To Whom Is the Law Addressed?

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Yellow: Vehicular traffic facing a steady yellow signal is thereby warned that the related green movement is being terminated or that a red indication will be exhibited immediately thereafter, when vehicular traffic shall stop before entering the intersection unless so close to the intersection that a stop cannot be made in safety; pedestrians facing a steady yellow signal, except when directed by separate pedestrian-control signals, are thereby advised that there is insufficient time to cross the roadway before a red indication is shown and no pedestrian shall then start to cross the roadway.

I. INTRODUCTION

This is not terribly interesting so far. Everyone knows what yellow lights mean before reading this statute. This and other laws function in society reasonably well, even without general public familiarity with their actual statutory formulations. At the same time, formulations seem to play an essential role in certain parts of our legal system. This presents a puzzle: How is it that the written formulations matter, despite the fact that the citizenry never reads or encounters the formulations directly?

The people who are subject to the law—the citizens—are almost certain

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2. Despite the lack of attention in law reviews, traffic signals attract an unusual amount of discussion in semiotics literature. See, e.g., Bernard S. Jackson, Legislation in the Semiotics of Law, in SEMIOTICS AND LEGISLATION: JURISPRUDENTIAL, INSTITUTIONAL AND SOCIOLOGICAL PERSPECTIVES 7, 18-19 (Hanneke van Schooten ed., 1999) (discussing the treatment by others in the field on the ideological message communicated by traffic lights and analyzing whether yellow signals are permissive or mandatory under British law). Traffic laws also present an interesting example of "general deterrence" as opposed to "special deterrence," in that anyone is a potential offender. This distinction is relevant because the audience of each type of deterrence is very different: General deterrence targets the entire community, while special deterrence targets a small sociological class that is statistically most likely to perpetrate certain crimes. See JOHANNES ANDENÆS, PUNISHMENT AND DETERRENCE 11 (1974). This significant difference in audiences can dramatically affect the nature of the communication needed to convey the message to the targets.
3. For example, this is the case when the outcome of a case hinges on the meaning of one word or phrase in a statute or when a court refers to an enabling statute to determine if an administrative agency, or the court itself, has jurisdiction over a matter. See also CHARLES L. STEVENSON, ETHICS AND LANGUAGE 290-97 (1944) (discussing the philosophical issues involved when the meaning of a single term takes on legal significance).
never to read it. Average citizens do not peruse statute books even once in their lifetimes; most will never read even one full paragraph from a court opinion. Some might see this situation as warranting dramatic social initiatives to give more legal education to the population, and to rewrite laws in simple English: This was Jeremy Bentham's view, for example. In the alternative, we can seek a new understanding about the purpose and function of these written formulations that better fits the situation as we have it. This Article seeks to provide the latter by proposing a new approach, one that assumes the written formulations of law are addressed only to the state itself, not to the citizenry. The model proposed here is similar to the descriptive or "positivist" theories of Hans Kelsen and others, and in some areas builds upon Kelsen's work. At the same time, this Article incorporates new insights from the Pragmatics field of sociolinguistics, whereas Kelsen's work was informed mostly by political philosophy.

Insights from these other disciplines are useful in answering an important
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question: How does the law work as well as it does in a system where ignorance of the law, at least in regard to its specifics, is rampant? Bentham believed that his great project for modern codification would only work if the citizens knew exactly what was expected of them. To this end, he proposed that states organize their codes very logically to facilitate memorization by the masses. Bentham was not alone in this concern: Hobbes argued that an unknown law was not a law at all, and Austin wrestled with the contradiction between his definition of law as a person’s known obligations and the rule that ignorance of the law is no excuse. Today’s legal system, and society as a whole, has been heavily influenced and shaped by Bentham’s utilitarian ideals. Yet many of the laws seem to work reasonably well without the level of widespread legal literacy that he, Hobbes, and Austin thought so necessary. How could the law work as well as it does in an environment where citizens never read the actual written formulations of the law? The problem has two possible solutions. Either the written formulations themselves are irrelevant and unnecessary, or the citizenry’s direct knowledge of the formulations is not necessary for them to fulfill their true function within the operation of the legal system. If the former is true, then the words of the statutory texts should not be critical to a defendant’s conviction or acquittal, or occupy a central place in jury instructions; this is the opposite of what we often observe in the courts. If the second alternative is correct, and the written formulations do matter in the proper functioning of the legal system, it is a puzzle how they could achieve

7. The results of surveys consistently reveal that usually less than one-fourth of the general population can state whether queried activities are illegal and what the pertinent penalties are. The main exception is prison inmates, who score much higher on such tests—hindsight is 20/20, as the saying goes. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 142-59, 297-306 (1973). See also, John M. Darley et al., The Ex Ante Function of the Criminal Law, 35 LAW & SOC’Y REV. 165, 167 (2001) (studying citizens’ knowledge about certain important laws in four different states and conclusively demonstrating that “people do not have a clue about what the laws of their states hold on these important issues”).

8. See BENTHAM, supra note 5, at 122 n.A ("On the extent of the notoriety given to the laws, depends every good effect it is in their nature to produce.").

9. Id. at 119-123.

10. See THOMAS HOBBES, LEVIATHAN 202 (Michael Oakeshott ed., 1969) ("The command of the commonwealth is law only to those[] that have means to take notice of it."). Similar expressions can be found in Thomas Aquinas, Blackstone, and Locke. See M.B.W. Sinclair, PLUGS, HOLES, FILTERS AND GOALS: AN ANALYSIS OF LEGISLATIVE ATTITUDES, N.Y.L. SCH. L. REV. 237, 239 n.8. (1996).


12. Bentham’s writing contains some apparently contradictory statements about the relationship between the “law” and the written formulations. For example, in JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION Ch. 17 n.7 §2 (1907), available at http://www.la.utexas.edu/labyrinth/ipml, he states: "By the word law then, as often as it occurs in the succeeding pages is meant that ideal object, of which the part, the whole, or the multiple, or an assemblage of parts, wholes, and multiples mixed together, is exhibited by a statute; not the statute which exhibits them." Later in the same note, however, he says that the complete list of criminalized offenses, together with the "expository matter" of definitions and qualifying conditions, would be "a complete collection of the laws in force; in a word a complete body of law; a pannomion, if so it might be termed." Id.
this end while essentially bypassing the citizenry.

This Article provides an answer to the puzzle. By inquiring into the linguistic "audience" or "addressee" of the written legal formulations, a model emerges that explains both the present state of affairs and provides some insights for currently troublesome areas of legal research. The thesis presented here is that the written formulations of the law are "addressed" to the state itself, or more specifically, a set of state actors—courts, agency officials, and enforcement officers. Although the written formulations, both statutes and cases, are available to the public, the citizenry is not in "actual" receipt of the law itself, but rather the state actors bring the law to the public through their actions (e.g., interpretation, implementation, enforcement). 14

Part II of this Article will set the stage by hypothesizing how legal texts could be relevant in a society where they are either inaccessible or unused by the general population. Part III begins an inquiry into the "audience" of the law, introducing some of the linguistic terms and concepts that may be unfamiliar to some readers, as well as a brief explanation of audience theory as it has developed among linguists in recent decades. Part IV considers each of the four possible alternatives for the "addressee" of legal texts, including the ideas set forth almost twenty years ago in a well-known article by Meir Dan-Cohen. 15 This Part develops the pragmatic linguistic basis for the idea that written formulations of the law are really addressed to the state itself, not to the citizenry. Part V addresses the issue of vague or ambiguous statutory terms, considered as "regulatory variables" under the model proposed by William Eskridge and Judith Levi. 16 The final Section of Part V will look at the place of lawyers within the proposed model.

Part VI considers some practical applications of my theory, beginning with the misguided ideological agenda of revamping laws into language for the

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13. The definition of "addressee" used throughout this Article is drawn from the influential article by Herbert H. Clark & Thomas B. Carlson, *Hearers and Speech Acts*, 58 Language 332 (1982). "The addressees are the ostensible targets of what is being said. Ordinarily, they are the participants for whom the speaker has the most direct and obvious goals in designing his utterances." Id. at 344. Addressees and participants are often distinguished "through the content of what is being said." Id. at 347.

14. The idea that legal texts are addressed only to the state runs counter to what seems to be the prevailing majority intuition: The law is addressed to "the people." The concept that the law is addressed to its subject is quite old. See Hobbes, supra note 10, at 198 ("For every man seeth, that some laws are addressed to all the subjects in general; some to particular provinces; and some to particular vocations; and some to particular men; and are therefore laws, to every of those to whom the command is directed, and to none else."); Romans 3:19 (New International Version) ("quaecumque lex loquitur his qui in lege sunt loquitur," translated as "whatever the law says, it says to those who are under the law"); in the context this arguably refers only to the Jewish Torah being inapplicable to Gentiles). But see, e.g., Teubner, supra note 6, at 71 (arguing that "[f]or society, all legislation does is produce noise in the outside world. In response to this external disturbance, society changes its own internal order.").


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“common man.” In addition, the traditional precept that “ignorance of the law is no excuse” is re-examined in light of the proposed model, as well as related rules about notice, statutory vagueness, and ex post facto laws. There follows a discussion challenging the supposed deterrent/informative effects of court decisions. Part VII contains a brief summary and conclusion.

II. THE SETTING

A. No One Reads the Laws

I would like to begin with a thought experiment. Imagine a country where the citizens can never read the texts of laws (including both statutes and court opinions); for whatever reason, the laws are completely inaccessible to the public, but accessible only to government officials. For sake of vividness, we could add that the laws are encrypted in an esoteric language, like Latin or Law French. Although these could be (and were) translated into the vernacular at times by officials, for the purposes of our hypothetical the esoteric language has the effect of making public access uncommon, difficult, and costly. The hypothetical country has three branches of government, as well as a vast system of administrative agencies. There are politicians elected to public office democratically; they tell the people, through the mass media, what they are doing in general.17

In this land, signs are posted, using the fewest words possible, to tell people to do or avoid doing certain things in that place. “Stop.” “No Loitering.” “65 mph.” “Buckle Up!” “No Trespassing.”18 The signs themselves are not the laws. Nor are all the laws reduced to signage. The government officials do tell reporters from the mass media about certain rules, and the media adds this information to its own news broadcasts, perhaps in an edited form.19 Also, from time to time the police take away a citizen by force because of something the

17. See, e.g., ZIMRING & HAWKINS, supra note 7, at 147:

Passing a new law will, by itself, have no effect on the perception of those whose conduct the law seeks to alter. Formal and informal channels of communication—including newspaper and television accounts of the new threats and stories of those punished for lawbreaking—will bring the message to members of the threatened audience.

On the other hand, Darley et al. specifically studied newspaper coverage of the laws about which they surveyed their respondents to test the idea that newspapers were the main conduit of legal information, and found almost no reporting of important changes where a state legislature adopted a rule out of step with the majority of other jurisdictions. Darley et al., supra note 7, at 184-85. The exception was Texas’ law giving citizens the right to use lethal force to protect private property, for which they found numerous articles lionizing a citizen who chased a burglar for three blocks before shooting him in the back. Id.

18. See id. at 149-50, 166 (describing several sign campaigns regarding new criminal sanctions and their relative effectiveness in deterring crime).

19. See Richard V. Ericson, Why Law Is Like News, in LAW AS COMMUNICATION 195, 222 (David Nelken ed., 1996). But see Darley et al., supra note 7, at 184-85 (finding in an empirical study that newspapers provided no coverage of important legal changes that affected many citizens). “If we can use newspaper coverage as a proxy for attention paid by the public media, then this is not the medium to count on for transmission of knowledge about criminalization rules to citizens.” Id.
person did. There is a trial to determine whether the person violated the laws, and if found guilty, designated sanctions follow. Criminal procedure makes good fodder for movies and television, which add to the public’s vague awareness of some of the laws and how they are applied. I would argue that the majority of the citizenry will avoid the misfortune of arrest and conviction, despite having no direct knowledge of the law.

How would citizens avoid violating unknown laws? Partly by heeding the terse warnings posted on signs and the information gleaned from a glance at newspaper headlines. The papers tell what the person did, but never reprint the violated statute itself. Most people get the idea that they should refrain from a behavior that apparently resulted in a conviction for the last fellow. Signs posted by the government and brochures summarizing some of the laws’ rules contribute to the citizen’s vague ideas about some of the laws. There are also factors that influence people almost unconsciously, or which depend less upon knowledge of the specific rules and sanctions. For example, a few of the laws do overlap with the norms and morals of society. Merely by being a conformist, a person would escape encroaching upon these particular laws, even though their texts are unknown. On the other hand, most of the laws in our imaginary country have little or no overlap with social norms, ethics, or religious morals.

When the average citizen goes about the activities of the day, many are within the context of the social institutions that the government either built or helped structure, and these incorporated the imperatives of the law. The government itself, being largely responsible for building roads, planning the layout of cities, printing and tracking the flow of money, etc., has created a channeling effect, as the guiding precepts of the laws were incorporated in these projects. In this sense, transgression has little opportunity. Finally, the average person simply does not do many different things. Their days are remarkably repetitive; work, home life, sleep, and even recreation are steady, habituated, and

20. See, e.g., ZIMRING & HAWKINS, supra note 7, at 149-50.
21. See Ericson, supra note 19.
22. See PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF THE LAW 15 (1998) (arguing that, “for most of us the law generally sits on a distant horizon of our lives, remote and often irrelevant to the matters before us.”)

The classical idea that legislation mainly consists of general rules of conduct thus appears far too simplistic. To a large extent, modern legislation is rather directed at creating institutional environments presenting both constraints and opportunities to individuals and collectivities in society as if they formed part of their physical environments. Needless to say, mandatory legislative rules still play an important role. Their number is relatively small, however, in comparison to the mass of legislative rules of other types. In any theory of legislation meant to provide a foundation for the analysis of modern statute law a great deal of prominence must be given to the legislative design of legal institutions. All such designs present images of overall institutional environments that exert pressure to be socially realized and, surprisingly enough, in a large number of cases we observe that social behaviour roughly adjusts to them.

Id. at 155-56.
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predictable. Habit and repetition mean that the people whose activities violate nothing in particular may continue on this path for years without interruption. Such repetition is partly the product of a habit instinct. In addition, the nature of commerce and production in this society depend upon the constant repetition of certain activities day after day. Appropriate, or "legal," activities become daily routines almost unconsciously; illegal activities would result in interruption and incarceration. Most people never experience the latter.

This country closely resembles our country: A country with a law about yellow lights that no one will ever read, but that everyone comprehends as kindergartners. How much would change in our day-to-day world if the legal formulations—statutes and cases—were more or less hidden away from the populace? I am not suggesting that we do this. It would not sit well with Americans if this were a candidate's explicit agenda: "We are going to hide all the laws from you after we translate them into Latin." It offends our culture's antipathy toward the idea of a "governing elite," as well as our notions about accountability for government. The fact remains, however, that most people go through life without needing to read a single statute or case, and still easily avoid ending up in court.

This makes sense if the written formulations of the law are not addressed to

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24. The thought experiment set forth above actually corresponds to the early history of Roman law, when "only patricians, the dominant stratum of the Roman people (populus Romanus), had any knowledge of the appropriate customs which were concealed from the plebeians, the stratum below the patri- cians." OLIPLIAD S. IOFFE, ROMAN LAW 4 (1987).

25. The publication of the Twelve Tablets of Law in ancient Rome "was a significant victory for the plebeians in their struggle against the patricians over the administration of law." Id. The law can exist as a secret code, but there are bound to be political consequences of excluding a large underclass in this way. Undoubtedly, the secrecy would be flouted by those in the know to affirm the psychological subordination of the rest. Some legal philosophers maintain that the law still is secret in modern socie- ties. See, e.g., Jan M. Broekman, Communicating Law, in LAW AS COMMUNICATION 45, 47 (David Nelken ed., 1996) ("And the law? ... What really happens remains a secret. The secret is enfolded in the application of the law. An extraordinary linguistic fact is the indication where the secret of the law is located: in the enfoldings of the practitioners' activity.".) This Article focuses more on the apocryphal nature of the legal texts themselves, from a public point of view, rather than on the inscrutable mysteries of the legal process and the hallowedness of private jury deliberations, which are the preoccupation of sociologists.

26. There is a legend that the nefarious Roman emperor Caligula wrote his laws in tiny print and had them posted on high pillars, so as to prevent the Romans from obtaining knowledge of the rules. PETER HAY, THE BOOK OF LEGAL ANECDOTES 236 (1989).

27. See EWICK & SILBEY, supra note 22, at 15; Willem J. Witteveen, Significant, Symbolic and Symphonic Laws: Communication Through Legislation, in SEMIOTICS AND LEGISLATION: JURISPRUDENTIAL, INSTITUTIONAL AND SOCIOLOGICAL PERSPECTIVES 28 (Hanneke van Schooten ed., 1999). "Many duly enacted laws do not come to mean very much for most of their intended audience when those the law addresses on paper have no need or no incentive to make it part of their actual con- siderations and doings." Id. at 28. While the sentiment that citizens do not need or want to read laws is well-put, I do not understand why Witteveen insists on the notion that the citizenry is the "intended audience" or "those the law addresses." It seems to make more sense to take this as an empirical hint that perhaps the citizenry are not those the law addresses, even if they are subject to it. This would avoid a very convoluted model of communication in which the "intended audience" universally shuns the messages sent, refusing receipt, but the sender continues unfazed for generations in the same futile communica- tive enterprise.
the citizenry, and not entrusted to them for interpretation. If, as Kelsen argued, legal formulations were designed to affect the citizens only indirectly, this would help explain why the citizens do not feel a need for direct access to it. Legislation is, in effect, “regulation of others through self-regulation.”

To provide another illustration: most people in America are familiar with baseball and how the game is played. Most people know the rules of the game well enough to play an informal game with friends or a social club, and this is frequently done. People are able to play a game of baseball even though they have never read the Official Rules of Baseball, which are quite detailed. There are eleven codified sections simply covering how the ball should be put into play, twelve sections regulating the activities of runners between bases; ten sections, spanning several pages, regarding “the batter,” and so on. The rules are as tedious and difficult to decipher as the tax code itself. Many of the pro-

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28. Early Roman law (the *ius civile*) was apparently “addressed” only to Roman citizens, and had no relevance for foreigners, even within their borders. Eventually a second body of law developed that was applicable to Romans and foreigners alike, the *ius gentium*, which became the dominant system as Rome grew from a small city-state into a nation and then an empire. See IOFFE, supra note 24, at 4-5.

29. Hans Kelsen argues that the technical “obligation” or duty imposed by the law itself is toward state actors; the idea that a citizen “ought” to avoid a prohibited act is an indirect implication of the statute’s plain language requiring the state to impose a penalty on individuals engaged in the prohibited act. In Kelsen’s words:

It is only if one makes use of the concept of secondary norms in the presentation of law that the subject [read: citizen] “ought” to avoid the delict and perform the legal duty, and thus, indirectly, law acquires validity for the subject, too. Only the [governmental] organ can, strictly speaking, “obey” or “disobey” the legal norm, by executing or not executing the stipulated sanction. As ordinarily used, however, the expressions “obeying the norm” and “disobeying the norm” refer to the behavior of the subject.

HANS KELSEN, GENERAL THEORY, supra note 6, at 61.

30. TEUBNER, supra note 6, at 82 (arguing that the legal system is a real system, and that the laws and/or rules of the legal system are addressed internally to the system itself).


32. Id.

33. See, e.g., id. § 8.00(a) (discussing legal pitching delivery).

There are two legal pitching positions, the Windup Position and the Set Position, and either position may be used at any time. Pitchers shall take signs from the catcher while standing on the rubber. Pitchers may disengage the rubber after taking their signs but may not step quickly onto the rubber and pitch. This may be judged a quick pitch by the umpire. When the pitcher disengages the rubber, he must drop his hands to his sides. Pitchers will not be allowed to disengage the rubber after taking each sign. (a) The Windup Position. The pitcher shall stand facing the batter, his entire pivot foot on, or in front of and touching and not off the end of the pitcher’s plate, and the other foot free. From this position any natural movement associated with his delivery of the ball to the batter commits him to the pitch without interruption or alteration. He shall not raise either foot from the ground, except that in his actual delivery of the ball to the batter, he may take one step backward, and one step forward with his free foot. When a pitcher holds the ball with both hands in front of his body, with his entire pivot foot on, or in front of and touching but not off the end of the pitcher’s plate, and his other foot free, he will be considered in the Windup Position. The pitcher may have one foot, not the pivot foot, off the rubber and any distance he may desire back of a line which is an extension to the back edge of the pitcher’s plate, but not at either side of the pitcher’s plate. With his “free” foot the pitcher may take one step backward and one step forward, but under no circumstances, to either side, that is to either the first base or third base side of the pitcher’s rubber. If a pitcher holds the ball with both hands in front of his body, with his entire pivot foot on or in
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scriptions correspond to familiar rules, such as the three strikes allowed batters, but some of the details (such as those regarding “dead balls,” or what motions the pitcher may use for a windup) are relatively unknown. Still, ignorance of these rules does not keep people from playing an actual game and enjoying it. Most people would not read the rules even if they knew where to find them. At the same time, the written rules are not irrelevant; in games with an umpire, the umpire’s decisions are supposedly made in adherence to these regulations.

The situation with the official published rules of our legal system is similar. People do not read statutes, regulations, or court opinions themselves, yet most are able to live productive lives as (more or less) law-abiding citizens without needing such information. On the other hand, the written formulations can be very important; many cases are decided on the interpretation of a single word or phrase in the statute. While some particularly avid fans may read the Official Rules of Baseball, they are addressed to the umpires and perhaps the coaches who train the players. Similarly, the written formulations upon which our legal system depends are really addressed to the courts, law enforcement officers, and agency officials.

