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The Communication Theory of Legal Interpretation and Objective Notions of Communicative Content

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1. In a recent paper, *Legislation As Communication? Legal Interpretation and the Study of Communication*, I criticize an approach to statutory and constitutional interpretation that I call the *communicative-content theory of law*, or, for short, the *communication theory*. According to this approach, legal texts are linguistic texts, so the meaning of content of a legal text is an instance of linguistic meaning generally. Therefore, in order to understand the meaning of an authoritative legal text, such as a constitution, statute, or regulation, we should look to our best theories of language and communication. Such theories teach us, according to the communication theorists, that the full linguistic meaning of an utterance is what the speaker or author communicates by the utterance -- call it *communicative content* -- which may go well beyond the literal meaning of the words. The communication theorists conclude that a statute's contribution to the content of the law is its communicative content. They thus draw a conclusion about the way in which statutes affect legal obligations from the study of language.¹

In *Legislation As Communication*, I argue that the communication theory fails. Because it restricts itself to linguistic considerations, it lacks the resources to draw any conclusions about a statute's contribution to the content of the law. In the present paper, I consider how the

¹ I often hear the communication theory offered in conversation, especially by philosophers of language, and it has recently been advocated in print by Alexander (1995), Alexander and Saikrishna Prakash (2004), Boudreau et al (2007), Campos (1992, 1993a, 1993b), Fish (2005, 2008), Knapp and Michaels (1982, 1983, 2005), Marmor (2008, 2011), Neale (2009), and Soames (2009). Other writers take a similar position with a focus on constitutional interpretation. eg, Lino Graglia (1992), Richard Kay (1988, 1989). The communication theorists fall into two groups -- those working in or strongly influenced by contemporary philosophy of language and linguistics, and those defending similar positions without that influence. (Of the writers cited in the text, Marmor, Neale, and Soames are in the first group; their predecessors include Sinclair (1985), Miller (1990).) Both groups think that their shared position about the meaning of texts and utterances follows from obvious facts about the nature of language and communication. My arguments apply to both groups' positions, but I will for the most part focus on the work of the first group because of its use of philosophy of language. For an important difference in the way in which the two groups frame their main arguments, see Greenberg 2011, note 21.

communication theory would fare if it employed what I call an *objective* notion of communicative content -- one on which communicative content is not constituted by the content of the speaker's communicative intentions.

I devote a separate paper to an objective version of the communication theory for two main reasons. First, legal theorists tend to find an objective notion of communicative content intuitively appealing, so I think it is important to address explicitly a version of the communication theory based on such a notion. Second, an objective version of the communication theory suffers from a different kind of problem in addition to those explored in *Legislation As Communication*. I will argue that, to the extent that the communication theory adopts an objective notion of communicative content, it loses its distinctive features. In particular, philosophy of language cannot play the dominant role that the communication theory assigns to it.

2. My arguments in *Legislation As Communication* do not depend on precisely which notion of communicative content the communication theory employs. My main argumentative strategy there is to show that there are various candidates for a statute's contribution to the content of the law,² including different components and notions of communicative content. The communication theorists lack the resources to explain why a statute's contribution to the content of the law is constituted in one way rather than another. (I do not mean to suggest any indeterminacy in what constitutes a statute's contribution; rather, the point is that the linguistic considerations to which the communication theory appeals are inadequate to explain a statute's contribution.) In the interest of concreteness, however, and because it is the best understanding of most of the communication theorists, the discussion in *Legislation As Communication* assumes a neo-Gricean notion of communicative content. On this notion, the communicative content of an utterance is the content of a certain complex intention of the speaker: roughly, the content that the speaker intends the hearer to understand by recognizing that very intention.

We can contrast the neo-Gricean communicative content with a family of *objective* notions of communicative content. The intuitive idea is that the communicative content of an utterance is what a speaker would *reasonably be understood* to have intended to communicate. Depending on how the notion of reasonableness is developed, whether the speaker is idealized in some way, how the audience and context are specified, and so on, we get different objective notions. (I call these notions *objective* because communicative content, on such notions, is not constituted by the content of the speaker's communicative intentions.)

² The enactment of a given statute would make it the case, other things being equal, that certain legal obligations (powers, privileges, and so on) obtain. Roughly, the statute's *contribution to the content of the law* consists of these legal obligations. I define the term more carefully in my 2011, section 2.

Suppose we ask what intention a member of the audience would reasonably take the legislature to have, given that the legislature has enacted a particular statutory provision. One problem is that it is widely understood that legislatures often -- probably typically -- lack communicative intentions with respect to particular statutory provisions.³ So, given a typical statutory provision, a member of the audience would be reasonable to take the legislature to have no communicative intention. (A similar point applies to inappropriate communicative intentions.) What about asking what *a hypothetical speaker* who had uttered the words of the statutory provision in some stipulated context would reasonably be understood to have intended? In that case, we need to specify what characteristics the hypothetical speaker and the context are taken to have. It would seem, for example, that we should not assume the speaker to be engaged in an ordinary conversation. It should be obvious that there are many different ways to stipulate the relevant characteristics. I will argue that which way is correct depends on the nature and goals of legislation or lawmaking more generally.

