance, of "psychological reductionism exhibited in my own essays about Meaning" (1989, p. 355) and in the work of Stephen Schiffer who observes that on Grice's account speaker meaning is "defined wholly in psychological terms" (1986, p. xiii). More generally, it is now standard to classify intention-based theories of communication as "mentalistic frameworks" (Geurts, 2019a, p. 27). Of course, it is widely disputed what mental states are, and since any answer is bound to be controversial, I will not take any position on this question. I merely highlight that on the standard view personal intentions belong to this class of states: they are the states of a *mind*.

When speaking about the *normative* feature of intention people usually have in mind features such as that once an agent has an intention there are certain actions that she *ought* to perform and certain other mental states that she *ought* to have (Bratman, 1987; Setiya, 2018). For instance, if Anne has the intention to go for a walk, then she ought to go for a walk and she usually also ought to have the intention to put on her shoes, at least in the absence of (weightier) reasons to the contrary. The idea is that not acting upon an intention or not having a mental state that is necessary for achieving what one intends constitute forms of behaviour that are in some sense inadequate. Clearly, the notions of ought or adequacy that are relevant are not normative in a moral sense because one can intend to perform immoral actions. Rather, it is a question of practical reason or rationality; one who has the intention to perform an act and does not perform it in the absence of good reasons to the

contrary will act irrationally.

Both general features of intention are present in Bratman's influential planning theory of intention (1987; 1999). As the name suggests, it analyses the intention to do something in terms of planning or having a plan to do it and the notion of a plan is understood as follows: "Plans […] are mental states involving an appropriate sort of commitment to action." (1987, p. 29). This makes it explicit that Bratman thinks of intentions as mental states and that these states are normative because they involve commitments. Before briefly explaining why commitments are normative it is worth highlighting that on Bratman's account one cannot intend to do something without being committed to doing it (see also (Tuomela, 2013a, p. 62)) because one cannot plan to do something without committing oneself to what is planned. Important here is that the notion of a plan is not understood in the sense of a recipe or algorithm that can be followed *if* one wishes to do so. For example, a recipe for how to cook lamb is a plan in this sense, but it is not what Bratman is referring to when he speaks of plans (1999, p. 37) because knowing the steps for how to cook lamb does not commit one to cook lamb. Rather, it is the plan *to follow* the recipe – planning to cook lamb – that is relevant to Bratman's account as it does come with a commitment to cook lamb.

The notion of commitment will be explained in further detail in chapter four, but it can already be noted that it is clearly normative (e.g., (Brandom, 1994; Bratman, 1987; Gilbert, 2013)). One who is committed to do something *ought* to do it and can – at least in the absence of reasons to the contrary – be blamed (or even blame oneself) for not doing it. Similarly, having a commitment to do something that requires the performance of other actions also commits one to perform these other actions and therefore to intending to perform these other actions. As such, the involvement of commitment in the mental state of intention is supposed to account of the normative feature of intentions on Bratman's account and is therefore also not necessarily moral but rather a matter of practical reason. I must also stress

that an intention is not claimed to be the same as a commitment but rather a mental state that involves (or comes with) a commitment. That commitments and intentions are not the same thing is indicated by the fact that they can come apart. For example, a politician can commit herself to protect the environment by making a promise to that effect but not actually have any intention to do so (even if she has the communicative intention to make others believe that she does). To intend what she is committed to, the politician would also need to be in the mental state of planning to protect the environment. This mental aspect constitutes a – if not *the* – crucial difference between intention and commitment.

Conclusion

In this chapter I presented Grice's theory of meaning and communication and considered different potential candidates for the notion of meaning as the explanans of SP. I argued that sentence meaning, and semantic meaning yield versions of SP that are implausible. Instead. recent proponents of SP have adopted communicative versions according to which the legal content of a statute is determined by the communicative content of that statute. It has further been noted that although one is not committed to a particular theory of communication in virtue of adopting a communicative version of SP, all its recent proponents rely on intention-based theories of communication. Subjective and objective varieties of intention-based versions of SP have been distinguished, their approaches to statutory interpretation have been explained, and the notion of personal intention has been introduced.

3. Objections to the Standard Picture

The aim of this chapter is to discuss to what extent intention-based versions of SP can deal with objections that have been raised by critics. My conclusion will be that although such versions are capable of dealing with some of the objections that threaten to undermine SP, they have difficulties to provide satisfying responses to some others. The chapter is divided in four sections. The first section considers two objections that I will find to be unproblematic. I refer to them as "the category mistake objection" and "the objection from bindingness" and explain briefly how they can be dealt with. The rest of the chapter considers three objections – or types of objections – that are more problematic. These objections are referred to as "the objection from collective intentionality", "objections from legal practice" and "the objection from parochialism" and each is discussed in an own section. The objection from collective intentionality is that intention-based versions of SP cannot explain how legislative bodies could have or could be reasonably ascribed the intentions that they would need to have according to such versions. As the name suggests, objections from legal practice are unified by the aim of showing that SP cannot account for certain phenomena from legal practice. Finally, the objection from parochialism is that there is a standing possibility that SP does not hold universally for all legal systems and that it is therefore only of limited philosophical interest.

3.1. Objections to the Standard Picture that are unproblematic

In this section I consider two objections that I argue not to pose significant problems for existing versions of SP. I must reemphasize that the discussion in this section is not meant to cover all the objections that I consider to be unproblematic. One reason is that several other objections have already been dealt with, or at least bracketed, in passing (though not always explicitly) when I clarified my understanding of SP. These include, for instance, the objection

that SP is implausible as a theory of the legal contents of all legal texts (Greenberg, 2011a), the objection that SP cannot provide an account of the content of the law without considering theories of the nature of law (Greenberg, 2011b; Greenberg, 2017b), or the objection that there can be statutes that have a meaning but no legal content because they are invalid (Levenbook, 2021, pp. 743-744). Moreover, it would go beyond the scope of this thesis to consider all objections that have been levelled at SP explicitly and the objections that I discuss here have been selected because they are often considered in the literature on SP and have not been directly addressed by my discussion until now. In not discussing all the existing objections I also rely on various other defences of SP that have been provided by other theorists and to which I refer the reader for further details (e.g., (Asgeirsson, 2020; Ekins, 2012; Goldsworthy, 2019; Marmor, 2014)). Finally, since I want to dedicate as much space as possible to the more problematic objections, I will move through the objections to be considered in this section rather quickly and not discuss them in full detail but only to an extent that I consider sufficient to show that they do not pose significant threats to SP.

3.1.1. The category mistake objection

A succinct formulation of the category mistake objection is provided by Greenberg: "The content of the law consists of obligations, rights, powers, and the like. By contrast, linguistic meaning is information represented by symbols. These two things are not even of the same general category." (2017b, p. 110; see also Smith, 2019, p. 506). The argument is that the content of the law cannot be (or be determined by) a statute's meaning because meaning is claimed to be encoded *information* (such as a proposition or an indication of one's communicative intentions) and therefore belongs to a different category than the legal *norms* that Greenberg considers to be the content of the law. The problem with this argument is that it is based on an understanding of SP that is problematic in at least two respects: it assumes, first, that the content of the law consists of legal norms and, second, that the meaning of a

statute must belong to the same category as the content of the law. To begin with the first, I argued that this claim is problematic because the notion of the content of the law should not be conceptualized in terms of legal norms but rather in terms of the contents of these norms. These contents might be conceptualized in terms of encoded information and therefore belong to the same category as the notion of meaning. However, sceptics might respond that the category mistake objection also applies if the explanandum of SP is the content of legal norms. As noted, it might for instance be the case that the content of legal norms consists in something like an action type while the meaning of a statute is a propositional attitude that is supposed to be adopted in virtue of recognizing a communicative intention (or an illocutionary force that is paired with a proposition, etc.). Depending on one's preferred way of categorizing these phenomena they might be claimed not to belong to the same category either, such that the category mistake objection might still apply.

However, even in this case, it would still be problematic to make the second assumption that the objection is based on, namely that the content of the law and meaning must belong to the same category. Here it becomes important that I have also argued – following Asgeirsson – that the relation that is at play in SP does not have to be one of identity but might also be constitution, grounding, or something else. Because these relations do not require the full or even extensive sharing of properties, SP also does not have to require that meaning and the content of legal norms belong to the same category but merely that they correspond to each other.[61]This is sufficient to show that the category mistake objection does not pose a real threat to SP.

[61] Indeed, this is one of the reasons considered by Asgeirsson (2020, p. 8) for not adopting identity-based accounts of SP in the first place. Asgeirsson (p. 8) also considers an interesting alternative strategy to deal with the category mistake objection which is to draw on recent insights from metaethics in order to argue that norms are propositions after all. But since I do not consider the explanans of SP to be legal norms I will not discuss this strategy here.

3.1.2. The objection from bindingness

The second is the objection from bindingness. This objection has also been presented by Greenberg and it is that SP is supposedly incompatible with a hypothesis "about law's nature" (2011a, p. 86) that he claims to be "relatively uncontroversial" (p. 90). According to this "bindingness hypothesis",

> a legal system is supposed to operate by arranging matters in such a way as to reliably ensure that its obligations are all-things-considered morally binding (or, equivalently, that a legal system is defective to the extent that it does not so operate.) Slightly more precisely, a legal system is supposed to operate by arranging matters in such a way as to reliably ensure that, for every legal obligation, there is an all-things-considered moral obligation with the same content–but *not* necessarily so that for every moral obligation there is a corresponding legal obligation. (p. 84)

According to Greenberg, "the source of the difficulty [i.e., SP's incompatibility with the bindingness hypothesis] is very simple" (p. 101) and it is that "issuing pronouncements is in general a very poor way to create moral obligations." (p. 101). To put this in my own words, the gist of Greenberg's objection is that the moral bindingness that the legal norms of a system must allegedly have in order for the system to be non-defective cannot be ensured if (the contents of) its legal norms are determined by the meaning of statutes (and other legal texts), i.e., if SP is true. The reason is that as far as SP is concerned the meaning of a statute can always be such that it directs citizens to behave in morally questionable ways and that a statute is even likely to do so because human lawmakers are fallible and therefore prone to enact statutes with meanings that do not match moral norms. I must stress that Greenberg's claim is not that legal systems cannot be defective. That is, he does not dispute that legal systems can contain legal norms that are not morally binding. Rather, his claim is that legal systems are defective if they do not ensure that their norms are morally binding and, indeed, that they cannot ensure this if SP is true. He therefore concludes that "SP [...] makes it difficult to see how a legal system can operate as it is supposed to." (p. 100).

Goldsworthy has recently observed that "[t]here is much […] to disagree with" (2019, p. 195) when it comes to Greenberg's objection and he and Levenbook (2021, pp. 744-750)

have already exposed various of its shortcomings in their own responses to the objection. Due to limitations of space the following response will only highlight some of the problems and I refer to the work of these theorists for further discussion.[62] I also admit that I will not be able to fully refute the objection, but I want to stress that this is complicated by the fact that Greenberg's argument is itself not fully developed. For example, Greenberg admits that he does not "give a real argument for the [bindingness] hypothesis" (2011a, p. 90) but primarily relies on its "relatively uncontroversial" (p. 90) status. However, Levenbook has already observed that "the bindingness hypothesis […] is hardly uncontroversial, as Greenberg claims." (2021, pp. 748-749) and that "[i]t needs a defence." (p. 749). We will see shortly that Greenberg does provide some supposedly indicative evidence in favour of the broad acceptance of the bindingness hypothesis, but it will be shown to be inconclusive. In any case, the lack of argument in favour of the hypothesis does not only put the objection on shaky ground from the very beginning but also makes it hard to assess. My strategy will therefore rather be to shift the burden of proof to Greenberg by raising strong doubts about some of the central aspects of his objection.

As just mentioned, one problematic aspect is the evidence that Greenberg provides in favour of the claim that the bindingness hypothesis is widely adopted. The perhaps most important source of evidence that he invokes is that it is allegedly common practice to treat legal norms as being all-things-considered binding:

> Once legal obligations are established, the law enforces them – including with coercion – regardless of moral or other reasons. This is to treat them as all-things-considered binding […] By the law's lights, at least, legal obligations are all-things-considered obligations, not merely pro tanto obligations that can be trumped by other obligations. (2011a, p. 94)

Greenberg is explicit that if an obligation is treated as all-things-considered binding then it

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[62] Another theorist who has recently objected to Greenberg's objection from bindingness is Alexander (2021). He accepts that "SP cannot reliably achieve bindingness" (p. 196) but claims that "[Greenberg] is wrong in thinking that's a defect in the SP account." (p. 196). However, Alexander's discussion of the bindingness hypothesis remains rather sketchy and will therefore not be further considered here.

is also treated as all-things-considered morally binding because moral considerations must be considered if all things are considered (pp. 85-86). By claiming that "the law" enforces its own obligations as all-things-considered he is likely to mean that legal institutions or legal officials enforce them as such but, as Levenbook (2021, p. 749) observes, Greenberg also suggests that non-officials treat them as such. The idea is that this supposedly empirical fact makes it plausible that the bindingness hypothesis is widely accepted.

However, virtually all of Greenberg's claims are questionable. To start with the empirical claim that legal officials, institutions, or people in general treat legal obligations as all-things-considered binding, Levenbook notes that Greenberg "offers no evidence" (2021, p. 749) for this claim. This is yet another respect in which Greenberg's argument is underdeveloped. What's more, Levenbook also argues that when applied to citizens Greenberg's claim is undermined by such facts as that "the vast majority of motorists in the United States treat what they know to be speed limit laws as subordinate to certain practical considerations (and desires)" (2021, p. 750) and that "[i]n the United States recently, a significant subset of individuals has laid claim to the supremacy of their religious convictions over certain legal obligations they recognise, thus treating law as failing to exclude some considerations." (2021, p. 750). Further, Goldsworthy (2019, p. 195) has argued that it is also questionable that legal officials do not recognize that some of the laws that they enforce are immoral and that they are not bound by morality to enforce them.

Moreover, even if it is true that a legal system excludes all other considerations in enforcing its laws this does not demonstrate that it is part of its nature that it is supposed to impose all-things-considered binding obligations. To show why this is not the case, Levenbook (2021, p. 749) borrows an example from Scott Shapiro (2011, p. 215): the organized crime syndicate known as the Yakuza. Within this organization orders are treated as dispositive in the sense that moral and legal considerations are taken to be irrelevant and it is certainly also true that people are coerced to follow them and punished severely if they

don't. The same holds for other crime syndicates. However, it would be absurd to say that this demonstrates that it is part of the nature of a crime syndicate to ensure that its rules are all-things-considered or morally binding (Levenbook, 2021, p. 749). These points illustrate that the considerations that Greenberg invokes in favour of the wide acceptance of the bindingness hypothesis are problematic. And since Greenberg does not provide any real argument in its favour it seems fair to say that a significant burden of proof remains on Greenberg's side to establish that it holds.

I now turn to the claim that the bindingness hypothesis and SP are incompatible because it is supposedly the case that "issuing pronouncements is in general a very poor way to create moral obligations" (2011a, p. 101). More specifically, legislative pronouncements are made by fallible human lawmakers and are therefore likely to have meanings that direct people to act in ways that do not correspond to moral norms and are therefore not morally binding. In his response to Greenberg, Goldsworthy objects that moral bindingness might be ensured in a way that is compatible with SP by "giving power to a democratically elected legislature to issue pronouncements" as this "is arguably the best way we have yet found of using law to create new moral obligations." (2019, pp. 196-197). The idea is that issuing pronouncements whose meanings correspond to the contents of legal norms might not be a poor way of creating morally binding norms after all if it is done by a legislature that has been elected in a (truly) democratic way. Of course, one is likely to respond that even democratically elected legislatures can enact laws that do not correspond to moral norms and therefore cannot ensure bindingness either. However, on the basis of what Goldsworthy says, I take it that his response would (or at least might) be that the fact that we have not yet found a better way for regulating conduct in a society might ground a general moral obligation to act on legal norms in democratic legal systems even if some of those norms do not quite match what morality would otherwise require.

In addition to objecting to Greenberg's claim that the issuing of pronouncements is

generally a poor way to create moral obligations, Goldsworthy's response also highlights a broader point. This point is that it does not have to be the correspondence of the content of the law and meaning – i.e., SP itself – that ensures that the legal norms of a system are morally binding. Instead, this might be ensured by other mechanisms or features of a legal system, such as that the statutes of a legal system are enacted by a democratically elected legislature. Hence, just because SP does not itself ensure bindingness in some legal system this does not mean that it is incompatible with the bindingness hypothesis in the sense that it makes it impossible or difficult to ensure the bindingness of the legal norms of some legal system.

Now, Greenberg (2011a, pp. 98-100) does consider the possibility that bindingness is not ensured by SP but by other factors. He discusses a number of candidates but rejects all of them as implausible or incompatible with SP. However, Greenberg's arguments to this effect are problematic, and I want to illustrate this by discussing what I consider to be the main candidate (one that is related to Goldsworthy's proposal). The idea that Greenberg considers is that bindingness can also be ensured by a general moral obligation to obey the laws of one's legal system, at least if the system satisfies certain criteria, such as that its institutions are just, democratic, etc. This obligation is usually referred to as a *political obligation* (Dagger & Lefkowitz, 2021). Greenberg rightly observes that "[t]heorists have devoted a great deal of attention" (2011a, p. 99) to the problem of justifying political obligations but he claims that the proposed solutions "are all subject to familiar and devastating problems" (p. 99). However, he also says that his discussion "is not the place for a review of the literature" (p. 100) and only discusses the existing accounts in two paragraphs. Although I acknowledge that approaches to establishing political obligation for some legal system are faced with difficulties, Greenberg's approach is highly problematic because an adequate review of the literature on the subject, as recently provided Richard Dagger and David Lefkowitz (2021), shows that theorists are "presently engaged in a lively debate"

(2021) on this subject and that it is anything but clear that no satisfactory account of political obligation can be given. This does not only highlight another aspect of Greenberg's objection that remains significantly underdeveloped but also exposes a major weakness in his argument. For note that Greenberg's objection can in fact only go through if political obligations cannot be justified for any legal system (or at least most of them) which is a position that is known as "philosophical anarchism" (Dagger & Lefkowitz, 2021). However, highlighting "the strength of the tendency to believe that citizens surely have an obligation to obey the laws of their country, at least if it is reasonably just" (2021), Dagger and Lefkowitz point out that this position is often considered highly problematic and implausible and that it has not been adopted by many in the long debate concerning political obligation. This is of course not to say that philosophical anarchism is false, but it is sufficient to show that the objection from bindingness entails a commitment to a highly problematic position. This gives us a strong reason to accept that political obligations are likely to be justified for certain systems (perhaps systems that are democratic or have just institutions). As a result, we have a strong reason to believe that SP and the bindingness hypothesis are not incompatible after all because the moral bindingness of legislative pronouncements (including their meanings/contents) is likely to be ensured by political obligations.

Three conclusions can be drawn from the foregoing discussion. First, the objection from bindingness is not sufficiently developed, second, it does not establish that the bindingness hypothesis holds or that it is widely accepted and, third, the objection does not demonstrate that SP is incompatible with the bindingness hypothesis even if it holds. For these reasons, I think that it is fair to say that proponents of SP do not need to be worried by this objection, at least until Greenberg or other sceptics can make a better case for it.

I want to finish this section by noting that the defences against the two objections that we considered do not rely on any features that are specific to an intention-based version

of SP or, indeed, any other version of SP. In other words, the defences did not rely on the claim that the notion of meaning that is at play in SP is communicative content or that communicative content is determined by communicative intentions. Hence, the defences can be relied upon by any version of SP, and not only by the intention-based versions on which the rest of this chapter will focus. For this reason, these objections will not be discussed again in the context of the commitment-based version of SP.

3.2. The objection from collective intentionality

The rest of this chapter is dedicated to objections that I consider to be more problematic for SP, or at least for intention-based versions of it. I start with the objection from collective intentionality, which is that intention-based versions of SP fail to provide an account of how multi-member legislative bodies can have or be reasonably ascribed the communicative intentions that are postulated by these versions. I develop the objection for the most part without making a specific distinction between subjective and objective intention-based versions of SP and only return at the end of this section to the question of how it applies to the different versions. To structure the discussion, the section is divided in four sub-sections. First, I set out the general challenge and show why some rather basic accounts of legislative intention cannot account for the necessary communicative intentions. Second, I explain why the influential account of legislative intentions that has been developed by Ekins (2012) cannot meet the challenge either. Third, I consider prominent general theories of collective intention and argue that they are unlikely to serve the needs of intention-based versions of SP. Finally, I explain how the objection applies to different versions of SP and explain more specifically why it also undermines objective intention-based views.

3.2.1. The objection and basic accounts of legislative intention

To explain the objection from collective intentionality, consider again the distinction

between personal and collective intentions that was drawn in the previous chapter. Personal intentions are the basic variety because they are the intentions of individuals, and it has been noted that they are generally considered to be mental states with a normative dimension. Collective intentions, on the other hand, are the intentions of collectives and it has been left open how these are best conceptualized. However, since in the case of statutes the 'speaker' is a legislative body, and this body is usually constituted by many members, the type of intention that is most relevant for the purposes of intention-based versions of SP is collective intention and must therefore be explained by them. More specifically, to account for the communicative content of statutes intention-based versions of SP need to provide two things: first, they must provide a plausible account of what collective intentions are and, second, they must show that legislative bodies have or can at least be reasonably ascribed such intentions (more specifically communicative intentions) when enacting statutes. The objection from collective intentionality is that these two requirements cannot be both met by intention-based versions of SP.

In the rest of this sub-section, I want to briefly consider some rather basic approaches to collective intention and explain why they are generally considered not to provide viable options. The most basic approach to collective intentions is to say that they are the same as personal intentions, i.e., mental states with a certain normative profile. However, this presents an obvious difficulty for even if no particular problem might be raised by collective intentions with regard to their normative features, it is widely acknowledged that collectives do not have a mind and therefore also no mental states. This is not only regularly pointed out by prominent sceptics of legislative intent such as Dworkin (1985; 1986), Heidi Hurd (1990), Michael Moore (1980) and Jeremy Waldron (1999) but also by the most prominent theorists from social ontology who argue in favour of the existence of collective intentions, including Bratman (1999; 2014; 2021), Margaret Gilbert (1989; 2000; 2013), Christian List and Philip

Pettit (2011; 2012), John Searle (1990; 1995; 2010) and Raimo Tuomela (2013a; 2013b).[63] Referring to "shared intentions", Bratman says that "a shared intention is not an attitude in the mind of some superagent" (1999, p. 111), simply because "[t]here is no [such] single mind" (p. 111).[64] Similarly, Gilbert argues that "there is no empirical warrant [for] a belief in independent group minds" (1989, p. 430), Searle rejects the idea of "a super mind floating over individual minds" (1995, p. 25), List and Pettit find such an idea to be "objectionable on metaphysical grounds" (2011, p. 9) and Tuomela declares it to be "obsolete" (2013a, p. 53). Following this established view, modern proponents of the idea that legislatures have intentions, such as Ekins and Goldsworthy, also distance themselves from the view that legislative intentions consist in "spooky group mental states" (2014, p. 64) and even critics usually acknowledge that "few if any persons who speak of legislative intent assume that a collective body has a mind." (Moore, 1980, p. 266). Hence, the proposal that legislative intentions are the mental states of the legislative body already fails because it relies on a clearly implausible account of collective intention.

Another proposal is to say that although a collective intention is not a mental state itself it might be the product of the mental states of the members of the group, most notably their personal intentions. A variety of this proposal is that a collective intention is an *aggregate* of the personal intentions of its members or at least some of its members. In other words, the personal intentions of (some of) the group members might be added up in some way that constitutes the group's collective intention. A general problem with aggregative accounts is that they are also considered to be implausible as theories of collective intentions in social ontology (e.g.: (Bratman, 1999, pp. 110-111; Gilbert, 1989, pp. 257-277; Searle, 1990, pp. 401-406). The perhaps clearest reason is that even in cases in which all the

[63] For a survey, see (Schweikard & Schmid, 2020).

[64] Various adjectives are used in the literature to refer to the intentions of collectives, such as "shared", "collective" or "joint" intention, etc. My preferred label is "collective" intention, but I will occasionally also use alternative terms when discussing the accounts of other theorists.

individuals that constitute a collective have the same personal intention it can be the case that the collective as such does not. For example, consider a group of individuals in a local park who, when surprised by a sudden rainfall, all run towards a large tree to protect themselves from the rain. Although all of them personally intend to protect themselves from the rain it seems false to say that they have such an intention *as a group* (or that there is a group with such an intention). The reason is that their personal intentions are unrelated to each other and that there is no element of coordination or of acting together that appears necessary for the occurrence of a collective intention.

This already provides a good reason to discard aggregative accounts. However, to make an even stronger case against this approach and to set the stage for the rest of the discussion I also want to briefly explain why aggregative accounts would be problematic when it comes to legislative enactments more specifically, even if they were appropriate as general theories of collective intentions. In doing so I rely to a large extent on standard arguments of sceptics of legislative intent (Dworkin, 1985; 1986; Hurd, 1990; Moore, 1980; Waldron, 1999) and distinguish three commonly discussed versions of the aggregative account. On one version, for a collective to have an intention all its members must have the same personal intention. Applied to the communicative intentions of a legislature the requirement would be that for a legislature to communicate something by enacting a statute, all its members would need to have the same communicative intention with regard to that statute. The obvious problem with this proposal is that virtually no legislative act is accompanied by intentions that are unanimously shared, as demonstrated by dissenting votes and abstentions. A second aggregative proposal is to say that for a legislature (or a collective more generally) to have an intention only a certain group within the legislature must share the intention in question. An obvious candidate would be the majority (which might be a simple majority or some qualified majority that is necessary according to the procedural rules that govern the acts of the legislature). Although this proposal might help to avoid the

problem of dissenting votes and abstentions it is still faced with serious difficulties. First, Ekins has pointed out that “it is the assembly that acts to make law, not the majority” (2012, p. 51) and that “[t]he majority has no authority to legislate alone” (p. 52). The objection is that it is not clear why the intention of the legislature would be determined by the majority given that it is only the legislature as a whole, including the dissenting minority and other members, that has legislative power. Further, most legislators usually do not engage directly with many of the statutes that they are voting on but rather vote in line with their parliamentary group, such that they are likely to have *no* communicative intention in relation to the respective statute or at least not one that has a content that corresponds to the statute’s legal content. Moreover, even if we could justify the consideration of the intentions of a particular sub-group of legislators and all of them were to have determinate communicative intentions with respect to the statute, there is nothing to ensure that they all have the *same* communicative intentions in relation to the statute. In fact, it is much more likely that there will be some – and probably significant – divergence among them about what they intend to convey by enacting it. This problem is underlined by the fact that many members of the legislature do not have sufficient expertise when it comes to legal language or the specific subject matter on which they are legislating such that it is likely that there will be divergence in what exactly they associate with the wording of an act. It should be clear that the foregoing considerations also undermine other views that appeal to the unanimous intentions of a sub-group within the legislature that is not the majority.

The last version of the aggregative account claims that the members of a group (or a sub-group therein) do not need to have the same personal intention but allows that these intentions can diverge while maintaining that they can yield the collective intention of the group if they are *combined* in some way. While this is an interesting proposal, the problem is that it is far from clear how – or even if – such personal intentions can be combined in a way that will yield a coherent communicative intention. Exactly because legislatures usually

consist of many members who are likely to have widely diverging (or no) intentions with regard to a particular statute it is entirely unclear how they can be combined to yield the communicative intention of the legislature. Moreover, it is far from clear that the communicative intention that is thereby yielded corresponds to the legal content of a statute given that there is likely to be some misunderstanding and a lack of expertise among legislators with regard to the wording of statutes. Due to the noted problems, most proponents of intention-based versions of SP (or at least those proponents who are aware of these problems) have come to accept that aggregative proposals are unsuitable for the purposes of SP (Asgeirsson, 2020, pp. 38-41; Ekins, 2012, pp. 15-76; Ekins & Goldsworthy, 2014, pp. 62-67; Goldsworthy, 2019, p. 189; Marmor, 2014, p. 18).

3.2.2. Ekins's theory of legislative intention

Against this background, Ekins (2012) has recently developed a sophisticated account of legislative intentions that analyses them as products of the personal intentions of its members but that does not treat them as aggregates of such intentions. Despite some disagreement (Goldsworthy, 2013) many of the central claims of Ekins's account have recently also been endorsed by Goldsworthy (Ekins & Goldsworthy, 2014; Goldsworthy, 2019), and it has also more generally been the most influential theory of legislative intent in recent years. Ekins develops his account in considerable detail, but for my purposes an extended summary will suffice. His (2012, p. 57) basic idea is to extend the influential account of collective intention that has been proposed by Bratman (1999) and that is explicitly limited to small and informal groups (Bratman, 1999, p. 110; 2014, p. 7), to the more complex case of legislative bodies. Ekins and Goldsworthy summarize Bratman's theory as follows:

> Bratman […] argues that group intentions arise out of the interlocking intentions of individuals. That is, the members of the group intend to act with one another, so their reasoning is structured by reference to action by all towards some commonly shared end. […] The intention of a group is the plan of action that its members adopt, and hold in common, to structure how they are to act in order to achieve some end that they want to reach together (2014, p. 64).

As explained here, Bratman extends his planning theory to collective intentions by claiming that the collective intention of a group consists in the plan that its members adopt and hold in common to pursue some shared end in a structured way. The shared intention (i.e., the shared plan) coordinates the actions of the group members, and it only exists if the members have actual personal intentions that 'interlock' and 'mesh' in certain ways. Roughly, for this to be the case, the group members all have to intend to contribute to the pursuit of the shared end as specified by the plan and the plan must be broadly compatible with their other intentions. Bratman's account therefore does not simply rely on an aggregation of the personal intentions of people but requires that these personal intentions are coordinated in the sense that the members all have the personal intentions to act together.

However, in this basic form Bratman's theory would run into problems that are even more severe than those that we have considered in relation to aggregative accounts that require unanimous intentions by all group members. The reason is that Bratman's account does not only require that all members unanimously intend some shared end but also that they intend to reach it together with the other group members and that these intentions mesh with their other intentions. To overcome this and other problems, Ekins and Goldsworthy propose to extend Bratman's account by a second "level" or "type" of intention:

> With simple groups all plans are held and known in full by all members of the group. Complex groups are different: […] Such a group may adopt procedures to settle how plans for group action are to be formed, and the plans so formed may not be known in full by all members. The group has, one might say, two types of intention: secondary (standing) intentions, which are plans to form and adopt other plans, and primary (particular) intentions, which are plans that directly concern how the group is to act on this or that occasion. Their action is still based on unanimity, because all members of the group have the same secondary intention, which is that the group use agreed procedures to develop and adopt primary plans (2014, p. 65).

In the case of the legislature, the secondary intention that is claimed to be held by all legislators unanimously is to follow legislative procedures to form primary intentions about how the law is to be changed and to act on these intentions, i.e., to enact a particular statute

to this effect. The particular intention is then a communicative intention whose content is to change the law in a certain way, but which does not need to be held or known by all legislators.

A question that merits attention is how legislative procedures are supposed to specify the content of the particular intention (i.e., the content of the communicative intention) that is associated with the enactment of a statute. The idea is that in the legislative process a statutory text is developed, often by a sub-group of legislators (e.g., by the members of a dedicated committee), then discussed and amended in several hearings and finally put to a vote. This text, Ekins and Goldsworthy say, "embodies the legislature's plans or intentions." (2014, p. 66) and its content is determined as follows:

> when [legislators] vote for or against [a Bill], they vote for or against not only the text, but the plan that text has been designed by their colleagues to communicate. The plan is 'open' to them, in that they could learn more about it if they wanted to, by using much the same methods as subsequent interpreters, who infer the plan from its text and publicly available contextual evidence of its purpose. This plan is what the legislature as a whole is reasonably taken to have intended (p. 67).

As Ekins and Goldsworthy explain, the content of the primary intention of the legislature (i.e., the legislature's communicative intention) that is conveyed through the statutory text is the content that a reasonable interpreter would understand the legislature to have intended to convey by enacting this text in the relevant context. Hence, on this account, legislative communicative intentions are claimed to actually exist and to determine the communicative content of statutes but, at the same time, their content corresponds to the 'objective' content that a reasonable hearer would understand the statute to have.[65]

However, Asgeirsson (2020, p. 40) points out that even this sophisticated account runs into an important problem which has to do with the requirement that in order for the primary intentions that are associated with (or "embodied by") particular texts to have the

[65] This supposed correspondence of the actually intended content with the content that a reasonable hearer would ascribe to the legislature is presumably the feature that reconciles Ekins' and Goldsworthy's respectively subjective and objective intention-based versions of SP.

objective content (or, in fact, any type of content) that they are claimed to have, legislators will need to have the standing intention that this is so.[66] The reason is that primary intentions must have their contents in virtue of being created in accordance with secondary intentions that specify how primary intentions are formed. Hence, it will be necessary that all legislators unanimously hold the secondary intention not only to follow certain procedures in developing statutory texts but also that these texts convey the content that they would be objectively taken to convey by a reasonable interpreter who considers the enactment in its context. However, Asgeirsson objects – and I agree – that this is implausible. Invoking the arguments by sceptics against unanimously shared intentions that I mentioned above, he writes:

> For reasons duly emphasised by the sceptics, I think that – at least in the actual world – there is insufficient agreement regarding what legislators take themselves to be doing in following legislative procedure to warrant the conclusion that the content of legislative changes in the law, and their promulgation, fully corresponds to the objective communicative content associated with the enactment of the text. (2020, p. 40).

The point that Asgeirsson makes is that it is unlikely that legislators have concordant secondary intentions with respect to how the statutory enactments that result from legislative procedures are to be understood. More specifically, the observation of sceptics that there is no convergence among legislators with respect to their intentions does not only apply to how particular statutes are to be understood but also to how statutes are to be understood in general.[67] Again, legislators are likely not to have any specific intentions in that regard or

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[66] In fact, Goldsworthy (2013, p. 837) has already noted that this might constitute a problem for Ekins's account but didn't provide a clear proposal for how it might be avoided.

[67] Asgeirsson further criticizes Ekins for not providing an account of "actual" (2020, p. 40) but merely "*fictional*" (p. 40) collective intentions because on Ekins's account the products of the legislative process are merely "treated as" (p. 40) the legislature's intentions in virtue of legislators' secondary intentions. I find it difficult to evaluate this objection because it remains somewhat unclear what would be required on Asgeirsson's account for a collective intention to be an actual rather than a fictional one. One candidate might be that it would need to be a mental state of the collective but – as we have seen – this would lead to a general scepticism concerning collective intentions because collectives do not have minds. Another requirement might be that the members of the group must have a collective intention à la Bratman's original account of collective intention or some other account of collective intention. The objection would then be that Ekins's extension of this account is not faithful to what collective intentions actually are because the second level of standing intentions that Ekins introduces only allows to *treat* something as the legislature's intention. Ekins (2012, pp. 57-58) would presumably not agree with either of these requirements because he relies on Searle's influential formula for

deliberately intend their enactments not to be understood in line with some objective communicative content but in some other way. I think that at least an indirect source of evidence that helps reinforcing this point comes from the influential empirical study of Abbe Gluck and Lisa Schultz-Bressman (2013) which shows that statutory drafters (in the U.S.) are in many cases aware of a common interpretive practice but nonetheless refuse to take it into account when drafting statutes and intend them to be understood in a way that does not conform with the practice. If this occurs among statutory drafters, then it is not unlikely that it also occurs among members of the legislative body. This does not only undermine the claim that lawmakers have the secondary intention that their enactments will be understood in the way Ekins and Goldsworthy claim but also that lawmakers have any other intention on that matter that is unanimously shared.