The problem, then, is this: we have official written formulations of the laws. These formulations, collectively, pertain to everyone but are read by almost no one. This paradox, in turn, poses two questions. First, do the written formulations matter? Second, if the legal texts matter, how or why do they matter? The first question is the subject of the following subsection.

front of and touching but not off the end of the pitcher’s plate, and his other foot free, he will be considered in a windup position. From this position he may: (1) deliver the ball to the batter, or (2) step and throw to a base in an attempt to pick off a runner, or (3) disengage the rubber (if he does he must drop his hand to his sides). In disengaging the rubber the pitcher must step off with his pivot foot and not his free foot first. He may not go into a set or stretch position if he does it is a balk.

Id. 34. See id.

35. The Official Rules Committee’s Foreword to the 2000 edition, however, reveals that the drafters intend them to be read, learned, and applied everywhere, even in non-professional games, as far as is possible:

We recognize that many amateur and non professional organizations play their games under professional rules, and we are happy to make our rules available as widely as possible. It is well to remember that specifications as to fields, equipment, etc., may be modified to meet the needs of each group. Money fines, long term suspensions and similar penalties imposed by this code are not practicable for amateur groups, but officers and umpires of such organizations should insist on strict observance of all the rules governing the playing of the game. Baseball not only has maintained its position as the National Game of the United States, but also has become an International Game being played in seventyseven [sic] countries. Its popularity will grow only as long as its players, managers, coaches, umpires and administrative officers respect the discipline of its code of rules.

Id. 36. See ANDENAECS, supra note 2, at 36.
B. Do the Written Formulations of Laws Matter?

Does the text itself matter? One can conceive of "law" existing without written formulations, and some would argue that the formulations are but a small part of what we mean when we say "law." A general adherence to the laws without knowledge of the written formulations simply indicates that these formulations do not matter. Perhaps the intangible operations of the law, together with social norms and institutions, shape behavior so much that the written formulations are unnecessary.

Nevertheless, the codified text plays an important functional role in modern legal systems. The police generally will not arrest an offender based on a concept of "law" divorced from its written formulation. Judges will not decide a case without close reference to the statutory text itself. Admittedly, there are cases where the judge stretches the meaning of a statute beyond recognition in order to achieve a desired result, or declares that some overarching constitutional or public policy consideration bars strict application of the statute in a special circumstance. In these cases, however, the court tends to spend even more time discussing and parsing the statute to pave a road toward whatever maverick turn it intends to take.

A straightforward dichotomy in some states' treatment of killing a cat and killing a dog illustrates how written formulations make a difference. Connecti-

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37. See John Bell, Statutes, Text and Operative Enactments, in SEMIOTICS AND LEGISLATION: JURISPRUDENTIAL, INSTITUTIONAL AND SOCIOLOGICAL PERSPECTIVES 71 (Hanneke van Schooten ed., 1999). Bell takes a position similar to that paraphrased here as an "objection":

In significant ways, a statute can be seen as not the text, but as something derived partly, but not wholly, from the text. In the ideas of Radolfo Sacco, the text is a formant, a source of information which provides the basis on which a statutory provision of normative content can be constructed.

Id. at 71 (citation omitted); see also John Gibbons, Language Constructing Law, in LANGUAGE AND THE LAW 3 (1994) (discussing how the law functioned in pre-literate England somewhat differently than it did after written codification, and how its transmission was much more localized).

38. There is also a question about the extent to which laws in the more general sense—apart from the written formulations—matter. Social norms and values undoubtedly shape behavior more than command-and-control regulations from the state. The inquiry here is narrower: To the extent that laws in general matter, what part do the written formulations play in that?

39. Witteveen, supra note 27, at 27 ("Laws can be seen as imperfect articulations of common understandings, as more or less adequate responses to practical needs, or as embodiments of some relevant concern (overlooking other relevant considerations). Common to all these expectations is the idea that the words of the statute make a difference for the practice of law.").

40. See Bell, supra note 37, at 71.

41. See TEUBNER, supra note 6, at 42 ("Statute law acquires validity only through the judge's act, the validity of which can in turn be established only by reference to a statute.").

42. The statute does not always dictate the outcome expected, because the court can often find some canon of "statutory construction" to twist the meaning in a desired direction, even with a result that appears to be the opposite of a surface reading of the text. On the other hand, the cases being appealed are self-selected to involve problematic statutory provisions or terms, and appellate cases constitute the bulk of opinions in law school casebooks. Most cases are not appealed, and presumably the application of statutes and regulations in these cases is more straightforward.
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cut's General Statutes contain a statute making it illegal to kill a dog but nothing comparable regarding the killing of a cat. While this could be inferential evidence that dog lovers have more political influence than cat lovers, the fact is that most citizens of the state have no idea that it is illegal to kill a dog but legal to kill a cat. A cat-killer might be charged and convicted under a general cruelty-to-animals statute, if one exists. It is possible, however, that a court would hesitate to make this move where the statutes specifically sanction killing a dog but neglect to mention cats. For example, there is an older case from Pennsylvania where a cat-killer was acquitted because "cat" was not mentioned specifically in the list of animals in the relevant statute.

As this example illustrates, textual codification does matter. A person can be arrested and fined for killing a dog, but the same person might be able to kill a cat and skirt the criminal justice system entirely, even though this does not comport with any widespread social norms. Under New York's first-degree

43. CONN. GEN. STAT. § 22-351 (2002). Theft, killing or injury of dogs: Any person who steals, confines or conceals any dog, or who, with the intention of stealing such dog or concealing its identity or the identity of its owner or with the intention of concealing the fact that the dog is licensed, removes the collar or harness or tag from any licensed dog, or who unlawfully kills or injures any dog, shall be fined not more than two hundred dollars or imprisoned not more than six months or both, and shall be liable to the owner in a civil action. For a second offense, or for an offense involving more than one dog, any such person shall be fined not more than five hundred dollars or imprisoned not less than one year nor more than three years or be both fined and imprisoned.

Id. Note that § 22-358 of the Connecticut General Statutes does give the right to certain individuals to kill a dog posing a threat to others or their animals. Probably the origin of this discrepancy is related to the functional use of dogs for hunting and guarding in earlier times.

44. Cats fare better in Iowa, Maine, Ohio, Pennsylvania, and West Virginia, where they are protected equally with dogs. See, e.g., IOWA CODE ANN. § 717B.3 (West 2002); ME. REV. STAT. ANN. tit. 17 § 1031, tit. 7 § 4011 (West 2002); OHIO REV. CODE ANN. § 959.02 (West 2002) (including cats along with horse, filly, jack, mule, sheep, ox, swine, and others); PA. STAT. ANN. tit. § 5511 (West 2002); W.VA. CODE § 19-20-12 (2002). Other states, such as California, Florida, and Oregon, prohibit killing cats or dogs for their pelts for resale. See, e.g., CAL. PENAL CODE § 598a (West 2002); FLA. STAT. ch. 828.123 (2002); OR. REV. STAT. § 167.390 (2002). But see State v. Griffin, 684 P.2d 32 (Or. Ct. App. 1984) (despite defendant being convicted of recklessly allowing his dog to kill his neighbor's cats, forfeiture of defendant's dog was an impermissibly harsh condition of probation, implying perhaps that Oregon still values dogs more than cats).

45. Jurisdictions without a cat-specific statute may prosecute cat-killers under a general "cruelty to animals" statute or common-law crime, or a catch-all "criminal mischief" law. See, e.g., State v. Spano, 745 A.2d 598 (N.J. Super. Ct. 2000) (defendant was convicted of the disorderly persons offense of needlessly killing an animal); Propes v. Griffith, 25 S.W.3d 544 (Mo. 2000) (plaintiffs suing for death of dogs under common law); State v. Picard, 1996 WL 633728 (Wash. Ct. App. 1996) (defendant convicted for hanging cat in local cemetery under statute not mentioning cats). The point here is not how a court might stretch the statute to cover the current loophole for killing cats, but to provide an example of statutes specifically criminalizing certain actions but not others, regardless of community norms.

46. See Commonwealth v. Massini, 188 A.2d 816 (Pa. Super. Ct. 1963) (holding that under statute providing penalties for injuring, killing, or poisoning domestic animals, a cat is not a "domestic animal," reversing defendant's conviction). The statute was thereafter amended to include cats along with dogs. See 18 PA. STAT. ANN. tit 18 § 5511. Fortunately for cats and their owners, I could find no other published cases where these laws had to be applied.

A determination of whether the victim fits under one of the delineated categories will make the difference between a conviction for first- or second-degree murder, which could mean the difference between the death penalty and imprisonment. Killing another carelessly, or in the heat of passion, does not leave one facing the possibility of capital punishment, especially if the victim was not among the special categories listed. Even if one rejects a textualist hermeneutic, one can still see functional importance in the texts.

The written formulations of laws matter in our legal system, even if the “law” in a more general sense includes far more than this; just as the rules of baseball matter, even though the game itself means much more than just the official rules. The written formulations of laws do not function as “instructions” to most members of society, but instead they can provide the necessary benchmark criteria to enforcers, whether courts, prosecutors, or police. Written formulations get the attention of courts, enforcement officers, and other officials. The question, then, is not whether the formulations matter, but how or why they do. The answer to this is already hinted at by the example of who pays the most attention to them: state actors themselves.

III. LINGUISTIC PERSPECTIVE

This Section discusses some sociolinguistic features of written legal formulations. The insights that can be incorporated from the study of linguistics and the “audience” of communication can provide a valuable framework for understanding the nature of legal texts in particular.

The “audience” of a speech or text is often distinguishable from the “addressee.” The latter is a subset of the former. Audience is everyone privy to the communication, who hears or reads the words personally; this includes participants in conversations as well as overhearers. The addressee must be part of the audience; but not everyone in the audience is necessarily an addressee. The

48. N.Y. PENAL LAW § 125.27 (McKinney 2002).
49. While the thesis of this Article depends to some extent on the inherent relevance of the legal texts themselves, thus overlapping with the textualist approach, I actually take issue in the last Sections of this Article with the typical textualist insistence on interpreting statutory terms as if they were addressed to the populace in general.
50. See Allan Bell, Language as Audience Design, 13 LANG. SOC. 145 (1984). Bell not only surveys a number of studies in this area, but explains how the primary addressee exerts the most influence over the crafting of the communication, relatively speaking, while known overhearers have a relatively small effect on the design of the speech or writing. In the context of legal formulations, such as statutes and court opinions, the true addressee—the state—shapes the form of the text the most. Bell calls non-addressee recipients of the communication “auditors.” See also Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 STAN. L. REV. (forthcoming 2003); Clark & Carlson, supra note 13, at 342-43. (“If speakers relied solely on conventional linguistic devices to convey what they meant, everyone who knew the language should have equal ability to understand them. But the examples we have offered suggest quite the opposite: When the speakers design their utterances, they assign different hearers to different roles, and then they decide how to say what they say on the basis of what they know, believe and suppose. [This is] a fundamental property of utterances ....[we] call AUDIENCE DESIGN ....”)
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formulation chosen for communication defines who in the audience is the addressee, who is an overhearer, and who is a participant or auditor. Henry Smith has done pioneering work in this area, demonstrating how the concept of audience design can be applied to the law, especially in the area of property. This Article attempts to extend Smith’s idea into a more general principle.

Clark and Carlson provide an interesting hypothetical that is very relevant:

Mother, whispering to son, out of earshot of father: Eat your peas.

Mother, aloud to son, in front of father: Eat your peas.

Suppose it is common knowledge to the mother, father, and son that the father metes out punishment at the behest of the mother, and that she could well ask him to punish the son if he doesn’t eat his peas. In the first example, the only participant is the son, so there is no immediately implied threat. In the second, since the father is also a participant, there is an immediately implied threat. . . . The mother can make her threat only because the son recognizes that she is also indirectly asking the father to punish him if he doesn’t eat his peas. The threat depends on the son’s being informed of her conditional request to the father.

This scenario illustrates the scheme imagined in the first alternative above: the state tells the citizen what to do, in the “hearing” of the enforcers, implying a threat that the state enforcers will compel the citizens to obey.

Contrast this, however, with the following, which are formulated to resemble more closely our legal formulations:

A. Mother to father, in front of son: Our son really should eat his peas, or get no allowance this week.

B. Mother to father, out of earshot of son: Our son really should eat his peas, or get no allowance this week.

The father here is the recipient or addressee. In scenario A, the son hears the implied threat that the father will make him do this. This is why it was said in front of him. But the result is likely to be the same in scenario B, if the father makes sure to coerce the boy into eating the peas. The result (what the members of the audience hear and how they respond) can be the same whether the son hears the mother’s statement or not. To substitute a legal scenario:

Legislature to executive, in published texts: Any person who kills any dog shall be fined not more than two hundred dollars or imprisoned not more than six months.

The recipient is the executive, not the potential dog-killers. If they are

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51. See Smith, supra note 50. For example, suppose a CEO, Alan, says to Bob, in the presence of Chris and Doug, “Come with me, Bob, it’s time to shred some documents.” Alan has asked (or ordered, depending on the context) Bob to come with him and shred documents. At the same time, he has also informed Bob, Chris, and Doug that he is asking Bob to come and start shredding. Bob is in the unique position here as an addressee. All of them together constitute the audience. Relating this analogy to the law, the public could be part of the “audience” as auditor or overhearer, without being the “addressee.” See also Henry Smith & Thomas Merrill, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L.J. 1 (2000).

52. See Clark & Carlson, supra note 13, at 365.

aware of the law, potential dog killers may interpret this, perhaps correctly, to mean that the executive will monitor dog-killing and punish offenders. On the other hand, the executive may monitor for violations and punish offenders even if the offenders are not aware of the law. They may become aware of the threat only by means of the actions of the executive because the law was not addressed to them. Even if the overarching goal of the legislature’s rule was to reduce the incidence of this offense, this was achieved by enjoining the state actors to catch the perpetrators and impose the delineated sanctions.

Performative communication inherently requires that the addressee be situated so as to possibly respond as the speaker intends, or to become affected as the speaker intends. \(^{54}\) This required condition does not seem to be present with the law and the general population. If the citizenry are the true addressees, they never hear the communication. There is no practical way to ensure that they do. Even if there were daily readings of the code books on prime time television, it is doubtful that the people would choose to tune in as viewers. \(^{55}\)

It is possible under current linguistic theory to have multiple or even indeterminate addressees. \(^{56}\) Suppose Alan leaves his office with several people still lingering behind, and he says, “The last one out should turn off the lights.” It is still undetermined who that will be; the addressee of the request will self-select by virtue of being the last to leave. At the time of the utterance, though, the entire audience (all those in the room) are potential addressees. They are not collectively addressees, though. Alan could not have intended everyone to turn out the light; he explicitly narrowed his request to a single actor. The audience is defined clearly in this case, and the addressee will be whichever individual is last to leave. \(^{57}\)

It is not possible, however, to have distinct intended meanings addressed to each hearer by the same speech act, unless one is being deceived or irony is present. It is a maxim of contemporary communication theory that communication has a sender, a message (in semiotic codes, whether words, pictures, or

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54. Linguists describe the requirements for a complete speech act as “felicity conditions.” Without “felicity conditions,” such as a necessary addressee, a given type of speech act could “misfire.” For example, if the umpire declares to a player, “You’re out!” the umpire has spoken a sensible command; the player will then go to the dugout. Suppose, however the umpire later says to the cashier at the concession stand, “You’re out!” The cashier will, at least, think this is inappropriate, or perhaps funny.

55. Imagine a minister saying “I now pronounce you man and wife” to an empty church; the words in this situation would have no effect, and even our understanding of their overall meaning would change. See Clark & Carlson, supra note 13, at 341 (giving example of a couple exchanging wedding vows without anyone else present, illustrating that certain speech acts are invalid or ineffective if not performed within the context of a certain institution).

56. See id. In addition, Clark and Carlson observe, “A party can address an individual addressee within a group of audience participants without necessarily knowing which individual is the addressee: Charles, to Ann and Barbara: ‘Please return my map, whichever of you has it.’” Id. at 338.

57. See id. at 361. “Professor, to students: ‘I announce to those of you who are interested that I hereby promise those of you who come early tomorrow that I will answer your questions about the last exam.’” The overall assertion is directed at all the students; the announcement is directed at the interested students; and the promise is directed at the interested students who come early the next day.
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musical notes), and a receiver.58 Alan could not intend for Bob to understand that he wanted a particular activity done, like turning off the light, and at the same time intended Chris to understand something else, like it was time to shred documents or call the consulting firm.59 While there may be an indeterminate set of addressees, the performative content must be the same for all, as there will only be one addressee in the end—the last person to leave. If Alan said, “Last one out get the lights, and somebody else should start shredding documents,” this would have two addressees, but it is for two separate requests or speech acts.60 Some performative requests require collective activity in response—“Would you guys give me a hand moving this piano?”—or distributive activity—“Could one of you guys help lift the other end of this, and another guy hold the door for us?” However, it does not appear that the law or the cases are so structured.61

This Article is focused on the intended hearers or audience of statutes and cases. These written formulations of the law fit best into the category called “Declarations” in Pragmatics; applying this model will clarify the issue of addressees for these formulations. As the term is used by linguists, “declarations” are a special type of communication whereby an assertion of certain facts brings those facts into existence automatically.62 The classic example is “I now

58. Witteveen, supra note 27, at 30. Moreover, in order for meaningful information processing to take place, the same codes must be used in sending and receiving. Id. at 30; see also Clark & Carlson, supra note 13, at 344 (“The addressees are the ostensible targets of what is being said. Ordinarily, they are the participants for whom the speaker has the most direct and obvious goals in designing his utterances.”).

59. See also H.P. Grice, Utterer’s Meaning, Sentence-Meaning, and Word-Meaning, reprinted in PRAGMATICS 65-76, 68 (Steven Davis ed., 1991) (coining the phrase “m-intentions” to describe the subjective meaning effect a speaker intends to produce in the hearer).

60. One exception to the above example is the case of deception of one addressee, but the idea of law as deception is untenable. Suppose, for example, that Alan is leaving behind his personal assistant along with several consultants and a federal auditor, and that his assistant knows that “last one out turn off the lights” is really code for “as soon as everyone else leaves, start shredding documents.” In this case, there are two classes of addressees with different m-intentions, respectively. The consultants and auditor think he wants the lights shut off; the assistant knows the light will be on for awhile that evening while the shredding task is performed. The problem with applying this scenario to the law is that it necessarily involves deception of one addressee or the other. For example,

Wife, to husband and another guest at a party: It’s really quite late.

The wife makes the assertion to both the guest and her husband. To the guest, she is using the assertion indirectly to make an objection. To her husband, she is using the assertion indirectly to make a request and a warning... As far as the guest is concerned, she is simply making an assertion and thereby objecting to him... The wife’s deception of the guest cannot be characterized without reference to the informatives. Traditional analyses provide no way of specifying that the husband is being informed of the assertion, objection, request, and warning, while the guest is being informed only of the assertion and objection.

Clark & Carlson, supra note 13, at 370-71. Dual meanings with two respective addressees generally seem to involve either deception of at least one of the parties or irony perceived by part or all of the audience.

61. See id. at 357 (asserting “[s]peakers can have m-intentions [that is, how they want to be understood] toward one or more hearers at a time, but not toward a collection of hearers”); see also Grice, supra note 59, at 68-69 (explaining in detail m-intentions).

62. See John R. Searle, A Taxonomy of Illocutionary Acts, reprinted in PHILOSOPHY OF LANGUAGE
pronounce you man and wife.” Other examples include “You’re fired!” and “War is hereby declared on Afghanistan.” Uttered by the right speaker in a given context, the last statement brings the state of war into existence.

Searle provides the following introduction to the concept of declaratives:

It is the defining characteristic of this class that the successful performance of one of its members brings about the correspondence between the propositional content and reality, successful performance guarantees that the propositional concern corresponds to the word: if I successfully perform the act of appointing you chairman, then you are the chairman; if I successfully perform the act of nominating you as the candidate, then you are the candidate; if I successfully perform the act of declaring a state of war, then war is on; if I successfully perform the act of marrying you, then you are married. . . . Declarations bring about some alteration in the status or condition of the referred to object or objects solely in virtue of the fact that the declaration has been successfully performed.

The distinction between “declarations” and “directives” is very important for the purposes of this discussion, as the former exemplifies the model for the law proposed in this Article, and the latter typifies the more conventional view of the law. Declarations require an extralinguistic institution in addition to the rules of language, and the speaker must be in a specified place within that institution. In contrast, directives seek to influence a state of affairs in response to the communication; declarations immediately alter the situation referenced .

158-59 (A.P. Martintech ed., 2001) (coining the term “declarations” to describe a subset of speech acts in more specificity than the catch-all phrase of “performatives” earlier pragmatic theorists were using).

63. “You’re fired!” is used by Searle to illustrate the essential nature of declaratives whose syntax is somewhat misleading because it does not require the invocation of the speaker’s position: the supervisor does not have to say “I hereby fire you,” but only “you are fired,” which syntactically is the same as: I declare + your job is terminated. “[T]here is no surface syntactical distinction between propositional content and illocutionary force.” Searle, supra note 62, at 159. “The explanation for the bemusingly simple syntactical structure of these sentences seems to me to be that we have some verbs which in their performative occurrence encapsulate both the declarative force and the propositional content.” Id. at 161.