3. Consider a promising method of developing a specific objective notion of communicative content in an ordinary conversational context. This method relies on Grice's (1975, 1989) principle of cooperation and conversational maxims. In Gricean theory, Grice's principles, properly understood, are not constitutive of what is communicated, but are simply a means for inferring what the speaker intended. If, however, we treat the maxims as constitutive of what is communicated, we get an objective notion of communicative content. On such a notion, for example, the maxims generate implicatures, for example, rather than serve as a tool for ascertaining them. The intuitive idea is that, in a cooperative communicative situation, it is reasonable to understand the speaker as intending what he would have to intend in order to be in compliance with the applicable principles. For example, if a physician says to a seriously injured patient in a hospital emergency room "you are not going to die," it is reasonable to understand her as intending to communicate that the patient is not going to die *from this injury* because, otherwise, his utterance would violate the maxim of quality.

In the case of legislation, we can develop a parallel objective notion of communicative content according to which the communicative content of an utterance is the content that the legislature would have had to intend in order to comply with the applicable principles. The applicable principles are the ones, parallel to Grice's Principle of Cooperation and maxims of conversation, that are applicable *in the legal context* -- specifically in the context of drafting and interpreting legislation (or other authoritative enactments).⁴ Call the version of the

³ See Greenberg 2011, p. XX.

⁴ I will sometimes talk of the principles for interpreting statutes rather than the principles for drafting and interpreting statutes. The principles are necessarily unified because proper drafting must depend on proper interpretation and vice versa. However, it is more familiar to discuss the principles under the rubric of principles for statutory interpretation.

communication theory that employs this objective notion of communicative content *the objective communication theory*, or, for short, *the objective theory*.⁵

There are many problems concerning what principles have a role in the drafting and interpreting of statutes analogous to the role in ordinary conversation of the Principle of Cooperation and the conversational maxims.⁶ First, the shared purpose of efficiently exchanging information plays a crucial role in the conversational case. It explains both why the maxims are rational to follow and why they are generally followed. As Grice says (1989, 28), his maxims assume that conversation "is adapted to serve and is primarily employed to serve... a maximally effective exchange of information." Given the cross-purposes and lack of cooperation both within the legislature and between the legislature and various parts of the audience, it is difficult to see what would be an analogous purpose shared by the legislature and audience across all legislation. (One piece of evidence for the lack of shared purposes is the fact that participants in statutory and constitutional interpretation do not generally follow a set of shared principles; rather, there is great controversy over the appropriate principles for statutory and constitutional interpretation.)

The audience cannot be assumed generally to share even the minimal purpose that the legislature effectively create law. In many situations, for instance, the executive branch and those subject to regulation would much prefer that the legislature not create law. Similarly, it is not clear that either the legislature or the audience will generally have even the purpose that the audience accurately ascertain what law the legislature creates (though perhaps this purpose should be imputed on normative grounds to any legislature that enacts legislation, whatever the reality). For example, given the compromises involved in the legislative process, it is probably common that a majority of those members of a legislature who vote in favor of a bill has the aim that the legislation not be interpreted accurately, but rather in a way that yields stronger or weaker regulation than was in fact enacted.

Second, in the conversational case, although the principle of cooperation and the maxims are best understood as having an at least partially normative basis,⁷ Gricean theory requires the

⁵ This version of the objective notion is a particularly promising one because it provides a way of resolving some difficult issues, e.g. how to idealize the speaker and how to precisify the notion of what a member of the audience would reasonably understand the speaker to have intended. For example, we can't simply ask what intention a member of the audience would reasonably take the legislature to have because, as is widely understood, legislatures often lack communicative intentions with respect to particular statutory provisions. See my 2011, XX. As discussed in section 5 below, the basic difficulty for the objective communication theory applies to other versions of the communication theory that appeal to objective conceptions of communicative content.

⁶ For a nice discussion in the service of a different argument, see Marmor (2001; also 2008).

⁷ Grice (1989, 29-30) says that he "would like to be able to show that observance of the Cooperative Principle and maxims" of conversation is rational given the goals of conversation and communication. He elaborates the tentative suggestion: "Anyone who cares about the goals that are central to conversation/communication... must be expected to have an interest... in participation in talk exchanges that will be profitable only on the assumption that they are conducted in general accordance with the Cooperative Principle and the maxims."

assumption that participants in conversations in fact generally conform to the principles. If they weren't generally complied with, it would not be rational to rely on them to exchange information.⁸

The point applies in the legislative context.⁹ For example, suppose it is known that, in the relevant jurisdiction, many courts will not consider legislative intentions that are not part of the semantic content of the statutory text. In that case, it would not be rational for the legislature to try to communicate a content, or to try to create a legal standard, without including it in the semantic content of the statutory text.