3.2.3. Alternative theories of collective intention

In light of the fact that Ekins's theory is problematic and that it is the most sophisticated and influential theory of legislative intentions currently available, intention-based versions of SP seem to be left without an answer to the question of how legislatures can have the required communicative intentions. However, proponents of such versions might draw on the fact that various general theories of collective intention have been developed in social ontology over the last decades and respond that we should remain optimistic that one of these theories will allow us to account for the communicative intentions of legislatures. Here, I want to explain why I do not share this optimism by briefly considering the most influential recent contributions to the literature on collective intentionality. I start with the accounts of Bratman,

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explaining social facts ("X counts as Y in C" (Searle, 1995, p. 28)) in order to account for his claim that the particular intentions of legislatures that he describes actually exist. According to Searle, this formula allows us to ascribe a status – such as being a collective intention – to something simply in virtue of being treated as such in some context and thereby to actually exist in the sense of being part of social reality. Asgeirsson does not discuss this aspect of Ekins's theory and since it would go beyond the scope of this thesis to determine whether such ascriptions of status are sufficient to make collective intentions (or any other social facts) part of reality, I will not rely on this objection against Ekins.

List and Pettit, Searle, and Tuomela, as we can move through them rather quickly, and then turn to Gilbert's account which requires more extended discussion. I finish by explaining why these arguments do not need to commit me to an implausibly strong scepticism.

The previous discussion has shown that accounts of collective intention on which unanimous personal intentions (standing or particular) are required fail to give intention-based versions of SP what they are looking for. This conclusion is sufficient to demonstrate that intention-based versions should not rely on the theories of collective intention by Bratman, List and Pettit, and Tuomela. The reason is that despite their specific individual features these accounts all agree on the fundamental claim that for a group to have a collective intention its members must unanimously share a corresponding personal intention and the content of this personal intention must correspond to the collective intention of the group. That this is the case for Bratman's theory has already been shown in the discussion in the previous section.[68] It also holds for List's and Pettit's account, according to which for a group to have a collective intention its individual members must "*each intend* that they, the members of a more or less salient collection, together promote the given goal." (2011, p. 33).[69] Finally, the same goes for Tuomela's theory when he claims that "some participants' joint intention consists of interdependent member intentions (we-intentions) all of which are

[68] In a very recent publication, Bratman (2021) attempts to extend his theory from informal groups to institutions. More specifically, he sets out to provide "a construction of institutional intentions as outputs of social rules of procedure, outputs that need not correspond to shared intentions." (p. 57). This might suggest that the extension of Bratman's theory could be more helpful to intention-based versions of SP than his previous work. Given the recency of this paper, it remains to be seen to what use it can be put, but I would like to point to three reasons to believe that it does not, as it stands, provide the answer that intention-based versions need. First, as Bratman acknowledges, the paper merely provides a "sketch" (p. 54) of how his theory might be extended. Thus, he recognizes that many details of the account are not yet fully worked out. Second, it remains to be seen if this account can prove its value against competing theories (including Gilbert's approach, to be discussed below). Finally, it's also somewhat unclear how exactly institutional intentions acquire a specific content on this account. Bratman suggests that they are determined by the outputs of the application of procedural rules, such as the outputs of votes (p. 71). Since the outputs of such votes in the case of legislation are enactments of *texts* the content of the institutional intention would presumably be determined by the statutory text that is enacted. However, this is likely to be unhelpful for intention-based versions of SP because it would turn their project upside down, as they attempt to explain the (communicative) content of statutory texts in terms of the (communicative) intentions of legislatures.

[69] Emphasis added. List and Pettit do not provide an own theory of collective intention as such but rather try to bring out specific aspects of collective intentionality, such as rational aspects of group agency. Their enterprise rather "presupposes that there is an acceptable account of what it is to act on a joint intention" (2012, p. 304) and they even say that their view is "broadly inspired by Bratman" (2011, p. 33).

also expressible by 'we will do X together.'" (2013a, p. 76). Hence, on Tuomela's account it is also the case that for a legislative body to have a collective (or joint) intention its members must have the same personal intentions, so-called "we-intentions". Tuomela also underlines this aspect of his theory when he says that "[i]f one [of the members of a group] gives up his we-intention, the original joint intention–dependent on those particular members–vanishes" (2013a, p. 80). This shared requirement exposes all such theories to the same problems that have been considered in the previous sections.

Searle's account is also unhelpful. The reason is that for Searle "collective intentions", or "we-intentions" (1990, p. 407) as he also calls them, are (as on Tuomela's notion of we-intentions) not the intentions of a collective but rather the intentions of individuals, i.e., personal intentions of people who purport to participate in collective action. Indeed, other theorists of collective intentionality object that on Searle's account there would already be a we-intention if only one individual existed that had such an intention and falsely believed that others with the same intention are involved (e.g., a brain in a vat; (Bratman, 1999, p. 116; Gilbert, 2018, p. 317)). Hence, the problem with applying Searle's account to legislative intentions is that it does not explain what the collective intention *of a group* is. And although the collective intention of a group is likely to be determined by the individual we-intentions of its members we would still need an explanation of what the collective intention of a group is whose members do not share each other's "we-intentions". Searle does not provide such an explanation and in light of the foregoing discussion it is hard to see what a helpful explanation might be.

I now turn to Gilbert's theory. Its most distinctive feature is that it claims that "there could be a shared intention to do such-and-such though none of the participants personally intend to conform their behaviour to the shared intention." (2000, p. 18; see also: 2013, p. 105). Instead of imposing the condition that the members of a group share the same personal intention Gilbert's account requires that there is a shared *commitment* among the members

of a group to pursue an intention together (e.g.: (2000, pp. 14-36; 2013, pp. 81-130). In her own words: "Persons X and Y collectively intend to perform action A (for short, to do A) if and only if they are jointly committed to intend as a body to do A." (2013, p. 83). Since Gilbert's theory does not require that the members of a group share the same personal intentions and a commitment also does not entail any other corresponding mental states (see second chapter) one might think that Gilbert's theory can give intention-based versions of SP what they need to mount a defence against the objection from collective intentionality. Relying on this theory, intention-based versions of SP might claim that the members of the legislature are jointly committed to a communicative intention when enacting a statute and therefore the legislative body as a whole has this communicative intention. Indeed, Neale, when defending SP, suggests that "Margaret Gilbert has provided a very attractive picture of how we should understand talk of the mental states of bodies of people" (unpublished b).

I must admit that I do not have a knockout argument against intention-based versions of SP that adopt a Gilbertian theory of collective intention. However, providing such an argument is complicated by the fact that nobody (including Neale) has developed such a version yet and that therefore it is not quite clear what exactly it would involve.[70] As there is no well-defined target, my strategy in objecting to a version of SP along these lines rather consists in raising a number of questions and problems that proponents would have to address, the sum of which, I suggest, is likely to render such a version unattractive. To begin with, we have just seen that there are various prominent theories of collective intentions, and it remains a highly contested question which theory is correct (Schweikard & Schmid, 2020). Further, we have also seen that Gilbert's account is fundamentally at odds with other prominent theories exactly because it does not require shared personal intentions for the

[70] We will see in the next section that a proponent of an objective intention-based version of SP who has briefly invoked the notion of commitment in the context of the objection from collective intentionality is Asgeirsson (2020, p. 41). However, he neither considers Gilbert's theory in that context nor makes an explicit proposal that collective intentions are to be analysed in terms of commitments.

explanation of collective intentions. This feature makes it particularly controversial and, therefore, theorists who suggest adopting a version of SP that relies on Gilbert's theory will need to establish why it is the correct (or at least most promising) theory of collective intention. This is of course not to say that Gilbert's theory is false, and I will note below that I am myself at least not unsympathetic to it due to the fact that it relies on the notion of commitment. Nonetheless, it is certainly not the case that one can simply assume that it is correct, and proponents of SP would need to make significant efforts to show this to be the case.

Second, it is not at all clear whether a version of SP that adopts an intention-based theory of communication together with a Gilbertian theory of collective would still deserve the name "intention-based version of SP". Rather, it seems that adopting a theory of collective intention that has the notion of *commitment* at its heart and that does not require any personal intentions makes the fundamental explanatory concept of such a version of SP commitment and not (communicative) intention. Although this version could still work with an intention-based theory of communication, there is a clear risk that combining it with Gilbert's theory of collective intention might concede too much to commitment-based versions of SP.

Third, and related to the previous point, it is also unclear whether the appeal to Gilbert's theory of collective intention is compatible with the general explanatory project or ambition of intention-based theories of communication. To explain why, it is useful to return to Neale's interpretation of Gilbert's theory. What is interesting about it is that after highlighting the attractiveness of Gilbert's theory he adds that this theory claims that "we should understand talk of the mental states of bodies of people in terms of the mental states of delegated individuals in those bodies." (unpublished b). This statement shows that Neale misconceives what Gilbert's theory involves, exactly because the distinctive feature of her account is that we should understand talk of collective intentions of a group *not* in terms of

the intentions or other mental states of individual members (whether delegated or not) but in terms of commitments. This is important because intention-based theories of communication from Grice onwards have attempted to explain meaning and communication fundamentally in terms of psychology (Grice, 1989, p. 355; Schiffer, 1986, p. xiii; see also the previous chapter). And I suspect that this is the reason why Neale hopes to find an explanation of collective intentions in terms of psychological or mental states in Gilbert's account. As noted, this is a misconception of her view. More importantly, it is not clear to what extent the explanation of communication that is provided by intention-based theories communication is compatible with a theory like Gilbert's that conceptualizes collective intention in non-psychological terms.

The fourth point is also related to the previous two and has to do with explanatory simplicity. The problem here is that once a theory of collective intentions in terms of commitments is accepted to explain the communicative content and legal content of statutes it becomes somewhat unclear why we would not rather adopt a commitment-based theory of communication for that purpose from the very beginning and thereby avoid the theoretical detour via communicative intentions. In other words, in light of the fact that there are extant commitment-based theories of communication, it seems that the acceptance of commitments as the fundamental explanatory concept by the hypothetical version of SP that is under discussion suggests that adopting such a theory of communication instead of an intention-based one might be a theoretically simpler, more straightforward and, therefore, more attractive choice.

Finally, it is not clear why we should hold that a legislature is committed to a *communicative* intention when it enacts a statute. To illustrate this, consider again the example of s. 1(1) of the Marriage Act. I do not necessarily dispute that enacting this statute makes a legislature committed to a 'simple' intention to make its audience act in a certain way, namely in accordance with the proposition that marriage of same sex couples is lawful.

One might for instance say that the legislature is committed to such an intention because it would be unreasonable to create a legal norm to this effect without intending people to act on it. However, it is not clear to me why we would say that the legislature commits itself to a *communicative* intention to that effect, i.e., the intention to make citizens act on the proposition that marriage of same sex couples if lawful *in virtue of the citizens' recognition of this intention*. Why would the legislature need to be committed that citizens act on this proposition in virtue of recognizing the legislature's intention to this effect rather than in virtue of something else, such as the simple fact that there is a legal norm to that effect? Intention-based theorist might say in response that there can only be a legal norm to that effect if the norm has a content to that effect and in order to have such a content, there must be a commitment to a communicative intention. However, it seems to me that doing so would be to presuppose that the intention-based version of SP holds, and therefore run the risk of begging the question.

As noted, I don't take these to be knockout arguments, but I think that in sum they are sufficient to throw significant doubt on the viability of the approach. Further, given the fact that nobody has yet seriously tried to develop a version of SP that is based on Gilbert's theory, I suggest that it is reasonable to put such an approach aside in the following discussion. If this is right, then we can conclude that none of the prominent theories of collective intentionality provide the necessary help to-intention-based versions of SP. However, a potential worry might creep up when we are faced with this conclusion, namely that it commits me to a position that is implausibly sceptical regarding collective intentions or legislative intentions more specifically. I want to finish this section by explaining why the view that is adopted is only sceptical in a moderate sense which does not need to be considered implausible.

To begin with, none of the foregoing commits me to general scepticism about collective intentions, as such. I have not argued that groups cannot have collective intentions

nor that any of the particular theories of collective intention is false. For instance, my theory is fully compatible with Bratman's or Tuomela's theory being correct, and with the general claim that groups whose members share the necessary personal intentions have collective intentions. I have only argued that prominent theories of collective intention do not support the claim that legislatures have the communicative intentions that they would need to have according to intention-based versions of SP. Indeed, I am not even committed to the claim that Gilbert's theory is incorrect, as I have only argued that it cannot be assumed to be correct and that even if it is correct, there are good reasons to think that it is incompatible with intention-based versions of SP.

But one might object that my position is still too sceptical in two other respects. First, one might point out that the theories I have considered are only the prominent ones and that there might be other theories of collective intention that provide a better basis for intention-based versions of SP. Although this is of course a possibility, I must make three points in response. First, the theories that have been considered are prominent because they represent influential views which makes it likely that other accounts will share their central features. In other words, they are likely to be representative of other views (or kinds of views) which suggests that other accounts will come with similar problems. Second, if it was the case that other theories of collective intention provide a better basis for intention-based versions of SP one would expect that proponents of SP would have made use of them. However, I am not aware that this is the case. Finally, and directly related to the previous point, I certainly think that the foregoing discussion shifts the burden of explanation on to intention-based versions of SP.

The other respect in which my view might be considered overly sceptical is that ordinary people and legal experts (including judges) frequently refer to the intentions of legislative bodies. We have seen this, for instance, in the intentionalist remarks about legislative intentions. Hence, the worry is that my account entails that many people and legal

experts must be said to be in error when they make such references. Although this is indeed a worry and I am not entirely sure what the best response is, there are certain possibilities for dealing with it which suggest that it does not need to be fatal to my view. First, as noted, I am not committed to rejecting Gilbert's theory of collective intention as a potential basis for legislative intention. Indeed, I am actually not unsympathetic to it. For her commitment-based explanation dovetails, at least prima facie, rather nicely with my own commitment-based approach. One possibility would thus be to take up the challenge to show that it provides the right explanation of legislative intentions and thereby account for references to legislative intentions.[71] Note that this move does not entail anything like a full retraction from my scepticism concerning intention-based versions of SP that rely on Gilbert's theory since the other problems that such views are faced with would still apply. The possibility to pursue this option is why I am not necessarily committed to scepticism about legislative intentions. At the same time, I also do not want to commit myself to the claim that Gilbert's theory must be correct because two other strategies might be pursued instead.

One is to accept that there is no theoretically viable way to account for the existence of legislative intentions but to say that references to such intentions also do not need to be considered errors in any strong sense but rather loose or figurative ways of speaking which might assimilate legislatures to individuals (or small-scale groups). While this is not the most attractive move from a methodological point of view, it might be justified and even necessitated by the lack of an appropriate theory that allows us to account for the claim that legislative intentions exist. The other response would be to highlight that the view that legislatures do not have intentions and that references to such intentions are misguided is not without precedent, as exemplified by the various sceptics of legislative intent. That is, in

[71] Given that Bratman's (2021) recently developed theory of institutional intentions might be incompatible with intention-based versions of SP (as explained above), another potential strategy might be to appeal to his theory. A commitment-based version of SP is presumably not incompatible with Bratman's account because it does not attempt to explain the (communicative) content of legal texts in terms of institutional intentions.

light of the lack of viable theoretical alternatives it might simply be claimed to be the right conclusion, despite its supposedly problematic implications for the assessment of discourse about such intentions.

3.2.4. The objection from collective intentionality as an objection to subjective and objective intention-based versions of SP

Up until now my discussion has not specifically distinguished between subjective and objective intention-based versions of SP. Nonetheless, it should be sufficiently clear that subjective intention-based versions of SP are undermined by the foregoing discussion. For it has been shown that we currently have no plausible account that explains how legislatures could actually have the communicative intentions that such versions postulate and that there are good reasons to be sceptical about the possibility of developing such an account. I now want to explain why this conclusion also undermines objective versions. The reason is that objective versions still require that it must be reasonable for a hearer to ascribe the necessary communicative intentions to the legislature but that the objection from collective intentionality shows that such an ascription would not be reasonable. Note that this requirement is generally accepted by both critics and proponents of SP, as illustrated by the following statements (for more examples, see, e.g., (Goldsworthy, 2013, p. 840; Smith, 2016, p. 237)):

> The existence of a subjective intention is a crucial presupposition of our attribution of an objective intention to the author of a text. If we knew that the creators of a text had no relevant subjective intention (for example, they were monkeys pounding randomly on keyboards), we would have no rational basis for attributing any objective intention to them either. (Ekins & Goldsworthy, 2014, p. 48)

> [U]nless the reasonable reader is assumed to be confused about legislatures, if we ask what the reasonable reader would take the legislature to have intended to communicate, the answer is: *nothing*. (Greenberg, 2020, p. 117)

As such, the objection from collective intentionality also undermines objective intention-based versions of SP.

Faced with this difficulty, theorists might propose an alternative version of the objective model. On this version, the communicative content of statutes is no longer determined by the communicative intention that a reasonable hearer (knowing the context, etc.) would ascribe to the legislature but the intention that this reasonable hearer would ascribe to *some* reasonable speaker who is capable of having intentions and who uttered the same words in the same context as the legislative body. However, I think that there are various problems with this response. First, it seems *ad hoc* because its only motivation appears to be to avoid the objection and I see no obvious independent reason why we would want to appeal to such an artificial notion of content. Second, the response raises questions as to the relevance of intentions for communication more generally because on the proposed account the actual speaker is neither required to have nor to be even capable of having communicative intentions, such that we are faced with the question why the appeal to communicative intentions should be important to explain communication in the first place. Finally, and most importantly, it is not clear at all how we could uphold the claim that the statutory enactment is authoritative or valid if its content is derived on the basis of the assumption that it is not made by a legislative authority. I take it that worries similar to those that I have just voiced also underly the following statement by Greenberg:

> "Once the notion of a reasonable reading is explicated in terms of counterfactual assumptions about the speaker or the context, its relevance and appeal fade. Why should the interpreter be focused on what would be reasonable for a reader who had certain false assumptions about the authorship of the text or the context in which it was uttered?" (2020, p. 122)

Interestingly, we can find related traces of doubt as to whether communicative intentions need to play any important role in determining the content that is communicated by statutes in Asgeirsson's objective intention-based version of SP. What is also interesting about Asgeirsson's account is that he appeals to the notion of commitment in this context:

> On the picture I favour […] the content of the resulting law is not constitutively determined by any actual intention of the legislature, or of individual legislators; rather, it is determined by the content to which the legislature – by way of rationality – commits itself in selecting and promulgating a particular text via its

> adopted procedures. And the content to which it thereby commits itself is – as a general linguistic matter – the linguistic content that a reasonable member of the relevant audience would, knowing the context and conversational background, infer that the legislature intended to communicate, in selecting and promulgating that text. It is worth emphasising that while communicative content – on my account – is in some sense 'objective', I still think that communicative intentions are indispensable. I understand how it may seem that by embracing an objective account of communicative content, one significantly demotes the notion of communicative content – if the norms of rationality, along with any further particular norms present in the relevant context, do most of the work in determining the content of any given utterance, then why do we need to refer to communicative intentions at all? […] The answer, I think, is that in doing so we would simply be talking about something other than meanings/communicative content. At least at the level of theory, communication necessarily involves reference to such intentions – that' s just how communication works, on my view. We can of course often bypass such reference for practical purposes, but once we do so in a robust, metaphysically committed way, I think we are simply doing something other than 'gauging' meaning. (2020, p. 41)

As Asgeirsson says, on his account the communicative content of statutes is not determined by actual communicative intentions but rather by the content to which the legislature *commits* itself in virtue of enacting a certain statutory text in a particular context. But while I am very much in favour of Asgeirsson's reliance on the notion of commitment, his account is still intention-based because he manifestly relies on an intention-based theory of communication when he claims that "communicative intentions are indispensable" for the explanation of communicative content (and therefore also legal contents) at a theoretical level.[72] More specifically, his claim appears to be that we need to refer to the notion of communicative intention to understand what the legislature commits itself to since this content is supposedly the communicative intention that a reasonable member of the audience would infer the legislature (knowing the context, etc.) to have. However, Asgeirsson does not provide an own account of legislative intention that would explain why it would be

[72] Although Asgeirsson sticks to an objective intention-based theory of communication throughout his work, he relies extensively on the notion of commitment to explain how judges should decide borderline cases in a way that maximises fidelity to law (2020, pp. 151-171). However, as I understand his view on that matter, he does not claim the role of commitments to lie in the determination of communicative content because the communicative content of statures is indeterminate in borderline cases, but rather to offer guidance as to how the law should be developed in such cases. This is also suggested by the fact that Asgeirsson does not draw on commitment-based theories of communication when developing this point (or, indeed, at any other point in his theory).

reasonable to ascribe a communicative intention to the legislature, such that his proposal is also undermined by the objection from collective intentionality as it applies to other objective accounts. The reason is again that it would not be reasonable for a hearer to infer that a legislature intends to communicate some content when enacting statutes if the legislature is generally incapable or unlikely to have the corresponding intentions. Now, although Asgeirsson does not consider Gilbert's theory of collective intentions in terms of commitments or proposes to explain collective intentions in such terms, his reliance on commitments might suggest that he would be sympathetic to the proposal of adopting a Gilbertian account of collective intentions in terms of commitments that might make the ascription of such intentions reasonable. However, this proposal would be subject to the same problems that have been considered in the previous section, such as the risks of incompatibility, unnecessary theoretical complexity, problems to explain why there is a commitment to a communicative intention, etc. Hence, despite my strong sympathy for Asgeirsson's appeal to the notion of commitment, I think that his deep and explicit theoretical commitment to an objective intention-based theory of communication makes it subject to the same problems as other objective intention-based versions of SP.

Nonetheless, it is interesting that Asgeirsson acknowledges that once an account along his lines is adopted, we need to face the question why we should appeal to communicative intentions, at all. He responds that such an appeal is required "at the level of theory" because "that's just how communication works". Unfortunately, he does not defend the intention-based theory of communication but simply seems to assume that it is the only viable kind of theory of communication. Hence, his claim would be undermined by the existence of an alternative theory of communication that did not require such an appeal. In the next chapter, I will show that the commitment-based theory of communication is a theory of this type.

3.3. The objections from legal practice

In this section, I do not consider one particular objection to SP but rather a number of objections that belong to one family. They are united by the aim of establishing that there are important phenomena in legal practice that supposedly lead to situations in which the legal content of a statute and its communicative content do not correspond. Objections of this kind have been made in various forms by theorists such as Baude and Sachs (2017), Greenberg (2011a; 2011b; 2017a; 2017b) and Levenbook (2013) but have been developed most recently and forcefully by Smith (2016; 2019; 2021) and therefore my discussion in this section will draw to a large extent on his account. As we will see, there is some disagreement among critics on the question which phenomena cause real trouble for SP, and Smith explains that not all examples that are presented by sceptics are problematic. In the following, I will first briefly consider three phenomena that Smith takes to be rather unproblematic and then turn to a more detailed discussion of the two phenomena that Smith claims to be more damaging: certain so-called "modifier laws" (2019) and the application of statutes in circumstances for which they have not been envisaged (2021). Although I will disagree with Smith on certain points, I agree with the main conclusion that these two phenomena constitute real problems for intention-based versions of SP. The section consists of three sub-sections. The first discusses objections from legal practice that are rather unproblematic, the second discusses modifier laws and the third considers the application of statutes in unforeseen circumstances.

3.3.1. Objections from legal practice: the easy cases

I start with three phenomena that Smith considers to be unproblematic. I want to be clear from the beginning that I neither consider all the phenomena that he discusses under this rubric nor discuss them in much detail because I only have limited space at my disposal and because I take his discussion (with some minor reservations) to be persuasive and to serve

as a reliable reference for further details. My main aim in discussing these phenomena is rather to illustrate the kind of phenomena that sceptics invoke and to present tools that are available to explain them.

According to Baude and Sachs (2017, p. 1110), one counterexample to SP is the presumption against extraterritoriality in U.S. law according to which U.S. statutes are only to be applied in the U.S. and not in other jurisdictions, even if virtually no statute makes this explicit. The objection is that because a statute does not make explicit that the rule is not to be applied outside of the U.S. its content does not correspond to its legal content. Smith (2019, p. 508) points out that SP can easily account for this apparent gap because it can treat the presumption from extraterritoriality as a contextual presumption that informs the legislature's communicative intention and restricts the scope of the content that the statute communicates. Just as the utterance "You are not going to die" is likely to be subject to an implicit contextual restriction when uttered to a child who is crying because of a minor cut, statutes are also generally restricted by such presumptions. And it is indeed rather plausible that the presumption against extraterritoriality is a contextual presumption because it is arguably common ground that U.S. statutes are usually only to be applied within its borders. This defence of SP can also be used more generally to explain how other laws or legal presumptions can affect the meaning of statutes without having been made explicit, at least to the extent that they can be plausibly held to be part of the common ground of legislative enactments.

Another example is what Smith calls "invalidating laws" (2019, p. 509): rules that apply in cases in which there is a conflict between the requirements imposed by two statutes or other sources of law. Invalidating laws resolve such conflicts by rendering one of the statutes invalid. One example is *lex posteriori* (or the "last-in-time rule" (Baude & Sachs, 2017, p. 1109)) which is the rule that in cases in which two statutes conflict the statute that was enacted more recently trumps the older one such that it becomes invalid. According to

Baude and Sachs (2017, p. 1109), this cannot be explained by SP because the older statute keeps its meaning but fails to have a corresponding legal content. However, Smith (2019, p. 509) points out that this relies on a misguided understanding of SP because – as already highlighted – SP only explains the legal contents of valid statutes (p. 509) as only these statutes have a legal content and therefore the older invalid statute does not pose a problem for SP because it does not have a legal content.

The third example is due to Solum (2013) and although it comes from constitutional law, parallel cases might also occur in relation to statutes. According to Solum, the communicative content of the U.S. Constitution cannot account for all the legal content of constitutional doctrine that is associated with it. For example, the communicative content of the First Amendment according to which "Congress shall make no law […] abridging the freedom of speech, or of the press" is claimed to fall short of determining its legal content because there are established constitutional doctrines that supposedly cannot be held to have been intended to be conveyed when the First Amendment was adopted. For example, free speech doctrines associated with the First Amendment do not only apply to "Congress" but also to judicially created defamation law, as well as to billboards and not only to "speech" and "the press". Moreover, associated doctrine also includes rules concerning prior restraint that *do* allow government to prevent newspapers from publishing material in cases in which the publication is likely to cause serious danger to the American public. Such doctrines might also develop in relation to statutes and would pose a problem for SP as understood here.

However, a proponent of SP can respond to this by arguing that the constitutional doctrines that have developed in relation to the First Amendment (or other provisions) are not part of the legal content of the First Amendment itself but rather of the case law that has developed around it. These doctrines have developed because the communicative content of the First Amendment is to some extent indeterminate and leaves certain questions unanswered such that courts had to develop more specific rules to decide related cases (Smith,

2019, pp. 510-511). For example, it is arguably vague or indeterminate what exactly "speech", "press" or "abridging" is intended to mean in this context and whether the explicit mentioning of Congress means that other state institutions are exempt. However, to decide cases in which such questions became an issue judges had to make fresh decisions that provided more specific legal norms than the ones created by the First Amendment. This might arguably account for doctrines that do not consider prior restraint in certain cases as an abridgement of First Amendment rights as well as doctrines that extend obligations under the First Amendment to the judiciary, and the right to free speech beyond "speech" and "the press" to billboards.[73]

3.3.2. Modifier laws

I now turn to the first of the two types of legal phenomena that Smith considers to be more problematic: certain instances of modifier laws. Because modifier laws come in different varieties and require a rather extended discussion, I divide this sub-section in two parts. The first explains the phenomenon, the problem that it poses and the reasons why standard strategies fail to explain it. The second discusses alternative explanatory strategies for intention-based versions of SP.

[73] Asgeirsson (2020, p. 10) also discusses another phenomenon that Smith considers to be potentially problematic for SP in an unpublished manuscript but that is not mentioned in his published work: mistaken precedents. The problem that is supposedly raised by mistaken precedents is that they are claimed to affect the legal contents of statutes without changing their communicative contents because the respective decisions get the 'original' legal contents of statutes wrong but must still be considered in subsequent decisions (usually by lower courts) due to stare decisis. As a result, they supposedly endow the statute with a new legal content, the 'mistaken' one. However, I will not consider this phenomenon in the further discussion because I am not convinced that it poses a real problem for SP, as its proponents might respond in at least two ways. First, they might highlight that it is not clear what exactly the legal content of a mistaken precedent is and, indeed, dispute if it actually has any such effect. More specifically, they might argue that if mistaken precedents changed the legal content of a statute in the way described then it would be hard to explain why such precedents can be correctly overturned on the basis that they are mistaken about the statute's legal content. This is of course not to say that precedents are irrelevant to subsequent decisions. For example, one might think of mistaken precedents as epistemic guides from authorities to the legal content of statutes or as instructions that are binding on lower courts but not determinative for a statute's legal content. Second, even if mistaken precedents do change the legal contents of statutes, proponents of SP could still treat them as exceptions because it is arguably overly sceptical to assume that courts are regularly mistaken about the legal contents of statutes. I also think that the commitment-based version of SP that I will propose might have further means to explain the legal contents of mistaken precedents (if any) but since I take the points just made to be sufficient to address the problem, I will not try to substantiate this further.

3.3.2.1. Modifier laws: the phenomenon, the problem, and the failure of basic responses

Modifier laws are legal norms that affect the legal content of a statute in the sense that the legal content would have been different had the modifier law not existed. One example that is often considered is the common law doctrine of mens rea (e.g., (Baude & Sachs, 2017, p. 1108; Greenberg, 2011a, p. 76; Smith, 2019, p. 511). According to this doctrine, criminal law statutes contain an element that requires that the act that it deems to be criminal (the actus reus) must be performed with the intention or knowledge of wrongdoing (i.e., a 'guilty mind' – the mens rea) in order to be a criminal offence, even if the statute does not explicitly state this. The doctrine of mens rea is said to pose a problem for SP because the effect of the statute contains an element, i.e., the mens rea requirement, that does not seem to be part of the statute's communicative content. Importantly, mens rea is only one example and there are several other laws that are said to work in similar ways, such as the general criminal law defences of insanity and duress or rules that stipulate that the solicitation, aiding or abetting to criminal acts is itself a criminal offence (Baude & Sachs, 2017, pp. 1099-1100). Further, these rules govern a wide range of criminal law statutes and therefore the modification of statutes by such laws is not a rare phenomenon that can be dismissed as an exception.

One might want to respond that such modifier laws can be treated in the same way as the presumption against extraterritoriality: as contextual presumptions that restrict the communicative content of the statutes to which they apply. Unfortunately, however, this strategy seems less plausible for doctrines such as mens rea than for the presumption against extraterritoriality because it is implausible that the doctrine is taken for granted in legislation. Especially the ordinary citizens to whom criminal law statutes are arguably addressed are unlikely to be aware of the doctrine such that it cannot be presumed to be part of the context of a statute and to inform the associated communicative intention (e.g., (Asgeirsson, 2020, p. 11; Greenberg, 2011a, p. 78; Smith, 2016, p. 239)). The same goes for many other modifier

laws as they are only familiar to legal experts. I must note, however, that Smith (2019, pp. 515-519) is somewhat ambivalent when it comes to evaluating whether standard modifier laws such as mens rea pose a problem for SP. While he certainly feels the pull of the objection, he also suggests that a sophisticated account of legislative intentions such as Ekins's might be able to deal with such examples. As noted, on Ekins's account content is not determined by what the actual interpreters (e.g., ordinary citizens) take the content of legislation to be but by what a reasonable and well-informed interpreter would take it to be because this content supposedly corresponds to the actual communicative intention of the legislature. And, indeed, Ekins claims himself that "[t]he legislature reasonably takes for granted, and thus intends, that all offences entail mens rea and voluntary action." (2012, p. 262). Further, although not discussed by Smith, on some objective intention-based versions of SP such as Marmor's the communicative content of a statute is claimed to be determined by reference to the understanding of a reasonable hearer who is characterized as "one who is well informed about all the background legal landscape and the technicalities of legal jargon." (2014, pp. 116-117). This would include mens rea and similar doctrines. Nonetheless, having some reservations about Ekins's account that are related to the ones I have discussed in the previous section, Smith (2019, pp. 518-519) also claims that Ekins and others would have to provide a more detailed story of how exactly the content of particular intentions is determined and how it can be affected by modifier laws that are not reasonably considered common ground. We have also seen that the particular choice of how the reasonable hearer is characterized is disputed and that it needs further justification, which might pose a difficulty to Marmor's account. However, for the sake of the argument and of treating the objection from legal practice independently from the objection from collective intentionality, I follow Smith, and work on the assumption that intention-based proponents of SP might potentially be able to account for mens rea and similar modifier laws along these lines.

Smith continues by arguing, however, that even if we leave this issue open none of

the previous responses can account for a particular type of modifier law that he calls "retrospectively operating modifier law" (2019, p. 519). The important feature of these norms is that they do not only modify the legal content of statutes that are enacted after the retrospectively operating modifier laws but also statutes that *predate* them. One example are legal rules according to which statutes must be interpreted in accordance with certain human rights instruments (Smith, 2016, p. 243; 2019, p. 520). For instance, consider s. 3(1) of the UK Human Rights Act 1998: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." The "Convention rights" are the rights set out in the European Convention of Human Rights. The important point about s. 3(1) is that it does not only apply to statutes that were enacted after it came into force but also to statutes that predated it – often by a rather long time. This seems at odds with SP because s. 3(1) modifies the legal content of pre-existing statutes by making the effect consistent with the Convention rights but without changing the communicative content of these statutes, as this content – at least according to intention-based models of SP – is determined by reference to the communicative intention of the enacting legislature. In other words, the objection is that on intention-based versions of SP the communicative content of a statute is determined by a historical fact that cannot be changed retrospectively. This extends to objective versions of the intention-based model because it would not be reasonable to ascribe a communicative intention to the legislature to limit a statute's application in line with the Convention rights when the statute was enacted, especially given that there are many statutes that came into force before the Human Rights Act (or the Convention) was even contemplated (Smith, 2019, pp. 521-522). Moreover, even if legislators had or could be ascribed such a communicative intention when the statute was enacted, intention-based versions of SP could not account for the fact that the legal content of the statute was *modified* when the retrospective modifier law came into force because in that case the statute's communicative content would have

been the same all along.[74]

Smith also explains that none of the other strategies that have been considered thus far can explain retrospectively operating modifier laws. First, such laws clearly do not invalidate or repeal statutes that were enacted prior to their own enactment (2016, pp. 249-251), if only because they would not have anything to modify if this were the case. It might perhaps be more plausible to suggest that retrospectively operating modifier laws can be understood along the same lines as doctrines that have developed in relation to the U.S. Constitution, namely as specifications of a statute's communicative content where this content is indeterminate. Rather than changing the communicative and legal content of statutes, retrospectively operating modifier laws would themselves be said to have a communicative content that provides more specific legal contents than the ones created by statutes that are indeterminate between a reading that is compliant with Convention rights and a reading that is not. One might even say that this is suggested by the wording of s. 3(1) according to which legislation must be read as complying with Convention rights but only "[s]o far as it is possible to do so". However, the problem is that judges in the U.K. do not only apply s. 3(1) in cases in which the communicative content of the original statute is indeterminate between a reading that is compatible with Convention rights and one that is not. For instance, Lord Nicholls writes:

> It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning.[75]

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[74] One might propose to solve the problem by conceptualizing SP only as a view that explains the legal contents of statutory *enactments*, i.e., the legal contents that statutes have at the time they are enacted, and not of statutes as such, i.e., the legal contents that statutes have while they remain valid. Since the legal contents of statutes after their enactment would not fall under the explanandum of SP, retrospectively operating modifier laws would no longer be problematic. However, there is a strong intuition that this solution does not live up to the explanatory ambitions that are standardly associated with SP because it does not allow proponents of SP to say anything conclusive about the legal contents of statutes after they have been enacted. I assume that these ambitions are also the reason why I am not aware of any theorist who has proposed or even discussed this solution. I will therefore not consider this possibility in the following and continue to think of SP as a view about the legal content of statutes while they remain valid.

[75] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [29].

This makes clear that what Lord Nicholls calls the "meaning" of a statute can be modified by s. 3(1) even if its 'original' meaning would be considered to be determinate.