This example also illustrates that some declarations function in institutional contexts somewhat related to our legal edifice. While wrongful discharge lawsuits are fairly common, there is currently a split of authority over the question of whether the supervisor who actually utters the declaration “You’re fired” is an appropriate subject for the suit, or if the institution giving effective force to the declaration should fill that role. See, e.g., Rebarcheck v. Farmers Co-op, 35 P.3d 892 (Kan. 2001) (holding that the supervisor cannot be held personally liable for the termination effected); Winarto v. Toshiba Am. Electronics Components, Inc., 274 F.3d 1276 (9th Cir. 2001) (holding that under relevant state law the “person” who spoke to effectuate the firing could be sued for retaliatory discharge).

64. Searle, supra note 62, at 159. Searle explains that every type of communication indicates, among other things, the “direction of fit” between reality and the statement’s verbal content. “Assertives” have a “words-to-world” direction (describing reality already in existence, as in “they finished mapping the human genome,” or an opinion as to the nature of reality, as in, “the Constitution leaves all other rights to the states”). “Directives” (e.g., I ask, order, command, beg, invite, advise, dare, defy, etc.) and “commisives” (promises and other commitments, e.g., I shall, intend, promise, etc.) have a direction of world-to-words. “Expressives” (expressing a psychological state, e.g., I congratulate, apologize, thank, welcome) have no word-world direction because the correspondence is already fit inherently. Declarations, however, are much harder to categorize in this way; the reality corresponds automatically, as with expressives, but only after the declaration is successfully performed, which is unique to this type. See id. at 156-159.

65. Id. at 159 (unlike other speech acts, this one is particularly dependent on the vantage point of the speaker).
simply by being uttered. Directives can be used successfully by anyone who has mastered the language itself, as when a foreign language speaker learns how to say, “Pass the salt,” or “Please call my attorney.” For example, it does not matter when a fan yells, “You’re out!” instead of the umpire; or if an overly eager altar boy quips, “I pronounce you man and wife” before the priest has a chance. As Searle notes, “It is only given such institutions as the church, the law, private property, and the state and a special position of the speaker and hearer within these institutions that one can excommunicate, appoint, give and bequeath one’s possessions, or declare war.”

Declarations can be further subdivided into two groups. Some are more descriptive, as when institutional situations require an official “finding” of facts so that inquiry can come to an end and the institution can act; judicial factfinding is a perfect example. These “verdicts” constitute a great deal of what our courts do, along with administrative hearings. Other declarations are of the “War is hereby declared” type; they simply initiate a state of affairs. This latter group has been called “pronouncements and enactments,” as they seem to encompass legislation and regulations.

Searle’s model is particularly interesting when compared with the literal form of legal texts such as statutes. Statutes read as simple assertions about the state of affairs in the world: Traffic facing a yellow light is thereby warned that it will soon be red, and a person is guilty of murder if they do thus and such. Yet, the statutes are not describing something in the real world but rather creating a state of affairs simply by being promulgated. They create the legal ramifications for anyone who fits the description in the statute. Cases generate “findings.” The factual findings of a lower court are the least likely aspect of an

66. Searle, supra note 62, at 159 (noting that there are at least two types of exceptional cases where declarations work without an institution as context: supernatural utterances (e.g., God says, “Let there be light”) and declarations about the language itself (e.g., I define, abbreviate, dub, call this _ __)).

67. Id. at 160.


69. Id.

70. Statutes in particular represent a special class of declarations due to their collective authorship, their written form, and their indeterminate audience. Statutes present special issues regarding the authors’ intentions; legislative intent is a topic of much debate. Many of paralinguistic cues about meaning—the body language of a speaker, or tone of voice—are removed by the written issuance of laws. At the same time, written text adds a great deal of permanence to the promulgation and facilitates widespread dissemination and uniform implementation. This Article does not attempt to undertake to resolve the issues surrounding “legislative intent,” which involves the problematic idea of “collective intentions” of a legislature composed of individuals paying more or less attention to a given act. It may be either impossible or undesirable to ascertain what, exactly, the legislature “meant” by a word like “substantial” or “reasonable.” For our purposes here, it does not matter whether it was written by the sponsoring representative, or an anonymous legislative draftsman, or even if the drafting was contracted out to a private writer. The final product went through an institutional process that involves serial anonymous editing and amendment. A text was produced, and the most basic question is whether it has an addressee at all (option number four above), or if it simply takes on a function within social structures and institutions divorced from its origin.
opinion to be scrutinized on appeal.

Declarations only work if there is some institution to receive the declarations and give them force and effect. This institution would appropriately be the "addressee." Without such an institution in the role of receiving and enforcing the declaration, there is no declaration. If there is no one in the role of receiving and enforcing the law, there would be no law. Therefore the law must have an addressee, and that addressee must be the institution that receives, effectuates, and enforces the law: the state.

Even passing verdicts on an individual's claims or guilt are not addressed to the parties themselves. "I find you guilty of crimes against humanity and sentence you to life in prison." At first blush, this apparently speaks directly to the defendant using vocatives. However, the defendant is not expected to do anything to effectuate the court's order; nor is the verdict likely to change the defendant's mind about his or her own guilt. The sentence will be carried out, very likely against the defendant's will. The court's ruling really tells the defendant what the sheriff is going to do to him or to his bank account; the defendant can then choose to preempt this by cooperating, or wait for the dictated events to run their course.

The state is the institution that gives declaratory force to the law, functioning in the role of addressee. The citizen's relation to the law is non-effectual and passive in this sense. The law remains the law regardless of what the citizen does, except perhaps in unusual cases of widespread defiance or revolt. On the other hand, if a court repudiates or otherwise ignores a law, the law is vitiated in practical terms. Long-term desuetude can take on legal significance. If the police were to refuse to arrest offenders of a certain new law, as a form of protest, the law would be significantly weakened in its status as law, or toppled from its position completely.

When we talk about the "addressee," we are concerned about the addressee of written legal formulations embodied in codes, statutes, and court opinions. These formulations of law could be grouped into two categories: rules and rul-

71. This is an unusual exception to courtroom formalities, which generally prefer the third person: "I find the defendant guilty."

72. Judge Cardozo seemed to be particularly aware of the fact that the true audience for his opinions was other judges, not the parties in the case, as he carefully chose wording that would be particularly memorable and become the rule adopted by subsequent courts. See RICHARD A. POSNER, CARDozo: A STUDY IN REPUTATION 92-124 (1990); see also Richard A. Posner, Judges' Writing Styles (And Do They Matter?), 62 U. CHI. L. REV. 1421 (1995) (arguing that the style utilized by a judge in writing an opinion can be categorized descriptively and has lasting significance, implying some normative suggestions).

73. The point here is that the law can become obsolete or invalid through desuetude even if it is addressed to the state. See ANDENAES, supra note 2, at 11-13; Mark P. Henriches, Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws, 76 VA. L. REV. 1057 (1990) (discussing declaratory actions brought under the theory of "fear of prosecution" for obsolete laws); Robert Misner, Minimalism, Desuetude, and Fornication, 35 WILLAMETTE L. REV. 1 (1999) (analyzing desuetude of fornication laws in Idaho and the implication for separation of powers doctrine).
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ings. Statutes and regulations are very similar; both have the “force of law,” and both are promulgated by an organ of the state. These can be classified together as “rules,” and would include the United States Code (U.S.C.), the Code of Federal Regulations (C.F.R.), various Rules of Procedure, and state-level equivalents. “Rulings” refer to court opinions, sometimes called “judge-made law,” from whatever level of court; all of these can have a binding effect on future decisions of courts and enforcers, if only as “collateral estoppel” or under the “law of the case” doctrine. Administrative agency rulings may or may not be in the category of “rulings” used here, depending on the legal effect given to these decisions by other government organs. This section looks at the formulations for the “rules” to illustrate some points about the role that they play in the legal system as a whole. The formulations of “rulings” is a subject addressed elsewhere. Not included in either category are items such as signage, instructions for filling out tax returns, or government brochures, such as the “rules of the road” booklets studied before taking a drivers’ license test. These latter items are designed to summarize and communicate the laws, but do not have the same significance in our legal system as statutes and regulations.

The following section analyzes the structure and format of the written formulations of laws. Keeping in mind the concept of “addressee,” and the particular form of speech act called “declaration,” the next step is to consider the four options for the formulations, with a focus on the nature of the formulations themselves.

IV. POSSIBLE ADDRESSEES

The central question here is: who is the law’s addressee? Even if the public is part of the “audience,” whether participants or overhearers, the public might not be functioning as the “addressee.” There is a finite set of possible answers to this question, which are mutually exclusive:

74. It has been argued that court opinions increasingly read like—and function as—legislation. See Frederick Schauer, Opinions as Rules, 62 U. Chi. L. REV. 1455, 1456 (1995) (“[T]he judicial opinion . . . should serve a function . . . much closer to that served by the less literary legal performances we find in the Statutes at Large and the Code of Federal Regulations.”). Citizens are no more likely to read court opinions than they are to read statute books or agency regulations, although important court opinions are more likely to be reported and summarized in the media. See ANDENAES, supra note 2, at 145 (“If, on the other hand, publicity is minimal, the sentence will probably be known only to the defendant himself and the officials involved in his case . . . .”). The New York Times (and perhaps some other newspapers) print excerpts from some court; this is a relatively small selection and seems to be the exception rather than the rule. The availability of full-text opinions on the Internet, through such resources as the Cornell Law School website, www.law.cornell.edu, may introduce a change in this area over time.

75. For an excellent discussion of the effect of administrative rules and rulings on judicial rulings, see Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 Geo. L.J. 833 (2001) (discussing the type of statutes and type of agency interpretations to which the mandatory deference doctrine of Chevron should apply).

Citizenry as Addressee: The law addresses the entire population (the citizenry), and the courts and enforcement officials are members of the audience merely in the bystander sense. These state actors may use the law, which purportedly flows from the legislature to the populace, as a benchmark to measure compliance of individual citizens, but the understanding is that the citizens were the original addressees in entirety. This is the classic view.

Dual Addressees (Citizens and State simultaneously): The law addresses both the populace in general and the state officials, with parts being more applicable to one or the other. Bentham hinted at this view, as have other academics; Meir Dan-Cohen develops it in great detail under the title “acoustic separation.”

No Addressee: The law addresses no one, but simply archives the legislative work product. What others do with the legislation is disconnected from the originators or authors. Citizens obeying the law, or a judge applying it, are in the same position—neither were intended addressees. The source is irrelevant, which makes the addressee irrelevant; all that matters is how the law is used, or how it functions, in society. Heidi Hurd championed this view, maintaining that laws are not a form of communication at all.

State Actors as Addressees: The law addresses the state directly, and the citizenry are merely part of the audience. The populace may fit in as overhearers or participants (intended recipients of the informative aspect, but not addressees). Another variation on this general position would see the citizenry as even more removed from the flow of the law’s illocution, perhaps as the audience of a hearsay report.

A. Citizenry as Addressee

The first alternative is to say that the law is addressed to the people, to the citizens who live subject to the law. The problem with this view is that the written formulations themselves strongly suggest a different intended audience than the public at large.

Returning to the example at the beginning of the Article, if we read the rule about yellow traffic lights again, we see that it reads very differently from grand social imperatives such as the Ten Commandments. There is no “Thou

77. See Dan-Cohen, supra note 15.
79. M.B.W. Sinclair makes this same observation in his article Plugs, Holes, Filters and Goals: An Analysis of Legislative Attitudes, supra note 10, at 242-243:

One immediate problem is that we just do not find many statutes that look like commands. Commands—like “Wash your hands!”—are typically present tense, declarative sentences with a second person pronominal subject deleted. . . . Statutes come in all sorts of grammatical forms, but the command (characteristic of those paradigmatic laws, the Ten Commandments) is not often found among them.

Nevertheless, Sinclair reaches a very different conclusion than this Article does, claiming that the law

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Shalt Not," as in the opening line of seven stanzas in the Decalogue. The question arises, "To whom is this law addressed?"

The text uses no second-person pronouns or verb forms; it nowhere says "you" (or "thou") as if addressing the reader personally. It simply says that when the light is yellow, those facing the light are thereby deemed to have been warned. In practical terms, we all know this means that when we are either stopped by a police officer, or involved in an accident in the intersection, we will not be able to excuse ourselves by claiming surprise if we saw the yellow light. We will not be able to claim a right to have proceeded as we did. It puts us in the position of being liable to either a criminal sanction (if a police car is nearby and catches us) or civil damages if we collide with cross-bound traffic

simply must be addressed to the subjects it seeks to control (the citizens), although his dismissal of the possibility that laws are addressed to the state is cursory and conclusory.

Of course, some statutes do use "shall," as seen in State Financial Assistance for Improvement, Expansion or Rehabilitation of Existing Buildings, N.Y. STAT. § 3.07(2) ("The council, after a review of the pragmatic and fiscal needs and resources of the project and organization, shall make a determination . . .") (emphasis added); Antidiscrimination, N.Y. STAT. § 83.3 ("It is the policy of the department that the department and its officers, employers and agents shall not discriminate against any individual by virtue of his or her being identified as, or suspected of having AIDS, HIV infection, or HIV related illness."). Although the word has a different meaning in these contexts than in the Decalogue. See PETER TIERSMA, LEGAL LANGUAGE 105-06 (1999). Tiersma devotes two pages to discussion of the use of "shall" in legal texts as opposed to common parlance. Outside the legal arena, he observes, "shall" functions as a helping verb to express the future, but has fallen out of use in lieu of "will." "Shall" in legal texts usually does not have a futuristic sense, but rather is synonymous with "must," as in "any convicted sex offender shall register with the local police department." Yet "shall" often occurs in legal texts with neither a sense of the future nor as a command, as in "This Act shall be known as the Penal Code of California." Tiersma observes, "It seems odd to say that the legislature is requiring that the populace must refer to this Act as The Penal Code of California. Could someone be thrown in prison for calling it The California Penal Code or even the Criminal Code?" Id. at 106. Clearly, "shall" is used here to signify a declaration, more akin to "hereby." This specialized use of "shall" supports my argument that the law is not addressing the citizenry directly, but rather state actors.

I would take this a step further than Tiersma. He asserts that "shall" has an imperative meaning in "sex offenders shall register," and that this meaning could not carry over to "This Act shall be called The Penal Code of California." It could, however, work the other way: the declaratory meaning in "This Act shall be called" could make sense as well in the phrase "sex offenders shall register." This is especially true if one assumes that the latter phrase does not address the sex offenders themselves, but rather enforcement officers whose task it is to monitor and compel compliance to the statute. In other words, "shall" does not have an imperative, second-person meaning in this phrase, either, but is rather a declaration to the relevant legal institution about what constitutes the rules in this regard. The statute affects the sex offender, but is not addressed to him. This is an important point, because the use of "shall" in statutes specifying individualized action, such as the "sex offenders shall register," contributes to the mistaken notion that the statute is addressing the sex offenders and directing them to do something. Rather, this paper argues that "shall" in a statute functions in a declaratory sense similar to the Presentment clause in the Constitution. It informs state actors, whether enforcement officials or courts, what the relevant rule is, or what the legal obligations are. See also YON MALEY, LANGUAGE CONSTRUCTING LAW, in LANGUAGE AND THE LAW 21 (John Gibbons ed., 1994) (noting that "must," "may" and "shall" often do not occur in modern statutes defining offenses, but rather the verb [i.e., "commits"] is in the present, "non-deictic" tense, "uttering or performing a continuing rule defining the offense or crime e.g., hostage-taking.").

80. Of course, some statutes do use "shall," as seen in State Financial Assistance for Improvement, Expansion or Rehabilitation of Existing Buildings, N.Y. STAT. § 3.07(2) ("The council, after a review of the pragmatic and fiscal needs and resources of the project and organization, shall make a determination . . .") (emphasis added); Antidiscrimination, N.Y. STAT. § 83.3 ("It is the policy of the department that the department and its officers, employers and agents shall not discriminate against any individual by virtue of his or her being identified as, or suspected of having AIDS, HIV infection, or HIV related illness.").


82. We may be able to claim an excuse for a mistake of fact, for example, if we can prove that the evening sunlight reflected from the traffic signal glass in such a way as to create an optical illusion about which signal was being illuminated. We would not be able to claim surprise that cross traffic proceeded as if having the right of way.
Jeremy Bentham actually recommended that laws be formulated this way. “To say to the judge, \textit{Cause to be hanged whoever in due form of law is convicted of stealing}, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, \textit{Do not steal}.\textsuperscript{84} He asserts that this would actually be much more “efficacious” in producing the desired result.\textsuperscript{85} A few paragraphs earlier, however, he gave the same example to distinguish different addressees of the laws, asserting that two different addressees require two different laws:

A law confining itself to the creation of an offence [sic], and a law commanding a punishment to be administered in case of the commission of such an offence [sic], are two distinct laws, not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, \textit{Let no man steal}; and \textit{Let the judge cause whoever is convicted of stealing to be hanged}.\textsuperscript{86}

The trend toward systematic codification of state law in the last hundred years has occurred along the lines described above. The result can be seen in the statute about yellow traffic lights from Connecticut. This may not have been due to Bentham’s direct influence as much as to the nature of the task of codifying what were previously common-law rules and a patchwork of legislative reactions. Bentham never returned to his point about the “altogether different” addressees that result. As the suggested format was applied universally, the entire body of codified law would be “addressed” to judges and enforcement officers and not to the general population. Bentham’s goal of “notoriety”—as well as his obsession with using laypersons’ English—seem to be in tension with the idea that the laws are addressed to state actors instead of citizens. Today, saying bluntly, “The laws are addressed only to the state” may sound radical and undemocratic to some.\textsuperscript{87} This is not to say that Bentham’s goal of increasing public awareness about the law is completely incompatible with the formulations being addressed to the state, but it does make the line of communication more obscure.

\textsuperscript{83} See Martin v. Herzog, 126 N.E. 814 (N.Y. 1920) (holding that driving without headlights on, in violation of a traffic law, “is negligence itself”); Clinksdale v. Carver, 136 P.2d 777 (Cal. 1943) (including the failure to stop at a stop sign in jury instructions about liability under negligence theory).

\textsuperscript{84} See BENTHAM, supra note 12, at Ch. 17 n.1 § VIII.

\textsuperscript{85} \textit{Id.} By this he seems to mean that closely associating the proscription with an authorization for state coercion or punishment gives it more force than it would have otherwise; it also makes for more concise codes by not having to state both the delict and the consequence, and succinctness was one of Bentham’s other priorities in code-drafting.

\textsuperscript{86} \textit{Id.} at Ch. 17 n.1 § VI.

\textsuperscript{87} The idea that the law is addressed to the state might sound undemocratic if confused with the issue of transparency of government. I am not advocating diminished transparency for government; to the extent that publishing the legislature’s enactments and distributing them to libraries further the democratic goal of transparency and accountability, I would certainly support that. This type of “reporting,” serving the goal of government accountability, is very different than inculcating the laws into the people.
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Other influential legal thinkers have espoused the same view as Bentham on the superiority of formulating laws this way. Hans Kelsen argued that it was superfluous to include the part of a law directed at the would-be offender:

An example: One shall not steal; if somebody steals, he shall be punished. If it is assumed that the first norm which forbids theft is valid only if the second norm attaches a sanction to theft, then the first norm is certainly superfluous in an exact exposition of law. If at all existent, the first norm is contained in the second, which is the only genuine legal norm. 88

Kelsen argued that the “law” is not the prohibition of a given act, but the mandate to the state to sanction the act, because the former cannot exist without the latter. 89 Similarly, John Austin wrote, “It is perfectly clear that the law which gives the remedy, or which determines the punishment, is the only one that is absolutely necessary.” 90

Most modern statutes and regulations have followed the suggestions of these influential writers and read just like this. A couple of examples should illustrate this idea.

First, consider New York’s first-degree murder statute:

N.Y. Penal Law § 125.27 Murder in the first degree
A person is guilty of murder in the first degree when:
1. With intent to cause the death of another person, he causes the death of such person or of a third person; and
   (a) Either:
      (i) the intended victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer; or
      (ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or .. . [ten more conditions similarly stated are omitted, including one about acts of terrorism]
   (b) The defendant was more than eighteen years old at the time of the commission of the crime. 91

Unlike the yellow traffic light law, triviality is not an issue here. 92 First-

88. KELSEN, GENERAL THEORY, supra note 6, at 61.
89. Id.
90. AUSTIN, supra note 11, at 767.
91. N.Y. PENAL LAW § 125.27 (McKinney 2002). Notice how “causes” becomes the defining verb for the law, rather than a “must not” or “shall not,” as discussed in the previous footnote.
92. Of course, violent crime statutes seem to receive a disproportionate amount of attention in the media, and even the academic literature, compared to other laws that affect the daily lives of almost everyone, such as traffic laws. It seems to me that this captivation with a small number of laws is probably related to the respective offense’s sensational and disquieting nature.
degree murder is a very serious offense. There is a similarity, however, be-
tween this potent piece of legislation and the excerpt about yellow traffic lights,
at least in the structure and syntax.93

If there is any behavior the state should explicitly command people not to
do, it is murder. Yet the murder statute is not constructed as a commandment or
exhortation. It is a description. A person’s action can be called “murder” when
the killing takes place under certain narrow circumstances (intent) and the vic-
tim is a certain type of person. For whose benefit is this delineated? These are
not instructions on how to commit or get away with murder (as if it was written
for would-be perpetrators) or how to avoid it or what one should not do (for up-
standing citizens). Most people know that they are not supposed to kill others
and that “murder” is against the law. Most people do not know, however, that
killing someone is only “murder” if the victim is a certain type of person, or if
the killing occurs under certain narrow circumstances. This description allows
enforcement officers to know whom to arrest and under what charge, the prose-
cutor to know the proper categorization of the perpetrator’s act, and the court to
know when an infraction has occurred and when to impose sanctions. The mur-
der statute neither tells nor asks anyone to refrain from this activity; it simply
delineates what constitutes this offense and what the punishment can or should
be.

