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**Andrew Currie**  
Postdoctoral Fellow  
UCLA Law & Philosophy Program

*“INTERPRETATION AND INCONSISTENCY”*

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## Interpretation and inconsistency

Andrew Currie

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This legislature is forgetful. Earlier it enacted: 'Smoking in playgrounds is permitted.' Later it enacted: 'Smoking in playgrounds is forbidden.'

If the semantic content of an enactment is the law, then smoking in playgrounds is legally permitted and legally forbidden. But nothing can be both permitted and forbidden, so the semantic content of an enactment cannot be the law. If the communicated content of an enactment is instead the law, then smoking in playgrounds might be legally permitted and legally forbidden. Whether it is depends on what the enactments communicated. But nothing can be both permitted and forbidden, so the communicated content of an enactment cannot be the law.

The argument of the previous paragraph assumes that the consequents of the conditionals in that paragraph are false. Some people reject that assumption. Those people maintain that something can be both legally permitted and legally forbidden, and so both legally permitted and not legally permitted. According to those people, legal obligation is *glutty* and its logic countenances truth value *gluts*: sentences that are both true and false.

This paper rejects the gluttiness of legal obligation. If legal obligation is glutty, then its logic cannot be classical, since by classical logic nothing is ever both so and not so. If legal obligation is not glutty, then its logic can be classical. In rejecting gluttiness, this paper thus rejects an argument against the classic-

ality of the logic of legal obligation; in rejecting that argument, it makes a case for classicality.

This paper's rejection of gluttness depends on claims about the interpretation of legal sources. Put crudely, the most important of those claims is that statutes mean whatever the law says they mean. Put less crudely, the claim is that the *legal content* of an enactment is the law—not its semantic or communicated content.

Inconsistent legislation does not issue just from forgetful legislatures. Legislation in any contemporary legal system is complex and plentiful: inconsistencies are inevitable. Yet the law can render these inconsistencies merely apparent, because it alone determines what enactments mean.

## 1 Interpretation

### 1.1 *Semantic content and communicated content*

An attractive proposal is that the interpretation of legal sources—statutes, constitutions, regulations, perhaps even judicial decisions—is governed by a single principle. Where  $A$  is a declarative sentence,  $c$  a context of use, and  $V$  a mapping from pairs of contexts and sentences to propositions, this single principle takes the form:

*Effective content* If a lawmaking authority declares in  $c$  that  $A$  then  $V_c(A)$  is the law.

(The conditional is to be read materially.) Call  $A$  the lawmaking authority's *declaration*. Call the value of  $V_c(A)$  the *effective content* of  $A$  relative to  $c$ , since this value has legal effect. By extension, let *effective content* refer to whatever function  $V$  stands for.<sup>1</sup>

1 For simplicity, attention is restricted to statutes (in particular, to sentences in statutes). The criticisms developed in this paper of candidates for effective content apply with even more force when the values of  $A$  are (parts of) judicial decisions rather than (parts of) statutes (see

The effective content principle asserts that a given relation holds between what a lawmaking authority declares and what the law is. The principle does not set out a method for getting from the former to the latter; nor does it make a claim about how the former determines the latter. (Of course, some ways of filling in the principle may commit one to such claims or such methods.) Because the principle is indifferent to how one gets from a declaration to its legal effect, the principle governs the interpretation of legal sources in a broader sense of ‘interpretation’ than is common. For all the principle says, the legal effect of a declaration—its effective content—may be a function both of the semantic content of the declaration and of the application of legal rules to that semantic content. (Those rules may but need not be rules of interpretation.) If so, the interpretation of the declaration, in the present sense of ‘interpretation’, is not its semantic content but the result of applying those rules to that content. The interpretation of the declaration, in other words, is its effective content.

What is effective content? An obvious candidate is the function that returns the semantic content of a given sentence relative to a given context. On this proposal, the effective content principle becomes:

*Semantic content* If a lawmaking authority declares in  $c$  that  $A$  then the semantic content of  $A$  relative to  $c$  is the law.

The semantic content of a sentence is distinct from its linguistic meaning. Semantic content, unlike linguistic meaning, may depend on speakers’ intentions (or on false assumptions about those intentions it would be reasonable for interpreters to make). That dependence is explained by the following. The semantic content of a sentence is a truth-evaluable proposition. A sentence yields such a proposition only if its constituents are assigned semantic values, and so only if

Greenberg 2011b, 73–75). Taking  $A$  to range over (parts of) judicial decisions is also incompatible with the declaratory theory of the common law, since on that theory ‘the common law is not found in a text; its content is *evidenced* by judicial reasons for decision’: *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 485 (emphasis added). For discussion of the declaratory theory, see Beever (2013).

any demonstratives in it, like 'this', are assigned referents. These assignments might depend on the intentions of the speaker (or on false but reasonably made assumptions about those intentions). The term 'semantic content' is otherwise left schematic; the precise way of filling it in does not matter.