The modification of statutes through retrospectively operating modifier laws is also not a rare phenomenon. A law such as s. 3(1) often applies to a large set of pre-existing statutes and has equivalents in a growing number of jurisdictions (Smith, 2019, p. 520). Moreover, legal requirements to interpret statutory provisions in accordance with certain human rights instruments are not the only examples of retrospectively operating modifier laws. Another example, presented by Smith (2016; 2019), are legislative enactments that require future and existing statutes to be interpreted in a way that is faithful to its (presumed) purpose. An example from Australia is s. 15AA of the Acts Interpretation Act *1901* that was introduced in 1981 and amended as follows in 2011: "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation." Again, this changes the legal content of provisions enacted prior to 2011 by specifying how they are to be interpreted without changing the actual communicative intention of past legislatures or the communicative intention that is reasonably ascribed to them. 15AA is not exceptional and similar legislative acts can be found in other jurisdictions.

3.3.2.2. Modifier laws: alternative explanations

Accepting that the standard strategies do not allow SP to explain modifier laws – whether they apply prospectively or retrospectively – Asgeirsson (2016; 2020) has tried to provide a new explanation of these (and other) legal norms that is compatible with SP on the basis of his so-called "Pro Tanto view". [76] To understand this view, consider the following statements:

> the Pro Tanto view distinguishes between the legal content of a particular statute

[76] Asgeirsson's (2016; 2020) view is also supposed to explain some other legal norms that have been said to be problematic for SP, such as the free speech doctrines associated with the First Amendment or mistaken precedents. For the reasons provided above, I do not consider these phenomena to be particularly threatening to SP, so I will not discuss further them in this context.

> or constitutional clause – ie the legal obligations, permissions, powers, etc that they give rise to – and the legal content of the law as a whole – ie the total set of legal obligations, permissions, powers, etc in a particular jurisdiction (2020, p. 18)

> The basic idea of the Pro Tanto view is twofold and fundamentally fairly simple. […] First, the legal content of an obligation-imposing statute […] is neither identical with, constituted by, nor (merely) supervenes on its communicative content […]; rather, its enactment grounds a defeasible legal reason to take or refrain from a specified course of action […], a reason that corresponds directly to its communicative content. Second, in much the same way that 'ordinary' *pro tanto* reasons interact with each other to determine what a person ought all-things-considered to do, the legal reasons provided by enactment often interact with other (antecedent or subsequent) legal content to determine the all-things-considered legal obligations that people subject to the relevant system have. On the Pro Tanto view, then […] it is not the case that the considerations appealed to […] *modify* the content that the enactment of a legal provision contributes to the law […]. Rather, they *interact* with that content in a certain way, by either outweighing or undercutting the reasons provided by it. (p. 14)

As Asgeirsson explains, on the Pro Tanto view there is a distinction between the legal content of particular statutes (and other legal texts), these are the 'pro tanto' legal norms, and the legal content of a legal system as a whole which consists of 'all-things-considered' legal norms".[77] According to the Pro Tanto view, the kind of legal norms that are relevant to SP are pro tanto legal norms and not all-things-considered legal norms in the sense that SP is held to claim that the communicative content of statutes (and some other legal texts) corresponds to the pro tanto legal norms that are created by statutes but not necessarily to the all-things-considered legal norms that hold in the legal system (2020, p. 29).[78] According to the Pro Tanto view there *might* of course be an additional correspondence between pro tanto legal norms and all-things-considered legal norms but the lack of such a

[77] All-things-considered *legal* norms are not the same as the all-things-considered *morally binding* norms that were discussed in relation to the objection from bindingness, because the Pro Tanto view does not claim that all-thing-considered legal norms necessarily have to be morally binding. Indeed, my understanding is that even all-things-considered legal norms are pro tanto in the sense that they could be defeated by moral (or other non-legal) reasons when it comes to the question what one ought to do all-things-considered.

[78] Note that my view that SP concerns the contents of legal norms rather than legal norms as such does not affect the following discussion in any significant way because the relevant question in this discussion is which legal norms are relevant in the first place, i.e., the legal norms that are created by statutes or all-things-considered legal norms. This leads to a parallel question on my account, namely whether we need to consider the contents of legal norms that are created by statutes or of all-things-considered legal norms. For the sake of simplicity, I will therefore follow Asgeirsson and talk about the explanans of SP in terms of legal norms in this context.

correspondence is not considered to be incompatible with SP.

The reason that the Pro Tanto view offers for the possibility of such a divergence is that all-things-considered legal norms are often the result of an interaction between the pro tanto legal norm that is created by a statute and other legal norms of the system which might be legal norms that are created by common law doctrines, judicial decisions, other statutes, etc. More specifically such an interaction takes place because the pro tanto legal norms that are created by statutes provide *defeasible legal reasons* to act in certain ways. These reasons are defeasible in the sense that they can be partly or entirely defeated in the process of producing an all-things-considered legal norm by being either outweighed or undercut by the reasons provided by other legal norms. This is why they only apply pro tanto. To give a non-legal example, one might have a reason to visit one's grandparents (e.g., because one has not seen them for a while), but this reason can be defeated by one's also having a reason to perform some other action, such as submitting a philosophy essay (e.g., due to a deadline). This does not mean that one no longer has a reason to visit one's grandparents, but it is just that this reason does not correspond to an all-things-considered obligation or some other norm because it is defeated by one's having a reason to submit a philosophy essay.

This, Asgeirsson (2020, pp. 17-19) claims, allows him to explain modifier laws. On his view, modifier laws (whether they operate prospectively or retrospectively) do not actually *modify* the pro tanto legal norm that a statute creates but rather *interact* with the defeasible legal reason that this norm grounds in such a way that the all-things-considered legal norm that their interaction yields does not correspond to the communicative content of the statute and the pro tanto legal norm that the statute creates. For example, consider how mens rea applies to a criminal law statute on this picture. A criminal law statute that states that some behaviour is prohibited without specifying that it needs to be accompanied by an intention of wrongdoing provides a defeasible legal reason not to engage in that behaviour irrespective of whether it is accompanied by an intention of wrongdoing or not. However,

mens rea interacts with this reason in such a way that the resulting all-things-considered legal obligation is only to refrain from engaging in such behaviour if one has an intention of wrongdoing (Asgeirsson, 2020, p. 17). The same is supposed to apply to retrospectively operating modifier laws. For example, a statute that was enacted in the U.K. prior to the Human Rights Act and that is in conflict with the Convention provides a defeasible legal reason to act in a certain way that corresponds directly to its communicative content even after the enactment of the Human Rights Act. However, after the enactment of the Human Rights Act there might just be no corresponding all-things-considered legal norm anymore because the reason provided by the Act interacts with the reason provided by the communicative content of the statute in a way that defeats elements which are not compatible with the Convention.

Asgeirsson's Pro Tanto view is certainly a very original attempt to explain modifier laws (and potentially other legal phenomena), but I nonetheless believe that it is problematic because it has implausible consequences. Let me try to explain this by working out the implications of the account for a specific example in which mens rea is at play. Suppose that a criminal law statute imposes a two-year prison sentence on persons who set fire to any building but without making explicit that this must be done with the intention of wrongdoing. On the Pro Tanto view this provides a pro tanto legal obligation – and, therefore, a defeasible legal reason – to imprison those who set fire to any building for two years regardless of whether they have done so with an intention of wrongdoing or not. It is only the mens rea doctrine that will then allegedly provide another reason that interacts with the reason provided by the statute to yield the all-things-considered legal obligation, which is only to imprison those for two years who set fire to buildings intentionally. Nonetheless, the criminal law statute keeps providing a pro tanto legal obligation and reason to imprison those who set fire to a building without an intention of wrongdoing, for, if it did not, then SP would be false, as there would be no legal obligation (and therefore no legal reason) that corresponds

to the statute's communicative content. As Asgeirsson says, "a defeated reason is still a reason, which allows us to sensibly say that the (*pro tanto*) legal content of an 'affected' statute […] remains intact." (2020, p. 15).

Now, what is implausible about this picture is that it entails that judges have pro tanto legal obligations and legal reasons to impose *criminal punishment on people who have not committed any crime*. This is implausible because it seems unacceptable to say that a judge could have *any* legal reason or any legal obligation to imprison people if they have not committed a crime. And the people in question would not have committed any crime exactly because the necessary conditions for the crime in question (e.g., arson) do not only include the performance of the actus reus but also the occurrence of mens rea (assuming, of course, that there are no exceptions in the relevant case, such as recklessness, negligence etc.). If there is no mens rea, the relevant act cannot be a crime and therefore there can also be no reason for criminal punishment – not even a defeated but still existing one. In other words, the analysis is implausible because it poses legal obligations to punish people who, by the law's own lights, are innocent. I think that this problem is also brought out by what I take to be a fact, namely that if we ask whether a judge has *any* legal obligation or *any* legal reason to imprison a person who has burned down a building without any malicious intent the right answer seems to be "no". In that regard, the legal case is different from the non-legal case considered above in which it seems perfectly acceptable to say that someone has a reason to visit one's grandparents even if it is outweighed by one's reason to submit a philosophy essay. For example, we could still say that one has a reason to visit one's grandparents because one has not seen them for a while, even if this reason needs to give in to the reason one has for submitting the essay. I take the perceived difference to illustrate the fact that while there is a defeated reason in the non-legal case there is no such reason – and therefore also no corresponding legal obligation – in the legal case.

Now, one might accept these points but argue that a proponent of SP only needs to

adopt Asgeirsson's explanation for retrospectively operating modifier laws and not for such modifier laws as mens rea, because we have seen that there might perhaps be alternative explanations for them. However, even if such an alternative explanation can be provided (which still remains to be established) similar problems can arise in the case of retrospectively operating modifier laws. Suppose, for example, that (long) before the Human Rights Act came into force a statute is enacted in the U.K. that criminalizes "inappropriate sexual practices". Let's assume, more specifically, that the statute is enacted at a time in which it is common to regard homosexual practices as perversions or even as sinful such that the statute is clearly understood as criminalizing homosexual practices upon its enactment. However, I take it as given that after the enactment of the Human Rights Act this interpretation of the criminal law statute would no longer be permissible because the European Convention of Human Rights is understood to forbid discrimination on the basis of sexual orientation.[79] Hence, homosexual practices would no longer be criminal after the enactment of the Human Rights Act. Nonetheless, the Pro Tanto view would have to say that there is a pro tanto legal obligation to punish homosexuals who engage in such practices. This, again, entails the implausible conclusion that there are legal obligations to impose criminal punishment on people who are not guilty of any crime.

In the next sub-section, I will highlight another difficulty from legal practice for the Pro Tanto view, but I consider the foregoing to be sufficient to show that its explanation of modifier laws is problematic. The last point that I would like to make in relation to his account for now is that I will not adopt his proposal to conceptualize the legal norms that are relevant for SP in terms of pro tanto norms but continue to think of them as all-things-considered legal norms. The reason is that the common understanding of SP is surely one on which it concerns the latter, as indicated by the fact that no other theorist refers to mere pro tanto norms in setting out SP and that both opponents and proponents of SP (except

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[79] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

Asgeirsson) accept that its explanandum extends to the content of the law that is generated by a statute after being affected by modifier laws. Since the Pro Tanto view has implausible consequences, I think we have reasons to stick to the more common understanding.

Another reaction to the problem that is posed by modifier laws and its retrospectively operating varieties is due to Goldsworthy (2019). As far as retrospectively operating modifier laws are concerned, Goldsworthy's reaction is simply to accept it (pp. 183, 188). Although Goldsworthy does not seem to think that this poses a large problem for SP, I agree with Smith that this concession would be too significant given that retrospectively operating modifier laws are not a rare phenomenon. This is reason enough to reject Goldsworthy's response. Nonetheless, his remarks on this matter are worth further consideration for another reason, namely his general characterization of modifier laws. What is interesting about it is that Goldsworthy conceptualizes modifier laws in terms of what he calls "standing commitments", as made explicit in his analysis of s.3 (1):

> To see that a legislature can have standing commitments, consider what the British Parliament did when it enacted the Human Rights Act 1998 (UK), s.3 […]. The Act in effect, declares Parliament's standing commitment to respect [Convention] rights, and charges the courts with helping it to do so through their interpretation of other legislation. (p. 188)

The idea here is that by enacting s. 3(1), Parliament committed itself to the Convention and thereby dictated that other pieces of legislation – past and future – should be interpreted in accordance with it. Goldsworthy's main motivation in invoking the idea that Parliament has standing commitments consists in explaining non-retrospectively operating modifier laws such as mens rea in a way that is compatible with SP. According to him, not only statutory enactments such as s. 3(1) can lead to standing commitments but also common law doctrines, such as mens rea, because they are established presumptions in the legal culture of the respective system (2019, p. 188). He goes on to argue that even if legislators and ordinary citizens are unaware of mens rea it can still be considered to be taken for granted in legislation and, therefore, be part of its context, because legislators must assume that they

will be attributed such standing commitments, irrespective of whether they are aware of them or not. And if one can assume to be attributed such commitments, Goldsworthy claims, these commitments can be treated as "tacit assumptions" (2019, p. 188) – and therefore as part of the context – that informs one's communicative intentions. This, in turn, entitles hearers to reasonably assume that criminal law statutes communicate content in accordance with such entrenched doctrines as mens rea. Since Goldsworthy's response has been found to be insufficient due to its concession that SP cannot account for retrospectively operating modifier laws, here I will not discuss whether standing commitment will necessarily create tacit presumptions, as Goldsworthy holds. I merely want to highlight that there is some recognition of the important idea that commitments are relevant to how the context is construed against which the communicative content of statutes must be determined. I will return to this idea when presenting my own explanation of how commitment-based versions of SP explain modifier laws.

I am not aware of any other reaction to the objection from retrospectively operating modifier laws which, as noted, is the most problematic variety of modifier laws. However, I nonetheless think that some other explanations might be proposed by proponents of intention-based versions of SP, and I would like to finish this sub-section by briefly discussing two of them. To bring out what these potential explanations have in common let me highlight the crux of the problem that is posed by retrospectively operating modifier laws. It is that such laws lead to a situation in which the legal contents of a large number of statutes change while their communicative contents supposedly remain the same. Hence, to explain the phenomenon in a way that is compatible with SP it would have to be the case that the communicative contents of statutes change, as well. However, this cannot be the case because the communicative intentions that determine communicative contents are fixed at the time the statute is enacted, or so the objection goes. But what if the premise that the communicative content of statutes cannot change is false? This might open up new

possibilities to explain retrospectively operating modifier laws. Now, I presume that most theorists are unlikely to accept the claim that the communicative content of statutes and other utterances can change, but in chapter five I will argue exactly that and use this conclusion as a basis to develop my own commitment-based explanation of retrospectively operating modifier laws. What I rather want to do here is to assume for the sake of the argument that the communicative content of statutes can change and discuss whether this is something that intention-based versions of SP could account for.

As noted, I want to consider two possible explanations and the first is that the communicative content of statutes can change because statutes are (or can be reasonably said to be) enacted with the communicative intention that their wordings are not to be interpreted against what is taken for granted in a legal system at the moment of enactment but rather against what is taken for granted at the time of interpretation.[80] One could then say that once a retrospectively operating modifier law is introduced, it becomes part of the context against which statutes should be interpreted and thereby changes their communicative contents. Although there might be a number of general theoretical problems that come with this proposal (e.g., that it appears ad hoc), here it is sufficient to note that it is implausible to assume that legislatures generally have or can be reasonably ascribed such communicative intentions. Indeed, legislatures have rather strong reasons not to have communicative intentions of this kind. For instance, a highly conservative legislature that enacts a statute that punishes "inappropriate sexual practices" and intends this to cover homosexual acts would be very unlikely to intend this aspect to be subject to reinterpretation, given the possibility that the general opinion about homosexuality might become more positive and

[80] Thanks to Emma Borg for urging me to discuss the potential of an explanation along these lines. Borg also urges me to clarify if the phenomenon might be explained by appealing to truth relativism à la John MacFarlane (2014). MacFarlane's theory is very complex and highly controversial (e.g., (Ball, 2020)) but for current purposes it is sufficient to note that he doesn't argue that the communicative content of an utterance can change but only that the *truth value* of an utterance can change because it might have to be relativized to the context in which it is assessed. Since we are not concerned with the truth values of statutes (in fact, it sounds rather odd to say that statutes have truth values in the first place), MacFarlane's theory is unlikely to be of help here. (I will briefly return to this theory in chapter five).

thwart the aim of criminalizing homosexual practices.[81] This illustrates the more general point that a legislature that intends its statute to be interpreted in line with what is taken for granted at later points will give up significant control over the content of the legal norms that it makes, and it seems unlikely that legislative bodies are generally willing to do so.

The second possibility would be to reject the claim that the communicative content of a statute is determined by the communicative intention that the legislature has or is reasonably ascribed at the time of enactment. Instead, one might claim that it is determined by the communicative intention that the legislature has in relation to a statute at the point in time in which it is interpreted or at which the relevant act is performed. More specifically, the claim would be that a legislature's communicative intention in relation to a statute might change – or be reasonably said to change – once retrospectively operating modifier laws that affect it are introduced to the legal system because they become part of the context against which the statute is to be interpreted. However, this proposal is also faced with an important objection which has to do with the noted fact that retrospectively operating modifier laws often apply to vast numbers of statutes. The problem here is that it is not plausible to say that the legislature correctly changes its communicative intention in relation to all (or even most) of the statutes that are affected by a modifier law because it is unlikely to know or keep track of all the changes that would be required, and to actually change its intentions accordingly. As Smith observes when discussing another potential explanation:

> There is no evidence that Parliament identifie[s], in a systematic way, which of the vast numbers of [statutory provisions that predate the retrospectively operating modifier law] would have their legal effect altered by the [retrospectively operating modifier law], let alone that it decided what interpretation each of those provisions should be given (2016, p. 250)

This also makes it unreasonable to say that such a change in communicative intentions is reasonably attributed to the legislature as "we cannot reasonably attribute to Parliament

[81] The claim here is of course not that there are good *moral* reasons for criminalizing homosexual practices.

intentions that it clearly did not have." (p. 250).[82] We can therefore conclude that even if the communicative content of statutes could possibly change this would not be something that could be accounted for by intention-based versions of SP. They are therefore left without a convincing explanation of retrospectively operating modifier laws.

3.3.3. The objection from the application of statutes in unforeseen circumstances

The last (and latest) phenomenon from legal practice that Smith (2021) claims to be problematic for SP is the application of statutes in unforeseen circumstances. As the name suggests, the objection is based on the observation that statutes can be applied in circumstances for which they have not been envisaged. Focusing on legal obligations Smith claims that this can lead to a situation in which "the content of the legal obligation generated by an act of deliberative law-making may not be stated (expressly or implicitly) by the law-maker." (p. 114). When speaking of the content of "stated" legal obligations Smith is referring to the content that is *communicated* (i.e., both what is said and implicated), as indicated by his reference to both expressed and implicit content.

Smith (pp. 100-103) motivates the objection by starting with an analogous example from a non-legal context: the directives of a parent. In his example a parent instructs her child to purchase low-fat milk from the corner store such that the child incurs an obligation to do so. However, arriving at the corner store the child finds that it is out of low-fat milk

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[82] The same problem would apply to a similar strategy which is to appeal to the so-called 'Always Speaking' doctrine (for a recent explanation of this doctrine and its history, see (Meagher, 2020)). According to this doctrine, "the words of a statute should be treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning" *A-G (Tas) v CL* (2018) 28 Tas R 70, 87. The idea is that statutes are supposed to be seen as being continuously reuttered, such that they can be understood against the context at the time at which they are interpreted (Meagher, 2020, p. 196). This proposal is subject to the same problem because the explanation of a change in communicative content would still have to be explained by a change in the legislature's communicative intention. However, the appeal to the Always Speaking doctrine might also be subject to further problems. One is that it appears to be limited to particular legal systems (e.g., the U.K. and Australia; see (Meagher, 2020)) and therefore might not allow for an explanation of retrospectively operating modifier laws in all systems that contain such laws. Another problem is that it is usually understood in a rather limited way which does not allow for significant departures from original meaning, i.e., it might be insufficient to explain the kind of departures that Lord Nicholls is referring to in relation to the Human Rights Act. These problems might be the reason why I am not aware of any attempt to draw on this doctrine to explain retrospectively operating modifier laws in a way that is compatible with SP.

and since one can arguably not be obligated to do the impossible the child cannot be subject to this obligation under these circumstances. However, Smith points out that the child is nonetheless obligated to act in certain ways, as indicated by the fact that the child cannot simply do anything about its parent's directive and, for instance, spend her time with friends instead. In addition to this negative obligation, the child also incurs a positive obligation such as the 'disjunctive' obligation to buy full-cream milk at the corner store, or to go to another store to buy low-fat milk or to contact the parent to seek further instructions, etc. To avoid potential complexities of such disjunctive obligations, Smith further stipulates that the child cannot contact the parent (she might not pick up her phone), that the family has a strong preference for low-fat milk rather than full-cream milk, and that not much further away there is a service station of which the child knows that it has low-fat milk in stock. It is reasonable to say that because of the parents' instruction and the situation the child finds itself in it has an obligation to go to the service station to get low-fat milk.

What is most important about the example is that the possibility that the corner store is out of low-fat milk is not envisaged by the parent when she instructs the child. Also note that it is not necessary for constructing the example that the unforeseen circumstances are such that they make it impossible for the child to follow the instruction of the parent. Instead of the store being out of low-fat milk it could have been the case that the price for low-fat milk has tripled so that although the child could buy the milk this would leave the family without money for dinner that day. In that case the child would also have an obligation to go to the service station to buy the milk. What is important about the fact that the circumstances are unforeseen is that by directing the child to buy the low-fat milk at the corner store, on the intention-based theory of communication the parent could not have intended to communicate that the child buys low-fat milk at the service station because the parent just did not foresee the possibility that the corner store would be out of low-fat milk or that the price would have tripled. For the same reason it would also not be reasonable for a hearer to

ascribe such a communicative intention to her.

Having developed this example, Smith (2021, p. 103) claims, and I agree, that it is commonplace that statutes are also often applied to unforeseen circumstances. The example that he (2021, pp. 103-106) presents to illustrate that parallel cases occur in legal settings is the case *King v Burwell*.[83] Smith draws our attention to a particular question that was raised in this case, and which concerns the extent of the obligation of government to provide tax credits under the Affordable Care Act 2010. The extent of this obligation became an issue because s. 1401 of the Act stated explicitly that the tax credits were available to those who purchased an insurance policy through an exchange that was established *by a state* but, contrary to the legislature's expectations, 34 of the 50 states failed to establish such an exchange. As a reaction to this failure, a federal exchange was established in compliance with s. 1321 of the Act but the question arose whether there was also an obligation to make tax credits available to those who purchased their insurance policy from this federal exchange, given that s. 1401 only explicitly refers to state exchanges. I think that Smith is right when he agrees with the majority of the Supreme Court judges who decided this case that s. 1401 indeed created an obligation also to provide tax credits to people who purchased their policy from the federal exchange.

According to Smith, the problem with cases of this kind for a view like SP is that the relevant content of the obligation is not communicated by the authority because it could not have any communicative intention to that effect. Just as the parent cannot be said to have the communicative intention that the child should go to the service station to buy the milk the legislature cannot be said have the communicative intention that tax credits are available to people who purchased a policy from a state *or federal* exchange when enacting s. 1401. Again, the reason is that the relevant obligations are shaped by the unforeseen circumstances.

> The meaning of the words in s 1401 depends on what Congress intended to convey by those words. It seems that, when enacting s 1321, Congress was aware

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[83] *King v Burwell*, 576 US 988 (2015).

> of the possibility that some states might not establish an exchange. However, there is little reason to think that, when enacting s 1401, Congress considered the possibility that most states would fail to establish their own exchange, let alone that it intended to address this possibility by conveying that the tax credits would be available to people who purchased a policy under either a state or federal exchange. If it had had that intention when enacting s 1401, it would have used the words "state or federal exchange". (2021, p. 105)

The argument is that because communicative content supposedly depends on the communicative intention of Congress and this intention could not have been informed by the circumstances in question because they were not foreseen, the communicative content cannot correspond to the content of the legal obligation. For this reason, it would also not be reasonable to ascribe such a communicative intention to Congress. What would have been reasonable for Congress to do if it had this intention is to explicitly mention federal exchanges since "in a federal system, one does not normally use the word "state" to mean "state and federal"." (Smith, 2021, p. 105). Interestingly, Smith's argument is explicitly stated to "presuppose a broadly Gricean account of meaning" (p. 105). This is evident from its reliance on the claim that meaning is determined by communicative intentions (or their reasonable ascription). Interestingly, however, Smith also claims that "[other] mainstream approaches in philosophy of language would be of no greater assistance to the majority." (p. 105). Unfortunately, he does not attempt to substantiate this claim.

Although I will argue in later chapters that the objection does not undermine a commitment-based version of SP, I do agree with Smith that it poses an important problem for intention-based versions. To keep the discussion to a manageable limit, in the following I will limit myself to explaining why the strategies that have been considered in the previous chapter will not be able to explain the phenomenon in accordance with an intention-based version of SP. For the discussion of other potential responses, I refer to Smith's (2021) own discussion. To begin with, given that s. 1401 still obligates government to provide tax credits to those who have purchased their insurance from a state exchange, it is obvious that the phenomenon cannot be explained on the basis of the invalidation of the statute. Further, at

least on the intention-based version of SP it is implausible to say that the content of the relevant obligation corresponds to its communicative content because there is a contextual presumption that extends the meaning of “state” to “state and federal”. As Smith notes, it would be highly unusual to intend to refer to state and federal exchanges by merely speaking of “state” exchanges. Moreover, it is also implausible to say that the communicative intention is affected because the unforeseen circumstances are part of the context. Exactly because these circumstances are not foreseen, they cannot be available to (or treated as given by) Congress or its members in the formation of its communicative intention. It is also implausible that cases in which statutes apply to unforeseen circumstances and thereby generate further obligations will be rare. I take this not only to be intuitive to legal theorists and practitioners but also to be suggested by the fact that analogous cases occur in non-legal contexts and do not strike us as artificial.

It is also problematic to suggest that the communicative content of the statute is ambiguous or indeterminate and that the extended obligation to provide tax credits to those who purchased their policy from a federal exchange does not exist because of s. 1401 but because of the decision of the court that resolved this indeterminacy by exercising discretion. The judges in *King* did not consider s. 1401 to be indeterminate in the sense that it had to be resolved by means of discretion and the relevant obligation was argued to pre-exist their decision and not to be a result of it. Similarly, it would be odd to say that the child had an obligation to go to the service station because the child (or someone else) *decided* that it should do so upon finding that the corner store did not have low-fat milk in stock. Rather, it had this obligation because it had received instructions from its parent which yielded a sufficiently determinate obligation in the unforeseen circumstances.

Finally, although he has not done so himself (yet), one might propose to use Asgeirsson’s Pro Tanto view to explain the phenomenon. On this explanation s. 1401 would presumably be said not to generate an all-things-considered legal obligation but merely a pro

tanto legal obligation to provide tax credits to people who have purchased policies from state exchanges. To explain how the pro tanto legal obligation is extended to an all-things-considered legal obligation that also covers people who purchased their policies from the federal exchange, the Pro Tanto view would presumably say that the defeasible legal reason that is provided by this pro tanto legal obligation interacts with other legal reasons in a way that yields the all-things-considered legal obligation. In fact, one might think that plausibility is added to this explanation by Smith's claim that "[t]here are legal reasons for construing s 1401 in light of s 1321" (Smith, 2021, p. 105),[84] such as that a failure of doing so would undermine the effectiveness of the Affordable Care Act whose purpose is clearly to incentivize people to purchase health insurance.

Now, I think that the case that has been made against the Pro Tanto view in the previous sub-section has already casted a reasonable amount of doubt on the explanatory power of this approach but here I also want to highlight another problem. This problem has already been presented in a similar form by Daniel Wodak (2021, p. 778) and it concerns cases, such as the one at hand, in which the (contents of the) all-things-considered legal norms are not *limited* but *extended* beyond the ones that would have existed under normal circumstances. Wodak explains that it is unclear how Asgeirsson's view is supposed to explain such cases given that his account focuses on examples (e.g., mens rea) in which the legal reasons that are provided by pro tanto legal norms are *defeated* (wholly or in part) such that the resulting all-things-considered legal norms are more limited than the initial pro tanto legal norms. More specifically, according to Asgeirsson legal reasons "interact with [the legal content of a statute or other legal text] in a certain way, *by either outweighing or undercutting* the reasons provided by it." (2020, p. 14).[85] However, in the case at hand the obligation to provide tax credits to people who have purchased their insurance policy from

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[84] Emphasis removed.
[85] Emphasis added.

a state exchange is neither outweighed nor undercut but rather extended to cover federal exchanges, as well. In its current state, the Pro Tanto view is insufficient to account for such cases. Of course, this is not to say that the Pro Tanto view *cannot* explain this phenomenon, but it is far from clear how the explanation would look like. One proposal might be to say that instead of being defeated the defeasible legal reason is *affirmed* in the case at hand. However, it wouldn't be correct to say that the affirmation of a reason to do something provides an extended reason to do something *in addition*. For instance, I might have a defeasible reason to do light exercise after working hours, such as that it is good for my physical health. This might be affirmed by another reason, such as that light exercise after working hours will also reduce stress. However, this affirmation does not provide an extended all-things-considered norm or reason such as to exercise during working hours or in the middle of the night, or to run a marathon after working hours.

The foregoing arguments provide good reasons for concluding that currently neither the Pro Tanto view nor any other intention-based version of SP provides an appropriate explanation of cases in which statutes apply to unforeseen circumstances.

3.4. The objection from parochialism

The last objection is what I call "the objection from parochialism". This objection is manifest in different writings by Greenberg (e.g., (2011b, pp. 236-239; 2017a, pp. 305-306)) and it consists in the problem that there is a standing possibility that legal systems can be such that the legal contents of its statutes are not determined by what a specific version of SP claims.[86]

[86] That there is a worry of parochialism along the following lines is also manifest in the responses to Greenberg by proponents of SP that will be considered later in this section. I should specify that Greenberg (2011b; 2017a; 2017b) mounts the following objection as part of a larger objection according to which proponents of SP cannot make conclusive claims about legal content without first engaging with theories about the nature of law because certain theories of the nature of law (such as his own) are incompatible with SP. As explained in the introduction, this thesis proceeds on the assumption that the wide acceptance of SP makes it reasonable to assume that the correct theory of the nature of law is compatible with SP. (When speaking of "compatibility" in this context, I mean that theories of the nature of law must allow for the *possibility* that SP holds universally, not that they must claim – or even establish – that SP holds universally). Therefore, I will not consider Greenberg's objection to the extent that it invokes theories of the nature of law that purport to be incompatible with SP but only to the extent that it invokes the possibility that legal systems have certain features that make it incompatible with SP.

More specifically, there might always be a practice or rule, such as a constitutional, customary or statutory rule (or even a rule of recognition), that specifies that the content of the legal norms that are generated by statutes corresponds to something else than the specific kind of meaning that some version of SP relies on (Greenberg, 2011b, p. 236). The objection from parochialism is related to the objection from legal practice but while the latter purports to present actual examples from legal practice that lead to a gap between legal content and communicative content of a statute the former rather invokes the possibility of such practices to undermine SP's character as a universal explanation of the legal contents of statutes. The underlying worry is that there is just no reason why the legal content of a statute should be determined by its meaning or a specific type thereof rather than something else.

The objection can come at different levels. At the most general level, the objection is that a legal system might be such that the legal content of a statute is not determined by any kind of meaning *at all*, whether we understand it as sentence meaning, semantic meaning, communicated meaning or any other variety of meaning. Instead, it might be determined by what Greenberg has called the "legal intentions" (2011b, p. 241) of legislators. Roughly, legal intentions are intentions of authorities to change the law in a particular way by enacting a statute (p. 242). Such intentions can be general or specific. For instance, by enacting statutes a legislature might have the general legal intention to change the law in a way that protects public health or the more specific intention to prohibit certain substances that are harmful to people's health to be infused in drinking water. In a legal system in which the legal content of statutes is determined by a legislature's legal intentions statutory interpretation might consist in trying to guess what these intentions were. This guess might of course rely on the statute's meaning (communicative or other), but it does not have to

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However, I will discuss attempts of *defending* SP against the objection from parochialism by relying on claims about the nature of law. Although I will argue that these attempts have been unsuccessful, I consider such attempts to be justifiable on the grounds that they rely on rather established assumptions about the nature of law.

correspond to it, i.e., meaning might simply serve as a clue to the legislature's legal intentions. Importantly, legal intentions are not the same as communicative intentions because legal intentions are not supposed to have their effect in virtue of being recognized. In that respect a legal intention is similar to the non-communicative intention of getting the hearer to eat one of Antonio's dishes by saying "Antonio is a good cook". The important point here is not necessarily that legal intentions are *likely* to be determinants of legal contents in actual legal systems (though Greenberg notes that they are more likely to be had by legislature than communicative intentions (2011b, p. 244)) but rather that there is a standing possibility that they or some other factors *might* be such determinants, such that the legal content of a statute would not correspond to its meaning.

At a different level, the objection from parochialism takes issue with versions of SP that claim that the legal contents of statutes are determined by a specific type of meaning, such as communicative content. For example, a legal system might be highly literalist in the sense that it specifies that legal contents are determined by a different type of meaning, such as semantic meaning or sentence meaning. Further, at an even more specific level, the objection specifically addresses subjective or objective communicative versions of SP. Again, a legal system might be such that a statute's legal content is not determined by the actual communicative intention of the legislature but by the intention that is reasonably ascribed to it or the way other around. Finally, even if a legal system generally specifies a statute's legal content to consist in a specific type of communicative content or meaning it might still require that this content or meaning also needs to be compatible with some other norms such as common law doctrines, human rights instruments, etc. Given these considerations there just does not seem to be any reason to believe that SP or some specific version thereof is universally applicable.

Since virtually all proponents of SP adopt communicative and intention-based versions, and these versions are considered to be most promising, in the following I only

discuss responses to the extent that they favour such version of SP. Before I start, I must make a small but important qualification concerning the objection's appeal to legal intentions or other entities than meaning. The objection cannot be that SP is undermined because the content of legal norms might be determined by legal intentions (or other entities) in the sense that legal intentions are entirely independent from the respective statute. For even if it might be possible that legal intentions determine the content of legal norms fully independently from statutes (e.g., in a system in which there are legal intentions but no statutes) this does not constitute a problem for SP because SP is only a theory of legal norms that exist in virtue of statutes (or texts more generally). In such a legal system, legal intentions would be an independent source of law and not fall under the explanandum of SP. Indeed, this is also the reason why SP is not undermined by the existence of customary law since norms of customary law exist in virtue of custom and not statutes. Hence, it has to be the case that the legal intention becomes relevant to the obtaining of the legal content in virtue of the statute and not simply in virtue of its own existence. For example, the legal intention might become relevant to the extent that the statute (or its meaning) serves as an indicator of what the legal intention is. To that extent, it would be similar to the way communicative intentions are relevant to legal contents as they are also indicated by the words of the statute, context, etc.