Bentham and Austin both state that this type of formulation is directed at
the state, and Kelsen goes so far as to say that only a state actor can break such
laws, in a technical sense.94 Bentham seems not to have noticed that he lost the
citizens as addressees along the way. Austin admits this presents a problem for
his definition of law as addressed to the citizens, and moves on.95 Kelsen comes
closer to confronting this deficiency head-on by saying that the influence on a

93. There is also a significant underlying difference between the two. Traffic laws present a special
case of self-enforcement and cooperation; presumably, many traffic laws simply establish a universal
standard and convention—to facilitate the even flow of traffic—rather than running counter to individ-
ual self-interest or preferences. Other laws, such as those against theft, exist primarily to restrain self-
indulgence that would harm others. The murder statute above, however, follows the same formulation as
the rule about yellow traffic lights. Rules against theft, racketeering, and unfair trade practices follow a
similar literary formulation, even though these laws function as obstacles to very strong self-interest on
the part of would-be offenders.

Perhaps this distinction is illusory. The laws use the same formulation, whether regulating self-
interested behavior or activities with neutral incentives. The innate tendency to covet other people’s pos-
sessions leads people in every nation to be tempted to misappropriate chattel belonging to others. Pre-
sumably there is not such a universal innate urge to drive on the wrong side of the street. Either way, the
laws read basically the same. On the other hand, it must be admitted that traffic laws do serve to restrain
a more general form of self-interest, namely, to rush and cut ahead of others, to force one’s way through
crowded situations and make others wait. There may be a universal innate temptation to rush through a
yellow light. If there were no yellow lights, then the temptation would be to keep going—at an increased
speed—after the light turns red unexpectedly, just as the drivers facing the other way have an urge to
lunge forward without looking the instant their signal turns green.

94. See Kelsen, General Theory, supra note 6, at 61-64.
95. Austin, supra note 11, at 767.
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citizen’s behavior is indirect.\textsuperscript{96}

M.B.W. Sinclair notices this problem and identifies it well:

“Manslaughter is punishable by imprisonment in the state prison, not exceeding ten years.”

You see the difference is rather marked. We might say that no one is really commanded not to kill. We have a statement—a conditional statement. Such and such acts are classed as manslaughter. Whoever does these acts—that is, if anyone does them—he is punishable in a certain way.

After making an important observation about the structure of the legal formulations, Sinclair anticipates the idea proposed in this Article, but he retreats from the notion that the law is addressed to state actors rather than the citizenry:

Statutes are addressed to the persons whose behavior is regulated by them, not to officials who may or may not do the regulating. We typically understand that a command or order carries some express or implied sanction for noncompliance. As orders to officials to inflict sanctions, statutes explicitly do not do so. On the contrary, they commonly explicitly include a specification of a sanction on the offending non-official. And, if a statute is a command to an official, why must it be promulgated to the public to be effective?\textsuperscript{98}

This passage summarizes the predominant view. Given that others are likely to raise similar objections, it is important to answer this argument.

Sinclair begins with the assumption that an “addressee” must be the one whose conduct is supposed to be modified by the communication. Clearly the legislature enacts laws with the idea that these laws will control—to some presumably desirable extent—the behavior of citizens. As seen in the previous section, however, the “addressee” in a linguistic sense is not necessarily the one whose conduct is supposed to change the most; the “eat your peas” examples illustrated this point. The “law” in an intangible, abstract sense probably is, in fact, directed at the people. It is important to distinguish, for purposes of the ideas set forth in this Article, the written legal texts from “law” in the less tangible ways it is used in our language. Sinclair makes a mistake by using a sliding definition of “law.” This definitional problem is probably a significant reason for the prevailing view: people think of “law” as different things in different contexts, and the ideas about the “law” in one sense spill over into the “law” in another sense. This is like saying, “In a republic the people make the

\textsuperscript{96} Id. at 61.

\textsuperscript{97} Sinclair, supra note 10, at 243-44 (quoting Max Radin, Solving Problems by Statute, 14 Or. L. Rev. 90, 91-92 (1934)).

\textsuperscript{98} Id. at 244. While most people know that it is both wrong and illegal to take another person’s life, most citizens would probably not know whether the taking of a certain person’s life under certain circumstances would constitute murder or manslaughter. The simple knowledge that taking another’s life is likely to be illegal may be sufficient to deter would-be offenders, so the distinction makes little much difference in most people’s decision-making. On the other hand, the distinction could make a life-or-death difference in the offender’s sentence if convicted. This text is addressed to the officials who prosecute such offenses and judge the cases, not necessarily the citizens themselves, who do not know the particulars—and hopefully would not get close enough to committing the offense that they would need to know.
laws," which may be true in some philosophical sense, but is completely incorrect as a description of the process. Sinclair begins by looking at the words of the text—he is using linguistics at first—but suddenly shifts to a more sociological/political use of the word "law" to talk about the addressee. "Addressee" is a linguistic concept, not a political one. Sinclair would have been more consistent if he had maintained his linguistic approach, but, if he did so, his political point would not follow. A law instructing a state officer to punish certain behaviors has the indirect effect of modifying the citizens’ behavior, even though it is addressed explicitly to the state actor. The state actor is the one who acts upon it most directly.

Sinclair’s second point regards sanctioning. He neglects the point that legal systems do, in fact, sanction state officials who do not properly fulfill their duties under the law. Judges can be disciplined and removed, and police officers can be put off the force. He is correct that most of the sanctions in our codebooks are to be meted out to citizen violators; but being the recipient of the punishment is not the same as being the addressee of the injunction to mete out the punishment. If a military officer commands his men to shoot at the enemy, his men are the addressees, not the enemy, even though it is the enemy who is shot.

Sinclair’s final point, that sending bound volumes of the enactments to libraries somehow proves that citizens are the addressees, ignores the fact that citizens almost never read these books. Selling volumes of the official code to libraries serves other functions, such as preserving transparency of the government. A similar motivation prompts government agencies to post extensive information on their Internet websites, much of which does not serve any transactional purpose. This is a formality we do to preserve our ideals of democracy. Secret government rules seem undemocratic to us, so we want them made available to the public.

In summary, modern statutes were drafted, pursuant to the recommendations of influential theorists like Bentham and Austin, in a form that speaks only to the actions required of state actors. The implications for the behavior of the citizens are just that—implications. This fact does not mean that the implications are insignificant or unlikely to influence behavior. Behavior can be drastically affected by indirect concerns and implied messages and meanings. However, problems arise, such as insuring that the people study and learn the law, when we turn to other features of Bentham’s project. To some, it is undoubtedly a frightening state of affairs that the legal texts have no place in the lives of most citizens, but this situation makes sense if the texts embody only formulations directed to state actors. People can play baseball without the offi-

99. See Kelsen, General Theory, supra note 6, at 197-201 (cautioning that the individual in that case acts outside the prescribed duties of office and therefore the illegal activity is not properly imputed to the state itself).
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cial rulebook; they can live productive lives as law-abiding citizens without poring over codes.  

As quoted above, Bentham identified two types of legislative formulations, one addressed to citizens and one addressed to state actors. Modern legislation consistently used the second form, so it seems contradictory to say that the formulations are directed at the citizens. Sinclair does make this assertion, but does argue that “the law” is really the kernel of mandated behavior contained within the “shell” of the formulation.  

This approach skirts the issue of the relevance of the formulations themselves. Essentially, Sinclair fails to distinguish between the written formulations and the “law” in the more general sense.

If we assume that the citizenry is the addressee of the written formulations, we must hold to this notion despite the following: (1) the citizenry never reads the written formulations; (2) ignorance of the law or its written formulations never furnishes an excuse for violations; (3) the written formulations only specify the state’s response to possible behaviors by citizens; and (4) the citizen’s interpretation of the formulations has little or no legal significance. Desuetude by the enforcers does render a law operationally defunct, but widespread defiance of the laws by citizens is significant only to the extent that enforcement resources are limited.  

It seems too far a stretch, therefore, to maintain that the written formulations are directed or addressed to the citizens primarily. This fact brings us to the second option, that they are addressed simultaneously to the citizens and the state.

100. See ANDENAES, supra note 2, at 36 (“General-preventative effects do not occur only among those who have been informed about the penal provision and their applications. Through a process of learning and social imitation, norms and taboos may be transmitted to persons who have no idea about their origins—in much the same way that innovations in Parisian fashions appear in the country clothing of girls who have never heard of Dior or Lanvin.”). Andenaes focuses on criminal law. It is not so clear that “norms and taboos” would cover the myriad of regulatory offenses that constitute a large part of our modern legal framework or other malum prohibitum acts, but his point is well-taken that the law can influence society even if the laws themselves remain unknown to most citizens.

101. See Sinclair, supra note 10, at 245-46. One could read Bentham’s comments (discussed at length earlier) this way as well—that the formulation “includes” the general prohibition. The problem is that the “kernel” is supposed to reach and influence one set of people (the citizenry), but it is, in Sinclair’s terms, enclosed within a “shell” of a formulation that targets a completely different set. While this may be true functionally, from the standpoint of transmitting information the problem remains: How is the “kernel” effectively transmitted to the supposed recipient if the “shell” containing it is sent to someone else?

102. The main exception to the “ignorance of the law is no excuse” rule is that when the statute specifies that knowledge of the law is an element of the required mens rea for conviction, a lack of knowledge will prevent conviction. See infra Section VI.B.

103. Andenaes provides several anecdotes about desuetude. One example is the peculiar laws about travel and transport of currency between Denmark and Sweden (before the era of the euro). While travelers were generally compliant with customs laws that were enforced, such as duties on tobacco, the prohibitions on carrying Danish or Swedish currency across the national border was not enforced, and noncompliance was rampant. See ANDENAES, supra note 2, at 11-12.
B. Dual Addressees of the Law?

The second alternative is that the law is addressed to both the citizenry and the state. Meir Dan-Cohen's article on "acoustic separation" is the best-known example of the "two addressee" theory. He repudiates the idea that the law is addressed to the citizenry by arguing that such a possibility would leave nothing to direct the judge about how to apply the rule to a given set of facts.\(^\text{104}\)

Drawing from the same Bentham passages quoted in previous sections, Meir Dan-Cohen proposed a model of "acoustic separation" for criminal law, portraying some portions of the law as directed toward officials to guide decisions about application, and other portions directed toward the populace, to guide behavior.\(^\text{105}\) In doing so, he provides the strongest proposal of the second alternative for the law's addressee, and seeks to displace both the idea that the laws are addressed to the citizenry, and what he calls the "reductionist" view of Hans Kelsen.\(^\text{106}\) The former, which apply to officials, are "decision rules;" he discusses only examples relating to the judiciary.\(^\text{107}\) Parts of the law directed at the person on the street are named "conduct rules." He portrays these rules as imperatives directing the behavior of the masses.\(^\text{108}\) Under Dan-Cohen's model, decision rules and conduct rules can be embedded within the same statute, side by side, without identifying markers.\(^\text{109}\) A part of the law is determined to be

\(^{104}\) See Dan-Cohen, supra note 15, at 628 ("We can successfully account for the normative constraints that the law imposes on judicial decisionmaking [sic] only if we impute to the legal system an additional relevant norm whose norm-subject is the judge and whose norm-act is the act of judging or imposing punishment.").

\(^{105}\) See id. at 626-27.

\(^{106}\) Id. at 627-28. He dismisses Kelsen's approach too quickly, based entirely on H.L.A. Hart's retort that it eliminates the difference between a fine and a tax and ignores the role of law as regulating social behavior. Id. (quoting H.L.A. Hart, THE CONCEPT OF LAW 39 (1961)). Kelsen himself thought this was part of the strength of his model. See, e.g., HANS KELSEN, PURE THEORY, supra note 6, at 54, 256-57. There is a case in which a tax and a fine are the same thing—both are a forced transfer of money from an individual to the state. The only difference is what condition triggers this forced transfer: in the first case, a morally neutral (presumably) transaction such as spending or earning money; in the second case, a morally reprehensible activity (such as a misdemeanor crime). Many tax theorists would say that even this distinction is illusory because taxing tends to put a damper on the levied transactions and contains some kind of normative signal. Anti-tax conservatives say that income taxes "penalize" hard work and financial success, and groups wanting to discourage smoking or gambling advocate taxing these activities disproportionately as a restraining influence. I would argue that Hart's response "fails to account for the difference" between a tax and license fees. Kelsen would certainly not deny that a sanction can have different "conditions," whether criminal, civil, or administrative, and that the condition gets its moral import from the relevant norms in society. See also Robert Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523 (1984) (distinguishing between "sanctions" as "detriments imposed for doing what is forbidden," and "price" as "money extracted for doing what is permitted," and arguing that "officials should create prices to compel decision makers to take into account the external costs of their acts, whereas officials should impose sanctions to deter people from doing what is wrong . . . ").


\(^{108}\) Id. at 648-51.

\(^{109}\) Dan-Cohen does not use the term "address" but substitutes similar phrases:

First, conduct rules and decision rules may often come tightly packaged in undifferentiated mixed pairs . . . . [R]adical separation is unnecessary in the real world. As Bentham pointed out, a single statutory provision may simultaneously guide both conduct and decision and may thus function as both a conduct rule and a decision rule. A criminal statute, to use Bentham's
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one or the other based mostly on practical effect—that is, whether it affects primarily the choices of officials or subjects. Judges heed rules like the defense of extreme duress, while would-be offenders focus their decision calculus on the proscriptions against rape, murder, etc. Dan-Cohen does take the extra step, however, of asserting that the “ordinary language” portions of the statute generally correspond to the “conduct rules” directed at citizens, while the technical terms and legal jargon indicate the part directed at the judge. Dan-Cohen does not quote or examine a single statutory excerpt to illustrate his point. All of the “decision rules” discussed at length in his article are common-law principles of jurisprudence, not codified text. The following examples he uses are primarily court-made rules: the mitigating consideration given to acts done under duress, the principle that you “act at your own peril,” or the rule that “ignorance of the law is no excuse, but vagueness in the law can be.” Similarly, Dan-Cohen’s examples of “conduct rules” in-

example, conveys to the public a normative message that certain behavior should be avoided, coupled with a warning of the sanction that will be applied to those who engage in the prohibited conduct. The same statutory provision also speaks to judges: it instructs them that, upon ascertaining that an individual has engaged in the forbidden conduct, they should visit upon him the specified sanction.

Id. at 631.

110. Specifically, Dan-Cohen does allow for the fact that each side is aware of the other’s commanded duties and can take them into account in decision-making:

[O]fficials are aware of the system’s conduct rules and may take them into account in making decisions. By the same token, because individuals are familiar with the decision rules, they may well consider those rules in shaping their own conduct. We may say, therefore, that reality differs from the imagined world in that real-world decision rules are likely to have conduct side effects, just as real-world conduct rules are likely to have decisional side effects.

Id. at 632.

111. Specifically, Dan-Cohen explains:

This peculiar combination of ordinary language and technical definition is especially puzzling in a system of normative communication. If the law intends to convey its message through ordinary language, the employment of technical legal definitions that distort the meaning of that language does not make sense. If, on the other hand, the intended normative message is best expressed through technical definitions, the law may do better to coin a technical vocabulary (as in fact it frequently does) rather than use misleadingly familiar labels. The difficulty would be removed, however, if the law intended not one or the other, but both: the law may seek to convey both the normative message expressed by the common meaning of its terms and the message rendered by the technical legal definitions of the same terms.

Id. at 652.

112. In the midst of a very lengthy discussion about statutory rape and mistake of fact by the perpetrator (which traditionally does not furnish a sufficient defense), he does relate one Victorian-era statute about statutory rape as part of a quotation from the court opinion in the case. He does not, however, refer to this statute to illustrate a quintessential “conduct” or “decision” rule. Rather, it is to show that ignoring mental state for a few unusual crimes can be justified by these crimes’ close connection to well-known social norms. See id. at 653. The overlap of the criminal law with social norms can, at times, create a presumption that the usually requisite mental state was present. This idea resolves an epistemological puzzle but does not help the reader see the “acoustic separation” model at work in a given statute. Nowhere does Dan-Cohen refer us to any laws that are actually on the books.

113. Id. at 633-643.

114. See id. at 644-645.

115. See id. at 633, 645-647. Sometimes statutes do incorporate certain “affirmative defenses,” including extreme duress, either by listing the defenses in a section of the code, or by making such mili-
clude only the quirky and controversial rules surrounding statutory rape, which are fairly atypical, and the vagueness doctrine—another jurisprudential tradition, but not a statute. As seen in the previous section about statutory formulations, the modern drafters followed Bentham and Austin and used a formulation addressed entirely to the state actors, knowing that this carries enough weight in implications to affect the behavior of citizens.

It is possible to read Dan-Cohen's thesis as focusing on the "law" in a much more general sense, and not on the texts themselves. This would explain the examples he cites, which are more traditions of jurisprudence than part of the official written forms. From the standpoint of "law" in an abstract sense, "acoustic separation" could be seen in "decision rules" that refer to the written formulations of laws, being addressed to state actors, and "conduct rules" that are the intangible operation of the "law" in achieving its desired end in the population's behavior. This would help save his binary model, but runs into problems with some of his statements, as when he urges that the "ordinary language" portions of the statute are addressed to the commoners.  

Another problem with Dan-Cohen's model is that the lines between the two types of rules become so blurry as to make the model difficult to use or apply. For example, a judge must use the entire "conduct rule" portion of the statute to make a judgment; after all, the judge's main role is to determine how the "rule" applies to the facts. In Bentham's example, "If anyone steals, let the court have him hanged," the court has no task without the "if anyone steals" part—there is no one to hang. Dan-Cohen says the "let the court have him hanged" part is necessary to give the court something to do; but clearly the "if anyone steals" part is just as necessary. Similarly, the defendant must explore every angle of the search and seizure rules of criminal procedure, which are explicitly addressed to state actors, to obtain an acquittal. So we are back gating circumstances the dividing lines between different degrees or classes of the same crime (murder to manslaughter, for example). The rule about duress that Dan-Cohen discusses, however, is completely the judiciary's brainchild, a self-promulgating tradition. This includes the court-created exceptions for prison escapes and refusals to testify in court.

116. See id. at 652.
117. As noted previously, Dan-Cohen does allow for some of this overlap, but seems to believe it is limited. See id. at 632.
118. See KELSEN, PURE THEORY, supra note 6, at 234-35. Kelsen argued that all "application" of the law by judges was, in a technical sense at least, "making" law for the specific arrangement of facts in that case. Interestingly, he asserted that this was true whether the judge was operating within a common-law system or a "code" system, as is common in European countries. This is particularly interesting because Bentham saw the "law-making" function of common-law courts as very undesirable and pushed for the Continental model to replace it. Kelsen argues in this section that there is not as much practical difference between the two as one might think, or as much as Bentham thought.
119. See supra note 13 and corresponding text.
120. Dan-Cohen, supra note 15, at 628 (this is supposed to be a "decision rule").
121. See KELSEN, GENERAL THEORY, supra note 6, at 61 ("Law is the primary norm, which stipulates the sanction, and this norm is not contradicted by the defict of the subject, which, on the contrary, is the specific condition of the sanction.").
122. For example, even though Miranda warnings are clearly a requirement placed upon the police
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where we started: the court and enforcement officers use all of the written formulation, and we hope that the machine as a whole will influence the behavior of citizens.

Even if Dan-Cohen’s model could be refined to clear up this blurring effect, there are additional problems with the idea that the written laws and cases are addressed to the citizens and the state. Many of the problems plaguing the suggestion that the written laws address only the citizens belie the idea that the citizens could be co-addressees as well. A citizen rarely reads the written formulations, ignorance of the law is not accepted as an excuse, and a citizen’s interpretation of the formulations has no legal significance. Dan-Cohen suggests that a typical “Bad Man” reads statutes and is “confronted with the full-fledged moral precepts he had hoped to evade,”¹²³ and that good people read the statute to find out how they can stay on the “safe side.”¹²⁴ Perhaps this happens in an “imaginary world,”¹²⁵ but it undermines his theory’s relevance for ours.

The linguistic rules reviewed earlier also seem to weigh against the idea of multiple simultaneous addressees. On the one hand, the statutes themselves do not appear to contain certain sections addressed to the state and others addressed to the offenders. We saw with Kelsen and Bentham that the typical formulation is addressed entirely to the state and regulates the citizens’ conduct indirectly, by implication. It is more concise for the code to instruct enforcers to punish certain acts than to state that the act is forbidden and mandate a sanction. On the other hand, we have seen that reading the same statutory section as if it conveyed different intended meanings to the state as opposed to offenders suggests an element of irony or deception, both of which seem inapposite in this context.¹²⁶

(to the extent that this requirement is still upheld by the courts), this state-actor-addressed rule is so important to citizens that people speak of “Miranda Rights.” Where is the “decision rule” and where is the “conduct rule” here? The same rule is perhaps equally important for both parties, albeit in different ways. It is important to police as a direct rule about how to conduct themselves. It is a life-saving rule for many defendants, but only indirectly, to the extent that it invalidates the actions of the arresting officers.