A surgeon, attending to a man who has collapsed in the street, opens the man's vein, causing him to bleed. An Act states that 'no one may draw blood in the streets' (compare Blackstone 1765, 59). Did the surgeon violate the Act? Yes, if the semantic content principle holds. The sentence 'no one may draw blood in the streets' expresses on its natural interpretation the proposition that no one may draw blood in the streets. That proposition is the sentence's semantic content relative to its context of use, on any reasonable understanding of 'semantic content'. A lawmaking authority declared what the Act states. So by the semantic content principle, the law is that no one may draw blood in the streets. The surgeon violated the law.

What if the Act was passed to discourage duelling in the streets? Perhaps it was implicated, given the context in which 'no one may draw blood in the streets' was declared, that the prohibition the sentence expresses was intended to extend only to blood drawn in duels. If the semantic content principle is valid, the law is indifferent to such implications. But there is an obvious way to remedy this indifference. The proposal is that effective content is instead the function that returns the communicated (or asserted or pragmatically enriched) content of a given sentence relative to a given context. This proposal yields:

*Communicated content* If a lawmaking authority declares in  $c$  that  $A$  then the communicated content of  $A$  relative to  $c$  is the law.

The communicated content of a sentence relative to a context is whatever proposition is communicated by the assertion of that sentence in that context. Typically, and approximately, it is a proposition which the speaker (on some accounts, a reasonable speaker) intends to be communicated and intends to be recognized by the hearer (on some accounts, a reasonable hearer) as inten-

ded to be communicated (Grice 1989). The term ‘communicated content’ is otherwise left schematic; the precise way of filling it in does not matter. One could substitute ‘asserted content’ or ‘pragmatically enriched content’ for it if one preferred.<sup>2</sup>

How do these principles fit with decided cases? The equation of effective content with semantic content is plausible enough so long as attention is restricted to a small class of English cases.<sup>3</sup> But that equation rapidly loses plausibility as one expands the class of cases under consideration. Few would endorse the semantic content principle today, despite remarks in older cases which favour a so-called literal approach to statutory interpretation.<sup>4</sup> The communicated content principle, on the other hand, is the semantic content principle’s more respectable relative. With respectability comes popularity: the communicated content principle, or something close to it, is frequently endorsed.<sup>5</sup>

## 1.2 *Difficulties*

The communicated content principle, while popular, quickly gets into trouble. This section outlines some well-known legal principles which show the implausibility of the equation of effective content with communicated content.<sup>6</sup>

*Mens rea.* Criminal offences are presumed at common law to require mens rea, which roughly means that criminal liability is presumed to attach only to

2 Stanley and Szabó (2000) discuss ways of distinguishing between semantic and communicated content. Soames (2004) offers a schematic account of pragmatically enriched content.

3 See for example *Hollands v Williamson* [1920] 1 KB 716 and *Colchester v Kewney* (1866) LR 1 Exch 368.

4 An example is *R v City of London Court Judge* [1892] 1 QB 273, 290.

5 For relevant debate, see Soames (2007), Marmor (2008, 2011), Greenberg (2011a, 2011b), and Asgeirsson (2016). As Wilmot-Smith (2019, 4 n. 10) points out, Raz (2009, chapter 11) might be taken to endorse something along the lines of the communicated content principle.

6 Similar principles are discussed by Greenberg (2011b), Solum (2013), Baude and Sachs (2017), Smith (2019), and Wilmot-Smith (2019). The semantic content and the communicated content principles are even less plausible when tested against civil law methods of statutory interpretation: see Bergel (2001, 231–66) and Zippelius (2006, chapter 3).

acts done with criminal intent. The presumption extends to offences created by statute: ‘whenever a section is silent as to mens rea there is a presumption that ... [a court] must read in words appropriate to require mens rea’.<sup>7</sup>

By this presumption (and simplifying the element of mens rea), the effective content of a statutory provision like (1) is the proposition expressed by (2):

- (1) Whoever injures another commits an offence.
- (2) Whoever intentionally or knowingly injures another commits an offence.

(‘The proposition expressed by’ is often omitted in what follows.) It is not part of the meaning of ‘offence’ that the offence of *Xing* can be committed only by intentionally or knowingly *Xing*. Nor, arguably, is it part of the meaning of ‘injure’ that one injures someone else only if one intentionally or knowingly injures them. Hence the semantic contents of (1) and (2) differ. For instance, one may unintentionally and unknowingly injure someone else, and so commit an offence under (1) but not under (2).