Let me now consider responses to the objection from parochialism. A first response that I want to mention briefly comes from Goldsworthy (2019) and it is that we should accept the objection but insist that it is not at odds with SP because SP should not be understood as a universal claim. More specifically, Goldsworthy confines his own version of SP "to the limited domain of statute law in Anglo-American legal systems such as those of the U.K., the U.S., Australia, Canada and New Zealand" (2019, p. 168) and claims that there is "no good reason to assume that it is also true of the equivalent of statute law in every possible legal system" (p. 168). This, he claims, is "the *real* Standard Picture" (p. 164). Goldsworthy further explains that this contingent version of SP does not need to be philosophically

uninteresting because the mere fact that SP – or a particular version thereof – holds in one or more legal systems shows that this is at least *possible* and that its negation isn't a necessary truth. This insight has philosophical relevance because it is incompatible with certain theories of (the nature of) law, such as Greenberg's own Moral Impact Theory (Goldsworthy, 2019, p. 168). I agree with Goldsworthy that a contingent version of SP can be philosophically relevant in the way he explains it and also that there is value in giving an accurate account of the legal contents of statutes of individual legal systems but I nonetheless think that the concession that Goldsworthy proposes is too significant for at least two reasons (for a similar view, see (Greenberg, 2011b, pp. 236-237)). First, this response is not persuasive because intention-based versions of SP already fail to give an adequate explanation of the contents of the kind of Anglo-American legal systems to which they supposedly do apply, as explained in the previous section. Second, contra Goldsworthy, this contingent or parochial conceptualization of SP does not line up well with the standard understanding of SP. This is indicated by the noted observation that legal philosophers tend to take SP for granted when developing theories of the nature of law. Since their theories concern the nature of law and are therefore meant to apply universally (or at least broadly), this suggests that they consider SP to hold universally as well. That this is the more standard understanding of SP will come out in the following discussion in which I consider arguments from other proponents of SP to the effect that it applies universally.

One argument to this effect can be found in the work of Marmor:

> Those who have doubts that legislation is necessarily a communicative act need only consider the possibility of making law without communicating anything. How would that work? Can we have a legislature (democratic and all) that fails to communicate its laws, keeping them entirely secret? That would not work, presumably. (2014, p. 18)

The argument is not developed in detail, but it seems to be that (the contents of) legal norms must be communicated because it would be incompatible with the nature of law or legislation – most notably in democratic systems – to have legislative norms that are kept "entirely

secret" from those to whom they apply. Although invoking principles of democracy is not a promising strategy against the objection from parochialism because legislation can also take place in non-democratic legal systems, there might be more to be said in favour of the idea that some fundamental aspects of the nature of law or legislation dictate that statutory norms must not be kept secret. Relying on theories of the nature of law one might claim that so-called legal norms that are kept secret are simply not laws, for instance because they would fail to serve the action-guiding purpose that is arguably essential to law. Theories of the nature of law that might be said to support such an argument are, for instance, the natural law theories of Aquinas or Fuller. According to Aquinas's theory, for example, "law is an ordination of reason for the common good, made by one who has the care of the community, and *promulgated*" (Aquinas, 2000, pp. 5-6)[87] and the requirement of promulgation is of course also central to Fuller's theory of the inner morality of law (1958, pp. 651-652; 1964, pp. 49-51).

But one might also find support in positivist theories. For example, in an argument that is similar to Marmor's to the extent that it also relies on the action-guiding function of law, Neale (unpublished a; unpublished b) invokes Hart's observation that "[i]f it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist." (2012, p. 124). Or one might turn to Joseph Raz's (1985; 1986) theory of authority and argue that in order to exercise its essential authoritative function a legislature has to communicate the legal changes that it wants to impose. Indeed, one might suggest that an idea along these lines is manifest in Raz's claim that "[w]hat cannot communicate with people cannot have authority over them" (1985, p. 301). The idea would roughly be that a legislative or statutory norm can only be authoritative if a legislative authority has communicated (the content of) this

[87] Emphasis added.

norm to them. It might therefore appear as if there is ample support from theories of the nature of law in favour of the claim that legislative norms must be communicated.

A first objection that one might want to make in response is that even if the argument is successful, it would only show that the legal contents of statutes must be communicated but not that the legal content is determined by the actual communicative intention of the speaker or the communicative intention a reasonable hearer would ascribe to the hearer. That is, the objection would be that even if the argument succeeds to rebut the objection of parochialism for all other possible constituents than communicative content, it does not show that there cannot be a legal system that specifies the communicative content to be a matter of its subjective vs. objective intentions, even if some particular intention-based version of SP says otherwise. However, proponents of such versions of SP would be right to respond that the question of what determines communicative content is not settled by some particular legal system but only by the correct theory of communication. That is, even if there should be a supposedly legal rule or practice in a system that claims the legal content of a statute to correspond to the actual communicative intention of the legislature, the correct theory of communication might end up being that communicative content is in fact determined by the intention that a reasonable hearer would ascribe to the legislature. Hence, the actual communicative intention would not determine communicative content and therefore a supposedly legal rule or practice that claims such an intention to determine the legal content of a statute could not exist or be actually operative in a legal system because of fundamental considerations of the nature of law and the correct theory of communication.

However, there is a more serious problem with the strategy that is under consideration. The problem is that it is far from clear that the remarks on “communication” or “promulgation” that underly the arguments of legal philosophers sufficiently align with the notion of communication that is at play in SP. More specifically, the theories of the nature of law under consideration do not require that the respective legal norm is communicated by

the legislature in any specific or strict sense of communication, let alone one that requires communicative intentions, but rather in the broad sense that legal norms must be *publicized* or *made available* to people in some way. And this publicity or availability requirement can already be achieved by publishing the text and specifying that its legal content is determined by, for example, the statute's sentence meaning or semantic meaning and not by the legislature's communicative intention or the communicative intention that would be reasonably ascribed to it. It might even be argued that the requirement is already satisfied if the statute's legal content were specified to be determined by the legal intention of the legislature. In that case, the statutory enactment would satisfy the requirement by providing a public indication of that legal intention through the meaning of the statutory text, but its legal content would not correspond to the statute's communicative content (for similar lines of argument, see (Greenberg, 2011b, pp. 250-251).

Even if correct, Marmor's own remarks only establish that it is unacceptable for laws to be kept "entirely secret." Fuller also thinks about the requirement merely as "[t]he requirement that laws be published" (1964, p. 51) and, as far as I am aware, there is also no suggestion in Aquinas's classical theory that his notion of promulgation should be understood in any specific sense of communication. Similarly, Hart's remark suggests that what is important to him is merely that people must be able to access and understand the standards that their conduct is subject to, not that the standards are communicated in any specific sense. And although we will see shortly that one might suggest adapting Raz's theory of authority in a way that does serve the purpose of the intention-based version of SP, Raz (2009, p. 283) himself explicitly rejects the claim that legislation has to rely on the notion of a complex communicative intention. To be sure, Raz does accept that legislation must be intentional, but he explains that the relevant intention is only 'minimal', i.e., not communicative, in the following sense: "Law-makers need not intend anything other than that the bill become law with the meaning given it by the conventions of interpretation of

their country." (1985, p. 321).[88] However, saying that the meaning would be determined by the "conventions of interpretation" of the legal system would do nothing to defend intention-based versions of SP against the objection from parochialism exactly because it would allow for the conventions to be such that the content of legal norms is determined by semantic rules, legal intentions, or something else. Indeed, Raz himself is explicit that "[t]here is no denying that many interpretive practices are parochial." (2009, p. 265) and that "[w]hich […] of a number of alternative interpretations is the right one varies from one legal system to another. It is a matter of their own rules of interpretation." (1985, pp. 317-318).

However, Asgeirsson (2020, pp. 33-35) has recently put Raz's theory of authority to use in an original argument in favour of the claim that SP holds necessarily, and the rest of this section is dedicated to a discussion of this argument as it is sophisticated and rather complex.[89] The argument is based on Raz's idea that "one of the essential functions of law [is] to help subjects better comply with the reasons that apply to them (via its role as an authority)" (Asgeirsson, 2020, p. 22) and that "the law can serve this function only if it is capable of expressing a view about how its subjects ought to behave." (p. 22). The idea behind this is that legal authorities must express views as to how their subjects ought to behave for, if they did not, these authorities could not serve their function as authorities to

[88] Raz clearly thinks that we are entitled to assume that legislators have such minimal intentions when he adds that "[t]o deny them that intention is to deny that they know what they are doing when they make law." (1985, p. 321). However, the evidence from Gluck and Schultz-Bressman (2013) that has been invoked in relation to the objection from collective intentionality suggests that Raz's assumption is too optimistic (see section 3.2.2.). Raz's reliance on minimal intentions has also been criticized by Ekins (2012, pp. 112-117). Ekins argues that minimal intentions are insufficient to ensure the authoritativeness of an enactment, for if the law changes according to the interpretive practices to which minimal intentions refer and the legislative authority is unaware of these practices, then the resulting legal content might not correspond to how the legislature actually intended the law to change. This, according to Ekins, would make the supposedly legal content unauthoritative. Ekins uses this in an argument to the effect that legal content is determined by the communicative intention of the legislature as this intention involves a more specific effect and supposedly matches the legislature's intention for how the law should change. Although Ekins does not explicitly present it as such, this argument might also be used as an attempt to show that SP holds universally. However, since Ekins does not press this argument and his theory of legislative intention has already been found to be problematic, I will not discuss it in the following. I merely want to highlight that it is unlikely to help against the objection because in a system in which the legal contents of statutes are determined by semantic meaning, sentence meaning or something else the legislature might simply express how it intended the law to change by using semantic meaning, sentence meaning, etc.

[89] Note that Asgeirsson does not offer the argument as a reaction to the objection from parochialism but rather as a general positive argument in favour of the claim that SP holds necessarily.

guide the behaviour of the subjects in appropriate ways because the subjects would not receive instructions as to how they should act. I take it that the main point here is that (the content of) a legal norm must correspond to what a legal authority has expressed as a view concerning how its subjects ought to behave, for if there was no such correspondence the legal norm could not be authoritative. Note that Asgeirsson is clear that "expressing a view" is understood rather broadly here and, for instance, does not need to involve language, for reasons such as that authorities might express their views through gestures or other non-linguistic means (2020, pp. 22-23). He specifies further that

> which forms of expression count, and whose […] is contingently determined by the law itself, which is to say that rules of recognition at the foundation of any given legal system determine, among other things who is authorised to express views about how the law's subjects ought to behave and what form such expression must take. (pp. 22-23)

Though expressed in Hartian terms, the main idea here should be generally accepted, and it is that that what counts as an authoritative expression of how legal subjects ought to behave is determined contingently for each legal system. For instance, the conventional rule of recognition can deem statutory enactments that are the result of certain legislative procedures to be authoritative expressions and the same applies to other legal texts and even customs.

Focusing on statutes (and constitutional clauses) Asgeirsson emphasizes that whenever statutes are used as authoritative expressions, they are necessarily linguistic and therefore they are necessarily *speech acts*. More specifically, according to Asgeirsson, a statute is "fundamentally a speech act of two types: it is both an effective and a directive" (2020, p. 33). To understand this characterization, it must be explained that intention-based versions of SP make a distinction between two general kinds of speech acts that subsume different types: communicative speech acts on the one hand and conventional or institutional speech acts on the other hand (e.g., (Bach & Harnish, 1979, pp. 108-119; Schiffer, 1972, p. 93; Sperber & Wilson, 1995, p. 245; Strawson, 1964)). Communicative speech acts are those that are claimed to require a communicative intention and its recognition for its success.

They are usually said to include such speech act types as assertives (e.g., assertions) and directives (e.g., commands, requests, etc.) among others. Conventional or institutional speech acts, on the other hand, are speech acts that have certain conventional or institutional effects and that rely on the existence of conventional or institutional rules for their success.[90] One standard type are effectives: speech acts that produce or change an institutional state of affairs. Common examples for effectives include such acts as the naming of a ship by saying "I hereby name this ship the Titanic" or pronouncing a couple husband and wife by saying "I pronounce you husband and wife". It would be false to say that these speech acts are intended to have their institutional effects (e.g., that the couple enters into the status of marriage) in virtue of the recognition of an intention to that effect. These speech acts rather have their effects because certain institutional rules (e.g., the rules of the church) hold and that they are correctly followed. Such rules characteristically require that a certain individual with the necessary authority (e.g., a priestess) must make an utterance of the relevant kind in the right circumstances (e.g., after the couple has made its vows). Importantly, one utterance can perform speech acts of both types: communicative and institutional (Bach & Harnish, 1979, p. 117). For instance, "You are under arrest." can create certain institutional state of affairs (put the addressee under arrest) and be an assertion at the same time (e.g., the indirect assertion that one is suspected of breaking the law).

Asgeirsson claims that this last point also holds for statutes when he characterizes them as both effectives and directives. Statutes are certainly necessarily effectives because their defining function is to create institutional states of affairs, i.e., to bring legal norms into existence. Further, their necessary character as institutional speech act is also underlined by the fact that they necessarily rely on institutional rules for their success, such as a rule of recognition or rules of legislative procedure (2020, pp. 33-34). It is a little less clear to me

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[90] This characterization excludes linguistic conventions because communicative speech acts also rely on such conventions (Strawson, 1964).

why Asgeirsson also takes statutes to be directives and this question will play a role in my critique of his account. However, my general impression is that this assumption is based on the Razian requirement that statutes must be expressions of the views of a legislative authority as to how their subjects ought to behave. Since they are necessarily linguistic expressions this characterization seems to fit rather well with how we generally think of directive speech acts.[91] But, the argument continues, once we accept that statutes are directives, we must also accept that the views as to how the subjects of a legislature ought to behave that are expressed by them must be (or correspond to) their communicative contents because directives are communicative speech acts, and their contents are communicative contents. In Asgeirsson's own words:

> legal systems can shape the way in which they institutionalise authoritative expression in a myriad of ways, but they cannot change the directive nature of the relevant speech act. And directive speech acts, as such, do depend on communicative intentions, both in that the speech act succeeds (in some relevant sense) by virtue of intention recognition and – what matters more to us here – in that the content of the utterance is its communicative content (2020, p. 34).

Adopting an objective intention-based theory of communication, Asgeirsson concludes that the content of the law that is generated by a statute must necessarily correspond to the communicative intention that would be ascribed to the legislature by a reasonable hearer. Note, however, that that the reliance on an objective intention-based theory is not necessary to make the more general point that the legal content of a statute is necessarily determined by its communicative content. Hence, one might also adopt a subjective intention-based theory as part of the argument (or, indeed, any other theory that considers directives to be communicative speech acts).

While this is clearly a sophisticated argument, I nonetheless think that there are at least two general problems with it, and they apply independently from the exact theory of

[91] Note that Asgeirsson (2020, p. 21) is careful to specify that although Raz also speaks of directives in this context, Raz does not use the term in the specific speech act theoretic sense but rather "in a wide sense which can cover, propositions, norms, rules, standards, principles, doctrines and the like" (Raz, 1985, p. 303). Hence, the classification of statutes as directive speech acts isn't taken from Raz's original account.

communication that is relied upon. The first problem arises when Asgeirsson's argument is combined with his Pro Tanto view. Since the Pro Tanto view claims that SP only concerns (the content of) pro tanto legal norms the argument would, even if sound, merely establish that it is the content of pro tanto legal norms that necessarily corresponds to the communicative content of statutes. However, this would be an unsatisfactory response to the objection from parochialism because it still allows for the possibility of a rule in a legal system that requires that the all-things-considered legal norms of that system correspond to the semantic meaning, sentence meaning, etc. of a statute rather than to its communicative content. Such a legal rule would then always defeat the pro tanto legal reasons or norms whose content corresponds to the communicative content of statutes in such a way that the resulting all-things-considered legal norms would never correspond to the communicative contents of statutes. Such a legal system would perhaps not change the allegedly directive nature of statutes, but it would make their communicative contents irrelevant to the all-things-considered legal norms that hold in a legal system. As such, the argument would at most provide a Pyrrhic victory to SP.

However, one might evade this objection by adopting Asgeirsson's argument without taking his Pro Tanto view on board. In that case, the argument would concern (the content of) all-things-considered legal norms and be claimed to establish that the communicative content of a statute necessarily corresponds to the content of these norms. This leads me to the other general problem of Asgeirsson's argument as it applies independently from the kind of legal norm that is said to be at play in SP. As already hinted at above, the problem has to do with Asgeirsson's reason for claiming that statutes are necessarily directives, but I want to be clear that my aim is not to show that this claim is false. Rather, I prefer to remain agnostic on this issue and merely argue that Asgeirsson does not provide sufficient reasons to think that statutes are necessarily directives in the relevant sense and that, even if there are other reasons to think that they are necessarily directives, his considerations do not

support the conclusion that SP holds necessarily.

But let me first explain why I will remain agnostic on the question whether statutes are necessarily directives. The reason is that although this claim might sound intuitive it is not uncontroversial. More specifically, it has been disputed by theorists such as Allott and Shaer (2018) and Bach and Harnish (1979), as Asgeirsson (2020, p. 33) explicitly acknowledges. Allott and Shaer argue that statutes do not generally share the features of standard directives such as commands. For example, a statute that specifies, "Marriage of same sex couples is lawful." seems rather different from an imperative such as "Treat the marriage of same sex couples as lawful!". Statutes usually also do not contain other terms that commonly mark directive speech acts, such as that someone "must" or "should" consider marriage of same sex couples as lawful. Moreover, statutes do not pass standard tests for the occurrence of indirect communication in the form of implicature (e.g., cancellability; see (Grice, 1989)), such that it is also problematic to claim that statutes perform directives indirectly. Finally, Allott and Shaer argue that a statute does not need to be a directive to serve its action-guiding purpose. Consider, for instance, that the conventional speech act of naming a ship guides people's behaviour in the sense that it gives them a reason to call the ship by that name, but this does not make naming a directive. Allott and Shaer suggest that something similar can be said about statutes for they might be seen as creations of institutional norms that guide people's behaviour without directing them to do so in the sense of speech act theory. The underlying thought in Bach's and Harnish's work, on the other hand, seems to be that legislation does not rely on communicative intentions but merely on institutional rules and that it is therefore not a directive speech act.

Instead of addressing these objections directly, Asgeirsson's strategy seems to be to counter them by arguing that statutes *must* be directives and, as noted before, my understanding is that it is based on Raz's claim that statutes are expressions of the legislature's view as to how subjects ought to behave. The idea seems to be that if the

legislature uses language to express a view towards its subjects as to how they ought to behave then it must be performing a directive speech act, for this description seems to fit rather well with how we would generally characterize directives.[92] And if it is a directive then intention-based theories of communication dictate that it is a communicative act whose content is its communicative content. However, my general worry – and this is the second problem of Asgeirsson's argument – is that Raz's notion of the expression of a view seems too broad to warrant these conclusions. (This worry is of course similar to the one expressed in relation to Marmor's and Neale's arguments). More specifically, we have already noted that the expression of a view does not need to involve linguistic means, but here it is important to see that it also does not need to involve communication. This is manifest in the fact that Raz does not only claim his theory to extend to legal norms that exist in virtue of statutes and other linguistic means but also in virtue of custom. As such, custom must also satisfy the condition of expressing a view and Raz claims that this is in fact the case when he says that "[custom] can hardly avoid reflecting the judgment of the bulk of the population on how people in the relevant circumstances should act." (1985, p. 306).[93] This clearly suggests that he considers customs to be the expressions of a view but it would clearly be

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[92] It is somewhat surprising that Asgeirsson does not provide an explicit definition of directives when presenting his argument in favour of the necessity of SP but that he does offer such a definition at a later point in his book when discussing non-literal aspects of legal language (2020, p. 109). According to this definition, which is due to Bach and Harnish, directives are utterances that "express the speaker's attitude toward some prospective action by the hearer and his intention that his utterance, or the attitude it expresses, be taken as a reason for the hearer's action" (1979, p. 41). This definition seems more demanding than the one that underlies the present argument because it does not only require that a view (or "attitude") is expressed as to how the hearer ought to behave, but also that an intention is expressed that the utterance or view is taken as a reason for the hearer's action. Prima facie, adopting this more demanding definition might undermine the argument in favour of the necessity of SP because there is no obvious requirement in Raz's theory that such an additional intention must be expressed. To the contrary, we have seen that he rejects the idea that legislation involves such rather complex intentions. However, I will not press this point here because Asgeirsson neither invokes Bach's and Harnish's definition in relation to his argument in favour of the necessity of SP nor heavily relies on it at later points, such that it is not clear how wedded he is to it and whether he needs to adopt it as part of the present argument.

[93] Although he speaks of "reflecting" on this occasion, it is clear from the context that what is at stake is the expression requirement (Raz, 1985, pp. 305-306). Further, note that even if the notion of reflecting a view might somehow supplement the notion of expression here, this would rather undermine Asgeirsson's argument for then there would be another way for how legal norms can be authoritative than being expressed. As far as I can see, Asgeirsson himself also accepts that customary law has to satisfy the condition of having to be expressed (2020, p. 23).

too much of a stretch to say that customs are communicative acts.[94] This shows that the notion of expressing a view that is at play is much broader than communication and I now want to show that, as a result, we can neither conclude that statutes are necessarily directives in the relevant sense nor that the legal content of a statute has to correspond to its communicative content if statutes were directives for some other reason.

To begin with, it seems to me that if we apply Raz's account as proposed by Asgeirsson this would overproduce directives in a way that is not only implausible but that also undermines his argument. For although we should certainly accept that the form of expression that is relevant for statutes is linguistic, the fact that Raz's notion of expression is not necessarily a communicative one does not provide a reason to hold that for some content to be *expressed* as a view of how subjects ought to behave it must be the *communicative content* of a statute and not something else. For example, there does not seem to be anything about the notion of expression that would force us to say that the semantic meaning of a statute cannot (also) be expressed as a view of the legislature as to how its subjects ought to behave. To illustrate this, consider the Alberta bylaw according to which drug shops "shall be closed […] at 10pm on each and every day of the week." Raz's notion of expressing a view does not provide us with any reason to say that the view that the legislature expresses can only be that all drug shops shall be closed at 10pm on each and every of the week and *shall stay closed until the morning* (its communicative content) rather than that they should close at 10pm without specifying if they can reopen immediately after that (its semantic meaning). However, if this is right, then the use of Raz's theory along the lines that have been described would entitle us to say that two directives are performed because both contents would be satisfying the condition on directives that they must be the linguistic expression of a view as to how subjects ought to behave: the directive that drug

[94] For claims to the effect that customary law is not the result of communicative acts, see again (Solum, 2013, pp. 517-518).

shops should be closed at 10pm and remain closed, and the directive that they should be closed at 10pm without further specification as to what should happen after that. But this result would not only be at odds with the specific communicative notion of directives that Asgeirsson is after but also fail to provide the response to the objection from parochialism that we are seeking, for it would still allow different types of content to be authoritative and therefore to correspond to the legal content of statutes. Similar arguments might also be made for sentence meaning, legal intentions, and potentially other kinds of contents that are expressed by linguistic means.

But I also want to highlight that even if statutes turned out to be necessarily directives for some other reason, we could still not claim that only the communicative content of a statute can be authoritative on the basis of Raz's broad notion of expressing a view. The reason is that although directives are of course communicative speech acts with communicative contents it is not the case that this is the *only* content that directives can express, for they also have a sentence meaning, semantic meaning, etc. which can also be considered expressions of different views as to how subjects ought to act, at least according to the broad notion of expression that is at play. This is why I do not need to commit myself to the claim that directives are not (necessarily) directives for the sake of this argument. However, as it remains unclear in light of the arguments by Allott and Shaer and Bach and Harnish whether statutes are really necessarily directives, my own defence of SP will not rely on this disputed premise and only work on the assumption that they are necessarily effectives, which I consider to be uncontroversial for the reasons stated above (for further arguments to that effect, see also (Kurzon, 1986)).

Conclusion

In this chapter, I have discussed the main objections that have been levelled against SP. I have argued that intention-based versions of SP are capable of dealing with some of these

objections, most notably the category mistake objection and the objection from bindingness. However, I have also made a case that intention-based versions of SP fail to provide adequate responses to the objection from collective intentionality, some objections from legal practice and the objection from parochialism. This result provides good reasons for rejecting intention-based versions of SP.

4. The commitment-based theory of communication

In light of the fact that intention-based-versions of SP are undermined by the objections that were discussed in the previous chapter, one might be tempted to agree with sceptics that SP ought to be rejected altogether. The rest of this thesis is dedicated to arguing that this conclusion would be too quick because there is an alternative theory of communication that provides a more robust basis for SP than intention-based theories: the commitment-based theory. This chapter introduces this theory, and it is divided in three sections. In the first section I make some general remarks about the approach that I take in setting out the commitment-based theory of communication. The second section introduces the central notion of commitment. The third section explains the central explanatory role of this notion in commitment-based theorizing about communication. The final chapter will then develop a version of SP that is based on the commitment-based theory and argue that this version can resist the objections that undermine intention-based versions.

4.1. The approach

I start with some points about my general approach in setting out the commitment-based theory of communication. These points are grouped under three broader subjects. The first is the relation between commitment-based and intention-based theories of communication. As already noted in the introduction, my aim is neither to demonstrate that a commitment-based theory of communication provides the correct theory of communication nor even that it is generally superior to intention-based theories. There is a large and ongoing debate in philosophy of language concerning these claims, and it would go beyond the scope of this thesis to establish any of them. Instead, my aim is the more limited one of showing that a commitment-based theory does a better job at defending SP than intention-based theories. As explained, its capability of upholding the widely accepted claim that is made by SP makes

the commitment-based theory more attractive, but I certainly do not consider this advantage to be the final word on the broader discussion which kind of theory is more attractive overall. For these reasons, I have also not made the general defects of intention-based theories of communication a real subject of the foregoing discussion (for a survey, see (Borg, et al., 2021)). I adopt a similar approach when presenting the commitment-based theory, at least in the sense that I will not provide a comprehensive survey of the problems that it is associated with, let alone show that it can deal with all of them. Nonetheless, I discuss at least some (alleged) difficulties as I go along and towards the end of this chapter and try to explain why I do not think that they are fatal. This will help to illustrate that there are certain ways to defend the commitment-based theory and also help to get an adequate understanding of the theory more generally. Further, although my presentation of the commitment-based theory often emphasizes how it differs from intention-based views this is primarily meant to bring out its distinguishing features rather than to suggest that there are no overlaps between the two. Indeed, one of the reasons why there must be such overlaps is that intentions are generally held to involve commitments. Moreover, we have already seen that intention-based versions of SP occasionally appeal to the notion of commitment despite the fact that they rely on intention-based theories of communication (e.g., (Asgeirsson, 2020, pp. 41; 150-171; Goldsworthy, 2019, p. 188)).[95] We will also see at some points that commitment-based theorists of communication acknowledge a role for (communicative) intention in theorizing about communication, even if it is not the central explanatory concept in their accounts (e.g., (Alston, 2000, pp. 249-250; Geurts, 2019a, p. 28).

The second subject concerns the theoretical sources on which I will draw. These of course involve contributions that have been made to commitment-based theorizing about communication. However, there have been many contributions of this kind (e.g., Alston,

[95] Another example is Soames (2013, p. 597), who relies on the notion of commitment in characterizing various – though not all – speech act types in his work on SP.

2000; Carassa & Colombetti, 2009; Clark, 1996; 2006; Drobňák, forthcoming; Garcia-Carpintero, 2015; Habermas, 1998; Kukla & Lance, 2009; Lance, 2001; Lance & Kremer, 1994; Loeffler, 2017; Scharp, 2008; Walton & Krabbe, 1995; de Brabanter & Dendale, 2008) and although I try to take as many of these sources into account as possible, it would go beyond the scope of this thesis to consider all of them or to discuss them in detail. Instead, a certain focus will be put on the theoretical frameworks of Robert Brandom (1983; 1994) and Bart Geurts (2018; 2019a; 2019b) since the former is the most influential classical account and the latter what I consider to be the most influential recent commitment-based account.

My account is also strongly influenced by another theoretical source, one that has already been mentioned: the work of Gilbert (1989; 2000; 2006; 2013; 2016; 2018). Gilbert provides a general and detailed account of human social life that is based on the idea that commitments can "be regarded as the core of human sociality" (2000, p. 4) and she therefore employs the notion to explain a variety of social phenomena, of which collective intentions are only one example.[96] She also suggests that "what goes on in ordinary conversations is the continuous production of different joint commitments" (2000, p. 4; see also Gilbert, 1989, p. 295) and although she does not work out the role of commitments in communication in detail this clearly indicates that she is sympathetic to a commitment-based theory of communication and that her theorizing about commitment is relevant to such theories.[97] I must highlight that Gilbert's main focus is on "joint" commitments, and I will explain how these differ from other types but most of her observations hold for commitments in general.

[96] Further examples include other collective attitudes as well as social norms such as conventions and even legal norms. I am generally sympathetic to her overall account and will mention her analyses of some of these phenomena at various occasions. However, I can only do so in passing and I will, for the most part, not rely on these analyses because there are of course many influential competing accounts of such phenomena (e.g., (Hart, 2012; Lewis, 1969), and it would go beyond the scope of this thesis to discuss whether Gilbert's account is correct.

[97] John Michael (2022, p. 9) even directly associates Gilbert with speech act theoretic approaches to commitment. Michael's own work on commitment does not concern communication but rather psychological aspects commitment (the 'sense' of commitment) and he develops a notion of commitment for the purposes of his psychology-oriented approach that is slightly different from the one that is adopted here. However, he acknowledges that the latter is "the mainstream conception of commitment among philosophers" (2022, p. 16) and "in the writings of speech act theorists." (p. 16).

The final subject concerns the fact that I present the commitment-based theory of communication as a unified approach. Given the multitude of contributions to commitment-based theorizing it is of course not the case that theorists fully agree on every single issue. Nonetheless, I think that a unified presentation is justified here because most of the claims that I rely on are not particularly controversial among the proponents of such theories. Further, given the broad variety of theoretical uses to which the notion of commitment has been put, limited space forces me to be selective with regard to the features that I incorporate in my presentation of the commitment-based theory; this selection is suited to my aim of defending SP and will allow me to ignore some controversies that are not directly relevant. However, where there is a larger controversy that is relevant, I will highlight this and justify my preferred approach. One important divergence among existing accounts that I highlight from the start is that not all theorists actually use the term “commitment”, or at least not only this term. For example, William Alston speaks of “taking responsibility” (2000, p. 3), Brandom speaks of “commitments and entitlements” (1994, p. xviii) and Gilbert speaks of “joint acceptance” (1989), at least in earlier work. However, this should not be understood as an indicator that they are talking about substantively different phenomena. This is suggested by such facts as that Alston occasionally casts his own view in terms of commitment (e.g.: (2000, p. 65) and that it is classified as a commitment-based view by commentators (Harnish, 2005; Krifka, 2019, p. 73). Further, it is also generally recognized that “commitments belong to the same family of relations as obligations, duties, and responsibilities” (Geurts, 2018, p. 279) which makes clear that the notion of commitment is closely related to the notion of (taking) responsibility and similar notions. It is also usually agreed that commitments come with corresponding entitlements (e.g., (Geurts, 2019a, p. 4; Gilbert, 2000, p. 54). Finally, Gilbert is explicit that her earlier work should be understood in terms of joint commitments (2013, p. 218). I will go into further detail about how commitments are related to these other notions in the next section.

4.2. Commitment

Since commitment is sometimes considered to be "a rather elusive concept" (Michael, 2022, p. 1), the purpose of this section is to explain it in some detail.[98] The section is divided in two parts. The first presents the notion and some of its central features, and the second provides an initial explanation of how commitments are undertaken, though without yet considering communication as a specific means to incur commitments.

4.2.1. The notion of commitment

A useful starting point is a recent characterization of commitments by Geurts according to which "commitment is a three-place relation between two individuals, *a* and *b*, and a propositional content, *p*: *a* is committed to *b* to act on *p*." (2019a, p. 3). More specifically:

> To say that *a* is committed to *b* to act on *p* is to say that *a* is committed to *b* to act in a way that is consistent with the truth of *p*. I take this to entail that *b* is entitled by *a* to act on *p*, and should *b* wish to act on *p*, and *p* turn out to be false, then *b* may hold *a* responsible for the consequences. Hence, commitment is a normative concept." (p. 4).

Although somewhat formalized, this characterization captures well the standard conception of commitment in the philosophical study of communication and speech acts (Michael, 2022, p. 9; 16): a commitment is a normative relation that, at least in the basic case, holds between two individuals and a proposition that is to be acted upon. In the following, I unpack this notion and consider cases of commitment that are not basic in this sense.

I start with a feature of commitments that has already been emphasized in relation to Bratman's work and that is absolutely crucial, namely that commitments are *normative*. They are normative in the sense that they entail that the parties involved should or may act in certain ways, namely in ways that are in accordance with the proposition to which they are

[98] Though note that it is still likely to be less elusive than the notion of intention because Bratman's (1987; 1999) widely accepted theory tells us that intentions involve commitments (see chapter two).

committed. Because of their normative implications, commitments bind the behaviour of those who are involved and therefore they are, in the words of Gilbert, “normative constraints on one’s behaviour” (2016, p. 20). These normative constraints entail that the parties to the commitment have a normative standing towards each other in virtue of the commitment. The person who is entitled to another’s action as a result of a commitment will have the standing to demand that action from the other and the individual who is committed to perform that action will be open to criticism, reproach, and sometimes more serious punishment in case she fails to act accordingly. These observations indicate why there is a close relationship between commitment and other normative notions such as entitlement, responsibility, right, duty, obligation, and so on. The idea is that the existence of commitments entails that the other norms hold, too. Once people are committed to some proposition there will inevitably be obligations, duties or responsibilities on one side that the committed parties act in accordance with the proposition, and entitlements, rights and permissions on the other side that the committed parties do so act (e.g., (Carassa & Colombetti, 2009, p. 1843; Gilbert, 2013, pp. 49-50; Scharp, 2008, p. 191). This could hardly be otherwise because it does not make sense to say that people are committed to act in some way but that there are no obligations, entitlements or other norms that one acts in that way (Gilbert, 2000, p. 54; 2006, p. 156). As before, in the following I primarily use obligations and rights (or entitlements) as examples for norms, but it should be kept in mind that other norms can also be the result of commitments.

Let me illustrate these remarks with an example. Suppose that Alex is committed to Barbara to buy eggs on his way home. In that case there is a relation between Alex, Barbara, and the proposition that Alex will buy eggs on his way home. This relation is such that Alex and Barbara are to act on the proposition which entails that they become subject to certain norms, such as obligations and rights. In particular, Alex has the obligation to buy eggs on his way home and Barbara the entitlement to Alex’s buying eggs on his way home. This also

entails that Alex is open to criticism in case he fails to act accordingly. Upon finding that he did not buy the eggs, Barbara can reproach him or demand from Alex to get back into the car to get the eggs, given that he is committed to doing so and failed to act as he was supposed to.

A feature of the type of normativity that is involved has also been mentioned already and is that the "notion of commitment here is not a specifically *moral* notion" (Gilbert, 2016, p. 21). For example, Alex is committed to Barbara to buy the eggs regardless of whether the exploitation of animals or the consumption of animal products turn out to be immoral. Similarly, two criminals can commit themselves to rob a bank and they will have this commitment regardless of its immoral nature. They will still be able to criticize and reproach each other if they do not participate in the heist or do not follow the plan that they were committed to, and they can do so simply on the basis of having committed themselves to it. This example also illustrates that "it makes perfectly good sense to say that a commitment is *legally nonbinding*." (Walton & Krabbe, 1995, p. 41), i.e., that the kind of normativity involved is not legal.[99] For these reasons one also needs to distinguish the obligations, entitlements and other norms that follow from commitments from moral, legal, and perhaps other types of norms. Whenever it will be necessary in the following to specify that I am referring to norms in this sense and this is not already clear from the context, I will make this explicit by referring to them as "norms of commitment", "obligations of commitment" etc. Rather than being specifically moral or legal, Gilbert explains that the normativity involved is one of practical rationality or reason which is why the 'ought' in question "can be called the rational ought" (2016, p. 20). This is analogous to what has already been said about the normativity involved in intentions in the sense that one who has committed herself to do something would not act in accordance with practical rationality if she did not act in the way in which she is committed, at least in the absence of better reasons to the contrary.

[99] Emphasis added.

Obviously, none of this is supposed to imply that obligations and rights of commitment cannot be trumped by legal or moral obligations and rights when it comes to the question what one should do, as shown by the fact that the commitment to rob a bank does not provide a legal or moral justification for acting in accordance with it. At the same time, the foregoing also does not imply that one cannot be committed to act in accordance with moral or legal norms, as indicated by the fact that people can commit themselves to moral behaviour, to the laws of the U.S., etc.