123. Id. at 650.
124. Id. at 650-51.
125. See id. at 630-31 (offering a thought experiment about an imaginary world where the judges and citizens are separated acoustically).
126. See Witteveen, supra note 27, at 47-58. Witteveen proposes an interesting metaphor comparing the law to a symphony: there is a composer (sender), the score (message), and the orchestra that reads and plays the score (the receiver). We can then compare this to legislation: the sender is the legislature, the message is the statutory text, and the receiver is the state (civil servants, judges, enforcement officers, etc.). The composer writes the staffs, notes, rests, key signature, etc. Regardless of the composer’s aspirations for fame and renown, all this writing is directed to a special class of people who can read it and who have instruments to play according to the marks on the score. The sounds produced may actually form a pleasant song, and the song may become popular with listeners. But there is a strong sense in which the composition is only directed at the orchestra; the written score is not addressed to the passive listeners. The composer does not communicate directly with the eventual concert attendees. The original communication ends with the orchestra musicians. The orchestra reads from a page and plays; the audience listens to sounds in the air and does nothing (except clap at the end). There are two separate communications here, of a different essential nature. It is not accurate to say that the composer is simul-
To make one final attempt to defend the binary addressee model, suppose a person stands on the balcony of the New York Stock Exchange at the end of the business day and shouts: “Trading is closed!” This communicates different things to different people who are present. To some, it signals that they should stop bidding or selling, and to others (analysts, perhaps) that it is time to start compiling an account of the day’s affairs. To the media, it signals that it is time to quickly prepare a summary news report, and to the Exchange cleaning crew, it signals that it is time to start their shift. Multiple addressees are here and multiple meanings. Or are there different meanings? The objective meaning here is actually the same, but the subjective implications for the members of the audience are individualized. Simply, suppose a bell replaces the person in the example, as is actually the case. The sounding of the bell means to one woman that she has just become rich, and to another that she is now poor.127 The sound is one and the same. The subjective associations for the audience do not determine the addressee.

C. Sovereignty in Silence?

The third alternative holds that the law is addressed to no one in particular, but derives its meaning and force entirely from the social institution within which it functions, post priori. The only thing that matters is that the law is used in a certain way by society. Heidi Hurd has argued for a version of this position, claiming that the law is not a communicative act at all, but rather something akin to a captain’s log on a ship,128 as a type of archive of the lawmaker’s decisions. Her article appears to be the only one arguing for this point, so I will consider it in some detail.

Suppose a mysterious code of rules washed ashore in a bottle. It is conceivable that the legislature could take something that washed ashore in a bottle and simultaneously sending his message to both audiences. It is only sent, or addressed, to the musicians and the conductor. The orchestra sends another message to the concert-goers. Perhaps the message the orchestra sends will be exactly what the composer wanted the audience to hear. This does not mean that his communication was addressed to both, only that it was instrumental in producing a second communication, indirectly, to someone else. The written legal texts (the score) are only for the relevant state actors (the musicians). The public (analogous to the concert audience) is the receiver of a separate and distinct communication, which is related to the original but of a wholly different nature.

127. Similarly, a highway sign that says, “65 mph” tells one driver to slow down, and another that it is permissible for her to speed up. The civil servants who placed the sign had only one intended meaning.

128. See Hurd, supra note 78, at 990-91. The captain’s log seems to be a strange analogy to select for the law, as the former has very little subsequent consequence, while the latter can spell death or life for individuals in certain circumstances. Captain’s logs are probably never read in the great majority of cases by anyone, except perhaps the captain when trying to track his own progress. Perhaps the captain himself is unlikely to read it except in the case where he gets lost. Laws are consulted every day by state actors, courts, and lawyers. The captain’s log, if read, is purely historical, like the “black box” in an airplane cockpit. The law is not a historical account; it defines the present and future states of the world’s affairs, at least legally.
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adopt it as law. As Bentham said, "In this sense whatever is given for law by the person or persons recognized as possessing the power of making laws, is law. The Metamorphoses of Ovid, if thus given, would be law." Such a situation would be analogous to the legislature or administrative agencies incorporating a code of industry standards from a private trade association as binding law, which is fairly common with fire codes and other standards. To carry force of law, however, the private code must be formally recognized and adopted by the legislature as its own; the law is still promulgated, but some of the content is plagiarized (permissively, of course). This places us back in the same place. If the original material incorporated as law originally had no addressee, it arguably obtains one once enacted.

Hurd does not really consider the possibility that the written formulations of law could be directed or addressed to state actors, but assumes a priori that state actors could only be "eavesdroppers." This is similar to the role of the state in the first alternative presented above. Hurd assumes that any communication would necessarily be addressed to the citizenry. Once she demonstrates the problems with this notion, along with the problems of determining legislative intent, she is done with the idea that the law communicates any-
thing to anyone. Her argument would exclude as communication anything written that is read by someone other than the subject of the writing, such as a child’s report card being read by parents. Both legislation and court opinions direct the actions and affairs of state actors. The state actors heed the statutes, regulations, and court rulings, whether as administrators, or even as a sheriff executing a judgment on a defendant’s bank account. Those issuing rules and rulings know their words do not disappear into the void, but are heeded and implemented. How can there be no communicative act in lawmaking?  

If Hurd was instead arguing that the written formulations themselves are distinguishable from “the law” itself, I would agree. Even so, she implies that the written formulations do not matter, because she sees the true source of law as being “natural law,” and I would dispute this. A belief in natural law would necessarily subordinate the importance of written formulations. The formulations may not be as important as the unwritten or intangible features of our legal system, such as legal institutions, the state monopoly on violence, or even the mass media. But the formulations do have some importance, as seen above, and the question remains as to why. Hurd does not provide a satisfactory answer.

This does bring up an interesting point about how the written formulations of the law are different from other writings in our society. Unlike books, newspapers, personal letters, or any other written media, the legal texts have an “authoritative” or “official” interpretation given by organs of the state like the courts. The degree of legal and practical significance given to these authoritative interpretations is enough to render private interpretations of these texts almost meaningless. This sets these writings apart from most or all other forms of communication, in which meaning can vary significantly depending on the user and hearer; there are no absolute rules about meaning in everyday conversation. In law, by contrast, there are official referees for meaning or interpretation whose rulings must be followed by others, rendering other interpretations moot. Perhaps Hurd was following an intuition about this unique characteristic then shows how this supports the thesis that law is addressed to state actors. See Kelsen, Pure Theory, supra note 6, at 32-33.

135. As Bentham said, even if the legislature adopted Metamorphoses as the law of the land, it then becomes an official written formulation that delineates the rights of the state and the citizens. Once the legislature enacts something as law, this because a communication to the enforcement officers and the courts who must implement the prescribed measures. BENTHAM, supra note 12, at Ch. 17 n.7 § II.

136. See Hurd, supra note 78, at 998-1006 (claiming that the idea of law as an archive or a captain’s log signals the reality of natural law). See also id. at 1000 (arguing that although “natural law” is out of fashion in academic circles, her agenda is to provide an intellectual framework for reviving the doctrine).

137. If moral or legal absolutes exist naturally, their existence would continue, in theory, even if society enacted a law that was “wrong.” A positivist would flip this around to argue that natural law, if it exists at all, is irrelevant to the scientific study of the laws we have in society.

138. I do not mean to restrict the ability to give official or authoritative interpretations to courts. Courts sometimes defer to other government organs’ interpretation, giving weight to the “official” interpretation determined by an administrative agency.
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of legal texts that sets them apart from all forms of communication. This feature would also set legal texts apart from "archive" type writings, such as Hurd's travel log. This unique feature does not mean that statutes or cases are not communication, but rather illustrates something about the addressee of these texts.

D. A Fourth Alternative

The law can only be addressed to the state and its various actors. The citizens rarely, if ever, encounter the law in its textual, codified form. Yet the codified texts, and the written decisions, are very important. In court, they furnish the basis for charging a citizen with a crime or assigning civil liability. "The state as addressee" explains this situation and resolves the tension surrounding it.

The group of citizens whose behavior the law was designed to affect, as in deterring would-be perpetrators of a particular crime or creating a legal duty for others to undertake certain actions, are "referenced" by the legal text but are not the true "addressees." The "addressees" are those who read and act directly upon the legal text, who are in receipt of the communication constituted by the legal formulations. Enforcement officers, agency officials, and courts appear to be in the position of the linguistic "addressee." The addressee is the institution that effectuates the declaration, that which gives it meaning (i.e., interpretation) and validity (enforcement). The law is addressed to the state.

The model proposed here could significantly change the expectations we have of legislation and regulation. Expectations that are more accurate might facilitate better drafting and implementation of the laws. Dick Ruiter suggests that the classic notion of laws as consisting of general rules of conduct is self-defeating; he asserts that most modern legislation is not directed at individual behavior, but at constructing social institutions that channel behavior. He notes that the consequence of mistaken assumptions can lead to misplaced disappointment:

In most modern welfare states hopeful expectations as to the effectiveness of goal-oriented legislation have been harshly disappointed in recent times. This has caused a wave of scepticism about the ability of society to shape itself by means of state

139. Ruiter, supra note 23, at 155. The author is not aware of any empirical tabulation of what percentage of statutes pertain to institutions as opposed to individuals or individual behaviors. Section IV.D of this Article, infra, addresses the issue of the role of legal texts in deterring crime, which is problematic as the would-be offenders are not usually in actual receipt of the texts, unlike the law enforcement officials as courts. While would-be offenders may have "constructive notice" of the law, they are very unlikely to have "actual notice." This phenomenon short-circuits the deterrence effect of much legislation. Ruiter's point, which is well-taken, is that the written texts may fail to accomplish "direct" deterrence, due to the lack of "actual notice" among would-be offenders, but may be very effective from the standpoint of creating social institutions that shape the behavior of the lives they touch. This is the basic thesis of this Article—that the rules of rulings contained in law libraries are addressed to the state actors within state institutions, and that they affect the citizens indirectly through these state actors and institutions, or as communicated by the media in fragmented form.
regulation. However, the recent fiascos with instrumentalistic forms of legislation must not make us close our eyes to the remarkable successes of other forms of legislative design, be it the diversity of constitutions with their cross-fertilization among the nation-states of this world, designs of institutional legal systems of a great variety of international organizations, codifications of civil and commercial law, or the designs of international treaties containing international regimes for the open sea of territories such as Antarctica. All such designs present images of overall institutional environments that exert pressure to be socially realized and, surprisingly enough, in a large number of cases we observe that social behavior roughly adjusts to them. Abandoning the idea of goal-oriented legislation in favour of the idea of legislation as a form of institutional landscaping means that the problem of its effectiveness is put in a different light.  

A proper view of whom the law addresses would help dispel confusion about the most effective means to have its objectives met. For example, drug laws are often assessed only in terms of the individual offenders caught or the estimated consumption rates in the population. It would be interesting to see instead how drug laws impact treatment and recovery rates for addicts, how they impact the outcome of tangentially-related court proceedings such as custody disputes, and how they augment or detract from the enforcement of other criminal laws. A more realistic model would make the enterprise of law-making more efficient and effective. The next Part considers the enterprise of interpreting statutes, and shows that the concept of the state as the “addressee” of the law fits well with the overall system of legal interpretation.

V. ADDRESSEES AS INTERPRETERS

A. Vague Terms and Interpretation: Regulatory Variability

Interpretation of the law’s terms is related to the concept of audience and “addressees.” As observed at the outset of this Article, our legal system includes, among other things, official written formulations of our laws in our statutes, regulations, and published cases. Much of this Article has focused on distinguishing, to some extent, these written formulations from the less tangible or looser meanings of “law” as it functions in society. At the same time, these written formulations can be distinguished from other forms of writings in our society, in that certain officials have the power to declare a “correct” or authoritative interpretation that renders other interpretations invalid as far as guiding the behavior of law enforcement or other state actors.

William Eskridge and Judith Levi have proposed that governmental discre-

140. Id. at 155-56. One implication of the theory set forth in this Article is that more legislation (and perhaps court decisions) should target the institutions of society directly in order to bring about the desired results in individuals' behavior.

141. Note that the Model Penal Code delineates four categories of official interpretations, which are set forth as requisite bases for justifiable mistaken reliance: statutes (and other enactments), court opinions, administrative agency orders, and interpretations by any other “public officer or body charged by law with responsibility for the interpretation, administration, or enforcement.” MODEL PENAL CODE § 2.04(3).
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tion or decision-making can be delegated through what they call “regulatory variables,” linguistic devices in the statute that leave the delegated interpreter a range of meanings and applications. \[^{142}\] The legal meaning of a word within a statute or regulation can vary depending on the topic of the statute, public policies of politicians and courts, and the “degree of delegated discretion.” \[^{142}\] Statutory terms are functional and intended to achieve the goal of regulating. \[^{144}\]

Regulatory terms are set and used within the context of other regulatory purposes, \[^{145}\] and “embedded within the statutory enactment is an intent that agents carrying out the statute have some discretion.” \[^{146}\]

There is nothing new in saying that the legislature intends to delegate some of its authority in certain circumstances. However, the focus here is on the mechanism for delegation, which is essentially a linguistic one. \[^{147}\] To use administrative agencies as an example, delegations from the legislature to such agencies are commonplace and widely accepted as part of our system of governance. While some portions of the enabling statute are often clear and directive, invariably there are other provisions containing some ambiguity, requiring the authorized official or administrator to exercise some discretion about the proper policy or action in that situation. It is in this sense that authority is really delegated. Ambiguity in statutory terms necessarily delegates. \[^{148}\]

Levi and Eskridge observe, “The level of linguistic generality permits an inference about the speaker’s willingness to delegate gap-filling discretion to another person (i.e., police officers and judges). The more general the statutory term, the more discretion the directive is implicitly vesting in the implementing official.” \[^{149}\] Stronger examples of regulatory variables are “reasonable,” substantial, good-faith, and the phrase “all deliberate speed.” \[^{150}\] Of course, sometimes the ambiguity is not evident until a difficult case arises. This approach to vagueness in statutory text is different from those that try to prescribe rules for how to derive

\[^{142}\] See Eskridge & Levi, supra note 16, at 1107-08 (shifting to the term “regulatory variability” out of fear that readers will imagine a list of magic words that delegate discretion).

\[^{143}\] See id. at 1106.

\[^{144}\] Id.

\[^{145}\] Id.

\[^{146}\] Id. The authors contend that this occurs in varying degrees, determined by a variety of factors. The proper application of statutory language varies with regulatory purpose; that is, the words of a statute should be given force to fulfill their statutory objective. At the same time, overarching public policy concerns, perhaps unrelated to the statute’s immediate purpose, may bear upon the interpretation. Id.

\[^{147}\] In addition, while it is well-settled that the legislature may delegate to administrative agencies, at least within certain parameters, it is less settled that delegations may flow toward the other two branches of government directly. Eskridge and Levi’s account, however, tells a tale of delegation to a variety of government actors, including judicial and executive ones. Id.

\[^{148}\] See Cass R. Sunstein, Nondelegation Canons, 67 U. CHI. L. REV. 315, 330 (2000) (arguing that “[w]hen statutory terms are ambiguous, there is no escaping delegation “and that while the nondelegation doctrine does not function well as a strict judicial rule, its underlying principles are quite useful and appear in many modern judicial approaches to agency actions).

\[^{149}\] Eskridge & Levi, supra note 16, at 1111 (noting that this discretion may be “vested deliberately or inadvertently”).

\[^{150}\] Id. at 1113.
a “right” answer whenever statutory imprecision is encountered.\textsuperscript{151} Instead, the vague or ambiguous term could be viewed as a linguistic maneuver designed to transfer the task of delineating the details or parameters to the delegate.\textsuperscript{152} Some would argue that this is the channel for delegation of discretion or decision-making authority.\textsuperscript{153}

Eskridge and Levi’s article becomes most interesting when it ventures into the area of the law’s audience:

Unlike most other communicative utterances, statutes are addressed to a large and heterogeneous audience. That audience includes administrators, who are typically the initial audience for the statute, but the audience also includes the citizenry. Because statutes are directive in nature and infinite in duration (usually), their intended audience also includes future administrators and citizens. The heterogeneity of the intended audience, the indefinite duration of the communication’s effects, and the key role played by administrators (other state officials) suggest the importance of discretion—an administrative law term for regulatory variability—in the statute’s implementation over time.\textsuperscript{154}

Perhaps Eskridge and Levi meant “addressees” and “overhearers” when they identified the statute’s “immediate” and “secondary” audiences, respectively. If so, then the idea of regulatory variables is mostly important for the state agents. It makes little sense to talk about citizens “interpreting” the regulatory vari-

\textsuperscript{151} There is some philosophical advantage in verbal imprecision in legal texts, in the sense that it avoids an infinite succession of borderline cases that would result from a bright-line rule. See Timothy A.O. Endicott, \textit{Vagueness and Legal Theory}, 3 \textit{LEGAL THEORY} 37, 60-63 (1997) (discussing Ronald Dworkin’s and Hans Kelsen’s problematic schemes for resolving cases of vagueness and ambiguity, and arguing that vagueness serves the purpose of avoiding an infinite succession of “borderline cases” that would result from an attempt at perfect precision of every term).

\textsuperscript{152} Deferring to the interpretation of the law made by agency officials is the substance of the \textit{Chevron} doctrine in administrative law. \textit{Chevron, Inc. v. Natural Res. Def. Council}, 467 U.S. 837 (1984). It would be going too far, however, to say that the legislature intended each vague word to be vague, as it could not possibly anticipate the borderline cases that would arise, making application/interpretation of some specific provision difficult. Rather, the legislature intends generally to leave it to the agency to fill in the gaps, to figure out whatever situations arise within the general confines of the clear provisions. See Sunstein, \textit{supra} note 148, at 324 (noting that “nothing appears to link agency performance with statutory clarity”).

\textsuperscript{153} See Ruiter, \textit{supra} note 23, at 148. If the administrative delegate’s every move is precisely dictated by the legislature, she would then function only as a robotic appendage of the legislature (which has never been a criticism lodged against agencies—that they are too responsive to the will of Congress). Without regulatory variables, the civil servant is an agent of the state, but not a delegate.

Interestingly, Sunstein notes that “congressional specificity often seems to produce outcomes that reflect the power of self-interested private groups, as, for example, where legislation reflects a capitulation of organizations using public-spirit rhetoric for their own parochial ends.” Sunstein, \textit{supra} note 148, at 323. He raises this as a problem with the traditional nondelegation doctrine as applied to administrative agencies, which took a dim view of statutory language allowing any leeway or discretion on the part of the unelected officials. Strict application of this view, however, can lead to rent-seeking, and disproportionate interest-group influence: “Statutory clarity, especially on details, is often a product not of some deliberative judgment by Congress, but of the influence of well organized private groups.” \textit{Id.} at 324.

\textsuperscript{154} Eskridge & Levi, \textit{supra} note 16, at 1110-11. This paragraph seems to be saying both that the nature of its audience prompts or motivates the legislature to use variable terms, and that the variability can be identified and evaluated in some way that is connected to the audience. Admittedly, there are certainly interpretive issues related to the originator of “law” communication, such as the imponderable question of whether the legislature could possibly have a collective “will” or “intent.”
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ables, as a private individual’s deviant interpretation of a statutory term would not be recognized in our courts. It is also hard to imagine that the legislature left ambiguity in the statute in order to delegate power to individual citizens, in the hope that people would figure things out for themselves. Hans Kelsen discusses this idea and argues that any discretion that appears to be left to citizens themselves is not “authentic”, because it is not binding on the state agents responsible for enforcement and punishment.

If we identify the state as the addressee, it narrows the range of possible interpreters, and thereby the possible interpretations. The state includes administrators, courts, police, and prosecutors. This focus makes the idea of regulatory variability reasonably bounded and solves the main weakness of Eskridge and Levi’s proposal. Ordinary citizens do not interpret statutes; administrators and courts do (and their unofficial appendage, the practicing bar), as do law enforcement officials to a lesser extent. It would not be a worthwhile endeavor to ask how ordinary citizens would have understood the words of the laws; ordinary citizens have no reason to read them. They receive the channeling effects of the law indirectly, but sufficiently, from the state actors who do the interpreting and implementing. Not only judges, but also agency administrators and law enforcement personnel, will have to engage in some degree of interpretation to determine whether the law’s terms apply to factual scenarios as they arise.

Consider H.L.A. Hart’s famous parable of “no vehicles in the park.” The term “vehicle” will have to be interpreted as new situations arise. State actors will have to determine whether a bicycle, wheelchair, or baby stroller is a vehicle, and what should be done about ambulances trying to rescue someone injured in the park. One can also imagine scenarios presenting conflicting interpretations of the words, such as “the park” and even “in,” perhaps for low-flying aircraft. Law officers patrolling the park, in deciding whether to arrest or not.
ticket the ambulance driver or wheelchair-bound visitor, will execute the initial stage of interpretation. The prosecutor will decide whether the case can be brought under the rule’s terms; the judge will act at yet another level of interpretation. The citizen is not entitled to engage in any authoritative, or otherwise meaningful, interpretation of the law. It simply does not matter whether she believes her motorcycle should not fall under the prohibition, or if a foreign terrorist does not recognize the court’s jurisdiction. Authoritative interpretation of the law’s meaning is left entirely to the agents of the state at various levels. Obeying the law is more a matter of conforming to the interpretations of the law of the state actors on each level; the citizen is not asked to obey according to his or her own understanding of the law.

This is not to confuse “interpretation” in its common sense with “authoritative interpretation” performed by certain state organs, such as the courts. One might say that citizens “interpret” merely by ascribing meaning to the words they read (if indeed they ever read a law or case); citizens “interpret” the law in its non-verbal sense when they apply it to their behavior. However, “authoritative interpretation” has an undeniably special function in the context of our written formulations of the law; it is difficult to think of non-legal examples where individuals possess the power to dictate for others what is the “correct” interpretation of a text. “Interpretation” as an authoritative activity of the courts or agency officials is not the same thing as “interpretation” as simple reading comprehension. The presence of the former, however, seems to affect the practical significance of the latter. Kelsen asserts that private interpretation of the law—even in the sense of simple reading comprehension—is not “authentic” when one looks at the legal system as a whole.