The mechanism by which the law goes from (1) to (2) does not matter. It may be, as the House of Lords has held, that a principle of statutory interpretation requires a court to ‘read in’ words appropriate to mens rea in a provision like (1). It may instead be that a principle of statutory interpretation takes a provision like (1) to establish an offence which does not fall outside the mens rea presumption and that a further legal rule provides that any such offence requires mens rea. Any difference between those approaches is irrelevant for present purposes, since on either approach (1) is not the law while (2) is, and so the effective content of (1) is (2).

Of course, the communicated content of (1) might be (2) relative to a context in which the intended interpretation of ‘offence’ is (or may reasonably be taken to be) an offence requiring mens rea.<sup>8</sup> But the mens rea presumption re-

<sup>7</sup> *Sweet v Parsley* [1970] AC 132 (HL) 148.

<sup>8</sup> The qualification ‘or may reasonably be taken to be’ is explained by the assumption that com-

quires the effective content of (1) to be (2) relative to *any* context in which the intended interpretation of ‘offence’ is anything other than an offence not requiring mens rea (a so-called strict liability offence)—including a context that discloses nothing at all about the intended interpretation of ‘offence’. Given the mens rea presumption, the effective content of a provision is not always its communicated content, and so effective content is not communicated content.

*Reading down.* In many jurisdictions a legislature’s power to change the law is limited. The limits are typically constitutional: a legislature may, for instance, be unable to enact legislation that restricts the exercise of constitutionally protected interests. In such jurisdictions, statutory provisions which would on their face exceed the legislative power of an enacting legislature may be interpreted as if they did not exceed that power. They may be *read down*.

Australia is such a jurisdiction. The constitution of Australia deprives federal and State Parliaments of the power to make certain laws restricting communication on political matters.<sup>9</sup> In certain circumstances statutory provisions which would exceed the legislative power of the enacting Parliament must be interpreted as if they did not exceed that power.<sup>10</sup> For example, a statutory prohibition on ‘communicating in relation to abortions in a manner reasonably likely to cause distress’ near an abortion provider might be interpreted as excluding any communication on political matters, as the prohibition could otherwise lie beyond the power of the legislature.<sup>11</sup>

This legal principle may, in other words, require the effective content of (3)

communicated content, like semantic content, may depend not only on speakers’ intentions but also on false assumptions about those intentions it would be reasonable for interpreters to make. Nothing in this paper turns on this assumption, and qualifications of this kind are left implicit in what follows.

9 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

10 Acts Interpretation Act 1901 (Cth) s 15A, along with cognate provisions in each State and self-governing Territory. Such provisions correspond to severability clauses in the United States. For discussion, see Stern (1937).

11 Compare *Clubb v Edwards* [2019] HCA 11, (2019) 93 ALJR 448 [149]–[153], discussing Public Health and Wellbeing Act 2008 (Vic) s 185D.

to be (4):

- (3) A person must not communicate in relation to abortions in a manner reasonably likely to cause distress near an abortion provider.
- (4) A person must not communicate in relation to abortions in a manner reasonably likely to cause distress near an abortion provider, except when that communication concerns political matters.

This principle requires the effective content of (3) to be (4) even relative to contexts which disclose no intention that (3) should be interpreted as falling within the legislative power of the enacting legislature. Indeed *any* interpretation required by this principle arguably goes against the intention of the enacting legislature or legislators, since ‘it may greatly be doubted that legislation is ever passed with legislators intending less than full and complete operation of the statute according to its terms’.<sup>12</sup> Arguably, then, even when the proposition intended to be communicated by the enactment of (3) is (3), the effective content of that enactment is (4). And so, since the propositions expressed by (3) and (4) differ, the effective content of (3) is not its communicated content.

*Inconsistencies.* The provisions of one statute may on their face be inconsistent, in light of background facts, with the provisions of another statute. Suppose Parliament enacts (5) followed by (6):<sup>13</sup>

- (5) No child under the age of ten years is guilty of any offence.
- (6) Any person who has a knife with them on school premises is guilty of an offence.

A nine year old takes a knife to school. By (5) and (6), on their natural readings,

12 *Pape v Commissioner of Taxation* [2009] HCA 23, (2009) 238 CLR 1 [389]. Whether a legislature can have an intention is controversial. For relevant debate, see Dworkin (1986, chapter 9), Waldron (1999, chapter 6), and Raz (2009, chapter 11).

13 Compare Children and Young Persons Act 1933, s 50 and Criminal Justice Act 1988, s 139A, read together with s 139. Cases of this kind are mentioned by Atiyah and Summers (1987, 101–2).

the child is both guilty and not guilty of an offence.

This is not the outcome at which English law arrives. (6) is instead read as subject to (5), so that the effective content of (6) is (7):

- (7) Any person who is at least ten years old and who has a knife with them on school premises is guilty of an offence.