I now want to be more specific about what is involved in the three-place relationship of a commitment, and I start with two points about the content of a commitment, i.e., what is to be acted upon. First, although I mostly follow Geurts and speak of this content in terms of propositions this should rather be understood as a placeholder that allows for other types of content as well, such as action types. This is not only in line with the liberal notion of content set out in chapter one but also with the fact that other theorists (e.g., (Gilbert, 2013, p. 400; Michael, 2022, p. 9) occasionally speak about the content of commitment in terms of action types, as well as the point just made according to which one can be committed to act on norms (e.g., moral, legal, etc.). Second, the content of a commitment does not necessarily have to specify some future action that must be performed. It might also be a commitment that some event has occurred in the past or that something is the case. For example, Alex might be committed to Barbara to act on the proposition that he has a car or that the Battle of Waterloo was fought in 1815. Nonetheless, no matter what the commitment, it will have implications for how people are to act at present or in the future. For instance, if Alex is committed to Barbara in these ways this entails the obligation to affirm the relevant propositions in cases in which they are called into question (e.g., "Of course I have a car!") or not to assert anything that is inconsistent with these propositions (e.g., that there has never been a Battle of Waterloo).

Let me also say something about the parties that can be involved in a commitment.

To begin with, although the basic case that Geurts focuses on are commitments between two *individuals* he clarifies at a later occasion that this is "a simplification" (2019b, p. 115) and that "[e]ither party in a commitment can be a group of individuals or an institution" (p. 115). For example, Clyde can be committed to his parents that he cleans the dishes after dinner and Diane's bank can be committed to send her a new credit card. Similarly, the Smiths might be committed to the Johnsons that they water their plants while the Johnsons are abroad. Indeed, we already considered the possibility that multi-member legislative bodies might have commitments and I will explain in further detail how such group commitments are possible when addressing the objection from collective intentionality in chapter five. At the same time, commitments can also involve less than two individuals, though not less than one, and therefore "commitments in general need not have an obvious social dimension" (Gilbert, 2013, p. 31). In such cases of "personal" (Gilbert, 2016, p. 21) or "private" (Geurts, 2018, p. 280) commitment, an individual has a commitment to *herself* to act on a certain proposition. For example, instead of being committed to Barbara, Alex might commit himself – i.e., have a commitment to himself – to buy eggs on his way home and criticize himself if he fails to do so. Indeed, this is the kind of commitment that is at play in Bratman's (1987; 1999) notion of an intention: whenever one intends to do something one is committed to oneself to do it.

The examples considered thus far are mostly such that there is only a commitment from one party towards the other to act in certain ways such that the obligations are on the side of the first party and the entitlements on the side of the second. However, there are also many cases in which the situation is such that both sides have commitments *towards each other* to act in certain ways and the example of the bank robbers illustrates this. Both of them are committed to each other to participate in the robbery and as a result both are also entitled to demand certain actions from each other. These are what Gilbert calls "joint commitments" and what others have called "mutual" or "shared" (Geurts, 2019a) commitments, i.e.,

commitments on both sides towards the other to act on the same content (I will primarily speak of mutual commitments). A further illustration can be given by adapting our initial example: if Alex and Barbara are mutually committed to buy eggs together then Alex will have a commitment to Barbara that they buy eggs together and Barbara will have a commitment to Alex that they buy eggs together. In the following, my focus will not be on private commitments but rather on commitments that involve more than one agent, i.e., the mutual commitments just considered and non-mutual commitments between different agents. Whenever necessary I will refer to the latter as "social commitments" but for the most part I continue to speak of commitments more generally unless it is necessary to be more specific and the specific sense is not already available from the context. Following Geurts (2019a), we can sum up the differences between the kinds of commitments that have been considered thus far in a more formal way as follows:

Social commitment:	$C_{a,b}\,p$
Private commitment:	$C_{a,a}\,p$
Mutual commitment:	$C_{a,b}\,p$ and $C_{b,a}\,p$

The rest of this sub-section highlights further important features of commitment. As noted by various theorists (e.g., (Gilbert, 2016, p. 22; Tuomela, 2013a, p. 30; 43)), commitments have the important property that, once undertaken and in the absence of special clauses or background commitments to the contrary (more on this below), it needs the agreement of all the parties that are involved to rescind the commitment. For example, Alex cannot simply unilaterally rescind his commitment to Barbara to buy the eggs. If he could, we could hardly say that there is a commitment. As long as she does not accept the proposed rescinding, the commitment persists, together with all the obligations and entitlements that it entails. This makes commitments a useful tool for *action coordination*: "making

commitments is a form of expectation management; it is a way of permitting others to rely on us to act in certain ways, so that they can coordinate their activities with ours." (Geurts, 2019a, p. 3; see also Michael, 2022, p. 44). For instance, Alex's commitment to Barbara allows her to plan her actions in accordance with the expectation that he will buy the eggs which might involve, for instance, that she does not need to worry about buying the eggs herself or that she can prepare to bake a cake that has eggs in it.

Another widely acknowledged feature of commitments is that someone who undertakes a commitment "also undertakes all the commitments and entitlements that follow from [it]" (Scharp, 2008, p. 192; see also Brandom, 1983, p. 646; Geurts, 2019a, p. 5). For instance, if the Smiths are committed to water the plants of the Johnsons, and the Johnsons happen to have daisies, then the Smiths also commit themselves to water the Johnsons' daisies. Similarly, if two individuals commit themselves to play a game of chess, they also commit themselves not to move the rook diagonally. The reason for this is that if one is committed to act in a certain a way and this entails that one must also perform other acts, one cannot but also be committed to the other acts because if one was not so committed one could also not be committed to the primary course of action. If the Smiths are not committed to water the daisies of the Johnsons, then they cannot be committed – or at least not fully – to water the plants of the Johnsons. Equally, someone who is not committed to abstain from moving the rook diagonally cannot be committed to playing chess. One could, at most, be committed to play a game that is similar to chess.

I must highlight, however, that people can also have background commitments that limit or extend the range of the commitments that they would be otherwise committed to by means of entailment. For example, if two people are committed to the fact that one of them does not have more than an hour of time and the two agree to play a game of chess then the commitment that is undertaken is limited to the extent that the game does not need to be finished if it lasts longer than an hour. Similarly, if the two have a background commitment

only to play chess with a certain limit on the time that is available to players for making their moves, then the commitment that is incurred will be expanded to the extent that it does not only commit the players to play chess but also to play chess with that time limit. A particular type of extended or additional commitment that is usually incurred in this way are commitments to act in a certain way if one – for some reason – does not or cannot live up to one's commitment. For instance, when Alex forgets to buy eggs on his way home, he is arguably still committed to get back into the car to buy them or if Alex is committed to buy six eggs on his way home but cannot do so because the last shop that is open only has four eggs left, he is still committed to buy four eggs rather than to go home empty-handed. What exactly people will be committed to if they cannot or do not live up to their commitments will also be determined by background commitments but – generally speaking – it seems that in such cases people are generally committed to act in ways that come as close as possible to what their initial commitment required. The important feature that underlies the point that commitments can be limited or extended by means of background commitments is that commitments are generally required to be consistent with each other (Geurts, 2019a, p. 25), for one cannot be committed to act in a way and not to act in this way at the same time, or at least not towards the same person. (I return to the difficulties that this requirement might raise in relation to conflicting commitments towards the end of this chapter).

The feature that by undertaking one commitment one also undertakes the commitments that follow from it has the important implication (already noted in chapter two) that for someone to have a commitment, that person does not need to be aware of having it. As Geurts explains, "*a* can be committed to act on *p* without suspecting that he is thus committed, and indeed without even entertaining the possibility that *p*." (2019a, p. 4). For example, the Smiths can be committed to watering the daisies of the Johnsons without knowing that they have daisies and one can be committed to abstain from moving the rook diagonally without knowing this rule. More generally, a commitment neither is nor

necessarily involves a corresponding *mental state*. That no awareness, intention, or other mental state is necessary for a commitment to exist is also acknowledged widely and explicitly by other commitment-based theorists. For example, Ronald Loeffler says that "the commitments and entitlements a subject acknowledges do not usually track perfectly the commitments and entitlements she really has" (2017, p. 43) and Antonella Carassa and Marco Colombetti note that "a commitment to do α does not logically entail the debtor's intention to do α" (2009, p. 1844; see also: Alston, 2000, p. 55; Brandom, 1983, p. 646; Gilbert, 2000, p. 6; de Brabanter & Dendale, 2008, p. 6). This feature is crucial because it sets apart commitments perhaps most distinctively from (personal) intentions. While intentions are mental states that involve commitments, commitments are just that: commitments.

Being entailed by other commitments is not the only way in which people can have commitments without being aware of them or without intending to act as the commitment requires. As the example of the politician who commits herself to protect the environment from chapter two illustrates one can commit oneself and even do so intentionally without having any intention to act on the commitment. Other reasons can be that someone has undertaken a commitment intentionally but forgets about it afterwards or that she no longer intends to act on the commitment but cannot rescind it. Agents might also have performed an act intentionally but not have been aware that its performance entails a commitment, i.e., incurred the commitment non-intentionally. One might intentionally sign a contract that one has not (fully) read, intentionally accept cookies when visiting a website without being aware which cookies one accepts (or even without knowing what cookies are), intentionally entering a library without being aware that this commits one to keep quiet, intentionally knock one's hand twice on the table during a poker game when it is one's turn to bet without intending to check, and so on. In such cases, people will nonetheless be committed to the terms of the contract, to permitting certain forms of data collection, to keep quiet, to checking,

etc., without being in a corresponding mental or cognitive state.

4.2.2. Undertaking commitments

The examples just presented illustrate that commitments can be undertaken in a broad variety of ways: signing a piece of paper, pressing a (virtual) “accept” or “consent” button, entering a certain location, knocking one’s hand on a table, etc. Another obvious way to undertake commitments that will be considered in the following section is of course the use of speech. It is generally agreed, for example, that making a promise commits a speaker to act as promised. A yet different kind of act that is widely considered to be commitment-generating and that will be relevant for my account is joining a group:

> commitments can be incurred by a person […] through his affiliation with, or membership in, a group. Such groups are widely varied and may include political parties, denominations, professions, unions, and corporations. In some groups, commitments are codified in an oath that is required in order to join the group. (Walton & Krabbe, 1995, p. 34)

As Walton and Krabbe explain here, commitments that one has in virtue of group membership can be incurred explicitly by means of an oath or some other verbal declaration (e.g., the Hippocratic oath in ancient societies), but this is not necessary. For example, joining a football team commits one to its training plan and becoming a physician commits one to not harming one’s patients and observe medical confidentiality regardless of whether one has explicitly stated this. One undertakes these commitments because membership in the relevant group requires, presupposes, or is defined in terms of having them.

The broad variety of ways in which people can incur commitments raises the question what makes different actions commitment-creating or which conditions must be satisfied in order for a commitment to be incurred (obviously, “action” is understood broadly here and can also involve such things as being in a certain states, such as being the member of a group). Different theorists have characterized the general necessary and sufficient conditions for the incurring of commitments in different and – as I will try to show – not entirely satisfactory

ways. This suggests that it is not a simple matter to explain what it takes to incur commitments and, indeed, I want to be clear from the outset that I have not been able to find or develop a general account of what it takes to incur commitments that I consider entirely satisfactory. However, on the basis of the work of other theorists I hope to provide an account that is at least sufficient for my purposes in this thesis. My plan for the rest of this (sub-)section is to present and critically discuss some prominent accounts of what it takes to undertake commitments to get a first and rough understanding of what theorists take to be the general conditions. More specifically, these are the accounts of Gilbert, Geurts and Brandom. However, it will not be until the next section that this rough understanding is developed in further detail, since most theorists discuss this issue with a specific focus on communication.

I start with Gilbert's account. As noted, she focuses primarily on joint commitments and claims that "in the basic case, matching expressions of readiness to enter a particular joint commitment are necessary to create that joint commitment." (2013, p. 47). She further specifies that "it must be common knowledge between the parties that [these expressions] have occurred" (p. 47) and says that "this is pretty much the whole story regarding the creation of a basic case of Gilbertian joint commitment." (p. 48). Hence, on her account expressions of readiness by the participating parties and common knowledge of their occurrence are both necessary and sufficient for the occurrence of "basic" cases of joint commitment. But although I don't necessarily disagree with this claim, I think that her proposal is unsatisfactory for my purposes for a number of reasons. To begin with, even if we leave out personal commitments, it does not explain how social commitments are created (i.e., non-mutual commitments between different agents).[100] Further, only basic cases of

[100] Gilbert (2013, p. 31) explains elsewhere that it is sufficient for the occurrence of private commitments that a person decides or intends to do something. I do not disagree with this claim, but it does not only leave it somewhat unclear why this is the case (though I presume that it is due to principles of practical rationality), but also whether there might be other ways to incur personal commitments.

joint commitment are considered. However, it is clear, for example, that there are cases in which the condition of common knowledge does not need to be satisfied, as Gilbert (2013, p. 68) notes herself. For example, in the case of the contract there is a joint commitment to act in certain ways even though a person who is bound by the commitment might not know that she has expressed her readiness to undertake that joint commitment because she does not know what the contract requires. Hence, it also cannot be *common* knowledge that she has expressed her readiness, at least if one takes common knowledge to require cognitive availability, as Gilbert does.[101]

It is also not entirely clear what it means to express one's readiness or what makes an act an expression of readiness. Indeed, Gilbert himself claims that "[i]t is not clear that there is any very helpful way of breaking down the notion of expressing one's readiness" (2013, p. 48). However, given that our question is what makes different actions commitment-generating this is not satisfying for it is not very helpful to know that they must be expressions of readiness without having a clear account of what an expression of readiness is. Despite these shortcomings, I think that Gilbert makes an important observation about the incurring of commitments that deserves to be highlighted, namely that in addition to not necessarily requiring cognitive availability, the incurring of commitment is compatible with the exercise of "strong pressure or coercion" (2013, p. 33) on the person who expresses the readiness. For example, one can express one's readiness to step down from a political post, and thereby commit oneself to step down, even if the only reason for doing so is that one is being blackmailed. Similarly, one can commit oneself to join the army even if the only alternatives are prison or execution. Hence, undertaking a commitment does not need to be voluntary. Indeed, this is already entailed by the fact that the undertaking of a commitment

[101] In early work, Gilbert (1989, pp. 194-195) has developed a rather intricate original account of common knowledge but due to considerations of space I cannot go into its details here. However, to see that her account involves a cognitive element consider that it requires that those involved "*notice*" (2013, p. 51) that some proposition is or can potentially become common knowledge.

does not require a corresponding mental state.

Another, though similar, proposal for what it takes to undertake commitments has recently been made by Geurts: “Acceptance is proposed as a prerequisite for commitment. Commitment is a relation between two consenting parties, and there is no commitment unless it is accepted by both.” (2019a, p. 19).[102] On this account the undertaking of commitments requires that the commitment is *accepted* by both parties that are involved, where acceptance is said to be a form of consent. Importantly, Geurts acknowledges that his talk of acceptance or consent might be suggestive of involving some form of cognitive availability, but he is clear that this is not how he understands the notion when he says that he “emphatically reject[s] the notion that acceptance requires awareness.” (2019b, p. 120). This makes Geurts’s notion of acceptance different from the one used by Stalnaker in his account of common ground, for – as explained in chapter two – on this account acceptance involves cognitive availability, at least if common ground is supposed to inform the formation and recognition of communicative intentions. Indeed, Geurts specifies that he “use[s “acceptance”] as a mere term of art“ (2019b, p. 120) which signifies “just that *a* cannot have a commitment to *b* unless *a* and *b* are each committed to the other that *a* has that commitment.” (p. 120). Put more formally:

“*Acceptance*: $C_{a,b}\,p$ entails $C_{a,b}\,C_{a,b}\,p$ and $C_{b,a}\,C_{a,b}\,p$“ (p. 120)

Hence, on Geurts’s account for a commitment to be undertaken it must be the case that there is a mutual commitment between the parties that are involved that this is the case. Indeed, this entails that there will also have to be mutual commitments to these mutual commitments, mutual commitments to the mutual commitments to these mutual commitments and so on. (I will come back to this infinite structure of commitments in the following section).

I agree with Geurts (2019a, pp. 18-19) that the undertaking of a commitment requires

[102] That the two accounts are similar is not only suggested by the fact that expressed readiness is intuitively a form of acceptance (or consent) but also by the fact that Gilbert (1989) herself used to speak of “joint acceptance” rather than “joint commitment” in early work.

acceptance thus understood because it is not only hard to see how *a* can be committed to *b* to do something without *a* also being committed to *b* to act on this commitment but also how *b* could be entitled to criticize *a* for not doing what *a* was supposed to do if *b* was not committed to *a* that *a* is committed to *b* to act in this way. To put this in terms of an example: it is hard to see how Alex could be committed to Barbara to buy eggs on his way home without being committed to act on this commitment (as evidenced by the fact that he must not deny having this commitment), or how Barbara could criticize Alex for not getting the eggs if she was not committed to him to act on the proposition that he is committed to get the eggs. Nonetheless, thus understood acceptance would also be unsatisfactory at least as a full explanation of what makes it the case that commitments are created for it would explain the undertaking of commitments in terms of higher-order commitments which themselves require the occurrence of further higher-order commitments, and so on, but where it is left unclear what makes it the case that such endless chains of commitments are in fact incurred. For this reason, Geurts's remarks concerning acceptance are presumably not supposed to provide a full account of what it takes to undertake a commitment, but just to be an observation about what the undertaking of commitments entails. As such, acceptance is only a necessary condition on what it takes to undertake a commitment (a "prerequisite", as he calls it) and not a sufficient condition.

The last proposal is Brandom's. According to him, "[u]ndertaking a commitment just is doing something that makes it appropriate for that commitment to be attributed." (1994, p. 62). On this account it is a necessary and sufficient condition on the undertaking of a commitment that it is appropriately attributed to those committed. I think that this way of putting things is attractive to the extent that it does not invite immediate connotations of cognitive availability or voluntariness, as requirements of common knowledge, acceptance, or consent do, but there is of course also an obvious problem with it, namely that it immediately invites the question what makes it appropriate to attribute a commitment to

someone. As we will see in the next section, Brandom does provide an answer to this question, but I will argue that it is also not entirely satisfactory as a general claim about the undertaking of commitments, even though I consider it to be sufficient for the purposes of this thesis. As a matter of terminology, in the following I will therefore primarily adopt Brandom's reference to appropriate attribution as the necessary and sufficient condition on the undertaking of commitments.

4.3. The commitment-based theory of communication

In this section, I present the commitment-based theory of communication on which my version of SP will be based. The section is divided in four sub-sections. First, I contrast the commitment-based theory and intention-based theories of communication with regard to what they claim communication and communicative content to be and with regard to how they conceptualize different speech act types. Second, I provide further remarks on the undertaking of commitments, focussing more specifically on the particular case of linguistic communication. Third, I explain how context and interpretation are conceptualized on the commitment-based account and how this account explains non-literal speech. Finally, I add some clarifications to make the account more precise and address some potential problems.

4.3.1. Communication, content, and speech acts

A useful way to introduce the commitment-based theory of communication is by way of contrasting it with intention-based theories. This does not only highlight relevant differences but is also how commitment-based theorists tend to present their accounts. For example, Brandom says that his theory "transposes the Gricean approach into a social key" (1983, p. 648), that "in the theoretical place usually occupied by the notion of *intentional states* the pragmatics presented here elaborates a conception of *normative statuses*" (1994, p. xviii) and that "commitments and entitlements [...] institute those statuses" (p. xviii). However,

we will see that the commitment-based theory doesn't merely replace the notion of a communicative intention with the notion of commitments in several (though not all) important theoretical positions but also that it puts the notion to use for further theoretical purposes. Or, as Geurts puts it: "Commitments can do most of the theoretical work that communicative intentions are held to do, and they can do a great deal more." (2019a, p. 15).

To begin with, the commitment-based theory of communication offers an alternative picture of what is essential about communication, i.e., what communication *is*. While intention-based views see communication essentially as a practice in which interlocutors try to get across what their communicative intentions are or are reasonably held to be, commitment-based views claim that "communication is, first and foremost, a matter of negotiating commitments" (Geurts, 2019a, p. 1). As a result, a communicative act is seen as an act in virtue of which a commitment of a certain type is incurred. Focusing on linguistic communication as a paradigmatic kind, the idea is that for a speech act to be communicative it must generate a commitment. In other words, what makes a speech act such as "I will buy eggs on my way home" as uttered by Alex a communicative act is that it serves to undertake a commitment, such as Alex's commitment to Barbara to act on the proposition that he will buy eggs on his way home (and potentially other commitments that follow from it). I must highlight here that the relevant commitments to be incurred must be of a certain type and that not any kind of commitment will make a speech act communicative. However, as it requires a good amount stage-setting I have to leave it until the last sub-section to explain the specific kind of commitment that is involved and work with an intuitive understanding for the time being (without specifying on each occasion that the commitment must be of a certain kind). Importantly, the claim here is not that intention-based theories are incompatible with the idea that commitments are undertaken in communication. This claim is not only fully consistent with intention-based theories but is also very likely to be affirmed (to at least some extent) by many proponents of such theories. What distinguishes the two

types of theories is rather that according to the commitment-based theory of communication utterances are communicative acts *because they create commitments*, and not because the speakers have (or can be ascribed) communicative intentions that are recognized by their addressees. Hence, an act can be communicative even if it is not accompanied by communicative intentions or if these intentions were not recognized.

In addition to replacing the notion of communicative intention in its role of specifying what communication is, the notion of commitment also claims its explanatory role of (metaphysically) determining the *communicative content* of communicative acts. For instance, comparing his view with the Gricean analysis on which the communicative content of an assertion consists in the effect that the speaker intends to have on one's audience and that is said to be a belief, Brandom says that on his view "[i]t is not the intention of the speaker which matters" (1983, p. 648) and that "[t]he effect of successful assertion on the audience is not taken to be belief, but commitment" (p. 648). Elsewhere, he also says that "[t]he pragmatic significances of different sorts of speech acts are rendered theoretically in terms of how these performances affect the *commitments* (and *entitlements* to those commitments) acknowledged or otherwise acquired by those whose performances they are." (1994, pp. xiii-xiv). The idea is that communication does not only essentially consist in undertaking commitments but also that the commitments that are undertaken determine the content that is communicated, i.e., the "pragmatic significances" of speech acts that Brandom is referring to. This is why the communicative content of an assertion such as "The Battle of Waterloo was fought in 1815" consists in the commitment to act on the proposition that the Battle of Waterloo was fought in 1815 (and potentially other commitments that follow from it), at least in the absence of a special context. (I consider speech acts other than assertion and the notion of context in more detail below.)

Another way to put the difference is provided by Carassa and Colombetti:

> Our strategy is to distinguish between *speaker's meaning*, understood as a personal communicative intention, and *joint meaning*, understood as a joint

> construal of the speaker and the hearer. We define joint meaning as a type of propositional joint commitment, more precisely as the commitment of a speaker and a hearer to the extent that a specific communicative act has been performed by the speaker. Joint meaning is therefore regarded as a deontic concept, which entails obligations, rights, and entitlements, and cannot be reduced to epistemic and volitional mental states like personal beliefs, common belief, personal intention, and communicative intention. (2009, p. 1837)

They further argue that it is their notion of joint meaning that provides "an adequate basis for an analysis of communicative interactions" (p. 1838) because it is only this type of meaning or content that interlocutors are jointly committed to as the content of an utterance. In the following, I will therefore continue to refer to what they call "joint meaning" as "communicative content". Carassa's and Colombetti's remarks also show that adopting a commitment-based theory neither forces one to reject the notion of speaker meaning nor an intention-based analysis of this notion (see also (Alston, 2000, pp. 249-250)). Indeed, it would be highly counterintuitive to deny that speaker meaning is a real and distinctive phenomenon or that what speakers mean is determined by what they intend to get across. Hence, commitment-based theorists do not claim that the notion of commitment should take over all the theoretical roles that are occupied by communicative intentions. The claim is rather that speaker meaning does not determine communicative content or that it must match this content or be recognized by the hearer in order for communication to occur. As far as I can see, commitment-based theorists can even agree with intention-based theorists that successful communication requires that the addressee correctly recognizes the communicative intention of a speaker. However, commitment-based views would – like objective intention-based theories – insist that this is not necessary for communication to occur, i.e., the occurrence of communication does not require that it is successful in that sense (see chapter two).

The last difference between intention-based and commitment-based theories that I want to highlight in this sub-section concerns illocutionary speech acts. We have seen that intention-based theories claim that conventional or institutional illocutionary acts are not

communicative because they rely on conventional or institutional rules for their success rather than on the recognition of communicative intentions. Commitment-based theories do not make any such claim because they consider all illocutionary speech acts to come with commitments. This is manifest in the following statement by Alston:

> to perform an illocutionary act of a certain type is to give one's utterance (sentential act) a certain *normative* status. This is initially put in terms of *taking responsibility* for certain conditions holding. The relevant notion of *taking responsibility* for the satisfaction of certain conditions is initially explicated in terms of rendering oneself liable to correction; blame; reproach, or sanctions in case the conditions in question are not satisfied. (2000, p. 3)

The idea is that the performance of an illocutionary speech act just *is* the undertaking of commitments (or the taking on of responsibility) of a certain type by means of language. And since the undertaking of (certain) commitments by means of language is a communicative act all illocutionary acts are considered communicative acts. As such, the commitment-based theory "offers a unified account of conventional and non-conventional speech acts. For […] there is no reason to exempt conventional speech acts from the general principle that a speech act causes a commitment for the speaker." (Geurts, 2019a, p. 15).

Following this thought, commitment-based theorists characterize different speech act types in terms of the different kinds of commitments that they generate, i.e., what they are committed to or in which specific way they are supposed to act on a proposition (e.g., (Alston, 2000, pp. 51-146; Geurts, 2019a, pp. 6-15). Roughly, an assertive is performed if a commitment is undertaken *that* a proposition is true (such as that the Battle of Waterloo was fought in 1815) and a commissive, such as a promise, is performed if a commitment is incurred *to make* a proposition true (such as to make it true that one buys eggs on one's way home). Directives, such as requests, are analysed in terms of a speaker's commitment to the goal that the addressee makes a proposition true. To give one of Geurts's examples, "[i]f Bertha asks Alfred to walk the dog, she patently becomes committed to the goal that Alfred

walk [sic] the dog." (2019a, p. 9).[103] Finally, a characterization of effectives, which will serve as our example of a conventional and institutional kind of speech act, is provided by Alston (2000, pp. 91-93). Alston's characterization is rather formal and marked by idiosyncratic terminology, but it can be rephrased more simply as the claim that effectives are commitments to the attempt of producing some conventional or institutional effect that has a (propositional) content.[104] For instance, when a speaker says "I hereby name this ship the Titanic" this will commit her to the attempt of bringing about the institutional fact that the ship has this name. Note that for an effective to be performed as Alston understands it, it does not necessarily have to be the case that the conventional or institutional state of affairs is in fact brought about but only that a commitment is incurred by the speaker to the attempt of bringing it about. For the relevant conventional or institutional facts to be actually produced it will also have to be the case that certain conventional or institutional rules hold and that the conditions that they impose are satisfied. For instance, for the ship to officially have the relevant name as a result of the utterance, institutional rules need to be in place that give certain individuals the authority to name the ship and the speaker will actually need to be one of those individuals. Otherwise, the effective 'misfires', i.e., it does not have the relevant effect, despite the speaker's attempt.

One might worry that counting a speech act that doesn't bring about the relevant institutional fact as an effective is problematic because it is not clear, for instance, to what extent that one is really engaging in the act of naming a ship or pronouncing a couple husband and wife if, as a result, the ship does not have the name in question, or the couple does not become husband and wife. While it might be true that such cases are not reasonably considered full-blown acts of naming or pronouncing because they do not bring about their

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[103] Emphasis removed. Geurts (2019a, p. 7) specifies that he does not understand the notion of a goal in psychological terms and therefore also not in terms of intention, let alone communicative intention.

[104] In addition to speaking of "taking responsibility" rather than "commitment", Alston also speaks, for example, of "exercitives" rather than "effectives" and "purporting" rather than "attempt" (for more details on the last notion, see below).

conventional or institutional effect, I agree with Alston (2000, pp. 91-92) that this should not be considered a problem for characterizing them as the right kind of effective *illocutionary* acts because what distinguishes them is their perlocutionary effect, i.e., the actual bringing about of the effect, rather than their illocutionary force. Hence, treating effectives as attempts to produce certain institutional effects does not entail collapsing the distinction between successful and unsuccessful effectives but only claiming – and I think plausibly so – that the difference is not to be found on the illocutionary level. Note also that an understanding of effectives according to which they can be unsuccessful does not change anything about the fact that intention-based theories of communication must classify them as non-communicative. For even if an effective such as the naming of a ship can be unsuccessful the intention-based theorists would still have to claim that for it to be communicative the speaker intends (or is reasonably ascribed the intention) to produce the relevant conventional or institutional effect in virtue of the audience's recognition of this intention. However, this would be implausible because the relevant effect cannot be brought about by means of intention-recognition but only by following the relevant conventional or institutional rules.

Finally, let me say something about the notion of the attempt to which a commitment is incurred in effectives. Alston himself rather speaks of "purporting" (2000, p. 93) but I have chosen to put Alston's account in terms of attempts because I consider it to be more natural and less suggestive that the speaker must be committed to an intention. More specifically, as I understand the notion of attempt in analysing effectives it does not need to involve an intention to bring about the relevant conventional or institutional effect and neither does Alston seem to understand it in this way, as suggested by his choice not to speak of intending but rather (though still somewhat unfortunately) of purporting. A similar view about conventional speech acts is expressed by Geurts when he says that "the psychology of the speaker seems wholly irrelevant to […] conventional speech acts" (2019a, p. 14). Instead, I think of the kind of attempt to which commitments are incurred through effective speech

acts simply as acts that would bring about the relevant effect if the relevant conditions are satisfied, regardless of whether the effect is intended or not.

4.3.2. Linguistic communication and the undertaking of commitments

I now return to the question of how commitments are undertaken, by addressing it with a specific focus on linguistic communication (though the same general points should hold for non-linguistic communication). We saw that, according to Brandom, for a commitment to be incurred an agent must do something that makes it appropriate to ascribe the commitment to the agent. However, it remained unclear what exactly makes it appropriate to ascribe a commitment on the basis of an action. As I understand him, Brandom (1983, p. 648; 1994, p. 183) holds that people can be appropriately attributed a commitment on the basis of certain actions because they have other commitments to the effect that the performance of these actions creates the relevant commitment. These are the background commitments that I already mentioned briefly. For example, knocking one's hand on a table in certain situations of a poker game commits one to check because one is committed to the rules of poker when one participates in the game, and signing a contract commits one to its terms because people in our society are committed to the fact that a signature has this effect. And when it comes to utterances speakers can be attributed commitments in virtue of producing certain words or sentences because they have background commitments that specify the commitments that will be undertaken if they use the words or sentences in question. For example, when Alex says to Barbara "I will buy eggs on my way home" he becomes committed to act on the proposition to buy eggs on his way home because there is a background commitment between them that specifies that an utterance of this sentence creates this commitment, at least in the absence of other background commitments (see below for further details). This is made explicit by Brandom when he contrasts his view with Grice's. After having specified that the effect of an assertion is not belief but commitment, Brandom goes on to say that "[i]t

is not the speaker's intention which brings about the desired effect but the social *convention* or practice governing his remark." (1983, p. 648) and he explains elsewhere that the relevant practices or conventions that he is referring to are what he calls "*deontic scorekeeping*–that is, the social practices of attributing and acknowledging commitments and entitlements" (1994, p. xvii). It is clear that Brandom takes this to hold for all speech acts.

For setting out his account of deontic scorekeeping, Brandom borrows and develops an idea by Lewis (1979) which, in turn, relies on Ludwig Wittgenstein's (1953) remarks on language games. In a Wittgensteinian spirit, Lewis assimilates conversations to games in the sense that both are governed by certain rules which define which actions or moves count as what, e.g., as checking, betting, goals, fouls, etc., and in which a score is kept that specifies the current state of play, i.e., who has checked, how many goals have been scored, etc. Which move counts as what in a particular situation depends on the rules and the already existing score. For instance, in poker knocking one's hand on a table twice only constitutes checking when the 'score' is such that it is one's turn to bet. Lewis's idea is that the rules of a language and a particular communicative setting similarly specify what counts as an assertion, question, etc. and that the existing score also determines which action counts as what.

Brandom further elaborates Lewis's idea by claiming that what he calls the "significance" (1994, p. 183) of a conversational move, i.e., speech act or other communicative contribution, is determined by the *deontic score*, i.e., the commitments and entitlements that interlocutors already have. The score is deontic because it specifies how the actions of people are normatively constrained by their commitments, i.e., because it specifies what they are obligated and entitled to. The commitments that constitute the deontic score then determine the commitments that are incurred by means of an utterance, because they determine how the performance of the utterance affects the score, i.e., which difference in commitments (and entitlements) the speech act brings about:

> In scorekeeping terms, the significance of a speech act consists in the way it interacts with the deontic score: how the current score affects the propriety of

> performing the speech act in question, and how performing that speech act in turn affects the score. Deontic scores consist in constellations of commitments and entitlements on the part of various interlocutors. So understanding or grasping the significance of a speech act requires being able to tell in terms of such scores when it would be appropriate […] and how it would transform the score characterizing the stage at which it is performed into the score obtaining at the next stage of the conversation of which it is a part […]. For at any stage, what one is permitted or obliged to do depends on the score, as do the consequences that doing has for the score. (Brandom, 1994, p. 183)

The idea here is that the commitment that is incurred by means of a speech act is determined by the score but, at the same time, also by how it changes the score. They are two sides of the same coin because the existing score determines the commitment that the speech act creates and the commitment that is created *is* the change to the existing score.

Now, while I take it to be reasonable and intuitive to say that the necessary and sufficient condition on the undertaking of virtually all commitments is that they are appropriately attributed on the basis of existing commitments, it must be clear that this cannot hold for all commitments because it would make it impossible to explain how the first commitment or commitments (a sort of "Ur-commitment") came into being as it could not have resulted from background commitments. This is why I am not entirely satisfied with the claim that the necessary and sufficient condition on the undertaking of commitments is that they are appropriately attributed on the basis of background commitments. However, I also do not think that it is necessarily a significant problem for the purposes of this thesis or theorizing about commitments more generally to allow for the possibility that, in order to get started, commitments were exceptionally incurred in the absence of background commitments without yet being able to explain how this happened. Indeed, analogous theoretical problems can be found in other areas of philosophical and scientific theorizing, such as the problem of explaining how there could have been a first living organism if living organisms are generally considered to be the result of reproduction or how there could have been a first (physical) state of the world if for the world to be in a state it is must have been the result of – or been caused by – a pre-existing state. It seems that none of this makes it

inappropriate to make the slightly imprecise assumption in biology, physics, or philosophy that in order for there to be living organisms or states of the world they must have come into being because of a pre-existing living organism or a pre-existing physical state. This of course does not solve our puzzle, but it allows us to leave the task of solving it for future theorizing and to continue by speaking slightly imprecisely of the necessary and sufficient condition on undertaking commitments in terms of doing something that makes it appropriate to attribute the commitment in virtue of background commitments.