If the applicable norms are the ones it is rational to follow, and it is not rational to follow a norm that is not generally conformed to by legal interpreters, it is obvious that the objective theory will not be particularly helpful to legal interpreters. There's a great deal of controversy about which principles of statutory and constitutional interpretation are the right ones, and different courts and theorists follow different principles. When there is controversy about the relevant principles of statutory interpretation, legal interpreters are most in need of help. But when there is controversy about which principles are applicable, the objective communication theory has nothing to say about how to resolve the controversy. It would presumably have the consequence that the law is indeterminate to the extent that conflicting principles would yield different legal content. (Notice that the point of Gricean conversational theory is not to help participants in conversation. Rather, the point is to explain how it is that language is used by speakers and hearers to exchange information that goes beyond the semantic content of the language.)¹⁰

4. To avoid the problem that if the applicable legal principles are regarded as rational principles of communication, they have to be principles that are in fact conformed to by legal interpreters, the objective theorist could understand the applicable legal principles as the standards *appropriate* to lawmaking and legal interpretation, regardless of whether they are actually followed. Presumably, however, in that case, which principles are applicable depends not merely on instrumental rationality but on considerations of political morality, such as democracy,

⁸ We are presently discussing an objective version of the communication theory, which will sometimes attribute communicative contents that the speaker does not intend. But the claim that a speaker communicated an unintended content because that is what the principles attribute depends on a general practice of complying with the principles by both speakers and hearers. For example, it would not make sense to say that a particular content that was not intended by the speaker was nonetheless communicated if the principles that attribute that content are not ones that hearers would generally take a speaker to be following.

⁹ See Marmor 2011, 18-20; 2008, 439-440.

¹⁰ The problem is not as much a problem for the version of the communication theory that employs a neo-Gricean notion of communicative content because that theory does not make the applicable principles constitutive of communicative content.

legitimacy, fairness, and welfare.¹¹ A familiar idea is that principles for the interpretation of statutes should reflect the democratically appropriate division of labor between legislatures and courts. Less familiarly, candidates for principles that apply to enacting legislation, and therefore to interpreting it, might include, for example: law should be created so as not to conflict with the Constitution; law should be created in such a way that it is morally legitimate; lawmaking should be public and give notice to all; law that will not be complied with or enforced should not be created; lawmaking should be carried out for the public benefit. But if the applicable principles importantly depend on considerations of political morality and legal theory, the communication theory's claim to solve or dissolve the problems of legal interpretation entirely on linguistic considerations fails. And legal theorists would seem to be in a better position than linguists or philosophers of language to say what principles should be observed in order to best achieve the purposes involved in creating law.

Also, even the communicative aspect of legislation is arguably governed by moral and legal norms that are special to the legislative context. For example, the form in which the law is put into language raises important fairness and democracy considerations that at least qualify, and perhaps override, considerations of efficient transfer of information.

Even when we consider only what is instrumentally rational for a lawmaker, the question is presumably what is rational given purposes such as ensuring compliance with the law, staying in power, not having the legislation held unconstitutional, solving coordination problems, or promoting welfare. Again, it is obvious that the relevant kind of theorizing will be not purely or even primarily linguistic.

In addition, the contents constituted by the applicable principles may not look much like communicative content as it is usually understood. To take a toy example, suppose that a principle of statutory drafting and interpretation in a given jurisdiction turns out to be -- perhaps partly because of considerations of democratic theory and partly because the principle is already widely conformed to in the jurisdiction -- that a statute's contribution to the content of the law is exclusively the semantic content of its text. In that case, the objective communication theory would have the consequence that a statute's contribution to the content of the law is exclusively the semantic content of its text. (The legislature could still intend to communicate more than the semantic content, but to the extent that it understood the applicable principle, it would understand that the additional content would not form part of the content of the law.)

5. In sum, if the applicable principles must be ones that are generally conformed to, the communication theory will be of little help to legal interpreters. If the applicable principles are the ones that are appropriate for lawmaking, they depend importantly on considerations of

¹¹ For a related argument, see Marmor 2011, 19; 2008, 439.

political morality and legal theory. In that case, the distinctive features of the communication theory are lost. The study of language will not be able to play a dominant role in solving the problems of legal interpretation. The principles of statutory interpretation, which partially constitute the relevant contents, will not be obvious and will not be morally neutral.

The point is not specific to the particular objective conception of communicative content that we have been considering. Here is a very general way of making the point. Once we move away from the actual intention of the speaker -- by, for example, imposing availability requirements -- there are diverse contents that could be treated as the communicative content of legislation. The crucial question now becomes which of those contents constitutes the statute's contribution to the content of the law. (We could, of course, call this content "the legislature's communicative intention.") Philosophy of language has nothing to say about this question. Gricean theory tells us that certain actual intentions of the speaker play a constitutive role in determining what the speaker means and communicates. But it has nothing to say about what we should *deem* to be the content of the legislature's intentions -- nor about looking to contents that, for reasons of law or political morality are deemed to be what the legislature intended. In fact, calling the relevant content "the legislature's communicative intention" plays no role. We could simply ask which content is to be treated as the content of the law.

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