The reason why (5) takes precedence over (6) and not the other way round does not matter for present purposes. What matters is that, given (5), (7) is the effective content of (6) relative even to contexts which disclose no intention that (6) should be subject to another provision or read in accordance with principles like *lex specialis*. Once again, effective content is not communicated content.

### 1.3 *Legal content*

Both semantic content and communicated content fail as candidates for effective content. Are there more promising ones?

Assuming a broad enough notion of communicated content, the outcomes in each of the cases in the last section have a common explanation. The explanation is that the law in certain circumstances takes the context of use of a statutory provision to be something other than its actual context of use. For example, whenever the legislature enacts a provision creating a criminal offence and does so without intending that the offence should (or should not) require mens rea, the law takes the context in which the provision is enacted to be one in which the offence *is* intended to require mens rea.

We might think of the law as transforming in certain circumstances  $C$  an actual context of use  $c$  into a context  $c'$  conforming to the law's requirements. Call  $c'$  the *legal transformation* of  $c$ . As a convenience, say that the *legal transformation* $_C$  of a context  $c$  is its legal transformation if  $C$  and  $c$  otherwise. (If not  $C$  then the legal transformation $_C$  of  $c$  is simply  $c$ .) Then the effective content principle becomes:

*Legal transformation* If a lawmaking authority declares in  $c$  that  $A$  then the communicated content of  $A$  relative to the legal transformation $_C$  of  $c$  is the law.

One might think that this principle demands too much of communicated content. One might think, for instance, that no matter the context the communicated content of (3) cannot be (4). If the notion of communicated content cannot do the work the legal transformation principle demands of it, there is an alternative explanation of the cases in the last section, an explanation structurally analogous to the one just advanced.

On this alternative explanation, the cases in the last section show that in certain circumstances  $C$  the effective content of a statutory provision  $A$  relative to a context  $c$  is something other than its communicated content—and that the law determines what this something other is. Call this something other the *legal content* of  $A$  relative to  $c$ . The legal content of a provision, roughly speaking, is whatever the law takes to be the propositional content of that provision. Again as a convenience, say that the *legal content* $_C$  of  $A$  relative to  $c$  is its legal content relative to  $c$  if  $C$  and its communicated content relative to  $c$  otherwise. Then the effective content principle becomes:

*Legal content* $_C$  If a lawmaking authority declares in  $c$  that  $A$  then the legal content $_C$  of  $A$  relative to  $c$  is the law.

The legal transformation and the legal content $_C$  principles improve on the qualifications of the communicated content principle advanced by some theorists. Soames (2007), for instance, claims that effective content is communicated content except in certain circumstances  $C$ . In those circumstances effective content is determined by reference to ‘principles . . . that routinely guide the interpretation of incomplete, inconsistent, or otherwise defective linguistic materials’ (2007, 404). Those principles are ‘applicable in both legal and nonlegal contexts’ (2007, 404).

Soames would reject the appeal in the legal transformation principle to the

*legal* transformation of a context as well as the appeal in the legal content<sub>C</sub> principle to the *legal* content of a sentence. He would reject these appeals since the legal transformation of a context or the legal content of a sentence might be determined by reference to principles applicable only in legal contexts.<sup>14</sup> In rough terms, Soames endorses a principle like this:

*Exceptional content* If a lawmaking authority declares in *c* that *A* then the exceptional content<sub>C</sub> of *A* relative to *c* is the law.

The *exceptional content* of *A* relative to *c* is the propositional content of *A* relative to *c* as determined by the principles of interpretation  $\pi_1, \pi_2, \dots$ . These principles are applicable in both legal and nonlegal contexts. Again, the *exceptional content*<sub>C</sub> of *A* relative to *c* is its exceptional content relative to *c* if *C* and its communicated content relative to *c* otherwise.

Soames's rejection of specifically legal principles of interpretation is misplaced. To take one example, ordinary nonlegal principles of interpretation do not yield the interpretations required by the reading down principle, which says that statutes should be read as not exceeding legislative power. By ordinary nonlegal principles of interpretation, (3), repeated here, does not relative to a normal context of use express or implicate or bear some other broadly semantic relation to (4), also repeated here:

(3) A person must not communicate in relation to abortions in a man-

14 Soames's insistence that the principles governing legal interpretation in exceptional circumstances are applicable in both legal and nonlegal contexts is difficult to reconcile with his subsequent claim that 'legal interpretation is special, and fundamentally different from some other forms of linguistic interpretation' (2007, 417). Given that Soames says that 'judges ... have the authority to make minor adjustments in [a law's] content to avoid transparently undesirable results in cases not previously contemplated' (2007, 417), it is difficult to see how these exceptional principles could apply in nonlegal contexts. Further complications are introduced by Soames's claim that (in the terminology of this paper) the effective content of *A* relative to *c* is *approximately* the communicated content of *A* relative to *c* (2007, 417). These complications are ignored.

ner reasonably likely to cause distress near an abortion provider.