4.3.3. Common ground, interpretation, and non-literal speech

We noted that the commitments that are undertaken through utterances are determined by the background commitments that interlocutors are subject to since it depends on these background commitments which commitments are appropriately ascribed to the interlocutors in virtue of saying something. This suggests that on the commitment-based theory of communication the background commitments of the interlocutors constitute the *context* of the conversation, and this idea has been pursued in further theoretical detail by Geurts (2019a, pp. 15-20). In outline, Geurts agrees with intention-based theorists that the context of a conversation is determined by the common ground but he proposes to conceptualize the common ground in terms of the mutual commitments of interlocutors rather than some sort of mutually held cognitive state, such as belief, knowledge or acceptance (in the sense of Stalnaker).[105] To understand Geurts's account it is instructive to consider a well-known objection against cognitive accounts that he also invokes, and that has to do with the fact that common ground has an iterative structure that involves an infinite chain of attitudes or states (2019a, p. 16). For example, if common ground is understood in terms of cognitive states such as belief, then for a proposition *p* to be common ground

[105] A similar reconceptualization of common ground or context in terms of commitments is also proposed by Manuel García-Carpintero (2015, p. 2).

between two interlocutors *a* and *b* it will not only have to be the case that *a* and *b* believe *p* but also that *a* believes that *b* believes *p* and that *b* believes that *a* believes *p*. But it will further also have to be the case that *a* believes that *b* believes that *a* believes *p* and that *b* believes that *a* believes that *b* believes *p*. It seems that this will have to continue infinitely for if at some point in the chain there were no higher order belief by one party that there is a belief at the lower level on the side of the other party then no belief at the lower level could be shared, as one party would not believe that the other believes it. The same goes for conceptualizations of common ground in terms of other attitudes and states. However, the problem with such accounts is that human beings only have limited cognitive capacities such that there simply could not be any actual common ground on accounts on which common ground requires that humans have infinite cognitive states.

I am on the side of those who find this objection persuasive, but I must highlight in defence of cognitive accounts and intention-based theories that attempts have been made to respond to it in various ways. For instance, it has been claimed that the infinite cognitive states are merely implicit in people's actual cognitive states in a way that does not imply problematic claims about human cognition (Schiffer, 1972, p. 36) or that for practical purposes it is sufficient to have cognitive states that only go up to a certain limited level (Bach & Harnish, 1979, p. 309). Since I do not have the space to go into the details of this complex debate, I merely want to use the preceding argument to illustrate why one might prefer to adopt an alternative account of common ground without committing myself to the claim that cognitive accounts are generally misguided. Nonetheless, they are not the kind of account that is of primary interest to commitment-based views because it is not such cognitive states but commitments that generate the commitments that are incurred through utterances. Therefore, I propose to follow Geurts and adopt his account of common ground in commitment-based theorizing, as it does explain context in terms of commitments.

On Geurts's account, a proposition *p* is common ground between *a* and *b* if there is

a joint or mutual commitment to that effect. Given that, as Geurts has argued and as I have explained in the previous section, his acceptance requirement holds as a necessary condition on the undertaking of commitments it follows that on this understanding common ground also has its characteristic infinite structure but that it does not do so because this is required for common belief or some other shared cognitive state (2019a, p. 19). The reason is rather that according to the acceptance requirement every commitment to a proposition (or action type, etc.), including a mutual commitment, entails that the parties to this commitment are mutually committed to the commitment to this proposition, mutually committed to being mutually committed to the commitment to this proposition, and so on. Put formally, a proposition *p* is common ground if and only if:

$$C_{a,b}\, p \text{ and } C_{b,a}\, p$$

$$C_{a,b}\, C_{b,a}\, p \text{ and } C_{b,a}\, C_{a,b}\, p$$

$$C_{a,b}\, C_{b,a}\, C_{a,b}\, p \text{ and } C_{b,a}\, C_{a,b}\, C_{b,a}\, p$$

and so on.

As noted, the subject of a mutual commitment can also be a social commitment and does not need to be a proposition (or action type, etc.). Indeed, according to the acceptance requirement, for a social commitment to exist there *has* to be a mutual commitment to this social commitment such that "a speaker cannot have a commitment without it being common ground that he is thus committed." (2019a, p. 19). Conceiving of common ground in terms of mutual commitment makes this account a socio-normative rather than a cognitive one:

> construing it as a set of mutual commitments entails that common ground is a normative construct, which not only supports but also constrains actions, and thus helps to coordinate them. Moreover, mutual commitment is a social concept, not a psychological one, and it does not entail belief, let alone mutual belief. (p. 17)

This account does not need to postulate infinite mental states for the existence of common ground because commitments do not require that interlocutors have corresponding mental states. It thus has a potential advantage over cognitive accounts. The reconceptualization of

common ground in terms of mutual commitments shows that on commitment-based theories the notion of commitment does not merely replace the notion of communicative intention in a number of theoretical positions but also that it comes to occupy new theoretical roles, since communicative intentions are not constitutive of context or common ground on intention-based theories.

Geurts's reconceptualization of the context and common ground in terms of mutual commitments also highlights that the background commitments that determine which commitments are undertaken in virtue of an utterance, i.e., what Brandom called the "deontic score", are the mutual commitments of interlocutors. This must be the case because for something to be a background commitment between interlocutors the interlocutors must be mutually committed to it. Further, on the commitment-based theory of communication the common ground thus understood also serves as the epistemic source in the process of identifying the communicative content of an utterance, i.e., *interpretation*. The idea is that to identify the communicative content of an utterance act interpreters must identify the commitment(s) that the utterance generates and that constitute its communicative content by figuring out which mutual commitments the interlocutors are already subject to. The contrast between the intention-based approach to interpretation and the approach of the commitment-based view is highlighted explicitly by Brandom when he says about his own theory that "in the place usually occupied by the notion of *intentional interpretation*, it puts *deontic scorekeeping*" (1994, p. xvii). He is also explicit that "[d]eontic scorekeeping is the form of understanding involved in communication. It is a kind of interpreting." (p. 508).

However, these theoretical differences do not entail that common ground thus understood does not or cannot contain the same varieties of propositional information that are central for interpretation on intention-based theories, namely the linguistic conventions that determine sentence meaning, Grice's Cooperative Principle and the conversational maxims, as well as further contextual information. The difference is merely that these are

not said to be common ground because of some shared cognitive state but because interlocutors have mutual commitments to that effect. There can be said to be a mutual commitment to the linguistic conventions that determine sentence meaning because interlocutors who belong to a certain linguistic community and use the language in question are appropriately attributed commitments to the rules and conventions of this linguistic community. This is another example in which commitments are incurred through group membership. Belonging to a particular linguistic community makes one incur commitments to such rules as that "egg" is used to refer to "eggs", that "maison" is used to refer to houses, certain syntactic rules and so on.[106]

Similar considerations apply to Grice's Cooperative Principle and his conversational maxims. Geurts has argued (2019a, pp. 20-27) that the Gricean principles can be conceptualized in terms of mutual commitments instead of presumptions of interlocutors because participation in conversation normally commits interlocutors to cooperate with each other to a certain extent which involves, for instance, not to say anything that is irrelevant, to avoid obscurity, etc. This is of course only normally the case and there can be special contexts – the so-called strategic contexts to which we have already referred – in which there it is unclear whether a commitment to cooperation or to the conversational maxims is appropriately attributed to the interlocutors. (I briefly come back to this point in the next chapter.) Finally, further contextual information can become part of the common ground through other commitments that the interlocutors share.

The foregoing considerations also allow the commitment-based view to account for the fact that the communicative content of an utterance can diverge from its sentence meaning (which is only determined by linguistic conventions). To begin with, it can account

[106] I do not make the stronger claim that linguistic conventions – or any other conventions or social norms – are to be analysed in terms of (joint) commitments to act in the relevant ways. This has been argued by Gilbert (e.g., (1989, p. 377; 405)), but although I am not unsympathetic to her account, there have of course been other influential accounts of these phenomena (e.g., (Hart, 2012; Lewis, 1969). Instead, my modest and, I think, plausible claim is merely that members of linguistic communities are committed to the linguistic rules and conventions of these communities.

for cases in which the meaning of the sentence that is used contains a context-sensitive expression such as an indexical or an ambiguous term. In cases in which the sentence uttered contains an indexical such as "I" in "I will buy eggs on my way home" the indexical will come with an associated rule to which the interlocutors are committed and which provides the referent of the expression, in this case: the speaker. Hence, in a context in which Alex is the speaker the use of the sentence will create a commitment for *Alex* to buy eggs on his way home. If, on the other hand, the expression is an ambiguous term, then its ambiguity will commit interlocutors to select the sense that is most appropriate to the conversation for the other senses will not fit with their mutual commitments (Drobňák, forthcoming, p. 13). For example, if a speaker speaks of "banks" and the interlocutors are committed to finances as the topic of the conversation then the referent of the term will be a financial institution, for it would be incompatible with their mutual commitments to use the term to refer to riverbanks. This highlights again that for commitments to exist alongside each other in a particular context they must be consistent with each other, for otherwise we could not appropriately attribute a commitment to act either way.

This feature is also crucial to the explanation of cases in which an utterance's communicative content diverges from its semantic meaning: pragmatic enrichment and implicature. To start with pragmatic enrichment, consider again the example of the mother who says to her child who is crying because of a minor cut: "You are not going to die." Since they can be appropriately attributed a mutual commitment to the proposition that humans are not immortal due to the fact that it is basic knowledge and to the maxim not to say things that they believe to be false the mother does not undertake a commitment to the proposition that her son is immortal (the semantic meaning of the utterance). Rather, due to the salience of the child's cut as the subject of the conversation and the maxim to make relevant contributions, there will be a commitment for her remark to be related to this fact and to be limited to the proposition that the child will not die *from this cut*. Similar considerations

apply to implicated content (Drobňák, forthcoming, pp. 14-16; Geurts, 2019a, pp. 20-27). Similar to cases of pragmatic enrichment, in cases of implicature the relevant commitment is undertaken because a literal understanding of an utterance is insufficient to preserve the Cooperative Principle and the maxims to which the interlocutors are mutually committed. Because the mere commitment to this literal understanding would be inconsistent with the interlocutors' mutual commitments, a further commitment is incurred as well. For example, while a speaker who says "Antonio is Italian" in response to the question if he is a good cook, will say – and thereby commit herself to the proposition – that Antonio is Italian, this is not fully sufficient to account for the commitment to say something relevant. In combination with the further commitment to the proposition that Italians have a reputation for their world-class cuisine the commitment to relevance will generate the implicated content that Antonio is a good cook on the basis of the assertion that he is Italian.

At this point it is important to note that a commitment-based theory does not only allow for the vagueness or indeterminacy of communicative content but that it also predicts it. As Alston puts it: "I doubt that our illocutionary act concepts are precise or determinate enough to permit us to draw a sharp line in every case between what a speaker must be committing himself to and what he need not commit himself to." (2000, p. 65). The reason why indeterminacy is unavoidable in communication is that it is likely to remain somewhat indeterminate in many cases if it is appropriate to attribute a particular commitment on the basis of an utterance. For instance, it is not exactly clear how many eggs Alex has to buy when he says to Barbara, "I will buy eggs on my way home". This is due to the fact that it might not be exactly determined by one's mutual commitments which commitments one incurs by performing a certain action. We have already noted that there can be such an indeterminacy when it comes to the Cooperative Principle and the maxims, but this of course also applies to other commitments. In Alex's case it is likely that there is no exact number because there is just no mutual commitment that specifies exactly how many eggs one has

to get in virtue of such an utterance. However, it is also clear that the acceptable approximate number depends on the mutual commitments that constitute the context, such as commitments to general social norms of what would be an appropriate number and more specific information that the interlocutors are mutually committed to such as that the purpose of getting the eggs is to bake a cake, etc. Similarly, it might not be clear if "Antonio is Italian" will also commit one to the proposition that Antonio is an *outstanding* cook, merely a good one or even to any further proposition at all, for it might not be fully determinate which proposition makes the utterance sufficiently relevant, what exactly the reputation of Italian cuisine is that interlocutors are committed to and whether the conversational setting is a strategic one. These facts might also help to explain why implicatures have a general indeterminacy to them and why interlocutors are usually able to 'cancel' them more easily than other kinds of content, as Grice (1989, pp. 39-40) himself has already observed.

The potential indeterminacy and vagueness of commitments is one of the reasons why there can be (reasonable) disagreement about what has been communicated and how committed parties ought to act as a result. But note that such disagreement might also occur in the absence of indeterminacy. Perhaps most notably, given that commitment does not require awareness, people might not be aware of their commitments and therefore dispute that they have them. This would of course not show that they aren't committed in the relevant ways for it might still be appropriate to attribute the commitment to them. For instance, someone might be appropriately attributed a commitment because she has made a promise to that effect, even if she forgot about it.

4.3.4. Further clarificatory remarks

I finish this chapter with clarificatory remarks on two subjects: the specific kind of commitment that is involved in communication and a theoretical problem that has to do with potentially conflicting commitments. This will add further detail to the commitment-based

theory of communication, help to forestall potential misunderstandings and illustrate how the commitment-based view can deal with at least some potential objections.

I start with the specific type of commitment that is relevant to communication. We noted that for a speaker to communicate something to her addressee, the speaker must undertake a commitment towards the addressee and that for commitments to be undertaken in general there must be a mutual commitment to that effect (as well as the infinite number of higher-order mutual commitments that this entails). We can therefore specify that for communication to occur, the speaker must become committed to her addressee, and the speaker and the addressee must also become mutually committed that the speaker has this commitment to the addressee (plus the infinite number of higher-order mutual commitments that these commitments entail; I will mostly leave this addition implicit in the following). However, note that this does not mean that for communication to occur interlocutors must have the same opinion or constantly affirm what the other says in the sense that they must be committed to act on the same proposition. To illustrate this, consider the following example. Suppose that in response to an assertion such as "The Battle of Waterloo was fought in 1815." one's interlocutor responds, "No, it was fought in 1830." Clearly, the interlocutors disagree when the Battle of Waterloo was fought, such that there is no mutual commitment to a particular proposition, but it is also obvious that they have both communicated something. This shows that in order for communication to occur it is not necessary that the interlocutors have a mutual commitment to a particular proposition, such as that the Battle of Waterloo was fought in 1815. Rather, they have a mutual commitment to the speaker being committed to this proposition, i.e., to the speaker's commitment to the hearer to act on the proposition that the Battle of Waterloo was fought in 1815 (or 1830). In order for a hearer to incur her 'part' of the mutual commitment that a commitment has been incurred by the speaker it must – as for all commitments – be appropriate to ascribe this commitment to the hearer. There are a variety of actions that can make the ascription of such actions appropriate.

It can be signalled explicitly or implicitly by an appropriate response such as an affirmation or rejection (as in our example) of what has been said, the hearer can nod, say "Hmm" or do something similar. But, as Geurts explains, it is often appropriate to ascribe the relevant commitment to the speaker "even in the absence of overt clues" (2019a, p. 19) in the sense that it is simply taken for granted if certain conditions hold. For example, in face-to-face conversations the relevant commitment is ascribed as a default if a speaker speaks clearly and loudly enough, the hearer is not out of earshot, the hearer does not say that he did not understand what has been said, etc.

Another point about the particular commitment that is relevant for communication has to do with how communicative acts are distinguished from non-communicative acts. The point is that it is not quite true that an act is communicative *just* because it creates a commitment. To illustrate this with an example, consider that when faced with another person one might visibly scratch one's nose and thereby incur a commitment that one has scratched one's nose. One incurs such a commitment because the visible scratching of one's nose will make it appropriate to ascribe the commitment to act on the proposition that one has scratched one's nose. This is further highlighted by such facts as that one could not appropriately deny having scratched one's nose and that it is arguably common ground that one has done so. But we would probably not say that the mere scratching of one's nose is a communicative act. The same applies to an endless number of other acts that create commitments but that are not reasonably considered communicative, such as breathing, tying one's shoelaces, walking down the street, etc. in the presence of others. Hence, the mere occurrence of a commitment as a result of an act cannot be what makes an act communicative. It is rather interesting that although this seems straightforward, I have not yet seen this point being addressed in the literature. However, I think that an appropriate way to deal with this problem is to impose the condition that for an act to be communicative it does not only have to generate a commitment but also that *the undertaking of commitments is the purpose of the*

act.[107] At least in normal circumstances, the act of scratching one's nose does not have the purpose of committing oneself to anything but rather to relieve an itch or something of the sort and similar considerations apply to such acts as breathing, tying one's shoelaces, walking, etc. On the other hand, the purpose of speech acts and other communicative acts is, at least according to the commitment-based view, to undertake commitments and this is what allows to distinguish them from non-communicative acts.

One might worry that the notion of a purpose seems rather close to the notion of intention and have the suspicion that it reintroduces this notion through the backdoor in order to account for the communicative nature of an action. But although I acknowledge the conceptual similarities between the two, it is usually agreed that intentions and purposes are not the same and that something can have a purpose without there being any existing corresponding intention or other mental state to that effect. One example is the purpose of hearts to pump blood through the blood vessels of the circulatory system of an animal. It is in the same sense that the purpose of speech acts is understood here. But note also that none of this is supposed to mean that an act such as scratching one's nose cannot come to have the purpose of undertaking commitments. For instance, two spies can commit themselves that they use this act as a signal that commits them to some of course of action and thereby endow the action with a communicative purpose.

Imposing this more specific requirement on communicative acts also has the advantage that it allows us to limit the communicative content of utterances to those commitments that are incurred in virtue of the utterance's purpose of incurring commitments rather than in virtue of the performance of the act itself. To illustrate the relevant difference and to make this point precise, consider that the utterance of "The Battle of Waterloo was fought in 1815" does not only create a commitment to act on the proposition that the Battle of Waterloo was fought in 1815 (and potentially other commitments that this entails) but also

[107] Geurts suggested a response along these lines to me in private communication.

a commitment to act on the proposition that one has pronounced the sentence "The Battle of Waterloo was fought in 1815", that one has pronounced the word "The", that one has spoken at all, that one has spoken with a sonorous voice, etc. The undertaking of such commitments does not fall under the purpose of the particular speech act which is to undertake the commitment to act on the proposition that the Battle of Waterloo was fought in 1815 rather than that the words have been pronounced. In a similar way, a heart will produce noise in serving its purpose, but the production of noise is not the purpose of a heart. The commitments undertaken in serving the purpose of communicative acts are rather side-effects of these acts and therefore do not form part of the communicative content of a speech act. Hence, the utterance "The Battle of Waterloo was fought in 1815" does not have the communicative content that one has pronounced the relevant words or that one has spoken with a sonorous voice, etc.[108] In the following, I will not further consider this purposive aspect of communicative acts explicitly but take it for granted when I speak about the commitments that are incurred through speech acts.

Let me now come to the subject of potentially conflicting commitments. There is a worry that this, if it is a real possibility, poses a difficulty when combined with the feature that the undertaking of a commitment results in the undertaking of all the commitments that this commitment entails. The difficulty is that the occurrence of commitments to contradicting propositions would commit one to every possible proposition due to the principle of explosion (ex falso quodlibet). Since the commitment-based theory claims that the communicative content of an utterance consists in all the commitments that are undertaken this entails that the content of an utterance that contradicts a previous commitment consists in a commitment to every possible proposition. However, it would be

[108] The distinction between side-effects and the effects of an utterance in virtue of its purpose is inspired by a distinction made by Stalnaker (1999, p. 86) that distinguishes between the essential effect of a speech act and its non-essential effects. Although Stalnaker does not speak of commitments but more generally of the effects that an utterance has on the common ground, he agrees that it is not part of the essential effect of a speech act that a certain sentence has been pronounced.

absurd to claim that someone who says, “The Battle of Waterloo was fought in 1815” and thereby contradicts a previous commitment communicates every possible proposition, including entirely unrelated propositions such as that Angela Merkel is a physicist or that bananas are red.[109]

There are a number of potential strategies to deal with this problem, but because some of them rely on controversial and fundamental claims about logic I am not able to provide a conclusive discussion or solution within the scope of this thesis. Instead, I confine myself to briefly mentioning some potential strategies and explaining which I consider to be most promising, leaving it for future theorizing to provide a more conclusive answer. A first but, I think, less than satisfying strategy is to deny the premise that a commitment to act on a proposition (or propositions) that entails another proposition also comes with a commitment to act on the further proposition. This is unsatisfactory because, as I have already noted, it is hard to see how one could be committed to act on the initial proposition without being committed to act on a proposition that is entailed by it. It would be no better than saying that one who is committed to go to London (U.K.) is not necessarily committed to go to England. A slightly more attractive response might be to claim that the logic that governs commitments is not a classical logic but one that rejects or avoids the principle of explosion, such as relevance logic or paraconsistent logic. Possibilities along these lines are considered by Mark Lance and Philip Kremer (1994). However, since a discussion of the question whether adopting a logic of this kind for theorizing about communication (or perhaps more generally) is adequate would go far beyond the scope of this thesis, I will not further comment on this strategy here.

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[109] The problem does not arise in cases in which one undertakes conflicting commitments towards different people, such that the commitments exist in separate common grounds. For example, Alex might tell Barbara that the Battle of Waterloo was fought in 1815 but later tell Clyde that the same proposition is false and thereby become committed to Barbara to act on the proposition that the Battle of Waterloo was fought in 1815 but also committed to Clyde to act on the proposition that the Battle of Waterloo was not fought in 1815. This is unproblematic from a communicative point of view because the commitments are independent from each other to the extent that they only require conflicting actions towards different people and therefore do not necessarily bind one’s actions in conflicting ways (Geurts, 2019a, p. 25).

Instead, my preferred strategy is to insist that there cannot be genuinely contradictory commitments between interlocutors so that the problem cannot arise. I think that this claim is plausible on conceptual grounds for it seems incoherent to say that there could be a commitment to act on a proposition and a commitment to act on its negation at the same time. If this is correct, then it can never be appropriate to ascribe conflicting commitments to an individual which is what would have to be the case for such commitments to exist. The same idea seems to be behind Geurts's claim that "one cannot be committed to one and the same person to bring about an impossible state of affairs" when he considers the idea of conflicting commitments in passing (2019a, p. 4). This raises the question of what happens in cases in which an utterance is made that would otherwise lead to contradicting commitments. This, I think, depends on the case. One potential case which I take to be very rare is that a speaker makes an utterance that is itself contradictory, e.g., "p and not p". If a speaker cannot make contradictory commitments, then this utterance will simply not have any communicative content because the interlocutor has not incurred any commitments (except those that have to do with the fact that the speaker pronounced certain words, etc.). This does not appear implausible because it is appropriate to say that the speaker did not convey anything in such a case; her utterance is empty, at least with regard to its communicative content.

In other cases, which are presumably more common, the speaker makes an utterance that would usually lead to a commitment that is in conflict with a commitment that is common ground. What happens in such cases again depends on the case. I think that in many cases the potential conflict between the existing commitment and the commitment to be undertaken will be resolved on the assumption that the commitment to be undertaken is compatible with the existing commitment. In such cases the existing commitments, which form the context of the utterance, inform the commitment that is undertaken in such a way that it is compatible with existing commitments. One example that has already been

considered is the case of pragmatic enrichment in which a mother tells her child "You are not going to die." Since the mother is committed to the proposition that all humans are mortal, committing herself to the contrary by means of the utterance would lead to a contradiction. This contradiction is avoided because the incurred commitment is modified in such a way that it fits with the common ground. Of course, there might be no way to plausibly interpret an utterance along these lines without the result of contradicting commitments but depending on the particular context the looming contradiction might also be resolved by abandoning the background commitment or by not undertaking the new commitment. In the former case the utterance would come down to an implicit rescinding of the background commitment by the interlocutors. In the latter case, the background commitment might be too significant to be abandoned (for example, because its negation is also inconsistent with various other commitments) such that the new utterance will not create a commitment. In this case, the utterance might be considered not 'serious' or genuine and thus not make any real communicative contribution. Although further discussion of this problem is necessary, I hope that the foregoing remarks suggest that it is not necessarily fatal for commitment-based theories.

Conclusion

In this chapter, I introduced the commitment-based theory of communication. In order to do so, I first made some general points about the way in which I go about this task and introduced the central notion of commitment. I then explained the use to which this notion is put in commitment-based theorizing about communication. In the next and final chapter, I use the commitment-based theory of communication to develop an alternative version of SP and argue that this commitment-based version resists the objections that have proven problematic for intention-based versions of SP.

5. The commitment-based version of the Standard Picture

In this fifth and final chapter I use the commitment-based theory of communication as a theoretical basis for a new version of SP and discuss whether this commitment-based version can deal with the objections that undermine intention-based versions: the objections from collective intentionality, legal practice, and parochialism.[110] The chapter consists of four sections. The first section introduces the commitment-based version of SP and the remaining three sections each address one of the objections. I conclude that the commitment-based version is not undermined by the objections and that it therefore offers a more robust defence of SP than its intention-based rivals.

5.1. Introducing the commitment-based version of the Standard Picture

This section introduces the commitment-based version of SP and is divided in two parts. In the first part I explain the commitment-based version's conceptualization of the main thesis of SP, its relation to theories of the nature of law and the specific kind of commitment that it postulates for the enactments of statutes. In the second part I turn to its conceptualization of statutory interpretation and context and explain some important kinds of mutual commitment that constitute statutory context. Note that my objective here is not to give a *full* explanation of the commitment-based version but rather to set the stage for the rest of the discussion; further features of this version will be introduced in the coming sections.

5.1.1. The basics of the commitment-based version of the Standard Picture

It is useful to start by explaining how the commitment-based version conceptualizes the central thesis of SP: the thesis that the content of the legal norms that are created by statutes

[110] As noted in chapter three, the category mistake objection and the objection from bindingness can be dealt with by relying on general features of SP. Therefore, they are also available to the commitment-based version and will not be discussed here.

is determined by the meanings of these statutes in such a way that the content of the legal norms corresponds to the meanings of the statutes. Since the commitment-based version of SP is a communicative version of SP it conceptualizes the relevant notion of meaning in terms of communicative content. Further, the commitment-based theory of communication on which it relies claims that communicative content is determined by the commitments that are incurred through the relevant speech act. Hence, the central thesis of the commitment-based version of SP is that *the content of the legal norms that are created by statutes is determined by the commitments that are undertaken in virtue of these statutes in such a way that the content of the legal norms corresponds to these commitments*.

I emphasize that the commitment-based version only explains the *content* of legal norms (that are generated by statutes) and that it leaves it to theories of the nature of law to explain what legal norms are or which conditions must be satisfied in order for them to obtain. This is of course not a special feature of the commitment-based version, but I stress it here because it might be tempting to think of the explanation that this version provides as a theory of legal norms as such since the undertaking of commitments entails that obligations, rights and other norms obtain as well. Thus, one might think that the commitment-based version claims that the legal norms that are created by statutes are simply the norms that are incurred due to the undertaking of commitments through statutes. However, we have seen that the commitments that are relevant for communication and the norms that they entail do not necessarily have a legal status just in virtue of being the result of commitments, such that the commitment-based version of SP would still have to rely on a separate theory of the nature of law for an explanation of what turns norms of commitment into legal norms. Hence, it cannot (at least on its own) explain legal norms as such or what has to be the case in order for them to obtain, nor does it purport to provide such an explanation.[111]

[111] I must not omit mentioning, however, that Gilbert (1989, pp. 405-407; 2006, pp. 183-214; 2018, pp. 293-324) has proposed to use the notion of joint commitment as the fundamental notion in a theory of the nature of law – a theory that closely resembles Hartian positivism and that might even be considered a variety of this

Having clarified this, let me now try to characterize more specifically the kind of commitment that must be incurred by means of a statute according to the commitment-based version of SP. To begin with, this kind of commitment must be appropriate to the kind of speech act that statutes are, and I have argued in chapter three that statutes are necessarily effectives.[112] I further explained that commitment-based theories of communication characterize effective speech acts as commitments of the speaker to the attempt of producing some conventional or institutional effect with a (propositional) content. Since the institutional effects that are supposed to be produced through statutes are legal norms the commitment-based version of SP must claim that by enacting a statute the legislature must undertake the commitment to the attempt of producing legal norms with a certain content. Since this commitment is the communicative content of the statute, it must correspond to the statute's legal content, i.e., the content of the legal norm that the statute does in fact produce. Of primary importance here is of course that the content of the legal norm that the legislature commits itself to attempt to be producing by means of the statute corresponds to the content of the legal norm that is in fact produced by means of the statute. A counter example to the commitment-based version of SP would therefore be, for instance, a case in which the legislature commits itself to the attempt of producing a legal norm with a content (e.g., *p*) that does not correspond to the content of the legal norm that it in fact does produce (e.g., not-*p*, or *p* and *q*; see below for a concrete example).

Because SP only concerns statutes that *do* have legal contents, this of course only applies to cases in which statutes produce legal norms (see chapter one). Hence, SP is not

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view. Prima facie, Gilbert's proposal dovetails nicely with my commitment-based version of SP. However, I will not discuss it here or rely on it because it is not developed in much detail and because (as already explained) it would go far beyond the scope of this thesis to discuss if it is the right theory of the nature of law.

[112] As noted in that chapter, I do not analyse statutes in terms of directives due to the fact that there are a number of potential problems with this claim (Allott & Shaer, 2018; Bach & Harnish, 1979, pp. 108-119). The commitment-based version of SP has the advantage over intention-based versions that it can also account for the claim that statutes have communicative content if they are only treated as effectives because commitment-based theories classify effectives as communicative acts. Of course, this is not to say that commitment-based versions of SP would be unable to account for the claim that statutes are also directives if this claim turns out to be true. In that case, it would also have to be shown that by enacting a statute the legislature incurs a commitment to the goal that its audience makes a proposition true.

falsified by cases in which the legislature commits itself to the attempt of producing a legal norm with a certain content in virtue of a statute but where the statute does not produce any legal norm at all (e.g., because the statute is invalid, etc.). Nonetheless, the proposed understanding of effectives as commitments to *attempts* of producing institutional effects also provides an explanation of the communicative content of such 'failed' statutes. Despite the fact that the legislature fails to introduce a legal norm (and therefore also a legal content) it is committed to the *attempt* of introducing such a norm in virtue of making an enactment to that effect and the statute will therefore be a communicative act with a communicative content.

However, note that there is more to the commitments that must be incurred through statutes because I also argued that in order for the speaker to be committed to its audience in virtue of a speech act the speaker and its audience must incur a mutual commitment that the speaker has such a commitment, as well as further mutual commitments of higher orders that follow from this. Hence, according to the commitment-based version a legislature does not only have to be committed to its audience to the attempt of producing a legal norm with a certain content, but the legislature and its audience must also have a mutual commitment that the legislature is thus committed, as well mutual commitments of higher orders that follow from this. The foregoing might sound rather abstract, so let me illustrate it with our example of s. 1(1) of the Marriage Act 2013 that states, "Marriage of same sex couples is lawful". As noted, s. 1(1) creates various legal norms, most notably a legal rule that marriage of same sex couples is lawful and a legal right and obligation to act on the same proposition (or the corresponding action type). Hence, the proposition that marriage of same sex couples is lawful is the legal content of s. 1(1). For this reason, the commitment-based version of SP must claim that this proposition corresponds to the commitment (or commitments) that is incurred in virtue of s. 1(1) since this commitment is the communicative content of the statute. Because s. 1(1) is an effective the commitment in question must be a commitment to the

attempt of producing the legal norm(s) that marriage of same sex couples is lawful. In addition, the legislature and its audience must incur the mutual commitment that the legislature is thus committed, as well as the higher-order mutual commitments that follow from this. In the next section, I will make a case that commitments of this kind are in fact incurred in virtue of statutes, though note that I will only explain why the first level of mutual commitments is incurred. The reasons are that it would be impossible to explain the endless chain of higher-order mutual commitments in limited space and also that there is not much point in doing so explicitly beyond the first level, given that it should be clear from the previous chapter that once there is a mutual commitment it is hard to see how those who are subject to it could fail to have mutual commitments of a higher order.

5.1.2. Statutory context and interpretation

To show that the relevant commitments are in fact incurred in virtue of statutes, I first need to explain what produces and determines the commitments that are incurred in virtue of statutes, and how the commitment-based version of SP conceptualizes statutory interpretation. Just as the commitments that are incurred through non-statutory speech acts, the commitments that are incurred through statutes are produced and determined by the mutual commitments that constitute the common ground or context against which statutes are introduced. In the case of statutes, these are the mutual commitments between the legislature and its audience. The commitment-based version of SP also provides the same general account for the interpretation of statutes as for non-statutory speech acts: in order to identify the communicative content of statutes – and therefore also their legal content – one needs to identify the commitments that are incurred through statutes by considering the mutual commitments that constitute the common ground. Now, this characterization of statutory context and statutory interpretation is of course general and does not tell us which specific mutual commitments hold between the legislature and its audience. As for every

communicative exchange, the answer to this question will of course depend on the specific communicative setting or situation, such as the legal system into which it is introduced. However, I think that there are at least some general claims that can reasonably be made about the mutual commitments that constitute statutory context. More specifically, they can be made by relating statutory context to the general types of contextual information that standardly determine communicative content in other communicative settings: linguistic conventions that determine sentence meaning, Grice's Cooperative Principle and the maxims, and other contextual features.

Here, it is instructive to consider again the claim made by Marmor according to which the interpretation of statutes generally requires reference to "all the background legal landscape and the technicalities of legal jargon." (2014, pp. 116-117). The commitment-based version of SP can – and, I think, should – agree with Marmor that the background legal landscape and legal jargon, must be considered in the interpretation of statutes. More specifically, I consider this to involves at least all the other legal norms of a system (i.e., the corpus juris), and the legal language that is used in that system and which covers both technical legal language and 'standard' linguistic conventions (i.e., the linguistic norms of standard English or standard French, etc.). Legal language is relevant because it is the determinant of the sentence meaning of statutes, and other legal norms constitute (additional) contextual information that further determines the communicative content of statutes. However, on the commitment-based view the reason that they constitute statutory context is not that they would allegedly be taken for granted by some idealized and fictional reasonable hearer but rather that they are what the legislature and its audience are mutually committed to. It is worth noting that Marmor makes no reference to the Gricean maxims and the Cooperative Principle in this context. Arguably, the reason for this is his claim (see chapter two) that it is indeterminate to what extent these conversational norms constitute the background of legislative enactments, as it is supposedly a strategic communicative setting.

However, I noted that there is disagreement on this issue and therefore I will neither claim that the legislature and its audience have a clear mutual commitment to the Cooperative Principle and the maxims nor that they don't. Instead, I will leave this issue open and allow for the possibility that it can be indeterminate – in some or all legal systems – to what extent the Cooperative Principle and the maxims in fact determine the content of statutes. I will argue shortly that there are in fact mutual commitments to the corpus juris and legal language between legislatures and their audiences but let me first make two other points about statutory context.

First, the remarks just made illustrate a broader point, namely that it might not always be entirely determinate which commitments are part of statutory context. This parallels the points concerning indeterminacy of mutual commitments in ordinary conversations and has the same implication for statutes: it can be indeterminate (to some extent) which commitment is incurred by means of a statute and therefore also which communicative and legal content it has. Second, statutory context can also be constituted by mutual commitments to something else than other legal norms and legal language since every type of information can in principle be the subject of a mutual commitment or even of 'the background legal landscape'. I only focus on these types of information for now for the purposes of illustration and because they will be particularly relevant in the coming sections. One type of information for which there is plausibly a mutual commitment in most systems are propositions of common sense because it seems appropriate to attribute a commitment to such propositions because of their obviousness. A more problematic candidate is the legislative history of a statute. On many intention-based versions of SP (e.g., Ekins, 2012), it is considered problematic to count legislative history as part of statutory context because it cannot be expected that the audience of statutes knows of the debates and other events that resulted in the enactment of the statute. To my mind, legislative history has a similarly problematic status on the commitment-based version of SP, but this is rather due to the fact

that it is unclear why it should be appropriate to attribute a commitment to legislative history to both the legislature and its audience. This is not to say that there cannot be a commitment to legislative history.[113] Such a commitment might for instance be established by a statutory rule or judicial decision that the legislative history is to be considered in interpretation. But, again, this will depend on the particular legal system in question.

I use the rest of this section to argue that, as a general matter, legislatures and their audiences must in fact be mutually committed to the legal norms of their respective legal systems and to the legal languages they use, as it is highly relevant for what is to come. I start by explaining why the *audience* of statutes has its 'part' of the mutual commitment to the legal norms of a system, and then extend the argument to legal language and to the legislature's part. To show that the audience of statutes has the relevant kind of commitment we first need to specify who the audience is. The intuitive and standard answer to this question is that it is the citizens of a state, and therefore I focus primarily on this group in the following. However, later I also briefly consider officials and those who reside in the territory of a state as other potential addressees. To show that citizens are appropriately attributed commitments to the legal norms of a system I rely on the noted fact that commitments are often incurred through membership in a group or its affiliation with such a group (Walton & Krabbe, 1995, p. 34). Noted examples were that the members of a football club are committed to its training plan and physicians are committed to medical confidentiality and to not harming their patients. The idea is that people also incur commitments in virtue of being members of the group of citizens of a particular state and that these commitments include the commitment to the legal norms of this state.