There is, therefore, a close fit between the class that gets to engage in authentic or authoritative interpretation of law and the “addressees” settled on in the earlier discussion of pragmatics and declarations. Part of what distinguishes an “addressee,” therefore, is whether the agent is entitled to engage in some degree of interpretation. The citizens are not empowered to engage in interpretation that carries legal force in the courts or administrative agencies, making it

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160. See Kelsen, Pure Theory, supra note 6, at 355.
161. See id.
162. See id. It makes sense that the law needs to have an agreed-upon objective meaning, and would not be able to function if it were dependant upon the subjective understandings of individuals.
163. See id. (“The interpretation by a law-applying organ [of the state] is different from any other interpretation—all other interpretations are not authentic, that is, they do not create law.”).
164. See Grice, supra note 59, at 68-69 (discussing the related topic of m-intentions and audience).
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less fitting to include citizens in the group of addressees.165

B. The Role of Lawyers

As stated above, lawyers probably constitute most of the actual readership
of statutes and court opinions; as such, they hold a significant, even primary,
place in the “audience” of the law, whether or not they are included in the “ad-
dressees” subset of the audience. The fact that one group of people, closely tied
to the judiciary, make up the bulk of the law’s readership lends additional cre-
dence to the idea that the citizens are not the addresses.

There are two possible positions for lawyers within the model set forth in
this Article. First, it is possible to conceive of lawyers as having no more rela-
tion to the law than the citizens, except for a professional interest in its content.
This approach would view the lawyer’s interpretation of the law as having ab-
soolutely no bearing on the effect of the law. Lawyers write briefs trying to per-
suade the court to adopt certain interpretations; the final decision is with the
court. If the brief contains weak arguments, the lawyer’s interpretation is at risk
of being disregarded.166

Indeed, cases abound in which a lawyer gave a client ample assurances that
the client’s activities were perfectly legal, with the end result that the client still
goes to jail. In Cheek v. United States,167 for example, the Supreme Court con-
sidered the claims of a tax evader who believed his income was not taxable, re-
lying upon seminars he attended that were taught by attorneys. The assurances
he received from attorneys (basically asserting that his noncompliance with tax
laws was protected by the Sixteenth Amendment) were not sufficient in them-
selves to shield him from criminal liability.168 Recently, Napster-like Internet
music provider MP3.com has sued its law firm, Cooley Godward, for malprac-

165. Where does this leave the citizen? Some may feel that removing citizens from the role of the
law’s addresses debases, dehumanizes, or relegates them. This is not the case; rather, the citizen’s indi-
viduality and autonomy is highlighted if the law is viewed as a self-contained system; the discomforting
idea of command-and-control coercion by the state is replaced with a model that recognizes laws as in-
fluencing our choices only indirectly. As Teubner observes, “Autopoiesis thus breathes new life into the
individual . . . It breaks up the unity of the individual and society, and makes us view human thought and
social communication as autonomous processes which reproduce themselves according to a logic of
their own.” TEUBNER, supra note 6, at 45. As laws have shifted from second-person imperatives (“thou
shalt not”) to third-person declaratives (“a person is guilty of murder who does . . .”), ascription of guilt
or liability shifts from a subjective, individualized model to a standardized, objective code, one descri-
ing and “deeming” objective states of affairs. See id. at 44 (“The effect of this is that individualized ele-
ments of liability become more and more like objectivized role descriptions.”)

166. See KELSEN, PURE THEORY, supra note 6, at 356 (arguing that an attorney who, in the interest
of his client, propounds to the judge only one of several possible interpretations of the legal norm to be
applied in the case, or a writer who in his commentary extols a specific interpretation among many pos-
sible ones as the only correct one, does not render a function of legal science, but of legal politics).


168. Cheek, 498 U.S. at 195; but see Long v. State, 65 A.2d 489 (Del. 1949) (holding that mistake
of law regarding bigamy statutes in another jurisdiction to which the defendant traveled, relying upon
counsel from a reputable attorney, could negate the mental state requirement for conviction).
tice, claiming that the firm’s erroneous assurances about “fair use” of copyrighted recordings led to MP3.com’s $53.4 million forced payout to the Recording Industry Association of America.¹⁶⁹

On the other hand, lawyers probably make up the law’s largest readership. Lawyers are the means by which the citizenry gets its best glimpse of the law itself.¹⁷⁰ Any individual or corporation with a thorough knowledge of the laws in a given area probably received the information mostly from lawyers. Some corporations are very sophisticated in their understanding of environmental, antitrust, or tax regulation. This understanding seldom derives from the directors or CEO having printed copies of the regulations before them. Rather, attorneys counsel them. Finally, legislators and rulemakers are aware that lawyers are their primary readers, and many provisions are included to anticipate the reaction of readers schooled in common-law terminology and principles.

For purposes of defining the law’s addressees, perhaps lawyers are better viewed as an appendage of the state. Attorneys are closely aligned with the state, even when the attorneys are adversarial parties to the state itself. The state bar associations, though supposedly independent, are essentially branches of the judiciary, and establish credential requirements and admissions to practice in the state.¹⁷¹ A similar licensing institution regulates doctors, but the disciplinary boards for attorneys more closely approach the judiciary itself. The powers and procedures of the grievance committees and state ethics commissions function as quasi-courts, and their sanctions appear to have the force of law. At times the judiciary jealously defends its right to “regulate the practice

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¹⁶⁹. The malpractice case has been filed in Los Angeles Superior court, MP3.com Inc. v. Cooley Godward LLP, No. BC 266625 (2002) (on file with the author); the case MP3.com was forced to settle was UMG Recordings Inc. v. MP3.com Inc., No. 00 Civ. 0472 (S.D.N.Y. Sept. 6, 2000). See also Stephanie Francis Cahill, Dot-Com Sues Law Firm Over Advice, ABA J. E-REPORTER 4947, Feb. 1, 2002, at 1.

¹⁷⁰. The fact that courts create special rules about privilege and legal malpractice so as not to create a “chilling” effect between lawyers and clients may be related to this idea on an intuitive level, although it is not usually offered as the real reason for the rules. Consider, for example, a recent case from the Colorado Supreme court, In re Stone v. Satriana, 41 P.3d 705 (Colo. 2002), holding that lawyers being sued for malpractice cannot implead the plaintiff’s new counsel as co-defendants for their contribution to her losses, based in part on the fear of a chilling effect on the legal profession’s task of providing counsel. See also Austin v. Superior Court, 85 Cal. Rptr. 2d 644 (Cal. Ct. App. 1999); Cal. State Auto. Ass’n v. Bales, 270 Cal. Rptr. 421 (Cal. Ct. App. 1990); Holland v. Thacher, 245 Cal. Rptr. 247 (Cal. Ct. App. 1988); Gauthier v. Kearns, 780 A.2d 1016 (Conn. Super. Ct. 2001); Waldman v. Levine, 544 A.2d 683 (D.C. 1988); Melrose Floor Co., Inc. v. Lechner, 435 N.W.2d 90 (Minn. Ct. App. 1989); Eustis v. The David Agency, 417 N.W.2d 295 (Conn. App. Ct. 1987); Hughes v. Housley, 599 P.2d 1250 (Utah 1979). In some circumstances courts have gone the other way on this issue, as in Maddocks v. Ricker, 531 N.E.2d 583 (Mass. 1988) (allowing a defendant in a legal malpractice action to bring a third-party complaint against successor attorney when successor attorney may have caused the original injury for which predecessor counsel was allegedly responsible); Parler & Wobbler v. Miles & Stockbridge, 756 A.2d 526 (Md. 2000) (refusing to exempt a potential joint tortfeasor from accepting the blame, and relying upon sanctions to deter frivolous claims).

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of law,” as seen in the Washington Supreme Court’s statement below:

Only the Supreme Court has the power to make [a] determination [regarding what
legal services may be provided by non-attorneys] through a bar examination, yearly
Continuing Legal Education requirements, and the Code of Professional Responsi-
bility. The public is also protected against unethical attorneys by a client’s security
fund maintained by the Washington State Bar Association.172

There are court rulings providing further evidence of the private bar func-
tioning as an appendage of the state. As a more extreme example, in State v.
Buyers Service Co.173 the South Carolina Supreme Court held that a company
performing title searches, recording, and closings for its clients had engaged in
the unauthorized practice of law. The court based its decision in part on the fact
that those reviewing the land records would be forced to engage in some legal-
type interpretation (perhaps under the theory that land records are a special type
of law in which citizens actually have a participatory role).174 This is a more
extreme position than the one taken in this paper, which focuses only on stat-
utes, regulations, and court opinions; land records may actually fit better in the
category of communication addressed directly to the citizenry. The court’s rea-
soning, however, illustrates an interesting point for purposes of the ideas ad-
vanced here.

The court insisted that the purpose of its holding was not to provide attor-
neys with monopoly market power, but rather was to maintain the legal system
in its current form:

The reason preparation of instruments by lay persons must be held to constitute the
unauthorized practice of law is not for the economic protection of the legal profes-
sion. Rather, it is for the protection of the public from the potentially severe eco-
nomic and emotional consequences, which may flow from erroneous advice given
by persons untrained in the law.175

One might think that public land records would exemplify the area of the
law most accessible to, and most accessed by, the public at large, and would
therefore undermine the idea that the law is addressed exclusively to the state.
The court in Buyers Service, however, forbid anyone besides lawyers from
even mailing or carrying land instruments to the courthouse for recording in the
land records.176 Nor were private parties allowed to conduct their own real es-
tate closings; an attorney needed to be present.177

Lawyers fill the role for the state of transmitting the law in distilled form to

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174. Id. at 17-18.
175. Id. at 18.
176. Id. at 19. The court’s ruling with regard to title search companies is not a necessary implica-
tion of the thesis in this paper. Land titles and records might appropriately be placed in a different cate-
gory from the “rules” and “rulings” embodied in statutes, regulations, and cases. In the alternative, title
searchers may be classified as belonging to a category separate from the general populace, a quasi-
auxiliary of the state (like lawyers, discussed in the rest of this section), and part of the “addressees.”
177. Id.
the citizenry. They change the law from its original form, addressed to the state, into "conduct rules" addressed to the citizen. Courts have held from time to time that lawyers occupy a special position in this regard. For example, the Eighth Circuit recently held that there is a constitutional right to confer with one's attorney in the courtroom orally instead of in writing, holding that the lower court's prohibition against speech between attorneys and clients in the courtroom effectuated, automatically, ineffective assistance of counsel.178

The question of the role of lawyers in this system is a subject for further research. Whether lawyers function as an appendage of the state, or as a private market for expertise in the legal process, neither approach would be fatal to the overall model described in this Article. The Buyers Service case described above, apart from its protection of the legal profession, is interesting in that it seems to exclude the citizenry from interpreting the law themselves, or at least from generating interpretations with legal significance for others. The case lends support to the idea that the citizenry is not included in the list of addressees of the law, regardless of the position of lawyers.

VI. APPLICATIONS

A. Plain English

If the written formulations of laws are addressed to the state, and not to the citizenry, there may be little value in expunging useful technical terms in order to make the laws easier for laypersons to read. Recent years have seen a growing outcry for a revamping of legal texts into common-parlance English, with legal jargon extirpated from consumer documents, jury instructions, and even court documents and statutes.179 It seems self-evident that certain consumer contracts, such as residential leases, individual insurance policies, and personal loan agreements, should utilize terminology intelligible to both parties; the contract should embody a meeting of the minds. Similarly, it makes little sense to have a jury at all if the jury cannot receive its directives in terms the jurors comprehend. The situation is different, however, for redrafting statutes and regulations in "user-friendly" English, as this endeavor seems premised upon an ideological commitment to having citizens read the laws. One example is Volume Twenty of the Code of Federal Regulations, which encompasses the regulations pertaining to Social Security benefits. A look through the volume

179. See, e.g., LAWRENCE SOLAN, THE LANGUAGE OF JUDGES 133-138 (1993); TIERSMA, supra note 80, at 211-230; Andrew Serafin, Kicking the Legalese Habit: The SEC's Plain English Disclosure Proposal, 29 LOY. U. CHI. L.J. 681 (1998); George Hathaway, The Plain English Movement in the Law, 50 J. Mo. B. 19 (1993); Carol Blast, Lawyers Should Use Plain Language, 69 FLA. B.J. 30 (1995); George Gopen, The State of Legal Writing: Res Ipsa Loquitur, 86 MICH. L. REV. 333 (1987). It should be noted that articles along these lines abound in state bar journals, and are found only occasionally in academic journals. This makes sense given that it is a practical issue of concern primarily to practitioners.
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reveals repeated use of "when you do this," and "we will try to do this." This was undoubtedly a public relations move for the notoriously Byzantine Social Security Administration. It serves little to clarify the tortuous process of obtaining disability benefits. Worse still, it is doubtful that a significant number of non-lawyers ever peruse the new "user friendly" version, which must have taken many labor-hours to produce.

There can be no argument in favor of obfuscation, anachronisms, or unrestrained prolixity. Yet it is a futile and wasteful endeavor to invest time and resources into rewriting the U.S.C., or any other set of statutes, in non-legal language familiar to any high school sophomore. The U.S.C. is not addressed to the citizenry as a whole. Rather, it is addressed to agency officials, judges, law enforcement officers, and perhaps lawyers. The efficient course would be to cast the law in terms both familiar and facile to this group.

Clarity, precision, and modernity are helpful to courts and officials as much as for others. Cumbersome language consumes time in deciphering and explaining, and can be a waste of judicial resources, whether in statutes or older court opinions. Yet this is a very different motivation than deluding ourselves that we can make the laws appealing reading for the general public. Some amount of "dumbing down" of the statutes may even help lower-aptitude lawyers provide better legal services to their clients. The clients, however, are unlikely to feel a need to read the statutes or cases themselves, no matter how easy the language of the texts.

Moreover, there is some utility in technical vocabulary. One word, such as "domicile," "Mirandize," "bailment," or "assignee," can capture and communicate an entire phrase or set of ideas to one trained in the profession. Such shorthand is often efficient and useful. It does not harm our democracy that the person on the street does not understand "bailments" or know that "consideration" in a contract does not mean altruism, neighborliness, or contemplation.
These terms are addressed to certain individuals empowered to implement the terms with the force of the state. The citizen can simply enjoy, unwittingly, our bailment system when valet parking is available, and can engage in *quid pro quo* contractual transactions every day.

A similar analysis can be applied to the "plain meaning rule" in jurisprudence, 184 taken to extremes with the consultation of dictionaries by our Supreme Court Justices. 185 If the idea is that the words of a statute should be given the meaning that a non-lawyer would understand, this is odd; the people do not read the statutes, do not plan around the words. The words were addressed to state actors, and the question should be what the meaning is for them. Admittedly, there is some value in having an arbitrary tie-breaker mechanism when disputes about interpretation reach a final impasse; it is probably better for the Justices to break open a Webster's Dictionary than to flip a coin, if that is the real purpose. 186 An ideological commitment to the citizenry's common usage of a term, however, is incongruent with reality and bound to make for bad policy. 187 The law is addressed to the state. Its meaning should be divined in light of the lawmakers' intended audience.

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184. *See* SOLAN, *supra* note 179, at 93-108 (explaining the "plain meaning rule" and applying it to RICO).

185. *See,* e.g., MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218 (1994) (majority and dissent engaged in argument about which dictionary should be used to determine the correct interpretation of "modify"); Am. Textile Mfrs.' Inst. v. Donavan (the *Cotton Dust* case), 452 U.S. 490 (1981) (dictionary definition of "feasible" forms basis for court's holding); *see also* Am. Mining Cong. v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) (dictionaries consulted to discern the proper meaning of "disposal"); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game,* 80 GEO. L.J. 523, 552 (1992) ("Justice Scalia himself slavishly relies on dictionaries to interpret statutes."); William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621 (1990) (explaining Justice Scalia's use of dictionaries within his overall interpretive framework). The trend is decidedly toward increasing use: [In the six Terms between 1987 and 1992, the Court never cited dictionaries fewer than fifteen times, with a high point of thirty-two references during the 1992 Term. Dictionary definitions appeared in twenty-eight percent of the 107 Supreme Court cases decided by published opinion in the 1992 Term—a fourteen-fold increase over the 1981 Term. The trend toward increased dictionary use has been pervasive: the Court has referred to twenty-seven different dictionaries since 1988 in cases involving not only statutes, but also constitutional provisions and administrative codes.]

Note, *Looking It Up: Dictionaries and Statutory Interpretation,* 107 HARV. L. REV. 1437, 1438-39 (1994). *See also* STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 298-99 (1999) (bringing up the interesting point that "in Nazi Germany, a primary technique for legal change was judicial reliance on the 'purposes' of the law, rather than on the text"; the Allies strongly encouraged German judges to refer to the "plain meaning" of laws after the War).

186. *But see* Note, supra note 185, at 1446 ("Moreover, dictionaries can mask fundamental arbitrariness with the appearance of rationality and make the subjectivity of judicial decisions even more difficult to confront: The Court's haphazard selection of dictionaries illustrates the arbitrariness of its recent practice.").

187. *See* Cambell v. Markham, 148 F.2d 737, 739 (2d Cir.1945) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary.").
B. Ignorance of the Law

It is a long standing maxim in our legal system that "ignorance of the law is no excuse." The implication is that the citizens are expected to have some mastery of the laws. One grounding for the idea that citizens should be held accountable for knowing the laws is a view of the law that places citizens as the addressees.

The "mistake of law" defense is raised most often in the criminal context; the reasonable person standard for determining negligence in civil cases, for example, obviates the relevance of the tortfeasor being unaware that carelessness can expose one to liability. The *ignorantia juris* rule has not been without its critics, especially among the philosophers, and a few jurisdictions have adopted penal codes that allow for a limited defense based on mistake of law.

In some modern legislation, Congress has included a "specific intent" (on "special intent") clause that the courts interpret as requiring actual knowledge of the illegality of the offense in order to convict the perpetrator. The Model Penal Code recommends that certain exceptions be made to the traditional rule where the ignorance can be demonstrated empirically and was reasonable. In general, however, the traditional rule still stands: one cannot escape legal consequences of prohibited actions simply because one was unaware of the prohibition.

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188. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 47 (1991) (noting that this "substantive principle is sometimes put in the form of a rule of evidence, that every one is presumed to know the law"). It is exactly this form of the rule that this section brings into question. See also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 147-158 (1995); MODEL PENAL CODE § 2.02(9) (1996) ("Neither knowledge nor recklessness nor knowledge as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is a defense.").


190. See, e.g., N.J. STAT. ANN. 2C §2-4(c)(3) (2002) ("The actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude."); 9 GUAM CODE ANN. § 7.55 (2002).

191. There has been an increasing tendency for courts to interpret the word "willfully" in a criminal statute to mean that the defendant actually knew the conduct was illegal. See Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998) (identifying a wide range of federal statutes that have been given a "knowledge of the law" requirement by courts, often in contradiction to the legislature's intended purpose).

192. Specifically:

A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterwards determined to be invalid or erroneous contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

MODEL PENAL CODE § 2.04(3).
One of the typical justifications for the rule is that the laws overlap enough with the norms and values of society to make would-be offenders aware that their actions are inappropriate. Many criminal laws do not, in fact, overlap with commonly-held moral intuitions: traffic violations, taxes, or crimes of possession (whether prohibited goods, like narcotics or stolen chattel, or "protected" items like bald eagle feathers). When the crime involves only a violation of the regulatory regime, without moral turpitude, ignorance or mistake of law are more likely to surface as a claimed defense. Others argue that the rule is an epistemological necessity, as it would be impractical for the courts to be required to discern the subjective lack of legal awareness on the part of every defendant. Still others, like Justice Holmes, argue that allowing ignorance to excuse lawbreakers would provide a perverse incentive for people not to learn any laws. One problem with the epistemological rationale is that we generally accept "mistakes of fact" as a valid defense, but not mistakes of law. As-

193. See Bald Eagle Protection Act, § 1(a), 16 U.S.C.A. § 668(a) (West Supp. 2001); Migratory Bird Treaty Act, § 2, 16 U.S.C.A. § 703 (West Supp. 2000); Andrus v. Allard, 444 U.S. 51 (1979); U.S. v. Kornwolf, 276 F.3d 1014 (8th Cir. 2002) (prohibition against trading feathers did not constitute a "taking" that would entitle the appellant to government compensation); U.S. v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (Native American religious usage of eagle feathers insufficient excuse for violating the statute); U.S. v. Smith, 992 F.2d 98 (7th Cir. 1993) (criminal intent unnecessary for conviction for possession when defendant had informed authorities that she knew possession of eagle feathers was illegal). See Darley et al., supra note 7, at 182-85 (offering a critique of idea that the laws approximate the moral intuitions of the community).

194. Possession laws are inherently arbitrary, as possessions always come in amounts, and some amount (or zero) must be delineated as the threshold amount for conviction. See Endicott, supra note 151. Traffic laws are less controversial in the abstract, but perhaps more controversial in day-to-day life, as these laws often run against immediate convenience or even exigencies of the circumstances.

195. See Houlgate, supra note 189, for discussion and criticism. Houlgate attributes this view mostly to the philosopher J.L. Austin, although Austin is certainly not the only person to make this argument; the intuition seems self-evident. Holmes notes that Justice Story made the same argument in 1833. See also HOLMES, supra note 188, at 48.