- (4) A person must not communicate in relation to abortions in a manner reasonably likely to cause distress near an abortion provider, except when that communication concerns political matters.

(Someone might object that the reading down principle is an instance of a general, nonlegal principle of interpretation. According to this alleged principle, whenever a speaker intends to oblige someone to do something but lacks the authority to do so, the speaker should be taken to have obliged that person to do only so much of that thing as the speaker has the authority to render obligatory. But this alleged principle lacks plausibility. Suppose I have authority to oblige you only to do what is legal. It is legal to climb halfway up the mountain; it is illegal to climb up any further. I say, 'You are hereby obliged to climb to the top of the mountain.' It is far from obvious that I have obliged you to climb halfway up the mountain; it is at least as plausible that my attempt to create an obligation has failed.<sup>15</sup>)

The rejection of specifically legal principles faces an even greater difficulty. On any plausible assignment of values to  $\pi_1, \pi_2, \dots$ , the principles denoted by those terms can themselves be changed by the law. (In the United Kingdom, those principles could be changed by Parliament if they were statutory principles of interpretation, and by the Supreme Court if they were common law principles of interpretation.<sup>16</sup>) The law cannot modify the principles applic-

15 There is another reason to doubt the plausibility of the alleged principle. Reading down provisions like section 15A of the Acts Interpretation Act 1901 (Cth) were introduced to displace the general law rule that 'legislation which by a collective expression covers objects some of which are and some of which are not within the scope of the power of the legislature' is wholly invalid: *Bank of New South Wales v Commonwealth (Bank Nationalization Case)* (1948) 76 CLR 1, 369–70. The existence of this general law rule casts doubt on the existence of the alleged principle.

16 Of course, Parliament can also modify common law principles of interpretation, and statutory principles of interpretation must themselves be interpreted by courts, but such complications are irrelevant to the present argument.

able to the interpretation of utterances or texts in nonlegal contexts, but it can modify the principles applicable to the interpretation of utterances or texts in legal contexts. Thus on any plausible assignment of values to  $\pi_1, \pi_2, \dots$ , at least some of the principles denoted by those terms will apply only in legal contexts. But those principles are by assumption intended to apply in both legal and nonlegal contexts, and so an assignment is admissible only if it assigns to those terms principles applicable in both contexts. This means that there is no assignment of values to  $\pi_1, \pi_2, \dots$  that is both plausible and admissible, so the exceptional content principle must be rejected. The legal transformation and the legal content<sub>C</sub> principles are right to appeal to specifically legal notions.

What does *C* stand for in those principles? We restrict our attention, without loss of generality, to the legal content<sub>C</sub> principle. In that principle *C* sets out the circumstances in which the effective content of a provision differs from its communicated content. *C* may simply be a long disjunction, such as:

- (v) the communicated content of *A* relative to *c* creates a criminal offence with no mens rea requirement or exceeds the power of the enacting legislature or ...

On this proposal, the legal content<sub>C</sub> principle becomes:

*Legal content*<sub>(v)</sub> If a lawmaking authority declares in *c* that *A* then the legal content<sub>(v)</sub> of *A* relative to *c* is the law.

By this principle, whenever a lawmaking authority declares that *A*, the communicated content of *A* is the law unless that content creates a criminal offence with no mens rea requirement or exceeds the power of the enacting legislature or ..., in which case the legal content of *A* is the law.

The difficulty is that the circumstances in which the effective content of a provision differs from its communicated content are determined by the law, and like nearly anything determined by the law those circumstances can be changed. Imagine that every instance of the legal content<sub>(v)</sub> principle is true, and so accurately reflects the law, at  $t_1$ . At  $t_2$  the Supreme Court abolishes the

mens rea presumption: the effective content at  $t_2$  of an enactment  $A$  creating an offence with no mens rea requirement is simply the communicated content of  $A$ . If the legal content of  $A$  at  $t_2$  differs from its communicated content, then the legal content<sub>( $\vee$ )</sub> principle wrongly entails at  $t_2$  that the legal content, rather than the communicated content, of  $A$  is the law. But then that principle is invalid, since not all its instances are true always. On the other hand, if the legal content of  $A$  at  $t_2$  is identical to its communicated content, then the effective content of  $A$  is its legal content at both  $t_1$  and  $t_2$ . And that means that the first disjunct in ( $\vee$ ) is redundant (for the legal content<sub>( $\vee$ )</sub> principle, with or without the first disjunct in ( $\vee$ ), then entails that the legal content of  $A$  is the law). An analogous argument can be given for each of the disjuncts in ( $\vee$ ): each either shows the legal content<sub>( $\vee$ )</sub> principle to be falsifiable or is redundant.