[113] Asgeirsson (2020, pp. 151-171) argues that legislatures of at least some systems might be committed to certain aspects of legislative history in some cases. I am not unsympathetic to this claim and consider it to be generally compatible with my account, but I am also not sure if it fully aligns with the way I think about commitments here because Asgeirsson only considers commitments in cases in which the communicative content of a statute is indeterminate. A related point is that it is also not entirely clear to me to what extent he considers the audience of statutes to be committed to the relevant aspect of legislative history, which is what is needed on my account for it to be part of statutory context.

But why would it be appropriate to attribute a commitment to the norms of a legal system to its citizens? The argument departs from the idea that the very possibility of one's citizenship depends on the fact that certain specific legal norms are in place that make citizenship possible, most notably because they create and regulate citizenship. This makes it appropriate to attribute a commitment to these legal norms to citizens, for how could they possibly be citizens without being committed to the legal norms that make this the case? Their citizenship simply presupposes these norms and therefore commits citizens to them. However, being committed to these norms in turn requires that citizens are committed to a legal system more generally since the norms that create and regulate citizenship can only exist and be effective as part of that system. Further, being committed to a legal system entails that one is committed to all the legal norms of that system because if one was not committed to all the norms of the system, one could not be committed to the system at all, since the system is just the totality of its norms and can only function as such. In sum, being a citizen commits one to a legal system and all its norms because not being committed to this system and its norms is incompatible with one's citizenship. That citizenship commits citizens to the legal norms of a system is also illustrated by such facts as that it is a standard requirement in the procedure of receiving the citizenship of a state that one makes an explicit declaration to that effect. For instance, according to s. 42 of the British Nationality Act 1981 one has to make the following pledge: "I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen." By making the pledge one explicitly commits oneself to respect, i.e., act upon, the laws of the United Kingdom and it is analogous to the Hippocratic oath and other explicit declarations that must be made in some cases to become the member of a group. And although no such pledge might be required from those who acquire their citizenship by descent (or other means) it is obvious that they must incur the same commitments as they are the same for all citizens.

To anticipate worries that one might have about this argument I want to reiterate and highlight a number of points. To begin with, for citizens to be committed to a legal norm (or anything else) they do not necessarily have to be aware of this commitment or norm (in fact, not even of their citizenship) because commitments do not require any corresponding mental states. Hence, the commitment-based version of SP does not make the clearly implausible claim that citizens are aware of all the legal norms that hold in a legal system. Moreover, note that the argument is not undermined by such facts as that people might prefer not to be citizens of a state, for instance because they dislike the system as a whole or (some of) its norms. Just as the fact that one's preference not to be a physician is irrelevant to the fact that one is committed to medical confidentiality, one's preference not to be a citizen does not change anything about one's commitments to the legal norms of one's state. Relevant here is also that it has been argued that one might have a commitment involuntarily, i.e., as the result of imposed force or threat, and that one's commitment might be at odds with one's personal intentions or desires. Further, for a citizen to be in fact rescinded from her commitment to the norms of a legal system she would actually have to give up her citizenship or be stripped of it and this cannot be done by the citizen single-handedly but only if it is approved by other legal agents (e.g., legal institutions or officials) that are also subject to the mutual commitment to legal norms (see below) and that are granted authority by these norms to revoke a person's citizenship.

My argument also does not entail or is an attempt to establish that citizens are *morally* obligated to obey the legal norms of one's system. An argument to this effect would establish that citizens generally have *political obligations* (Dagger & Lefkowitz, 2021). As noted in chapter three, political obligations are often said to hold for at least for some systems, but these considerations are orthogonal to the present argument because the existence of commitment neither requires nor implies moral obligations to act accordingly. Hence, as far as the argument is concerned it might be morally acceptable – and even required – not to act

on the legal norms that one is committed to in virtue of citizenship.[114] Finally, the argument is not even meant to establish that citizens have any legal obligations or that they are subject to any other legal norms. The argument rather presupposes this and leaves it to theories of the nature of law to explain why people are subject to legal norms. The argument only establishes that citizens are *committed* to the legal norms of their systems in virtue of their citizenship, as citizenship makes it appropriate to attribute these commitments. This holds broadly in virtue of practical rationality rather than specifically moral or legal considerations.

Until now I have assumed that the addressees of statutes are the citizens of a state. However, one might not share this assumption and claim that other groups are (also) addressed by statutes. Here I briefly want to consider two other groups that are salient candidates: legal officials and those who are physically present in the territory in which the statutes apply. We can deal quickly with officials because a parallel membership-based argument applies in the case of officials. Again, the very status of a legal official exists only in virtue of certain legal norms which is sufficient to get the argument going. The issue is not quite the same when it comes to individuals who are physically present in the territory of a state. Since the commitment to the enactment of statutes is not ensured by their membership in the group of citizens, officials, or some other relevant group, they must incur this commitment in a different way. My proposal is that they do so in virtue of entering the territory of the state whose legal system is under consideration. To make this plausible, consider again the example in which one incurs the commitment to keep quiet by entering a library. This illustrates that it is appropriate to attribute commitments to people in virtue of entering or being physically present in a specific location. Clearly, this phenomenon is very common: similar considerations apply to the entering of churches, shops, bars, museums,

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[114] Gilbert (2006) has argued that the notion of political obligation should be stripped of its moral connotations and reconceptualized in terms of the obligations that are entailed by the commitments of citizenship. While I am sympathetic to her view that citizens generally have commitments in virtue of their citizenship, I am not fully convinced that it would be useful to reconceptualize the notion of political obligation in this way and prefer to think of it along more traditional lines.

and so on. By entering a church one can become committed to baring one's head, by entering a museum one can become committed to abstain from touching the exhibits and taking photos, etc. More generally, entering the relevant location commits one to its house rules. In the same way, it is appropriate to attribute the commitments to the legal norms of a system to people in virtue of entering the territory of the state in question.

Having established that the audience of statutes is committed to a legal system and all its norms the argument can be extended to the claim that the audience is also committed to the legal language of a system. The reason is that a legal system usually specifies an official language that is used in the system or at least presupposes that language through its use which commits those who are committed to the system to the linguistic conventions of that language, as it is thereby established as the language of that system. Further, technical uses of terms are often themselves specified by the linguistic conventions of a system or even stipulated explicitly in enactments and therefore also commit those who are committed to the legal system. The argument to the commitment to existing legal norms and legal language can further be extended from the audience of the law to the legislature itself. The reason is that, just as citizens and officials, legislatures themselves are created by means of legal norms which makes it appropriate to ascribe the commitment to the legal system to the legislature, for its own existence presupposes such a system. And, as just noted, this will come with commitments to all the legal norms of that system and to its legal language. In the next section, I will go into further detail concerning what it means for a legislature (not being an individual person) to incur a commitment, specifically in virtue of a statute. However, I take the argument just made to provide at least a first important reason for accepting not only that legislatures can have commitments but also that they have the specific commitments that are generally claimed to be part of statutory context. On the basis of this argument, it is also not difficult to see why other legal institutions, such as courts, are also committed in the same ways, since their existence also depends on legal norms.

The last point to be made is that the commitments in question are of course *mutual* commitments, i.e., that the legislature and its audience are committed *to each other* to act upon the legal norms and legal language. I think that this claim holds because of a more general fact, namely that *all* agents in a legal system, i.e., all those who are committed to a legal system, including the audience of statutes and legislatures (and potentially other legal institutions), are mutually committed to each other (i.e., all the other legal agents) to the legal norms and language of that system. That there is such a general mutual commitment between those who are committed to a legal system does not only appear intuitively plausible but can also be argued for as follows. If an agent is committed to a legal norm (or a rule of legal language, etc.) because of her commitment to the legal system, then this entails that other agents who are committed to the legal system also have a commitment to the norm, for a commitment to the system entails a commitment to all its norms. As such, one's commitment to a legal norm in virtue of a commitment to the legal system entitles one to ask from others who are committed to the legal system to act on the norm as well, and vice versa. And since an entitlement of this kind is just the flip side of a commitment, we can say that the other agents in a legal system are committed to this agent to act on the legal norms, and vice versa. Hence there is a mutual commitment between all the legal agents in a system to act on its legal norms and, a fortiori, there is also such a commitment between the legislature and its audience. The same goes for the rules of legal language.

5.2. The objection from collective intentionality

Having introduced the commitment-based version of SP, I can start explaining how it responds to the objections that undermine intention-based versions. I start with the objection from collective intentionality. According to this objection there is no plausible account of how legislatures can have the communicative intentions that are postulated by intention-based versions of SP. The commitment-based version of SP has a short and a long response

to this objection. The short response is simply that it is not undermined by the objection because it does not postulate any communicative intentions to account for the communicative content and legal content of statutes. But while this might be sufficient to address the objection from collective intentionality as such it is clear that more must be done to show that the commitment-based version of SP is more robust than its intention-based rivals. For one thing, it still remains to be explained more specifically how the relevant commitments are incurred in virtue of statutes. Second, the same considerations that undermine the claim that legislatures have the necessary communicative intentions might also cast doubt on the claim that they undertake the necessary commitments. Addressing these two related issues is the purpose of the long response to the objection from collective intentionality which I will provide in the rest of this section.

Let me start with the first issue. I argued in the previous section that for the commitment-based version of SP to be true, by enacting a statute the legislature and its audience must incur the mutual commitment that the legislature is committed to the attempt of creating a legal norm (or legal norms) whose content corresponds to the content of the legal norm that is in fact created. I also argued that the commitments that are incurred through statutes are determined by the mutual commitments between the legislature and its audience and which include such things as the other legal norms and the legal language of a system. To see how this allows us to make a case that the relevant commitments are in fact incurred, consider again the example of s. 1(1) of the Marriage Act. In order for SP to be true, the legislature and its audience must incur the mutual commitment that the legislature is committed to the attempt of creating the legal norm(s) that marriage of same sex couples is lawful. Let us start with the legislature's 'basic' commitment to this attempt (i.e., the commitment to which there is a mutual commitment). That there is such a commitment is due to two factors. First, in enacting s. 1(1) as a statute the legislature speaks to its audience in its capacity as a lawmaker which commits it to the attempt of creating legal norms, i.e.,

the enactment of a statutory text makes it appropriate to attribute a commitment to the attempt of creating a legal norm. And, second, the words that it utters further commit it to the specific proposition that marriage of same sex couples is lawful as the content of the legal norm to be created. The words do so primarily because of the linguistic conventions of the English language to which the legislature and its audience are mutually committed, and which determine that the use of the sentence "Marriage of same sex couples is lawful" commits one to the proposition that marriage of same sex couples is lawful, at least as long as there is no other mutual commitment in the common ground that is at odds with it. But note that other legal norms also contribute to the creation of the commitment in this case. For, prima facie, this is at odds with a mutual commitment that holds between the legislature and its audience, namely the pre-existing legal norm that only the marriage of a man and a woman could be lawful, as established by the Marriage Act from 1949. However, the mutual commitment to this legal norm is rescinded in virtue of the fact that there is a commitment to another legal norm, namely lex posteriori (the 'last-in-time rule'; see chapter three), which repeals the relevant parts of the Marriage Act 1949 because they are less recent and incompatible with s. 1(1). This shows that the legislature's commitment does not only depend on linguistic conventions but also other legal norms that constitute the context of s. 1(1).

In addition to the basic commitment of the legislature, we can also show that there is a *mutual* commitment between the legislature and its audience to this commitment. That the legislature is committed to its commitment should be obvious because one cannot be committed without being committed that one is committed. What is perhaps more interesting is the part of the mutual commitment of the audience, which is also due to two factors. First, it shares the mutual commitments with the legislature that determine the commitment that is incurred by uttering the relevant words, i.e., the linguistic conventions and legal norms just mentioned. But note that this cannot be enough since the mere sharing of common ground

is not sufficient for incurring a commitment, as indicated by cases from ordinary conversation in which two interlocutors share common ground but the audience cannot be attributed its part of the mutual commitment, for instance because the speaker speaks when the audience is out of earshot. Instead of having to be 'uttered' in such a way that the audience can be reasonably he said to hear and understand it, it seems that what has to be the case to appropriately attribute its part of the mutual commitment to the audience of statutes is something else, namely that it is published in an official gazette or journal, government website, etc. The reason for this is again that the audience is committed to the legal norms of the system and these norms specify the ways in which a statute has to be published in order for it to count as being conveyed. In virtue of their commitments to the relevant norms, the audience can then be appropriately attributed the commitment to the legislature's commitment to the attempt of creating a legal norm. If this is correct, then a case has been made that the postulated mutual commitment can indeed be attributed to the legislature and its audience in virtue of s. 1(1) of the Marriage Act. The claim is of course that the same general explanation can be extended to other statutes. This claim will be substantiated in the following sections in which I argue that the commitment-based version of SP can also account for certain legal practices that have appeared problematic and that it holds across legal systems.

What I want to do now, however, is to address the worry that facts about legislation that undermine the claim that a legislature has the necessary communicative intentions might also undermine the claim that it incurs the necessary commitments. I start with the root of the objection from collective intentionality which lies in the problem that the basic or standard type of intention is a personal intention, i.e., a mental state, and that it is not clear how intention could be held by groups or institutions because these do not have any mental states. To the extent that this problem specifically concerns mental states it clearly does not undermine commitment-based version of SP because commitments are not mental states and

also do not necessarily require that corresponding mental states are held by those who have them. Nonetheless, one might claim that there is a parallel problem for a different reason, namely that the basic type of commitment is arguably the commitment of an individual person towards another and that it is not clear how a group or institution such as a legislature can have a commitment towards others. However, it is not clear what would give force to this objection once it is acknowledged that commitments do not need to involve corresponding mental states. Commitments are normative constraints on behaviour, and it is unclear why groups or institutions would not be subject to such constraints. There does not seem to be anything mysterious about such claims as that the Johnsons are committed to water the plants of the Smiths or that Diane's bank is committed to send her a new credit card. Still, the best way to respond to the objection is surely to explain more specifically what it means for a group or institution to have a commitment. My explanation here will draw on an account of this phenomenon proposed by Gilbert. According to her, a group or institution has a commitment if its members "are jointly committed *to phi as a body*, where 'phi' stands for the relevant verb. […] they are jointly committed to emulate, *by virtue of the actions of all*, a single phi-er." (2013, p. 7). The idea is that when a group or institution is committed to act in a certain way, its members must have a joint or mutual commitment to act together, i.e., to coordinate their actions in such a way that they constitute a body that acts in that way. Note that the idea of "a single phi-er" is not that of a single person, for this would mean, for instance, that when committed to play a football match the members of a team would be mutually committed to play like a single player, which is clearly false. The idea is rather that the members of the group are mutually committed to act as a single agent (in this case, a team).

An important feature of the commitment of a group is that although it requires the mutual commitment by all members to act together, it does not necessarily require that each member is committed to act in the same way as the others do. For instance, if the Johnsons

are committed to water the plants of the Smiths this obviously does not mean that all members of the family must individually water the plants. Although all of them are mutually committed to make the proposition true that the plants get sufficient water it would already be enough if only Mr. Johnson actually took care of this. The same goes for the case of the bank. While all bank employees must be mutually committed to coordinate their actions in such a way that Diane receives her credit card, this does not mean that each of them is individually committed to executing this action or even be a direct part of the process. Neither is it the case that for a group to have a commitment all its members must be mutually committed to be in favour of the commitment. The members might express worries towards each other about Diane having a credit card (e.g., because she has difficulties dealing with finances), but this does not mean that they are not mutually committed to make the credit card available to her once they are committed as an institution. In other cases, however, it is indeed true that the mutual commitment does impose the same commitments on each member. This might, for instance, be the case if a group is committed to act on the proposition that something is the case, such as that the Battle of Waterloo was fought in 1815. In that case, it is plausible to say that all group members are committed to act on the proposition that the Battle of Waterloo was fought in 1815 which would entail, for example, that they should not deny this fact.

We can now consider how this plays out in the case of the legislature when it undertakes commitments in virtue of statutes such as s. 1(1). The claim must be that for the legislature to incur its commitment to the attempt of producing a legal norm that the marriage of same sex couples is lawful its members must be mutually committed to each other to the attempt of producing a legal norm as a body that marriage of same sex couples is lawful. This does not strike me as an implausible claim and to explain why, I want to bring out two salient and specific commitments that the mutual commitment between lawmakers involves and explain what makes it the case that there are such commitments. First, it is reasonable

to say that the mutual commitment to the attempt of producing a legal norm as a body that marriage of same sex couples is lawful commits all members of the legislative assembly not to deny but to affirm that the attempt has been made. The reason is that it is hard to see how one could have a mutual commitment to be part of a group that made an attempt to create a legal norm and being entitled to deny that such an attempt has been made. And it indeed seems that lawmakers do have such commitments towards each other. For lawmakers could appropriately be criticized by their peers for denying that they, as a legislative body, have made an attempt to producing the legal norm that marriage of same sex couples is lawful.

Obviously, he commitment to affirming that the attempt has been made is not the same as a commitment to be in favour of the attempt, and this brings me to the second commitment that is entailed by the mutual commitment between lawmakers. While it would be clearly false to claim that all lawmakers are also committed to being in favour of the attempt, it is appropriate to attribute such a commitment to at least some of them, namely those who enabled the body to make the attempt in question, most notably those who voted in favour (assuming that the vote was not anonymous and that they can be identified). The reason is that for the legislature to enact a statutory text as a body that constitutes an attempt to produce legal norms, certain procedural criteria must be satisfied which involve such things as a final vote in favour of it by a specified majority. Given that this vote leads to the enactment of the statute it seems appropriate to attribute a commitment to those who voted in favour to justify to the others why they did so, i.e., to provide reasons for attempting to introduce the legal norm as a body. Again, the claim that such commitments are in fact incurred by the members of the relevant majority is supported by the fact that it would be appropriate for other members to demand from those who voted in favour why they did so and to criticize them for not being able to provide appropriate reasons. The flip side of this is of course that the majority can also demand from the minority to demand why they did not vote in favour, as this might have obstructed collective action.

The foregoing is not only meant to make it plausible that the relevant mutual commitments are incurred by lawmakers but also to hint at why they are incurred. Like other commitments, they are incurred in virtue of the mutual commitments that lawmakers are subject to because of their commitment to the legal system, and these include the commitments to legal language and legal norms that make it the case that the statute produces the commitment to the attempt of creating the relevant legislative norm. However, it is also important to highlight that legislators incur the specific mutual commitments *to other legislators* to affirming that they made an attempt as a body to create a certain legal norm and potentially providing reasons in favour of it, due to the fact that they are *members of the legislature* (which is not the case for citizens and other legal agents). As such, they are directly subject to the mutual commitment to act on the rules of legislative procedure – such as voting rules – that specify the procedures that are to be followed by the members of the legislature in order for the body that they are part of to enact statutes. If these procedures are followed and the necessary conditions satisfied (e.g., that a majority votes in favour of a text), the members of the legislature become mutually committed to enacting the statute together and therefore to the attempt of producing a legal norm as a body. This mutually commits them all to not denying that an attempt has been made but since the procedural rules do not specify that all of them need to be in favour, it does not commit all of them to providing reasons in favour of the attempt, but only those who actually voted in favour. No such (mutual) commitments are incurred by citizens or other legal agents because they are not members of the legislature. As such they are not directly subject to the mutual commitment of following legislative procedures in the sense that they are neither supposed nor able to follow such procedures. They are only committed to the fact that such legislative procedures hold in the legal system in question and that they are to be followed by those who are members of the legislative body.

I now want to show that the foregoing points also enable us to argue that other

considerations that fuelled the objection from collective intentionality do not undermine the commitment-based version of SP. A first problem was that in the case of virtually every legislative enactment there is a minority of legislators who abstain or vote against the enactment of a statute and thereby either not actively approve it or even directly express their disapproval. While this clearly shows that usually not all legislators share the same intention with regard to a statute, it has been shown that for a legislature to be committed in a certain way it does not need to be the case that those who are committed must approve the commitment or vote in favour of it. All that needs to be the case is that they are mutually committed to the attempt of producing the legal norm in question and although this involves a mutual commitment by all lawmakers to affirm that the attempt has been made it does not involve a commitment to act in the same ways by all of them, and most notably not their approval of the attempt or legal norm in question.

Another problem was that in most cases there will be legislators who do not engage with the relevant statute and therefore do not know what exactly they are voting on. This shows that some legislators do not need to have any specific personal intention with regard to the effect of a statute, but it does not undermine the claim that the relevant commitment is incurred by the legislature because this is ensured by the fact that the statute is enacted as a result of following the relevant procedures and because the procedures make the absence of personal intentions or other mental states on the side of individual legislators irrelevant. Even if legislators have not engaged with the statutory text, they will be committed to affirming that it has been enacted and therefore that the relevant attempt has been made. Equally, the fact that they have not engaged with the statutory text will not liberate legislators who voted in favour from the commitment to provide reasons in favour of making the attempt. A legislator who didn't read the statutory text but still voted in favour still needs to explain why she did it, just as a legislator who didn't read the text but who voted against.

A third worry in relation to collective intentions was that if we only focus on the

intentions of the majority who voted in favour, we run the risk of ignoring the fact that only the legislative body as a whole can legislate, including the minority that is against it. Although on the commitment-based version of SP it is of course true that only the majority needs to vote in favour of committing the legislative body to the attempt of producing the relevant legal norm it is not the case that the majority legislates alone. The reason is that all members of the legislative body are eventually committed to the attempt of producing the relevant legal norm as a body in virtue of their mutual commitments to the legislative procedures that specify the majority that is needed for the legislature to take an action as a body.

Finally, similar points apply to the two other considerations that have played a role in the objection from collective intentionality and which both have to do with the fact that legislators can have diverging intentions with respect to how statutes are to be understood. One is that for every statute it is likely that legislators will have diverging intentions as to how exactly the *particular* statute is to be understood – irrespective of whether they approve of the statute or not. The other problem is that legislators are likely to have diverging intentions about how statutes are to be understood in *general* and not only in particular cases. This shows that legislators are unlikely to have convergent intentions – particular or standing (in the sense of Ekins's account) – that might allow the legislature as a whole to have the right communicative intentions with regard to specific or all statutes. However, these considerations do not undermine the claim that the legislature and its members incur the relevant commitments because the incurring of commitments depends solely on the commitments that constitute the common ground and that are mutually shared. This is of course not to say that there will always be a determinate commitment in a legal system as to how exactly statutes are to be interpreted. As noted, it might be indeterminate what exactly the commitments are that determine the commitments that are incurred through legislation such that the commitments incurred might be similarly indeterminate. However, this only

shows that the commitments that are incurred might be to some extent indeterminate and not that no commitment is incurred.

It is also not to say that lawmakers who voted in favour of a statute cannot appropriately deny having made an attempt to introduce a particular legal norm because they understood the text in a different way. However, note that on the commitment-based version of SP such denials can only be appropriate if there is some reasonable indeterminacy on this issue within the mutual commitments that determine which commitments are incurred in virtue of statutes. Given that these mutual commitments are indeterminate, it will also be indeterminate which commitment the legislature incurs and therefore also which commitments particular lawmakers incur as a result of that. However, the commitment-based version claims that cases in which there is no such indeterminacy will not allow for such denials. This claim is confirmed by what I consider to be a fact, namely that lawmakers who claim that they understood a statute in a way that is a clear *mis*understanding could not appropriately deny their commitment to the attempt of introducing the relevant legal norm. Such a denial would rather be a violation of the commitment that the lawmaker incurred in virtue of the statute, as well as to the mutual commitments that constitute the common ground.

5.3. The objections from legal practice

I now turn to objections from legal practice. These objections invoke different phenomena from legal practice that supposedly make it the case that a statute's legal content doesn't correspond to its communicative content. Some of these phenomena were shown to be unproblematic because SP had the resources to explain the phenomena from legal practice that these versions of the objection were based on without relying on a particular notion of meaning or theory of communication. More specifically, invalidating rules and doctrines that developed in relation to constitutional provisions could be explained on the basis of the facts that SP does apply to invalid statutes and that the relevant doctrines are not part of the legal

content of the respective provisions but of the judicial decisions in which these doctrines were developed. Hence, they are also unproblematic for commitment-based versions of SP and will not be further considered in the following. Another version of the objection was shown to be unproblematic because it could be explained on the basis of certain claims that are made by intention-based versions of SP: the objection that SP cannot account for the presumption against extraterritoriality. I will argue that this presumption can also be explained by commitment-based versions of SP and then turn to phenomena that were found to be more problematic: modifier laws and applications of statutes in unexpected circumstances. Due to the complexity of the different phenomena the discussion will need to be rather extensive, so I divide it in three parts. I first deal with the presumption against extraterritoriality and some 'standard' modifier laws, such as mens rea. Then I discuss retrospectively operating modifier laws. Finally, I consider the application of statutes in unforeseen circumstances.

5.3.1. The presumption against extraterritoriality and modifier laws

The presumption against extraterritoriality is part of a variety of legal systems, such as U.S. law, and it specifies that the statutes of the legal system in question only have a legal content in the territory of the country in which they apply, even if this is rarely made explicit in statutes (Baude & Sachs, 2017, p. 1110). The presumption has been claimed to create a gap between the communicative content of a statute and its legal content because this limitation is not made explicit. Intention-based versions defended SP on the basis that there is no such gap because the presumption from extraterritoriality is part of the common ground and therefore implicitly restricts the communicative content of statutes to the effect that they only apply in the territory of the relevant state. Commitment-based versions of SP offer an analogous explanation but, importantly, they do not conceptualize the common ground in terms of a set of shared presumptions but rather in terms of the mutual commitments of

interlocutors. In other words, the presumption against extraterritoriality restricts the applicability of statutes to a certain territory because a mutual commitment to the presumption is said to hold between the legislature and its audience. That such a mutual commitment does in fact hold between them is ensured by the fact that the presumption against extraterritoriality is not just a widespread presumption but an established principle or rule of statutory interpretation in the U.S. and other legal systems.[115] This makes it a part of these systems and since I have argued that there are general mutual commitments of legislatures and their audiences to their legal systems, the fact that the presumption against extraterritoriality is part of these systems also commits them to this presumption. More specifically, the idea is that the commitment that is incurred in virtue of a statute that does not make explicit that it only applies within a particular territory is restricted implicitly by the mutual commitment to the presumption against extraterritoriality to the commitment of attempting to produce legal norms that only apply within the territory of the relevant state.

The commitment-based version provides an analogous explanation for modifier laws such as mens rea. We noted that some intention-based versions of SP have also tried to account for mens rea by treating it as a contextual presumption, but this strategy has been found to be less convincing because most ordinary people to whom these statutes are addressed presumably do not know the mens rea doctrine, such that it seems implausible to consider it to be part of the common ground. Different theorists have proposed different strategies to deal with this problem, but it remained somewhat inconclusive to what extent these strategies are convincing. However, it is worth reminding ourselves of one particular account, namely Goldsworthy's, since he claims that the legislature has what he calls "standing commitments" (2019, p. 188) to mens rea and similar modifier laws. Goldsworthy claims that a legislature's commitment to mens rea as sufficient to ascribe a tacit assumption

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[115] The fact that such interpretive principles and rules are part of legal systems is argued probably most forcefully by Baude and Sachs (2017).

to the legislature that mens rea is part of statutory context. It should be clear by now that Goldsworthy's claim that commitments justify the ascription of tacit assumptions is unwarranted because someone might have a commitment even if he clearly does not assume this to be the case and also does not have any other corresponding mental state to that effect: for instance, Alex is clearly committed to buy eggs even if he shows up at home without any eggs because he manifestly forgot to do it. Similarly, we are not justified to ascribe the tacit assumption of mens rea as a shared presumption to the legislature merely in virtue of its commitment because the majority of its audience is manifestly not familiar with the doctrine (this also holds if the commitment is mutual).

However, what I do agree with is Goldsworthy's (2019, p. 188) claim that the legislature is clearly committed to mens rea. More specifically, on my account there is not only a commitment to mens rea by the legislature but a mutual commitment to it between the legislature and its audience. And the reason that there is such a mutual commitment is the same as for the presumption against extraterritoriality, namely that mens rea is an established part of the legal systems in question. That it is part of them is highlighted by the fact that mens rea is a doctrine of these legal systems or, more specifically, a modifier *law*, i.e., a norm of the legal system in question. And, again, since it has been shown that the legislature and its audience are mutually committed to their legal system and its norms, they must also be mutually committed to mens rea. This is all we need to show that the commitment-based version of SP can account for criminal law statutes that are affected by mens rea, for it shows that mens rea is part of the common ground that determines the commitments that are incurred in virtue of these statutes. The idea is that the commitment that is incurred through a criminal law statute that does not specify that a certain act must be performed with the intention of wrongdoing in order to constitute a crime is implicitly restricted by the mutual commitment to the mens rea doctrine to the commitment of attempting to produce a legal norm that only criminalizes the act if it is performed with that

intention.

5.3.2. Retrospectively operating modifier laws

I argued, following Smith (2019), that even if intention-based versions of SP might be able to explain standard modifier laws such as mens rea in some way they are nonetheless incapable of explaining the specific variety of retrospectively operating modifier laws: laws that modify the legal content of a statute after the statute's enactment. Here, I will argue that the commitment-based version of SP can successfully explain such laws. As already announced, the explanation relies on the claim that the communicative content of an utterance can change over time. I take this claim to be by far the most controversial aspect of the explanation and therefore this sub-section is for the most part an extended attempt to establish this claim. My attempt owes a lot to a similar argument that has been presented by Mark Richard (1995; 2004) and that is based on Lewis's (1979) widely accepted theory of accommodation. However, although I highlight Richard's endorsement of some of the key points along the way, I try to present the argument mostly in my own words, use my own examples and add further ideas because this will allow me to be more concise and to tailor it to the requirements of my own account. I will eventually also argue that the argument does not need to specifically rely on Lewis's theory of accommodation. Nonetheless, it is useful to start by briefly outlining this theory in order to understand the theoretical basis of Richard's argument.

According to Lewis, accommodation occurs in cases in which for an utterance to be true or otherwise acceptable the context in which it occurs needs to have a feature (e.g., contain some piece of information) that it does not yet have before the utterance is made. In such cases, the relevant feature is simply added to the context when the utterance is made (i.e., accommodated) at least as long as the interlocutors do not object. Consider the following example. Suppose that A and B, who have not yet established a clear standard for

what counts as tall, are walking down the street and see former NBA player Tony Parker. In that situation, A says:

(1) A: Tony Parker is tall.

For this to be true, some standard of tallness is needed on which Tony Parker counts as tall and it might be, for instance, the average height of an American male which is 1.75m. Since Parker is 1.88m he would count as tall on that standard. If B does not object, this standard (or something like it) becomes part of the context and will therefore be accommodated. In this particular case, accommodation occurs because "tall" is a vague term and such terms require a fitting standard to be appropriate in a particular speech situation. However, Lewis himself has observed that accommodation does not only occur in relation to vague terms but also many other kinds of expression. Another standard example are presupposition triggers such as "*my* car" or "*the* King of France". Since the use of these expressions presupposes that the speaker has a car or that there is a King of France these objects will be added to the context in the relevant cases.

Herman Cappelen and John Dever summarize the main idea of Lewis's account and virtually all subsequent theorizing about accommodation as follows: "the central thought is this: a feature of context that was not in place before the speech act happened is put in place because of that very speech act. *The very context that determines the content of a speech act is, in part, created by (or shaped by) that very speech act*." (2016, p. 180). Taking for granted that Cappelen and Dever speak of communicative content here (e.g., semantic content or sentence meaning would be clearly implausible), this highlights the important point that in cases in which an utterance leads to accommodation its communicative content is not already determined by the context that was in place before the utterance was performed. Instead, the utterance itself provides a part of the context that determines its own content. This also applies to our example and makes it the case that the communicative content of A's utterance is that Tony Parker is tall *for an American male*.

Up to this point I only considered cases in which accommodation is successful. But note that the addressee might also reject the relevant contextual standard. For instance, B might respond as follows:

(2) A: Tony Parker is tall.

B: I do not think that he is tall. The average male NBA player is 2.01m, so Parker is well below average.

Here, B refuses a standard of tallness on which Parker counts as tall and relies on the standard of an average male NBA player instead. Such cases are usually analysed as disputes or negotiations about the context of the conversation, for they are disputes about the contextual standard that should be used.[116] As such, they are also disputes about the communicative content of an utterance since – as we have seen – the content of an utterance depends on its context. Again, this point is made explicit by Cappelen and Dever when they explain such disputes (speaking of communicative content as "meaning"): "In their joint context neither one wants to accommodate the other. What happens? We can describe the process as a form of negotiation over meaning or over context that determines meaning." (2016, p. 181). Hence, in a situation in which interlocutors engage in a dispute about the context of an utterance, its content will be determined by the standard that they agree upon *after* the utterance is made (if they manage to agree on a standard, at all). This is a consequence of the fact that for some feature to be part of the context it must be *common* ground, i.e., the feature must be the subject of *common* belief, *shared* acceptance, *mutual* commitment, etc.

The fact that a negotiation over context and content takes place is illustrated by the fact that once such an agreement is reached it would not be inappropriate for A to say that

[116] This type of discussion has often been referred to as "metalinguistic negotiation" (e.g., (Marques, 2017; Plunkett & Sundell, 2013; Richard, 2004). I do not want to commit myself to any particular view that is adopted in the rich literature on this subject but only to claim that people do engage in metalinguistic negotiation which I take to be sufficiently uncontroversial by now (though see (Cappelen, 2018, pp. 163-179) for some second thoughts). In particular, I do not mean to commit myself to the claim that metalinguistic negotiations are 'merely' about language use and not the manifestations of more substantive disagreements. This claim has been forcefully attacked by theorists such as Teresa Marques (2017) and Richard (2004).

his initial utterance was false:

(3) A: Tony Parker is tall.

B: I do not think that he is tall. The average male NBA player is 2.01m, so Parker is well below average.

A: Hmm, you are right: most NBA players are taller than Parker. Michael Jordan was 1.98m, LeBron James is 2.06 and they are not even the tallest players. So, I was wrong when I said that Tony Parker is tall.

Here, it is not only the case that the standard that would have to be part of the context for A's initial utterance to be true was not accommodated but also that a contextual standard is accepted that makes the utterance false, namely the height of an average NBA player. But, and this is crucial, note what has to be the communicative content of the initial utterance for it to be false. It must be *that Tony Parker is tall for a male NBA player* and it cannot be *that Tony Parker is tall for an American male* because the utterance would not be false in that case. This illustrates the theoretical point made above that in such a case the communicative content of A's initial utterance is determined by events that occur *after* the utterance is made because the content is determined by the contextual standard that A and B come to share.[117]

Having developed the argument in a similar fashion and relying on an example in which the contextual standard for the vague term "square" is negotiated, Richard draws the following conclusions:

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[117] Note that the example also illustrates what has rather been assumed thus far in setting out the example, namely that it would not be reasonable to think of context as a merely epistemic tool to indicate the communicative intention of a speaker. The reason is that in that case it would not make sense for A to say that his initial utterance was false, since the contextual shift would not have affected his initial communicative intention (which we can stipulate to be that Tony Parker is tall for an American male) and therefore also not the utterance's communicative content. Note also that the claim is not that A *has* to accept the contextual standard that is proposed by B. Instead of going along with the standard of NBA players A might insist that the standard that he presupposed or intended to be using was that of average American males and that on this standard his assertion was true. My claim is merely that it is *possible* that A accepts the alternative standard and that, in this case, it would be appropriate for him to say that he was wrong. Relevant here is also that A's insistence that he intended to be using a different standard does not necessarily have to be the end of the negotiation over the context (and content) of the utterance. This is illustrated by the fact that it is open to B to respond that, despite A's intentions, he still thinks that A was wrong because a more reasonable standard in the light of Parker's NBA history would be that of NBA players. This suggests that A does not have the sole authority over the content or the context of his utterance.