196. Holmes’ explanation includes a strong dose of "tough luck" in typical Holmesian prose: The true explanation of the rule is the same as that which accounts for the law’s indifference to a man’s particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

Holmes, supra note 188, at 48. The “public policy” aspect of Holmes argument has recently been made for applying the ignorantia juris rule to environmental crimes, even where the statutes appear to create an exception to the rule. See Andrew J. Turner Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal, 23 COLUM. J. ENVTL. L. 217 (1998).

197. See id. at 222. See also Woozley, supra note 189. Holmes makes a similar refutation: If Justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try. But everyone must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case. Furthermore, now that parties can testify, it may be doubted whether a man’s knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance back on the lawbreaker.

HOLMES, supra note 188, at 48.
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certaining the defendant’s subjective knowledge of the facts presents many of
the same problems as the defendant’s subjective knowledge of the law.\textsuperscript{198} It
seems inconsistent to accommodate one subjective epistemological inquiry in
our courts and not another.\textsuperscript{199} One could also argue that mistakes of law are
really a subclass of mistakes of fact: The defendant was mistaken about what
the laws say, which is, after all, an objective fact. Regarding Holmes’ concern
about perverse incentives, allowing mistakes of fact to furnish a valid excuse
could create a perverse incentive, at least in some circumstances, for individu-
als to remain intentionally ignorant about certain facts to avoid liability.\textsuperscript{200}

The Model Penal Code (MPC) attempts to create a framework to handle
some of these problems.\textsuperscript{201} This framework includes breaking down “igno-
rance” of the law into two categories, as well as shifting the burden of proof to
the defendant for this defense.\textsuperscript{202} The first category of ignorance is when “the
statute or enactment defining the offense is not known to the actor and has not
been published or otherwise reasonably made available prior to the conduct al-
leged.”\textsuperscript{203} The second is when the defendant has relied upon an “official state-
ment of the law” that turns out later to be erroneous.\textsuperscript{204} Neither of these excep-
tions provide an excuse for not reading the laws once they are available in the
local law library, or for not understanding them correctly. The “official state-
ments” that can be relied upon to furnish an excuse are basically the same cate-
gories of written formulations of law identified and discussed in this Article:
rules (statutes and agency regulations) and rulings (judicial or administra-
tive).\textsuperscript{205}

There is a special problem, however, with holding citizens responsible for
knowing the laws. As discussed above, almost no one reads laws. Even if many
people know the gist of some of the laws, through the media, signage, and con-

\textsuperscript{198} See, e.g., MODEL PENAL CODE § 2.04(3) (1985) (treating mistakes of fact and law together in
one section, although mistakes of law are subject to special considerations).

\textsuperscript{199} Admittedly, there is a qualitative difference between the two. A mistake about the law in-
volved knowledge about something abstract, and an epistemological inquiry would involve as-
certaining whether a defendant actually read a certain code book on any occasion. This seems far more
difficult than dealing with the defendant’s awareness of concrete objects that would have been observ-
able to others, such as a victim’s identity or the make and model of a vehicle.

\textsuperscript{200} See MODEL PENAL CODE § 3.09(2) (1985) (asserting that law enforcement officials should not
be excused for excessive use of force based on a mistake of fact where the officer was reckless or negli-
gent in having a mistaken belief, such as to the identity or legal position of the victim).

\textsuperscript{201} See id. § 2.04(3).

\textsuperscript{202} See id. § 2.04(4) (“The defendant must prove a defense arising under subsection (3) of this
Section by a preponderance of evidence.”). This solves some of the epistemological inquiry problems by
making it the defendant’s duty to compile and present convincing evidence about past subjective knowl-
edge (presumably, the defendant has knowledge of the law once the state presses charges). It does not
really solve the universality problem discussed below.

\textsuperscript{203} Id. § 2.04(3)(a).

\textsuperscript{204} Id. § 2.04(3)(b) (stating that the reliance must be “reasonable,” and therefore likely excluding
fallacious defenses such as relying on a very old statute book that does not include modern prohibitions,
like computer crime).

\textsuperscript{205} Id.

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versation, non-lawyers do not develop a mastery of the rules and rulings that constitute our official legal texts. Even the laws that are widely known in general form—e.g., do not murder—are relatively unknown in their specifics. Everyone could claim ignorance of the law to some extent.

Nevertheless, at common law, “every one is conclusively presumed to know the law.” This is a legal fiction; sometimes such fictions are necessary or useful. The fiction that citizens spend their Friday evenings curled up with a volume of the Federal Register, however, can lead to distortions of justice, as when small vendors with state contracts are left without recourse when the state breaches the contract, due to the presumption that everyone knows the state is immune to suit. As another example, Professor Bailey Kuklin has shown that assuming an offender knew the law increases the associated culpability and moral turpitude ascribed to the individual. A recognition by the court that citizens do not normally read or know the law in detail could shift the analysis of culpability to the actual seriousness of the offense or the resultant harm, and the defendant’s foreknowledge of these “concrete” ramifications. In addition, when courts struggle to justify the rule on traditional grounds, it perpetuates the unnecessary and confusing fiction that the law normally is comprehensible to the average citizen. By conceding paternalistically that the average citizen cannot know and comprehend the extent of the codes, the court implies that most of the time the citizen can indeed know and comprehend the extent of the codes.

Imagine for a moment what it would be like if courts instead presumed that no one had a direct knowledge of the law, or at least of the written formulations

206. See, e.g., Darley et al., supra note 7; Zimring & Hawkins, supra note 7, at 142-43.

207. See Zimring & Hawkins, supra note 7, at 143 (“It is highly unlikely that public ignorance of the existence of legal prohibitions is widespread with respect to most forms of serious criminality. What is much more likely is that people are not informed about the specific penalties provided.”). In a survey conducted in California, only prison inmates could give correct answers about the penalties of crimes more than one-fourth of the time. Id.

208. Some may object that it is silly to talk of “ignorance of the law” as it pertains to the actual legal texts. The “law” relevant for scienter is the general delict that the law prohibits. If a person generally knows that killing another person is forbidden, with severe sanctions, then the person knows the “law” enough to refrain from killing.

“Ignorance of the law” defenses focus most often on those details hidden in the statute—that killing a parole officer, for example, subjects one to the death penalty, while killing one’s mother-in-law may not. Killing a dog in Connecticut may result in arrest; killing a cat (without torture) would not. The overlap of the laws’ terms with the widely held notions of official delicts is not tidy.


210. One egregious example of this fiction leading to abuse is the fact that contractors who perform work for the government can be the victims of a contract breach, and left without recourse, if the contract was procured by a state agent ultra vires. See, e.g., Amelco Electric v. City of Thousand Oaks, 27 Cal. 4th 228, 234 (2002) (“In general, under long-standing California law, if a public contract is declared void, a contractor may not be paid for work performed under that contract. . . . Persons dealing with the public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. . . . If, as we have seen, the contract is absolutely void as being in excess of the agency’s power, the contractor acts at his peril, and he cannot recover payment for the work performed.”) (citations omitted).

embodied in statute books and case reporters. Assume that courts incorporated the model set forth in this Article, that legal texts are addressed to the state alone. Culpability would have to be associated more with the actual behavior instead of some nefarious mental state; the individual’s blameworthiness would depend on the objectively obvious seriousness of the offense and the resulting harm. “You should have known better,” as one component of guilt, should relate to the malfeasance itself more than the legal formulations regulating such behavior. There would be certain advantages to this approach, especially as deterrence of certain behaviors forms the conceptual basis or policy reasoning for an increasing number of enactments. Mens rea could still be an element of crimes, because the voluntariness of actions would remain an important consideration in determining responsibility, even if knowledge of the law was deemed irrelevant. It is more useful to deem ignorance of the law irrelevant, because of its universality,\(^{212}\) than to say, “ignorance of the law is no excuse,” and imply some amount of blameworthiness for this ignorance.\(^{213}\)

The mens rea requirement does not depend on a presumption that people know the law, notwithstanding statutes that require knowledge of a law as part of a “willfulness” requirement. Our criminal justice system would be improved by using a more realistic model—one which recognizes that the legal texts are addressed to the state and relatively unknown to the citizenry—instead of the traditional legal fiction. For example, the perceived fairness of certain sanctions might be different if sanctions were viewed as serving more of an ex post function than an ex ante, informative function. If having courts convict defendants who are presumed not to know the law leaves us with any qualms, these reservations should be limited to the idea of notice and its relation to fairness: It seems unfair for people to be punished for breaking a rule about which they did not know.

The MPC exceptions to the ignorantia juris rule described above, which break down ignorance into different categories, do so on the basis of different types of notice (publication or obsolescence).\(^{214}\) “Constructive notice” seems to correspond to the previously discussed “audience” category of participant or overhearer, but not addressee. This lends support to the idea that the citizens are not in the same “audience” category as state actors, who are better understood as addressees. The second MPC exception, for actual notice that is simply wrong, again seems more congruent with being a non-addressee part of the au-

\(^{212}\) As John Selden wrote in the seventeenth century: “Ignorance of the Law excuses no man; Not that all Men know the Law, But because 'tis an excuse every man will plead.” JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 109 (Legal Classics Library 1989). This brings up an important point. How can we have a workable prohibition if there is a defense that every single defendant will successfully assert? Either the rule must be abandoned in such a case as a bad law, or the defense must be understood in a different way so that it is not really a defense. The latter is the argument being made here.

\(^{213}\) See Kuklin, supra note 211; Darley et al., supra note 7, at 183-84 (expressing concern that the moral credibility of the law is at stake with these issues).

\(^{214}\) See MODEL PENAL CODE § 2.04(3) (1964).
dience; the erroneous information implies an indirect transmission. Interestingly, the MPC does not allow these exceptions for state actors, supporting the idea that the written laws are addressed primarily to them. The real problem with ignorantia juris is the issue of notice, for a citizenry where “actual notice” is a rarity.

C. Notice

Related to the doctrine that ignorance of the law is no excuse is the idea that citizens must have notice of the laws’ terms and requirements before sanctions can apply. If the state is the true addressee of the law, we need to reconsider the traditional rules regarding the “notice” requirement.

“The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed.” In Torres v. INS, Judge Posner entertained a deportation appeal, which based its claim on the impossibility of the deportee knowing the grace period for filing a petition had suddenly changed from ninety to thirty days. This rendered the deportee without further recourse.

Despite the moralistic maxim the court set forth above, it continued:

But it is an impermissible leap to conclude that Congress is under a constitutional duty to take measures . . . to make sure that no one is caught unawares by a change in law. The duty of fair notice of changes in law is a technical and qualified one. Many laws take effect on the date of enactment . . . . Civil laws are sometimes (tax laws routinely) made retroactive, which means that they go into effect before publication; and this is allowed. Judge-made rules of law are frequently changed by judicial decision, and the change goes into effect on the date of the decision, which means before publication in the law reports. Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the statute. A defendant convicted of a crime created by a statute that took effect the day before he committed the crime would ordinarily have no defense of lack of fair notice, even if the enactment of the statute had received no publicity at all, so that the defendant had proceeded in warranted,

215. See id. § 3.09(1)(a) (stating that various justifications for use of force by state actors are unavailable when the use of force was based on an error “due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search”).

216. Torres v. INS, 144 F.3d 472, 474 (7th Cir. 1998).

217. Id. The same page of the opinion explains how even the deportee’s attorney would have had great difficulty discovering the change in time in this case:

West Publishing Company had not yet published the reform act in or as a supplement to the United State Code Annotated. And a search of the Immigration and Nationality Act on either Westlaw or Lexis-Nexis (or both), the standard computerized databases for legal research, would not have disclosed that the 90-day provision had been repealed. A search of Westlaw’s Public Laws database would have revealed both the Omnibus Consolidated Appropriations Act and the Extension of Stay in the United States for Nurses Act, but neither of these titles would have alerted the reader to the fact that the acts had changed the period within which to seek judicial review of orders under the immigration laws, although the full title of the Nurses Act does imply a connection to immigration.

Id.
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perhaps indeed unavoidable, ignorance of it.\footnote{Id. (citations omitted).}

This seems to be an example of "constructive notice"; "actual notice" is not required as long as the court can find "constructive notice," which is usually based on the idea that the defendant could have found out the law if he or she had tried hard enough. Yet the lines become blurry here; the excerpt above appears to find "constructive notice" even where actual notice would have been prohibitively costly.

This is the point of the MPC's rule for mistake of law, given that accurate knowledge of the law was truly unattainable. The MPC's exceptions correlate to different forms of notice. Section 2.04(3)(a) speaks of the level of notice given when the books are actually in the law library,\footnote{"[Have] not been published or otherwise reasonably made available prior to the conduct alleged." MODEL PENAL CODE § 2.04(3)(a) (1962).} which fits with the traditional notion of "constructive notice." Section 2.04(3)(b) refers to actual notice of laws that seem objectively inapplicable to the given situation.\footnote{"[H]e acts in reasonable reliance upon an official statement of the law, afterwards determined to be invalid or erroneous...." Id. § 2.04(3)(b).}

Jurists raise an efficiency argument against requiring actual notice about the law's content among citizens. The cost of targeting an individual with a personalized law (such as a bill of attainder) exceeds the cost of an individual wandering unwittingly within the ambit of a generalized, unknown law.\footnote{Thus, Richard Posner gives an argument similar to Holmes justification of ignorantia juris: Legislation is prospective in effect and, more important, general in its application. Its prospective character enables the persons affected by it to adjust to it in advance. Its generality offers further, and considerable, protection to any individual or organization that might be the legislature's target by imposing costs on all others who are within the statute's scope. The prospect of such costs incites resistance which operates to protect what might otherwise be an isolated, vulnerable, politically impotent target of the legislature's wrath or greed. The mechanism of protection is similar to that provided by the principle of equal protection of the laws. Equal protection limits the power of a legislature to target a particular individual, organization, or group by requiring that the legislature confer benefits or impose costs on a larger, neutrally defined group; it cannot pick on just the most vulnerable. Prospectivity and generality of legislation are key elements of the concept of the rule of law, a concept that long predates either the principle of equal protection (though there is a resemblance) or the concept with procedural regularity embodied in our modern concept of due process of law. The right to notice and a hearing, the essence of that concept, are substitutes for the prospectivity and generality that protect citizens from oppression by legislators and thus from the potential tyranny of electoral majorities. The generality of legislation makes notice by service or otherwise impracticable; many of the persons affected by the legislation will be unknown and unknowable. L.C. & S., Inc. v. Warren County Area Plan Comm'n, 244 F.3d 601, 602-3 (7th Cir. 2001).} It would decrease social utility or welfare more to have the legislature be able to target "isolated, vulnerable, or politically impotent"\footnote{Id. at 602.} subjects, as this would foster legislation driven by greed or other self-interest; laws of general applicability help check the self-interest of government actors.

The judiciary, however, engages in a certain amount of double-talk about the notion of notice. In cases concerning "vagueness" doctrine, for example,
"actual notice" seems to be implied in the analysis: "[A] fair warning should be
given to the world in language that the common world will understand, of what
the law intends to do if a certain line is passed."223 It is one thing to use the le-
gal fiction of "constructive notice" to assign culpability where a person could
have found out the limits of the law. It is another to speak of citizens being able
to plan their activities around the law, which should require actual notice, not
mere constructive notice.

Ex post facto laws present similar issues regarding notice. In *Prater v. United States Parole Commission*, the Seventh Circuit attempted to base the ex post facto rule partly on the expectations of citizens: "to allow people to go about their business without fear that their behavior, though noncriminal when engaged in, will subject them to punishment."224 This approach, however, proved unworkable for the court,225 and it abruptly switched to an argument similar to the one above. "The way to break the circle is to bring in the other purpose . . . that of keeping the legislature from getting involved in the execu-
tive and judicial functions of prosecuting and punishing past acts."226 The ex post facto rule works to discourage private bullying by the government and
provide the transparency necessary for a democracy. It is not meant to serve the
goal of advising the citizenry so that they can studiously avoid the misfortune
of arrest. This would require actual notice; the citizenry only has constructive
notice. The courts do not seem to note this distinction. The difference is corre-
lated with which party has the burden in the case, or at least on that point of the
case, but this factor is usually not identified explicitly.

Constructive notice blurs into the policy value of the law-abiding public
having the ability to know the law and plan around it. The courts confuse the
different types of notice, and then they find the reasoning unworkable. The
types of notice correspond to levels or positions of "audience" for the written
texts; this is why it is important to identify the difference between the "ad-
dressees" of the legal texts and the other "audience" members, such as overhear-
ers.

D. Deterrence

*Ignorantia juris* and the doctrines about "notice" both touch on the issue of

223. McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.); see also Coleman v. City of
Richmond, 364 S.E.2d 239, 241-42 (Va. Ct. App. 1988) (requiring that the language of the statute pro-
vides a person of average intelligence a reasonable opportunity to know what the law expects from him
or her, and that it must not encourage arbitrary and discriminatory enforcement of the statute).
225. *Id.* at 953 ("There is an element of unreality, as well as circularity, in trying to determine the
scope of the ex post facto principle by reference to expectations. The more narrowly the principle is de-
 fined, the fewer expectations are reasonable; the more broadly it is defined, the more are reasonable; if
one asks what expectations are reasonable in the absence of rules against ex post facto laws, the inquiry
turns subjective.").
226. *Id.*
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dissemination or communication of the law to the citizens and whether this takes place through direct or indirect channels. Another area of law that depends heavily on assumptions about information—and therefore communication—is deterrence in criminal law.

One of the goals of criminal laws is to deter would-be offenders from engaging in the proscribed activity. There are other functions of criminal law and punishment, such as retribution against violators, incapacitation of recidivists, the expression or reification of the community's values and norms, or the moralizing influence the law has on the values or preferences of individuals. Deterrence, however, seems to be in the limelight of current policymaking.

Deterrence depends partly on the offender's knowledge of the law and its consequences. Modern deterrence theories, starting perhaps with Beccaria and Bentham, seek to effect a very rational calculus in the mind of the potential

227. See, e.g., HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 ("Third, it is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens."); Michael S. Moore, The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER, AND EMOTIONS 179 (Ferdinand Shoeman ed., 1987) ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it."). The Supreme Court vacillates about whether retribution is a valid purpose for criminal law. See Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("[retribution] is neither a forbidden objective nor one inconsistent with our respect for the dignity of men."); Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformulation and rehabilitation of offenders have become important goals of criminal jurisprudence."); Exodus 21:24.


229. See, e.g., 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (London, MacMillan 1883) ("[T]he sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment."); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108 (George Simpson trans., Free Press1964) ("Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience . . . . [I]f an emotional reaction of the community did not come to compensate its loss . . . it would result in a breakdown of social solidarity."); Johannes Andenaes, The General Preventative Effects of Punishment, 114 U. PA. L. REV. 949, 950 (1960) ("Punishment is a means of expressing social disapproval.").


231. Deterrence itself can involve different approaches. One approach to deterrence is simply to scare people out of committing certain crimes. This was perhaps part of the medieval mindset, when criminals were subjected to gruesome, revolting tortures in public. This older approach was intermingled with strong doses of retribution and vengeance; often the punishment involved the maiming of the bodily organ instrumental in the offense, such as the hand. The retribution aspect, however, does not necessarily require a public spectacle in the town square. Public corporal punishment, therefore, seems to have had the purpose of shocking or frightening a would-be offender enough to trigger a flight instinct, an almost involuntary recoiling from the temptation to commit crimes. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH 73-74 (1975); Andenaes, supra note 229, at 951.

The rational, calculating individual is assumed to exercise a fully functional free will to choose the self-maximizing course of conduct. Deterrence has thus come to mean making the costs (or “price”) of committing a crime higher than the benefits a would-be offender would accrue from the criminal activity. If the costs outweigh the benefits, crime will lose its appeal and be abandoned. Assuming that the deterrent calculus does occur in the mind of potential offenders, there remains a problem: information. The model of deterrence and rational actors requires that the citizens have actual knowledge—or actual notice—of the penalties associated with certain crimes and some idea of the likelihood of detection.

The criminal could be wrong, of course. A shoplifter, for example, may grossly underestimate the chances of being caught. Misinformation may spread about the penalties for certain actions, or whether an action is illegal at all. General deterrence does not require that criminals have all their facts straight. They may believe, mistakenly, that a certain offense is a felony.

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234. See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968); Richard A. Posner, Economic Analysis of Law 237-268 (5th ed. 1998). The older approach focused on subconscious instincts and reactions by instilling simple primal fear. A few modern authors suggest that the law target endogenous tastes and preferences, instead of exogenous incentives. See, e.g., Dau-Schmidt, supra note 23. This proposed approach harkens back, in one sense, to the earlier approach. Most of the modern approaches to deterrence, however, focus on the rational mind and calculating decision-making mechanisms instead of primal emotions like fear (or even morality). See David Friedman, Price Theory 459-465 (1986); George J. Stigler, The Optimum Enforcement of Laws, 78 J. POL. ECON. 526 (1970).

235. See Stigler, supra note 234; Becker, supra note 234; Posner, supra note 234. Presumably the would-be offenders consider the legal penalty of a crime, multiplied by the probability of getting caught and convicted, in addition to the other influences such as opportunity costs, societal stigma, and conscience. If the costs are priced high enough, through the right formula of punishment and enforcement, then they will deter the person from the forbidden activity. Critics challenge the idea that criminals think this much. Andenaes summarizes the main variations on this criticism. See Andenaes, supra note 229, at 955. Defenders of the approach point to survey data or empirical studies of crime rates to show that the model is indeed congruent with the real world. See id.