We need another way of filling in  $C$ , one that is insensitive to the mutability of the law. A more promising candidate for  $C$  is:

- ( $\neq$ )        the legal content of  $A$  relative to  $c$  differs from the communicated content of  $A$  relative to  $c$

On this proposal, the legal content <sub>$C$</sub>  principle becomes:

*Legal content*<sub>( $\neq$ )</sub> If a lawmaking authority declares in  $c$  that  $A$  then the legal content<sub>( $\neq$ )</sub> of  $A$  relative to  $c$  is the law.

By this principle, whenever a lawmaking authority declares that  $A$ , the communicated content of  $A$  is the law unless that content differs from the legal content of  $A$ , in which case *that* content is the law.

This principle can be simplified further. The legal content<sub>( $\neq$ )</sub> of  $A$  relative to  $c$  is its legal content relative to  $c$  if ( $\neq$ ) and its communicated content relative to  $c$  otherwise. But if not ( $\neq$ ) then the legal content of  $A$  relative to  $c$  is identical to the communicated content of  $A$  relative to  $c$ . Hence the legal content<sub>( $\neq$ )</sub> of  $A$  relative to  $c$  just is its legal content relative to  $c$ . The legal content<sub>( $\neq$ )</sub> principle is therefore tantamount to:

*Legal content* If a lawmaking authority declares in *c* that *A* then the legal content of *A* relative to *c* is the law.

The conclusion that the effective content of a declaration by a lawmaking authority is its legal content sits well with the law's ability to govern the interpretation of those declarations however it likes. Take the mens rea presumption or the reading down principle. That presumption and that principle are legal rules, which is why they are described as such by courts and in textbooks.<sup>17</sup> Those rules are expounded by common law courts; and like any (or nearly any) such rule, they can be changed or abolished by those courts. They can be supplemented, too, by further rules the courts create. In principle, common law rules of statutory interpretation can have whatever content an ultimate appellate court determines them to have. Of course, that statement must be qualified with the rider 'subject to any constitutional constraints'; but this qualification does not detract from the plausibility of the identification of effective content with legal content, since constitutional constraints are themselves legal rules.

Similarly, a legislature can enact whatever principles of statutory interpretation it likes, again subject to any constitutional constraints.<sup>18</sup> For instance, the principle of Australian law that statutes should be read as not exceeding legislative power is a statutory principle; it could be repealed or amended by whichever legislature enacted it. A constitutionally unconstrained legislature could even enact a statute requiring each sentence in every other statute to be read as if it began with the words 'it is not the case that'. Such perverse provisions are of course fanciful, but the examples in section 1.2 show how radically

17 See for example *M v Secretary of State for Justice* [2018] UKSC 60, [2019] AC 712 [31]; *Lacey v Attorney-General of Queensland* [2011] HCA 10, (2011) 242 CLR 573 [43]–[44]; Bennion (1984, 256–57).

18 Constitutional constraints may limit a legislature's ability to govern the interpretation of its own enactments. If it is the 'constitutionally mandated function' of a court to determine the meaning of statutes, the legislature may be unable to control the exercise of that function. See *Marbury v Madison* 5 US 137, 177 (1803); *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, (2019) 93 ALJR 212 [76].

the effective content of a provision may depart from its communicated content. The law countenances all sorts of other departures from communicated content too. For instance, the common law sometimes holds that the bearer of a statutory power is under a duty to exercise that power, even if the power was conferred only with the word ‘may’. The common law, loosely speaking, sometimes reads ‘may’ as ‘must’: a radical departure (at least usually) from communicated content.<sup>19</sup>

The legal content principle has the virtue of being consistent with how at least some courts describe the task of statutory interpretation. Australian courts, for instance, distinguish between the ‘literal or grammatical meaning’ and the ‘legal meaning’ of statutory provisions. The legal meaning of a provision:

ordinarily ... will correspond with [its] grammatical meaning ... But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.<sup>20</sup>

It is natural to identify legal content with legal meaning. The legal meaning of a provision is what has legal effect: it is the effective content of a provision. And the legal meaning of a provision is determined by rules of interpretation. It has been said, for instance, that ‘the search for legal meaning involves application of the processes of statutory construction’ and that ‘the preferred construction by

19 This principle is no modern innovation. It was held in 1683 that ‘though the words in the Act of Parliament were, that the Chancellor may grant a Commission of Bankrupt, yet that *may* was in effect *must*’: *Alderman Backwell’s Case* (1683) 1 Vern 152, 153; 23 ER 381, 381. Subsequent cases, from at least *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 onward, deny that ‘may’ is read as ‘must’ and instead say that a statutory power may be coupled with an implied duty to exercise that power. This alternative analysis does not detract from the claim that legal content may depart radically from communicated content, since implications of this kind may arise whatever the intention of the enacting legislature or legislators.