> Lewis's observation about 'square' was that its use at a time t in a conversation can shape the semantic properties of sentences being uttered at t and thereafter in the conversation. If you reflect on it, you'll see that a use of 'square' at time t in a conversation may also effect [sic] the interpretation of sentences uttered before t within the conversation. (1995, p. 564)
>
> [O]ur conversational behaviour presupposes that what transpires in a conversation at a time t may effect [sic] the interpretation of predicates used in contributions to the conversation completed (long) before t." (p. 565)

However, this does not yet show that the content of the relevant utterance must necessarily have *changed*. For even though in our example the communicative content of an utterance is only fixed after the utterance has been made (i.e., at the point at which A and B agree on a standard), it might still the case that it is *only fixed at that point* and has not changed because it did not have a (fixed) content before that.

To make this further point, a modified version of the example must be construed. Suppose that A makes the same initial utterance about Tony Parker in the same situation but that this time the necessary contextual standard *is* accommodated. For instance, B might simply nod or say the following:

(4) A: Tony Parker is tall.

B: Yeah! No surprise he is so good at basketball.

Here, B agrees that Parker is tall which establishes a contextual standard on which this is true. Let us assume again for the sake of simplicity that the standard is the height of an average American, such that the communicative content of A's utterance is *that Tony Parker is tall for an American male*. But then suppose further that after this exchange A and B go to a bar where they tell their friend C that they saw Parker, that A said that Parker is tall, and that B agreed. At this point, C might say the same as B in (3) and A and B might agree with C, such that the conversation goes as follows.

(5) A: Tony Parker is tall.

B: Yeah! No surprise he is so good at basketball.

[Later at the bar…]

C: I do not think that he is tall. The average male NBA player is 2.01m, so Parker is well below average.

A: Hmm, you are right: most NBA players are taller than Parker. Michael Jordan was 1.98m, LeBron James is 2.06 and they are far from being the tallest players. So, I was wrong when I said that Tony Parker is tall.

B: [nods]

In this scenario, the communicative content that A, B and C ultimately agree upon for A's initial utterance is (as in (3)) *that Tony Parker is tall for a male NBA player*, but (unlike (3)) this is only agreed upon after A and B initially accept its content to be *that Tony Parker is tall for an American male*. This is so because here a contextual standard is initially accommodated but renegotiated later on. And my claim is that this conversational behaviour can only be explained if we say that the communicative content of A's initial utterance changes over time.[118] Its communicative content before A and B come to agree with C's proposal is relying on the accommodated standard, but its ultimate content is relying on the standard proposed by C and adopted by A and B.

Now, one might object that there is no change in the communicative content of the utterance because the content of an utterance is determined by its context and its context is determined only by what the participants to the conversation accept. And since C does not accept a standard for tallness that is based on the height of the average American, it cannot be part of the context and therefore not determine the utterance's communicative content. Instead, the utterance's communicative content would only be what I have called its

[118] Here, one might want to claim again that truth-relativism in the style of MacFarlane (2014) can offer an alternative explanation of this phenomenon because this account might be able to make sense of the different truth evaluations by claiming that what has changed is not the utterance's communicative content but its truth value. As briefly noted in chapter three, MacFarlane's theory is very complex and highly contested (e.g., (Ball, 2020)), such that it would go beyond the scope of this thesis to discuss this proposal in detail or to evaluate its plausibility. However, I also think that at least one important reason why we should be sceptical about this proposal that can be quickly stated is that MacFarlane himself only claims the truth relativist analysis to extend to a limited number of rather specific kinds of terms, and he is even quite explicit that "tall" and similar vague terms do not fall in that category (2014, p. 181). Hence, his theory is unlikely to explain our example or to provide a general explanation of the phenomenon under consideration (for more examples of the phenomenon, see below). I therefore think that we can put this proposal to the side, here.

"ultimate" content: the one that is based on the contextual feature that all three eventually come to accept. While I think that this is correct if we consider the conversation as a whole, it is important to take into account that initially the conversation only has A and B as participants such that the requirement that all participants accept the context is not violated if we claim that its initial content is *that Tony Parker is tall for an American male*. It is only once C gets involved and indicates disagreement that the context shifts and that the content changes, as well. If we hold that the content of A's initial utterance is the same throughout, then the utterance does not have a communicative content until A and B tell C about it and agree on a shared standard. But this is clearly implausible. Had A and B been asked on their way to the bar what they have just been talking about it would surely have been appropriate for them to report that A said *that Tony Parker is tall for an American male*. The same would hold if the two had never met C. This is certainly a datum that must be made sense of, and I do not see how this can be done if one holds that the communicative content of an utterance cannot change. Here, my position is close to Richard's:

> there is every reason to say that in the sort of case we are considering the utterance occurs in at least two contexts. For it occurs within the context established by his utterance at the time he makes it (we might call this the utterance's *local* context), and it occurs within the global context determined by the conversation taken as a whole. (1995, p. 566)

The idea is that in the kind of case under consideration there is a local context of the utterance and a global context, both of which determine the communicative content of the utterance within their domain, so to speak. In our case, the local context is the initial exchange between A and B, and the global context is the entire exchange in (5). The global context is of course the one that ultimately determines the communicative content of the utterance, and it is the important context all-things-considered. However, none of this shows that the communicative content of the utterance could not have changed or that only the global context can determine the utterance's content, because at some point the local context of the utterance used to be its global context. And note that what is the global context *now* might

also change in a way that the 'ultimate' communicative content will change again. Finally, note that although the utterance "occurs" in different contexts, as Richard puts it, it is still the *same* utterance, so we do not have several utterances with different contents. Rather, the content of the same utterance is different in different contexts throughout time.[119]

Following Richard, the argument that the communicative content of an utterance can change has been constructed on the basis of Lewis's theory of accommodation. However, I think that it is not difficult to extend the argument to cases that do not involve accommodation, i.e., standard cases in which the relevant contextual feature is already accepted at the beginning of the conversation. To illustrate this, consider that we can easily imagine that exactly the same conversations about Tony Parker might start from a situation in which it has already been established at some earlier point that 1.88m counts as tall, so it does not need to be accommodated. One example would be a context in which it has already been established at some earlier point in the conversation that Will Smith (also 1.88m) is tall. Nonetheless, we can imagine that when they come to talk about Tony Parker, B (or C) suggests applying a different standard because of Parker's history in the NBA and A (and B) might go along with it, such that A ends up saying that he was wrong when he said that

[119] Another theorist who notes that Lewis's theory has the implication that the content of an utterance can be affected by sub-sequent events is Derek Ball (2018). As I understand him, Ball (2018, p. 381) rejects the claim that the content of an utterance can change, but the problem with this claim is that he does not consider cases in which there is a subsequent renegotiation of the contextual feature that is first accepted by the participants. And, as explained, it is this type of case that is crucial to make the point. Also note that Ball (2020) has recently provided further arguments to the effect that the meaning of an utterance or other expression can be affected by subsequent events. He calls this view "temporal externalism" because it is a specific form of semantic externalism. Roughly, semantic externalism is the claim that the (semantic) meaning of an expression is not (only) determined by the internal state of a speaker (what is 'in the speaker's head') but (also) by facts external to the speaker. According to temporal externalism the meaning of an expression is determined by the whole pattern of use of an expression which does not only include its use at the moment at which it is pronounced and how it has been used before that but also by how it will be used in the future. Indeed, Ball is not the only proponent of this otherwise rather rarely adopted view and his article is only one of several of a recent volume in which this view is discussed and adopted by other theorists (see (Jackman, 2020) for an introduction and overview). The view proposed here is not a version of temporal externalism thus understood for at least two reasons. First, while temporal externalists claim that the meaning of an expression is determined by its whole pattern of use, including its use outside of a particular conversation, I try to establish that it is determined by the contextual features in a particular conversation. Second, temporal externalists claim that the meaning or content of an expression is already determined by its future uses *when it is used* while I am arguing that its content changes *when a different contextual standard is adopted*. In other words, for temporal externalists the meaning of an expression does not change despite being determined by future uses. Indeed, this is also the reason why I think that temporal externalism ought to be rejected, for I find it highly problematic to say that the meaning of a term can be determined by something that does not exist or has not occurred, yet.

Parker is tall. Again, it seems that this communicative behaviour cannot be explained if we do not presume that communicative content can change. This shows that the underlying reason why communicative content can change is not that a particular contextual feature must be accommodated but rather that the context that determines communicative content is subject to negotiation. The primary motivation behind using accommodation to develop this point was that it is a widely adopted theory which highlights the point rather clearly, since the contextual feature to be accommodated must be approved and is therefore more prone to be negotiated than a feature that is already established. But this does not exclude the possibility that already established parts of the context can be negotiated, as well.

I would also like to highlight that the argument can be applied to a wide range of terms. In principle it seems applicable to every term that is vague or otherwise context dependent because it seems generally possible to renegotiate the aspect of the context that determines the content of a context-sensitive term. And since it is widely accepted that most or even all terms are vague or otherwise context dependent, this is arguably a very large class (Richard, 2004, p. 228). Let me illustrate this by providing parallel examples for a verb and a noun. First, consider an example involving the term "can" that is due to Richard Holton and that is presented by Cappelen and Dever (2016, p. 178):

(6) We can't get to London in time for the conference.

In order for this utterance to be true, the contextual standard is very unlikely to be that of physical possibility, for – depending on the location of the interlocutors and the amount of time left – it might still be that a speed far short of the speed of light can get the interlocutors to London in time or even that a private helicopter might do so. Rather, the standard that must be accommodated for the utterance to be true is something like that of the standard means of transportation. Hence, if the addressee responds by pointing out that her helicopter might take them there and the speaker goes along with that, then it would not be inappropriate for the speaker to say that what he said was false. Second, consider a noun like

"man". It might very well be that up to some point in time some group of interlocutors only uses "man" to refer to cisgender men but then agree that it should be extended to transgender men (understood as those individuals who self-identify as men but whose biological gender at birth was female). It might or might not be reasonable to adopt this as a standard but once it is adopted it would not be inappropriate from a conversational perspective for the interlocutors to say that they were wrong when they said in earlier exchanges, "transgender men are not men".

If what I have argued is correct, then a case has been made that it is generally possible for the communicative content of utterances to change. This opens up the possibility of explaining retrospectively operating modifier laws in a way that is compatible with SP because it makes it plausible that the communicative contents of statutes can change, as well. More specifically, the idea is that in a case in which a retrospectively operating modifier law is introduced in a legal system, this constitutes a renegotiation of statutory context which affects the communicative content of the relevant statutes. To illustrate this, consider, our main example of a retrospectively operating modifier law: s. 3 of the U.K. Human Rights Act 1998. According to s. 3, all statutes, including those that were enacted before the Human Rights Act, must be interpreted, and given effect to in accordance with the European Convention of Human Rights, as far as this is possible. The idea is then that upon its enactment s. 3 changed statutory context for existing and future statutes in such a way that their communicative contents had to be compatible with the Convention rights. Hence, statutes whose communicative contents were incompatible with these rights before the Human Rights Act was enacted were retrospectively modified by s. 3 in such a way that they were made compatible with them. As a result, the communicative contents of the relevant statutes corresponded to their legal contents and therefore these statutes do not provide counterexamples to SP.

However, our work isn't done yet. For it has been shown in chapter three that even if

we simply assume for the sake of the argument that the communicative contents of statutes can change as a result of retrospectively operating modifier laws, this does not yet show that a theory of communication is able to account for this possibility. More specifically, we even considered the possibility that an intention-based theory of communication might allow the communicative content of certain statutes to change by claiming that a legislative body can change (or be reasonably said to change) the communicative intentions that it has in relation to these statutes. However, it was argued that even in this case it would still fail to account for a specific feature of retrospectively operating modifier laws, namely that they often affect large numbers of pre-existing statutes. Not only is there no evidence that the legislature systematically keeps track of the many legal implications of a retrospectively operating modifier law and that it changes its communicative intentions accordingly, but the vast number of statutes also makes it simply implausible that it does so (Smith, 2016, p. 250).

I do not think that the commitment-based version of SP is subject to the same problem but let me first explain how it accounts for the claims that the communicative content of utterances can change. Since it claims communicative content to be determined by the commitments that are incurred in virtue of an utterance, the commitment-based theory of communication must claim that for the communicative content of an utterance to change the commitments that are incurred in virtue of it must change over time. And because it claims that the commitments that are incurred in virtue of an utterance depend on the mutual commitments of interlocutors it needs to claim further that for communicative content to change the mutual commitments of interlocutors must also change in the appropriate ways. We can apply this to explain our example from ordinary conversation as follows. In their initial conversation, A and B are mutually committed to the height of an average American male as the contextual standard for evaluating whether Tony Parker is tall because this commitment either pre-exists A's utterance or because it is accommodated by B. However, once C joins the conversation, there is no evident reason why it would be appropriate to

attribute the same mutual commitment to her. Indeed, once it becomes the subject of the conversation, C refuses to commit herself to this standard and convinces the others to adopt a different standard, namely that of male NBA players. In virtue of their mutual agreement, A and B rescind their initial mutual commitment in favour of a mutual commitment with C to the more demanding standard. As a result, the communicative content of A's initial utterance changes, as well.

An analogous explanation can be used for retrospectively operating modifier laws. When such laws are introduced into a legal system a mutual commitment to these laws is incurred by those who are committed to the legal system in virtue of the fact that it is now part of the legal system. As such, it becomes a part of statutory context and thereby affects the communicative contents of existing and future statutes in a way that is compatible with SP (i.e., such that they correspond to the legal content of statutes). To apply this to our main example: the idea is that s. 3 generates a mutual commitment for those who are committed to the legal system of the United Kingdom to interpret and give effect to pre-existing and future statutes in a way that is compatible with the European Convention of Human Rights, as far as this is possible. As noted, the fact that s. 3 leads to a commitment along these lines is even affirmed by Goldsworthy when he says that "the Human Rights Act 1998 (UK), s. 3 […] declares Parliament's standing commitment to respect [Convention] rights, and charges the courts with helping it to do so through their interpretation of other legislation. (2019, p. 188). It might be worth noting that although s. 3 and other retrospectively operating modifier laws are in many respects analogous to renegotiations of the context in ordinary conversations, they also have the special feature that they do not require any direct agreement by those who are affected. The reason is that their commitment is guaranteed in virtue of the audience's commitment to the legal system as it involves a commitment to all its norms, including retrospectively operating modifier laws.

We can then finish by briefly noting why commitment-based versions of SP are not

undermined by the fact that retrospectively operating modifier laws can affect a vast number of statutes. The reason is of course that commitments have the important feature that in order for them to be incurred, those who are involved neither have to keep track of their commitments nor to be aware of them, such that it does not matter how many statutes are affected, as the legislature does not need to keep track of its commitments in order to incur them. Hence, contrary to hypothetical intention-based versions of SP that allow that the communicative content of statutes can change, commitment-based versions of SP have the advantage that they can also account for this when retrospectively operating modifier laws are involved.

5.3.3. Applications of statutes to unforeseen circumstances

I finish this section with Smith's (2021) objection from applications of statutes to unforeseen circumstances. The objection was based on the observation that statutes regularly create legal obligations and other legal norms to act in certain ways in circumstances that have not been foreseen by the legislature. This undermines intention-based versions of SP because these circumstances cannot be plausibly said to inform the communicative intentions of the legislature, such that the communicative contents of statutes would not correspond to the contents of the legal norms that they generate. Does the phenomenon have similarly problematic implications for the commitment-version of SP? Prima facie, it is not clear why it would also undermine the commitment-based version because this version claims the communicative content of a statute to be independent from what is foreseen by the legislature. More generally, the commitment-based theory of communication on which it relies does not require that for commitments to be incurred through utterances the speaker must foresee the commitments in question or the circumstances under which it binds her actions, because the speaker does not need to have mental states that correspond to her commitments. It has already been noted, for example, that the Smiths can be committed to watering the daisies

of the Johnsons when they commit to watering their plants without entertaining the possibility that the Johnsons have daisies. Indeed, the Smiths might even have such a commitment if they do not know that there are any such plants as daisies. But, again, this cannot be the full response because it is one thing to say that circumstances do not need to be foreseen for commitments to be incurred but quite another thing to show that the necessary commitments are in fact incurred. To make this plausible, I want to return to the examples that Smith offered in support of the objection.

I start with the non-legal example: the example of a child that it instructed by its parent to purchase low-fat milk at the corner store but who – due to unforeseen circumstances – ends up having the obligation to go a nearby service station instead to buy the milk. There were two variants of the case. In one of them the corner store was out of low-fat milk such that it was impossible to purchase the milk and in the other the price had increased so much that buying the milk would have left the family without money for dinner that night. As far as I can see, what needs to be shown for both variants of the case by a commitment-based theory of communication in order to demonstrate that the child's obligation corresponds to the communicative content of the parent's instruction are two things. First, it must be shown that the commitment to purchase low-fat milk at the corner store that is created by the instruction is not unconditional in the sense that it does not apply in the respective circumstances. Second, the child must *also* incur the commitment to purchase low-fat milk at the service station under the given circumstances.

The first point can again be made by relying on the fact that the mutual commitments that constitute the common ground can limit the commitment that is incurred through an utterance. To illustrate this with a related case, consider Wittgenstein's (1953, §70) famous example that an instruction to show a child a game does not apply to gambling regardless of whether the instructor made this explicit, thought about gambling or intended to exclude this possibility. This can be explained by reference to the mutual commitments that restrict the

commitments that are incurred in virtue of utterances which, in this case, include the general or commonsensical commitment not to teach children gambling. Similar considerations apply to Smith's example. People are generally committed to act on such commonsensical propositions as that someone cannot purchase an item that the relevant shop does not have in stock and that dispensable items should not be purchased at a price that is so inflated that it would leave the family without dinner. Hence, the commitment that is incurred is clearly not unconditional but implicitly restricted in such a way that there is only a commitment to purchase the low-fat milk at the corner shop *if* the shop has it in stock and *if* it comes at an affordable price.

The other question is if the instruction also generates the further commitment to purchase the low-fat milk at the service station under the relevant circumstances. I believe that it does because we have seen that, as part of undertaking commitments to act in certain ways, people also undertake further 'extended' commitments if they cannot act as they were supposed to or if they fail to do so. If Alex is committed to buy eggs on his way home but forgets to do so, he will still be committed to get back into the car to get the eggs. Similarly, if Alex commits himself to get six eggs on his way home but finds that the only shop that is still open only has four eggs left, he will still be committed to get the four eggs rather than to go home empty-handed. More specifically, it was noted that, as a general matter, there is not only a commitment to act as required in such cases but also a commitment to act in a way that comes as close as possible to how one was supposed to act if this is not possible. What exactly one is committed to in such cases – i.e., what it means to act in a way that is as close as possible to how one was supposed to act – is again determined by the mutual commitments that constitute the common ground. It is determined by such mutual commitments as that failing to live up to one's commitments commits one to make up for it in the best way possible or that the main purpose of buying the eggs that Alex and Barbara are mutually committed to is to bake a cake and that four eggs are sufficient for that purpose.

The same applies to the example of the child. If the child cannot get the low-fat milk for a reasonable price at the corner shop because the corner shop doesn't have it in stock or because it has become prohibitively expensive, the child will still be committed to act in a way that comes closest to doing so which, in this situation, is to get it at the nearby service station. The relevant mutual commitments that make this the case are not only the mutual commitments that make the child's commitment subject to certain conditions (such as that the low-fat-milk must be affordable) but also such mutual commitments as that the family has a strong preference for low-fat milk rather than full cream milk, which the child could have purchased at the corner shop for a reasonable price. Other relevant mutual commitments are that the child should do so at a location that is closest to home (or to the corner shop) which, in this case, is the service station. This is of course not to say that these mutual commitments will always dictate one particular course of action. If there were no mutual commitment that the family's preference for low-fat milk is very strong, then it might be appropriate to say that the child had no particular commitment to either go to the service station to purchase low-fat-milk or to purchase full cream milk at the corner shop. (Though the child would still be committed to do one of them). Note again that for this to be the case the particular circumstances do not need to be foreseen because the commitments that are shared between the parent and the child do the work.

I now turn to Smith's example from statutory law: the case of *King*. As explained, the relevant issue in this case was whether the Affordable Care Act imposes an obligation to provide tax credits to people who purchase an insurance policy through a federal exchange, despite the fact that s. 1401 only explicitly states that tax credits should be given to those who purchased an insurance policy through a state exchange. The question arose because Congress did not foresee the possibility that 34 of the 50 states would not establish an exchange, even though it did foresee the possibility that some of them would not do so and therefore gave permission to create a federal exchange through s. 1321. Smith argues

convincingly that under the unforeseen circumstances s. 1401 also obligates government to provide tax credits to those who had purchased their insurance from the federal exchange because not doing so

> would undermine the effectiveness of the Affordable Care Act, since it would remove the incentive for healthy people to take out insurance in 34 out of 50 states. This is analogous to insisting, in the version of the corner store example in which the corner store has just tripled the price of low-fat milk, that [the child] should do what [the parent] said and purchase the milk there even if this would leave the family without enough money for dinner that night. (2021, pp. 105-106)

I agree with Smith on these points, but I disagree that they are at odds with SP. A commitment-based version of SP can account for them by relying on the fact that just as the parent's instruction must be understood against the mutual commitment not to leave the family without dinner the relevant statute must be understood against the mutual commitment between legislature and its audience for government to make affordable healthcare available to its citizens. This mutual commitment is incurred by them in virtue of the Affordable Care Act as a whole which constitutes the immediate context of the statute and to which they are committed because it is part of the legal system. More specifically, this mutual commitment is not only evident in the name of the act but also made explicit by Title I under which s. 1401 and s. 1321 are grouped and that is supposed to provide "affordable healthcare for all Americans". When it comes to s. 1401 this commitment is pursued by means of providing tax credits, but in the unforeseen case in which most states did not establish their own exchanges these tax credits could not be provided to many people if the commitment that is incurred was limited to insurance policies that were purchased from a state exchange. Because this would not be in pursuit of the overarching commitment of the Act to provide affordable healthcare to its citizens (it would, as Smith notes, "undermine its effectiveness"), the statute should be understood as committing government also to provide tax credits to people who have purchased their insurance from the federal exchange. Put somewhat differently, the commitment to provide tax credits only to those

who purchased their insurance through a state exchange is conditional on the establishment of state exchanges by most states and since this condition is not satisfied s. 1401 generates the commitment to act in a way that is as close as possible to what it would have been committed to if the condition had been satisfied. In the context of the Affordable Care Act which imposes a general commitment to make healthcare affordable for all citizens – and specifically s. 1321 which provides the possibility of establishing a federal exchange – this generates the commitment to provide tax credits also to those who have purchased their insurance through the federal exchange.

The idea is of course that similar explanations can be provided for other cases in which the circumstances under which a statute applies are not foreseen. This claim is further supported by the noted fact that the commitments that are incurred through speech acts do not need to be foreseen by the interlocutors.

5.4. The objection from parochialism

In this last section, I address the objection from parochialism. The section is comparatively brief because I believe that a lot of the necessary argumentative work has already been done in the previous sections and only needs to be generalized here. To briefly reiterate, the objection from parochialism claims that there is a standing possibility that legal systems can have features that are systematically at odds with SP. For example, it is claimed that a legal system might contain rules and other norms that specify that the legal contents of statutes are determined by types of meaning other than communicative content – such as sentence meaning or semantic meaning – or supposedly not even a type of meaning but by something else, such as the indication that the statute provides of the legislature's legal intentions, which are non-communicative intentions to change the law in a certain way. It is objected on this basis that SP fails to provide a universal explanation of the legal contents of statutes and that it is therefore at most a parochial theory with limited philosophical relevance.

The response of the commitment-based version of SP is based on the observation that even in the hypothetical legal system that we are considering the feature that would supposedly make it the case that the legal content of a statute is determined by its sentence meaning, semantic meaning, indication of legal intention, etc. rather than its communicative content, would still be a feature *of the legal system*. However, as argued in the first section, if this is the case then the legislature and its audience will be mutually committed to this feature because they are mutually committed to the legal system which includes all its rules and other features. As such, the mutual commitments to this feature will (co-)determine the commitment that is incurred through a statute. This commitment might then be a commitment to the attempt of producing a legal norm whose content corresponds to the statute's semantic meaning, sentence meaning, indication of legal intention, etc., but the incurred commitment will *also* be the communicative content of the statute. The reason is simply that the communicative content of a speech act (such as a statute) is the commitment that it generates. Therefore, the communicative content of the statute would still correspond to its legal content, such that SP is not undermined by the possibility of legal systems with such features. More generally, this claim can be said to hold universally, because the specific features of a legal system that would supposedly undermine SP would necessarily be part of the legal system in question, such that there would necessarily be a mutual commitment to them by the legislature and its audience which guarantees that these features would affect the communicative contents of statutes in the appropriate ways.

Indeed, this is also the reason why the objections from *actual* legal practice that have been considered in the preceding section fail, since in the respective cases there are commitments to the relevant features of the legal system, such as mens rea, s. 3(1) of the Human Rights Act, the purpose of providing affordable healthcare, and so on. Since there are commitments to these features, they will determine the commitments that are incurred through statutes and therefore also their communicative contents. As such, the explanations

provided in the previous section are illustrations of how this general explanation works in practice. In the following, I want to extend this explanation by applying it to the specific examples of legal systems in which the content of statutory norms is determined by sentence meaning, semantic meaning or the indication that the statute provides of a legislature's legal intent.

To begin with, consider a potential legal system with a feature that specifies that the legal content of statutes is determined by sentence meaning. The legal content of the statutes of this system would be exclusively determined by the linguistic conventions that determine sentence meaning and the feature of the legal system that makes this the case. However, this legal system would not constitute a counter example to the commitment-based version of SP because the commitment to these linguistic conventions and the relevant feature of the legal system – being common ground – would generate a commitment to the attempt of producing a legal norm whose content corresponds to the sentence meaning of the relevant statute. Being a commitment, this would also constitute the communicative content of the statute in question such that there would not only be a correspondence between legal content and sentence meaning but also between them and the communicative content of the statute. Pretty much the same holds for a legal system in which legal contents are determined by semantic meaning. The only difference would be that the legal contents and communicative contents of statutes would correspond to a content that is not determined by linguistic conventions alone and the relevant feature of the legal system but also by contextual information that must be considered in virtue of the linguistic rules that are associated with indexicals, ambiguous terms and potentially other directly context-sensitive expressions.

Here, one might want to object that in the legal systems that we envisage the commitments that are created by a statute are only determined by a very limited set of the mutual commitments that hold between the legislature and its audience. This might be claimed to be incompatible with the commitment-based version of SP because this version

claims that the commitment that is incurred through a statute depends on all the mutual commitments between the legislature and its audience, and these also include further commitments, such as the mutual commitments to other legal norms. But although this characterization of the commitment-based version is correct as far as it goes, I do not think that it is incompatible with the proposed explanation. The reason is that although the commitment-based version claims that the communicative content of a statute depends on all the mutual commitments between the legislature and its audience, it does not claim that all these commitments must be directly operative, so to speak, in the determination of the communicative content of the speech act. It is only the commitments that apply to the particular speech act that will determine or at least directly affect its content. To illustrate this idea with an example from ordinary discourse, consider that while Alex and Barbara might be mutually committed to act on the proposition that Alex will buy eggs on his way home this commitment will of course be irrelevant to the commitment that is incurred in virtue of Barbara's utterance "The Battle of Waterloo was fought in 1815." Similarly, the legal systems under consideration are such that they contain a feature to which the interlocutors are committed that happens to make it the case that the relevant commitments will merely be the relevant linguistic conventions, or some other limited set of commitments that must be considered for disambiguation and reference resolution. Put somewhat differently, in such systems the commitment incurred still depends on all mutual commitments between the legislature and its audience, but these systems just happen to be such that they contain a mutual commitment to a feature that makes the mutual commitments that are directly operative only those that determine sentence meaning or semantic meaning.

We can also use a structurally analogous explanation to account for the possibility of a system in which legal contents are determined by what the statute indicates about the legislature's legal intentions. In such a system, there will be a mutual commitment to the feature of the legal system that makes this the case, such that the commitments undertaken

by statutes will have propositions (or action types, etc.) as content that correspond to what the statute indicates about the legislature's legal intentions. Obviously, in such a legal system it would need to be the case that legislatures *do* have legal intentions or are at least likely to have them, for otherwise statutes could not be reasonably said to act as indicators of such intentions. The potential existence of such a system is not at odds with my account because I have explained in chapter three that I am not a sceptic of the possibility of legislative intention or collective intentions more generally. For instance, in such a system lawmakers might generally have convergent intentions à la Bratman as to how statutes are supposed to change the law or they might generally have the necessary joint commitments to a legal intention that are required by Gilbert's theory of collective intention, etc. The idea is of course that analogous explanations to the ones just provided could also be given for possible legal systems in which the legal contents of statutes are determined by something else than sentence meaning, semantic meaning, or what a statute indicates about legal intentions.

I finish by addressing one last, though important, potential objection. While it might be accepted that a feature of a legal system that determines its legal content must also be the subject to a mutual commitment between the legislature and its audience and thereby ensures that the communicative content has a corresponding determinant, one might object that there is nothing in my account to ensure that the opposite also holds: namely that the mutual commitments that determine the statute's communicative content have an analogue among the determinants of legal content. More succinctly: it is not clear why on my account a feature that determines communicative content must also determine the content of legal norms. Here, one might return to my claim that mutual commitments to various types of information *other* than legal language and the corpus juris might hold between the legislature and its audience, such as the propositions of common sense. And one might further claim that although mutual commitments to common sense determine the commitments that are incurred through statutes and therefore their communicative contents, it is not clear why

common sense would also have to determine the content of legal norms. Something similar might hold for mutual commitments to other types of information. Although this objection is not directly based on the specific problems that were considered as part of the objection from parochialism, it must nonetheless be taken into account here because it would establish that the legal content and communicative content of a statute do not necessarily correspond.

My preferred strategy to respond to this objection relies on the claim that the communicative content of a statute must necessarily be a commitment of the legislature to the attempt of producing a legal norm with a certain content (as well as the necessary mutual commitments by the legislature and its audience). I take it that this has been sufficiently established by the following considerations. First, it has been argued that statutes are necessarily effectives because their defining function is to create certain institutional states of affairs, namely legal norms, and because they necessarily rely on institutional norms to do so. Further, it has been shown that commitment-based theories of communication claim effectives to be commitments to attempts of producing institutional norms such that the communicative contents of statutes must be commitments to the attempts of producing legal norms. Finally, it has been shown that this feature of statutes can be accounted for due to the fact that statutes are performed by legislative authorities in their capacity of making laws which cannot but commit them to attempts of producing legal norms with certain contents when enacting statutes (see the first section of this chapter).

Relying on the fact that the communicative content of a statute must be the commitment of the legislature to the attempt of producing a legal norm with a certain content, we can highlight that the content of the legal norm that the legislature commits itself to attempt to be producing just is its legal content. However, and this is important, this content could not be affected by the mutual commitment that is postulated by the objection that we consider exactly because, *ex hypothesi*, the mutual commitment is a commitment to a feature that does not affect the legal contents of statutes. As such, it also cannot affect the content of

the legal norm that the legislature commits itself to attempt to be producing in virtue of the statute. The most such a mutual commitment could perhaps do is to affect the legal norm (rather than the content of this norm) that the legislature commits itself to attempt to be producing (e.g., to make it a legal rule rather than a legal obligation), but since what is relevant is the content of the norm, this would not undermine SP. This might sound abstract or potentially confusing, so let me use the example of common sense to illustrate this. We assume, following the objection, that there is a mutual commitment to common sense that determines communicative content but not the content of legal norms. In that case, this mutual commitment could not lead to a situation in which the communicative content of a statute does not correspond to the content of the legal norm that it generates for the following reason. As in all other cases, the communicative content of this statute would be a commitment to the attempt of producing a legal norm with a certain content. But since the content of the legal norm that the legislature commits itself to attempt to be producing is nothing but its legal content, this legal content could not be determined by the mutual commitment to common sense exactly because, ex hypothesi, the mutual commitment to common sense is such that it does not determine legal content.

This, I hope, makes it sufficiently clear why mutual commitments that determine communicative contents cannot be such that they lead to a situation in which the communicative content of a statute does not correspond to its legal content. Combined with the argument that the determinants of legal contents must have analogues within the mutual commitments that determine communicative contents, this provides an argument that communicative contents and legal contents will necessarily correspond.

Conclusion

In this chapter, I presented the commitment-based version of SP and argued that it offers adequate responses to the objections that have proven problematic for intention-based

versions of SP. First, this version is not undermined by the objection from collective intentionality because it does not need to postulate legislative intentions to account for the communicative content of statutes and because the considerations that fuel this objection do not provide reasons for holding that legislatures do not undertake the necessary commitments. Second, the commitment-based version can account for the phenomena from legal practice that provided counter examples to intention-based versions. Most importantly, it explains retrospectively operating modifier laws by allowing for the possibility that the communicative content of statutes can change and it explains the application of statutes to unforeseen circumstances because it does not require that the commitments that are incurred through statutes are foreseen. Finally, it accounts for the universality of SP by conceptualizing features of a legal system that supposedly make it the case that the legal contents of statutes do not correspond to their communicative contents as mutual commitments that determine the commitments that are incurred through statutes, i.e., their communicative contents. It can also show that the mutual commitments that determine communicative content cannot be such that they lead to a situation in which communicative content and legal content do not correspond. This allows us to conclude that the main thesis of the commitment-based version of SP holds necessarily.

Conclusion

I started this thesis with the observation that there is a widespread view of how the legal content of a statute is determined: SP. SP has been provisionally characterized as the view that the content of the law that is generated by means of statutes is determined by the meanings of these statutes. Chapter one took first steps towards a theoretically more informed characterization of this view by critically examining the notion of the content of the law and the relation that is claimed to hold by SP. It was argued that the notion of the content of the law is best conceptualized in terms of the content of the legal norms that a statute creates and that the relation that is at play must be a determination relation that ensures the correspondence of communicative content and the content of the law. In chapter two I turned to the explanans of SP – the notion of meaning – and argued that that it is most plausibly conceptualized as communicative content. In this chapter it has also been observed that existing versions of SP that rely on the notion of communicative content are intention-based versions of SP because they adopt intention-based theories of communication. Chapter three discussed to what extent intention-based versions of SP are capable of resisting objections that have been raised by critics. While it was found that they are capable of defending SP against the category mistake objection and the objection from bindingness it was argued that they are unable to resist the objections from collective intentionality, legal practice, and parochialism. In chapter four the foundation for an alternative defence of SP was laid by means of presenting an alternative theory of communication: the commitment-based theory. This theory has been applied to SP in chapter five and it has been argued that it is capable of defending SP against the objections that undermine intention-based versions.

While I take this to show that commitment-based versions of SP are more robust than intention-based versions I would like to finish by stressing again that the defence of SP that has been offered in this thesis is not a full defence and that more work remains to be done.

More specifically, the defence of SP that has been offered only considered SP in relation to statutes and not to other legal texts and it was conditional to the extent that it assumed that SP is compatible with the correct theory of the nature of law as well as that a commitment-based theory of communication is the right theory of communication. We can therefore identify the questions of whether SP also extends to other legal texts, whether it is compatible with the correct theory of the nature of law and whether the commitment-based theory of communication is correct as important questions for further research. The same goes for the question of how the commitment-based version of SP relates to debates about statutory interpretation such as the debate among textualists, intentionalists and purposivists. But although answers to these, and certainly many other, questions must be left for another occasion, I hope that opening up the possibility of defending SP on the basis of a commitment-based theory of communication has provided a valuable contribution to the literature concerning SP and related subjects, and that it will help to advance future discussions.

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