236. See Neal Kumar Katyal, Deterrence’s Difficulty, 95 Mich. L. Rev. 2385, 2447 (1997) (“Implicit in the discussion up to this point was the assumption that people actually know the cost of an activity despite the costs of obtaining such information.”).

237. See Zimring & Hawkins, supra note 7, at 304-06, describing the delusion shared by many juvenile offenders—including those who have been caught many times—that they possess an almost magical immunity to detection and/or arrest. Andenaes describes the following phenomenon: [W]hen discussing the risk of detection, what is decisive is not the actual practice but how this practice is conceived by the public. Although little research has been done to find out how much the public knows about the penal system, presumably most people have only vague and unspecified notions. Therefore, only quite substantial changes will be noticed.

238. See, e.g., Zimring & Hawkins, supra note 7, at 297-98 (“As long as the public feels that unpleasant consequences are attached to apprehension for forbidden behavior, a deterrent effect is possible. Public ignorance of the level of penalties may produce a pattern of responses from that public which includes both overestimates and underestimates.”). The authors further suggest that these overestimates
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when it is only a misdemeanor. Louis Kaplow argues that an equilibrium of mistakes can be reached so that deterrence still “works” as long as the mistakes about penalties or likelihood of detection err on the side of a net overestimation large enough to apparently outweigh the benefits the criminal seeks from the activity.239 There is some room for play.240 At the same time, there is a minimum threshold of information necessary to obtain the net desired result. Legal deterrence cannot operate if there is simply no information about the illegality of a certain offense or the potential penalties. An offender can still be convicted with no foreknowledge that the action perpetrated was illegal: Ignorance of the law is no excuse.241 The law itself could not deter the offender in this case. Others (the majority) who did not commit the crime must have other reasons for refraining, such as lack of opportunity, conscience, etc.

Deterrence depends upon knowledge of the banned activities and associated penalties. This presents a special problem if one assumes that the law is addressed to the state, and if it is admitted that the citizenry never reads the statutes or court opinions. Legislators cannot assume that simply enacting a harsh law will deter would-be offenders sua sponte.242 The harsher law may justify

and underestimates can average each other out. See id. at 298-99. This seems to ignore the fact that general deterrence is only effective to the extent that it deters the people who are actually would-be offenders. Other writers have also addressed this “averaging” issue in sanctions; see, e.g., David Haddock et al., An Ordinary Economic Rationale for Extraordinary Legal Sanctions, 78 CAL. L. REV. 11 (1990) (arguing that “extraordinary sanctions are necessary in those situations in which the expected imposition of liability rules, which seek to make the plaintiff whole, would encourage a defendant wrongly to take a plaintiff’s property rather that [sic] negotiate for it.”). On the issue of the different optimal levels for sanctions and prices set by lawmakers and judges respectively, see Cooter, supra note 106, arguing that “[o]fficials should create prices to compel decisionmakers to take into account the external costs of their acts, whereas officials should impose sanctions to deter people from doing what is wrong.”

239. Louiz Kaplow, Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts are Subject to Sanctions, 6 J.L. ECON. & ORG. 93 (1990). Kaplow suggests that sanctions should be set to reflect the relative uncertainty in the minds of would-be offenders, striving to find a middle ground between overdeterrence of desirable activities and underdeterrence of undesirable ones. Id.

240. See Katyal, supra note 236, at 2448. Katyal argues that deterrence works simply from the general ideas of the punishments becoming known:

My contention in this section is that high criminal penalties may deter crimes even when people do not know what those penalties are. Traditional economists, too focused on the price of criminal conduct, have not understood that preferences may be shaped even when the price is unknown to actors. People who have never eaten caviar, for example, do not need to know its cost for their preferences to be affected by the price. This would be particularly so if the high price of caviar put a stigma on caviar-eaters—that they were greedy and selfish, for example. In such circumstances, even if the monetary price of the good is unknown, the social price (which is in part a function of the monetary one) will deter consumption. Id.

241. See, e.g., JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 263 (1996)

242. See, e.g., ZIMRING & HAWKINS, supra note 7, at 299 (“The ‘classical’ theory of communications appears to assume an immediate, direct, and literal relationship between the provisions of legal commands and citizen perception. Thus, on a Tuesday afternoon, the California legislature passes a law raising the minimum penalty for possession of marijuana from x to y. The law is due to go into effect the next day. According to the “classical” theory, overnight all citizens who might be affected in this state perceive: (a) that there has been a change (b) the nature or direction of the change... and (c) the extent of the change . . . “”) (citations omitted).
harsher retribution under the doctrine of "constructive" notice, but "actual notice" is much more likely to be effective in deterring the criminal. If the legislature hopes to achieve a deterrence effect, policy makers must consider the question of how to make the populace aware of the costs imposed on a given crime. The media will do some of this work, and there will be some second-hand awareness created by the conviction of some people's friends and relatives. Where these second-hand mechanisms fail to reach certain segments of society, however, deterrence is inoperative. Other factors may guide these individuals away from the crime, but not the threatened penalties, as they are unknown in this case.

To achieve deterrence through the imposition of greater penalties, the state must ensure that the delineated penalties will become common knowledge though some means other than the laws themselves. A government campaign to broadcast such information could have more effect than simply enacting laws. Deterrence, in this sense, is separate from the law itself, as it depends on public perception more than the enacted text. Legislatures and courts, however, seem to persist in the idea that a rule or ruling in itself will "send a message" to would-be offenders. The academic literature also reveals an

243. This was apparently a problem in the ancient world as well. This paper began with a comparison between the law about yellow traffic lights in Connecticut and the Ten Commandments. The surrounding text of the Decalogue attempts to deal with the problem of communication to the masses: "Impress them on your children. Talk about them when you sit at home and when you lie down and when you get up. Tie them as symbols on your hands and bind them on your foreheads. Write them on the doorframes of your houses and on your gates." Deuteronomy 6:6-9; see also Joshua 1:8 ("Do not let this Book of the Law depart from your mouth; meditate on it day and night, so that you may be careful to do everything written in it.").

244. See Katyal, supra note 236, at 2449-50. Katyal postulates that certain people are "information vanguards" about the penalties associated with crimes—namely, those who are convicted, and necessarily alert their families and friends to the consequences that come upon the offender. Perhaps lawyers fill this role as well, to some extent.

245. Morals, religion, socialization, or preferences for other activities are examples.

246. See Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 YALE L.J. 1097, 1185 n.469 (2001) ("[T]he label of the crime could mention the omission of the element, or an advertising campaign could educate the public of the change. While the law has traditionally presumed that citizens know the law, the approach in the text turns this fictitious presumption on its head. It presumes that citizens know well-settled common-law crimes, but that they do not know the intricate details of modern statutes unless the legislature takes affirmative steps to make these details known.").

247. But see Andenaes, supra note 2, at 117 (recounting a story about a British drunk-driving law, which went into effect in 1967). The law was accompanied by an extensive publicity campaign, and there was a substantial decrease in the accident rate after it went into effect. Surveys conducted before and after the law went into effect showed no change in beliefs or values about drunk driving. Andenaes concludes that "it was the deterrent effect of the new law, not the publicity campaign and moral eye-opener effects of the new law. The publicity campaign seems to have been of value only in the sense that it made drivers aware of the new law." Id.

248. This is not to suggest that the government should engage in deception or propaganda. This is contrary to the idea of a democracy and demeans the citizenry.

249. See Zimring & Hawkins, supra note 7, at 299; Andenaes, supra note 229, at 952; Darley et al., supra note 7, at 184 ("If we examine the ways in which the transmission of knowledge from the halls of the legislature to the heads of the citizens is supposed to take place, we find a puzzling silence. . . . Do legislatures assume that every citizen memorizes the state code and consults it when nec-
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ideological adherence to this idea. Rules and rulings do send a message to other static actors, whether administrative agency officials, lower courts, or enforcement officers (and perhaps lawyers). They do not send a message to the citizenry directly.

Courts can sometimes be the worst perpetrators of this fiction that their opinions are sending a message to the whole world. Andenaes notes that it is misguided for judges to believe that one sentence will have any real deterrent effect in society as a whole. One exception would be high-publicity cases, where either the defendant is a celebrity or the crime has attracted a great deal of media attention. "If a case has for some reason attracted great publicity, a

essary?")

250. See, e.g., Kurt Strasser, Cleaner Technology, Pollution Prevention and Environmental Regulation, 9 FORDHAM EnvTL. L.J. 1, 93 (1997) ("Enforcement punishes wrongdoing and the penalties imposed must communicate the messages clearly. Coordinating penalties across media is possible, where the statute or rule grants sufficient prosecutorial discretion, but it is not a simple matter even then."); James J. Gobert, The Fortuity of Consequence, 4 CRIM. L.F. 1, 35-36 (1993) ("In identifying those risks that should be the subject of criminal sanctions, and in setting penalties for their creation, Parliament communicates to the public a hierarchy of values, just as it currently does when it defines crimes in terms of result."); Elissa Kirby, Comment, A Conflict of Interests: Frustrating the Goals of Anti-Discrimination Legislation with the Third Circuit’s Latest Judicial Estoppel Analysis, 70 TEMP. L. REV. 349, 367 (1997) ("[T]he holding also serves as a warning to individuals who treat lightly the filing of such applications.").

251. Darley et al. offer a stinging critique of this problem: "As this example suggest, it is difficult to suggest that the code drafters of the states are taking the steps necessary to make the laws known. We suspect that making them known is a problem that never even occurred to code drafters." Darley et al., supra note 7, at 185.

252. See Andenaes, supra note 229, at 952-53; see also Frozen Food Exp. v. United States, 351 U.S. 40, 47 (1956) ("To be sure, the order does serve as a warning to carriers that the Commission interprets the Act in a particular way . . . ."); Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975, 978 (Wyo. 1984) (holding that the purpose of punitive damages is to publicly condemn some notorious action or inaction, to punish a defendant, and to serve as a warning and a deterrent to others); United States v. Martinez, 16 F.3d 202 (7th Cir. 1994) (justifying the imposition of felony murder sentences). The sentences imposed in this case are not unduly harsh when we consider the nature of the defendants’ conduct. . . . Carrying lethal and, judging from what happened to Mares, unstable bombs though the streets of Chicago at rush hour with the intention of blowing up downtown stores . . . deserves a punishment of exemplary severity. The death . . . confirmed the dangerousness of the defendants’ conduct, and the sentences imposed as a consequence of that death may encourage future extortionists to stay with sledgehammers rather than graduating to explosives.

Id.

Posner’s characteristic irony is well-taken; the serious threat posed to society by crimes of this ilk is easy to understand, and certainly firebombs in downtown metropolitan shops merit deterrence measures. The mystery is how Judge Posner expected word to get out to other extortionists that they should use less drastic measures to punish their noncompliant clientele. It seems unimaginable that up-and-coming extortionists run a search on Westlaw to see what acts of violence and coercion carry the lightest sentences.

At least one court has held that its ruling would send a message to people in other countries as well, alerting them to the nuances of our legal system. O’Rourke v. Rowan Cos., 782 So.2d 1185, 1186 (La. App. 2001) ("[T]he fact that we have a foreign citizen who is collecting some wages through the laws of our country, but yet is going to have a judgment attempted to be seized against him in another country, I want to make sure that country knows of our laws and as such I’m going to enter in the judgment an order prohibiting anyone from seizing the assets, which are protected in the United States; even seizing them in England. So your order should reflect that.").

253. See ANDENAES, supra note 2, at 136-38.

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severe sentence could be expected to have great deterrent effect.\textsuperscript{254} Andenaes also notes that a judge giving a harsh sentence purportedly for its "deterrent" effect may be trying to send a message to other judges to follow this lead. In addition, the judge may be trying to compensate for a perceived laxity on the part of other judges regarding a crime the current judge considers more serious than others.\textsuperscript{255}

To achieve deterrence, the government must disseminate information through some means other than the rules and rulings themselves.\textsuperscript{256} Before recommending a full-fledged "hang 'em high" media campaign, however, one must note that there is a possibility of backfire.\textsuperscript{257} Lawyers are certainly the largest readership of the state's rules and rulings, and may therefore be one of the primary means of disseminating the rules, in the form of counsel, to the public. Perhaps legislators and courts should keep this mechanism in view when generating laws intended to have a behavior-modification effect, such as deterrence. Louis Kaplow has argued that higher sanctions may prompt more individuals to seek legal counsel before undertaking questionable conduct.\textsuperscript{258} At the same time, Kaplow elsewhere cautions that increased legal counsel can defeat the deterrence effect of legislation as lawyers disseminate information about loopholes in the law and ways to avoid the sanctions while still engaging in some level of harmful activity.\textsuperscript{259}

This idea could also shape some aspects of policy regarding the legal profession in the future. Electronic databases, like Westlaw and Lexis, have greatly facilitated the ability of attorneys to gain immediate access to new rulings and recent enactments. Websites such as those maintained by the American Bar Association or Lawyer's Weekly provide a valuable service of sorting and filtering through the information to make the most significant items more accessible.\textsuperscript{260} There are also numerous books that attempt to summarize certain areas

\textsuperscript{254} See \textit{id.} at 137.

\textsuperscript{255} See \textit{id.} at 145.

\textsuperscript{256} See TEUBNER, supra note 6, at 74-75 ("We must abandon notions of linear causality, where legal norms bring about social changes directly. These can be replaced by notions of an internal circular causality, subject to 'modulating' influences . . . . We have to change our view of legislation, and cease to regard it primarily as a transmitter of information to social spheres. It is not legislation which creates order in social subsystems. It is the subsystems themselves which deal selectively with legislation and arbitrarily used it, to construct their own order."). (citations omitted).

\textsuperscript{257} See, e.g., ZIMRING \& HAWKINS, supra note 7, at 172 ("Extensive publicity may, of course, tend to undermine the credibility of legal threats when there has been no change in the substance of law enforcement. But dramatic increases in the efficiency of law enforcement will fail to achieve maximum impact without extensive publicity.").

\textsuperscript{258} See Kaplow, supra note 239, at 115. Kaplow cautions, however, that this raises the overall social cost of the sanction, and this cost should be weighed against the purported benefits of more widespread legal advice. \textit{id.}


\textsuperscript{260} An interesting website is the one operated by The Legal Knowledge Company (http://www.lk.com) which purports to be educating both lawyers and the corporate workforce about legal and ethical issues. The website is designed not only to provide information, but to generate busi-
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of the law for laypersons. Policies could encourage this trend more, recognizing that information about the law needs to be disseminated through indirect channels.

Interestingly, Andenaes has noted that one of the indirect mechanisms through which deterrence works is the removal of “bad examples.”

“Experience shows clearly that a bad example, when it goes unpunished, can be infectious.”

Where violations of the law become very common, other individuals feel fewer qualms about engaging in the same conduct; the “unthinkable is not unthinkable any more when one sees one’s comrades doing it.” Before the “bad example,” others would either have felt inhibited from committing a certain offense, or the offense itself may never have occurred to them. When the initiators of certain types of offenses are either deterred or incarcerated, even if others do not know of the punishment, they are less likely to conceive of the crime or less emboldened to attempt it. This model of indirect deterrence fits well with the idea that the laws are addressed to state actors and not the would-be offenders themselves, both as a descriptive model to understand what works and as a normative model for future policy. By directing the state enforcement officials to remove instigators of bad behavior from the mainstream of society, the crime rate for others decreases even without the others having a mastery of the rules themselves.

Laws are not only for deterrence. Criminal punishments may serve wrongdoers their just desserts, and incarceration prevents criminals from preying upon more civilian victims during their time in prison. There is also a sense in which the criminal law may affirm and support to the law-abiding majority, serving an “expressive” function or reification of the majority’s norms and values. The message must flow through indirect channels, as the laws themselves are addressed to the state. Similarly, some have argued that laws can shape the values of the individual in society. For example, stigmatizing a cer-

261. See ANDENAES, supra note 2, at 122-25.
262. Id. at 122.
263. Id. at 123.
264. This is the phenomenon of “copycat crimes.” Andenaes gives the example of airplane hijackings, which seem to come in surges. See id. Another example may be the Tylenol-poisoning cases of the mid-1980s, or certain bizarre sex crimes that are repeated by others once they are portrayed in the media.
266. This article has also discussed several “intermediate” communicators, such as lawyers, the media (news reporting and laypersons’ books), and even title search companies. As stated above, lawyers could be classified either as part of the state-addresssee group, or perhaps as “overhearers” or non-addresssee participants in the “audience.” The media and other purveyors of legal information seem to be more clearly in the latter category; they take information not directed to them and repackage it for others who are interested.
267. See, e.g., Dau-Schmidt, supra note 230; Michael Shapiro, Regulation as Language: Commu-
tainty activity by associating it with imprisonment may incline individuals to add the activity to their subjective roster of "immoral acts."

There is a converse concern that legalizing certain activities traditionally considered immoral, like prostitution, normalizes the behavior in the public’s perception so that it becomes a more widespread choice.

In either case, this shaping of beliefs must occur through an indirect mechanism as well. The public perception of what is illegal has more influence upon public morality than the terms of the enacted texts or published court opinions.

In summary, there is empirical evidence that laws do have some deterrent effect. The mechanism for this effect remains somewhat mysterious, and is the subject of speculation among legal scholars and sociologists alike.

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[nicating Values by Altering the Contingencies of Choice, 55 U. Pitt. L. Rev. 681 (1994) (focusing on the regulation of biotechnology as a means of communicating and instilling values and norms about the sanctity of human life, individual liberty, etc.).]

268. See Andenaes, supra note 2, at 116-18. Andenaes cautions, however, that this use of law is overrated, and cites surveys about popular beliefs showing that deterrence effects of the law produced compliance even where societal values remained recalcitrant. Quoting Nigel Walker, he admits, "[L]egislation must be one of the weakest influences that could be imagined." Id. at 118. Similarly, Darley et al. argue that the rampant ignorance of the law they discovered in their empirical study severely undermined the idea that laws could influence the morals of the community. Darley et al., supra note 7, at 182. On the other hand, Andenaes sees an indirect moral influence from law that takes place through the mechanism of social groups. "If the law succeeds in influencing some individuals, the effects may spread to others as a result of social interaction." Id.


270. Michael Shapiro, who sees regulation primarily in this sense, struggles with the missing piece of a clear mechanism for this process:

The learning mechanisms are varied. Some learning is generated by the communication of direct instructions or threats. Some arises from the observation of the regulatory network, or at least from knowing of it. Some "communication" in the customary sense may be involved, with nonverbal as well as verbal behavior by regulators being used to set examples or reinforce values. Other aspects of producing regulatory effects are communication in only a metaphoric sense. And still other aspects are in some hazy in-between.

Shapiro, supra note 267, at 697. This seems speculative considering that it is necessary for Shapiro's idea to work, that is, that regulation "sends a message" and engenders values and norms. Shapiro later qualifies this and takes a more positivist tack: "'Communication,' 'inference,' and 'learning' are of course not synonymous. The loose use of 'communication' here, however, arises from the focus of learning effects, even though there may be no literal communication in any given case. There are structural similarities in communicative and noncommunicative routes of learning, and these are captured by the broad usage." Id. at 698.

In other words, he seems to say, we know the communication takes place because the people learn what they were supposed to about values and norms (the "learning effects"). This is circular—how can it not matter whether the "learning" takes a "communicative" or "noncommunicative" route, if his argument is pushing for one route as opposed to the other? Rather, the mechanism or route is critical to his approach. It would make more sense to acknowledge that the public is not the addressee of the laws or regulations. As we increasingly treat legislation, regulation, and jurisprudence as means of mass behavior modification, this becomes increasingly important. Even if that modification is purportedly endogenous, like instilling values and norms, it is meaningless if the objects of the instillation are several steps removed, socially and epistemologically, from the didactic rules and regulations.

271. See Katyal, supra note 236, at 2447-2450 (posing a theory of legal "lore" in the culture); Ewick & Silbey, supra note 22, at 1-53 (analyzing how law operates in society in an incognito manner, influencing individual decisions even when the parties are not consciously contemplating the law itself).
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model proposed here should help lay the groundwork for further development in this area.

VII. CONCLUSION

The written formulations of the law are addressed to the state and its actors, not to the citizenry in general nor to the segment of the population to whom a text refers. The texts matter, even if most citizens never read them or have a clear knowledge of their contents. This Article proposes a model that explains the function and relevance of these written formulations in a society where the citizens obtain whatever knowledge of the law they have through indirect means. This raises important implications, however, for certain areas of the law that are built on the unrealistic assumption that the laws are known to the citizens—deterrence, notice, and delegations of interpretive decision-making to private parties.

There are also implications here for the movement toward drafting laws in layperson's English. Plain language has some value as far as making consumer contracts intelligible to the consumers themselves, and bringing clarity in legal proceedings. It would be misguided, however, to draft statutes or court opinions as if they were addressed to the public in general. It would also be misguided to interpret statutory terms as if the legislature had addressed the terms to citizens outside the legal profession.

The model set forth in this paper, however, is more descriptive than normative. It should lay the groundwork for further research in the area of deterrence theory and the mechanisms for transmission of information to the individuals supposedly being deterred. It also shows an active ambiguity in the way courts talk about "notice," blurring the practical distinctions between constructive notice and actual notice. The clarification that this model brings to the issue of "notice" regarding the law carries implications for the rules regarding mistake of law as a defense to criminal charges. Finally, defining the correct addressee of the official legal texts helps clarify the concept referenced by common expressions about the "legal system," illustrating that there is, in fact, a "system" of internal communication at work here.