20 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [78] (citation omitted).

the court of the statute’—that is, the statute’s legal meaning—‘is reached by the application of rules of interpretation’.<sup>21</sup> Presumably, then, the legal meaning of a provision is whatever the law takes to be the propositional content of that provision; and so legal meaning corresponds to legal content.

Of course, in a given legal system, legal content may coincide with semantic content. But it does not follow that effective content is semantic content in the intended sense of those expressions. To see why, we need temporarily to complicate the effective content principle by relativizing parts of it, including the function  $V$ , to a legal system  $S$ :

*Effective content<sub>S</sub>* If a lawmaking authority of  $S$  declares in  $c$  that  $A$  then  $V_{c,S}(A)$  is the law in  $S$ .

We can now introduce a harmless ambiguity and call the value of  $V_{c,S}(A)$  the *effective content* of  $A$  relative to  $c$  in  $S$ . Effective content is semantic content, in the intended sense of those expressions, only if the effective content of  $A$  relative to  $c$  in  $S$  is the semantic content of  $A$  relative to  $c$  for each possible sentence  $A$ , context  $c$ , and legal system  $S$ . Suppose in a legal system  $\sigma$  the legal content of a statutory provision is always its semantic content. Then the effective content of  $A$  relative to  $c$  in  $\sigma$  is the semantic content of  $A$  relative to  $c$  for each sentence  $A$  and context  $c$ . But suppose in another legal system  $\sigma'$  the legal content of a statutory provision sometimes differs from its semantic content. Then the effective content of  $A$  relative to  $c$  in  $\sigma'$  is not the semantic content of  $A$  relative to  $c$  for some sentence  $A$  and context  $c$ . And so the effective content of  $A$  relative to  $c$  in  $S$  is not the semantic content of  $A$  relative to  $c$  for some sentence  $A$ , context  $c$ , and legal system  $S$ . Hence effective content is not semantic content.<sup>22</sup>

21 *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56, (2012) 248 CLR 378 [25]; *Zheng v Cai* [2009] HCA 52, (2009) 239 CLR 446 [28].

22 An analogous argument can be given for communicated content in place of semantic content. Hence the claim that the so-called canons of construction of a given legal system coincide with (neo-)Gricean principles (Carston 2013) is consistent with the claim that legal content is in that system communicated content and the denial of the claim that effective content is in

#### 1.4 *Intentions*

Has the rejection of the equivalence of effective content and communicated content been too swift? A theorist might insist that effective content *can* be equated with communicated content, so long as the intentions relative to which communicated content is determined are properly characterized.<sup>23</sup>

Take (3), a provision regulating communication near abortion providers. The theorist might claim that the communicated content of (3)—that is, the proposition intended to be communicated (and to be recognized as intended to be communicated) by the enactment of (3)—is (8):

- (8) (3) or if (3) is beyond the power of this legislature then so much of (3) that is within power.

Unfortunately for the theorist, the effective content of a legislature's enactment may be a function of legal rules of which the enacting legislature (or any reasonable enacting legislature) is ignorant. Such rules might be enacted by a legislature, or declared by a court, with retroactive effect.<sup>24</sup> No actual or reasonable legislature can know of a rule that is not yet enacted or declared; so no such legislature can intend to communicate a reference to such a rule. Whatever it is to intend to communicate something, one presumably cannot intend to communicate something of which one is ignorant. Similarly, the effective content of an enactment may depend on a legal rule which is at the time of enactment long forgotten but subsequently discovered. (Perhaps this rule lies in an obscure sixteenth century decision.) No actual or reasonable legislature can know of a rule which by hypothesis is forgotten and hence unknown; so no such legislature can intend to communicate a reference to such a rule.

The theorist might append to (8) a further disjunct:

every possible system communicated content.

23 This theorist, of course, must dismiss the observation in section 1.2 that some legal systems appear explicitly to contemplate that the effective content of an enactment may differ from its communicated content.

24 For related discussion of such rules, see Smith (2019, 18–29).

(\*) whatever according to the law is the propositional content of (3)

(More concisely: ‘(3), subject to the law’.) On reasonable assumptions, however, the resulting disjunction is equivalent to (\*): the other disjuncts are redundant. A natural proposal is thus that (\*) itself is the effective content of (3). That proposal, when generalized, yields this principle:

If a lawmaking authority declares in *c* that *A* then the communicated content of *A* relative to *c* is the law, where that content is equivalent to whatever according to the law is the propositional content of *A* relative to *c*.

But this principle is scarcely distinguishable from the legal content principle. What distinguishes the former from the latter is the former’s implausibility: the former principle, unlike the latter, holds only if legislatures or legislators really do intend to communicate whatever according to the law are the propositional contents of their enactments (or if it would be reasonable to take legislatures or legislators so to intend). This is at best a contestable empirical assumption. The legal content principle, unlike this theorist’s principle, depends on no such assumptions about the intentions of (reasonable or actual) legislatures or legislators.<sup>25</sup>

The most promising candidate for effective content is legal content.

### 1.5 *Constraints*

The legal content principle places no constraints on the circumstances in which the declaration of a lawmaking authority has legal effect: legal efficacy is as-

25 Smith (2019, 17–18) suggests that the communicated content principle might be salvageable if communicated content is determined relative to Ekins’s (2012) nonstandard account of legislative intention. But on that account a legislature’s intention is simply to enact legislation in accordance with applicable laws and procedures. Such an intention does not yield communicated content in any standard sense. Indeed, as Brand (2013) points out, ‘what Ekins advertises as an appeal to “legislative intent” looks much like an appeal to “good legal reasoning that takes everything relevant into account”’. And that sounds much like the legal content principle.

sumed to be unconstrained. For example, the legal efficacy of an authority's declaration does not depend on its conformity with the demands of morality. Nor does the legal content principle place any constraints on how the law may interpret an authority's declaration: legal content is assumed to be unconstrained. For example, the legal content principle does not say that the law must, if faced with a range of possible interpretations of a declaration, choose the interpretation that best conforms to the demands of morality.

These assumptions are made for simplicity, and the argument of the previous sections can be straightforwardly modified if one or both of the assumptions is false. For instance, if the legal efficacy of a declaration is conditioned on its compliance with the demands of morality, the legal content principle could be reformulated as:

*Constrained efficacy* If a lawmaking authority declares in *c* that *A* then (the legal content of *A* relative to *c* is the law provided that this content is morally permissible).

If this principle rather than the legal content principle were valid, a declaration whose legal content was morally impermissible would not have legal effect. This principle would guarantee that only moral laws were law.

If the constrained efficacy principle or one structurally analogous to it were valid, the claim that effective content is legal content would be false. But the claim that effective content is neither semantic content nor communicated content would still be true. And the former claim would need only to be minimally qualified to be rescued from falsehood: effective content is legal content so long as the latter is morally permissible. Because the unqualified claim and the unqualified legal content principle are simpler, and because that claim and that principle can be qualified without compromising the argument of this paper, the assumption that legal efficacy is unconstrained—and thus that the legal content principle is unqualified—is left in place.

Arguably, if legal efficacy is unconstrained, legal content is unconstrained too. At the very least, to suppose otherwise demands substantial argument.

Since legal efficacy has been assumed in this paper to be unconstrained, legal content is assumed to be unconstrained as well. And just as the argument of this paper stands (with straightforward qualifications) if legal efficacy is constrained, so too does it stand (with straightforward qualifications) if legal content is constrained.

Of course, even if legal content is unconstrained, the rules of a legal system may impose constraints on the considerations that *other* rules of the system may take into account when interpreting an authority's declaration. These constraints will usually be constitutional (and so are themselves legal rules and so do not issue from outside the law). Moreover, even if legal content is unconstrained, principles of political morality may determine, at least in part, which considerations the law *should* take into account when interpreting an authority's declaration.<sup>26</sup> For instance, it is usually easier to know what a statute requires of one if legal content at least approximates semantic or communicated content. But principles of political morality may pull in different directions. The mens rea presumption—the presumption that criminal liability attaches only to acts done with criminal intent—shifts the legal content of criminal provisions away from their semantic or communicated content; but the same presumption curtails the coercive powers of the state and to that extent advances the liberty of the subject.

## 2 Inconsistency

### 2.1 *Inconsistent obligations*

Here is another argument against the equation of effective content with semantic content. Suppose the semantic content principle holds. The legislature enacts 'Everyone may smoke' and 'No one may smoke'. The 'may' in each enactment presumably expresses legal permission, so by the semantic content principle it is the law that smoking is legally permitted and it is the law that

<sup>26</sup> Fuller (1969) defends a series of such principles. For discussion, see Kramer (2007, chapter 2).

smoking is not legally permitted. An action is presumably legally permitted whenever the law says it is (and legally obligatory whenever the law says it is), so smoking is and is not legally permitted. But that is a contradiction, so effective content is not semantic content after all. (An analogous argument can be given for communicated content.)

The argument of the previous paragraph assumes that contradictions cannot be true. Some theorists reject that assumption—and with it the classicality of the logic of legal obligation. Priest (1987, 2008), for instance, endorses *dialetheism*, the thesis that some contradictions are true. He points to the law as evidence for this thesis. Priest thinks that the law is often unable to resolve apparent inconsistencies in legislation, in the sense of statutory provisions which, taken on their face, are jointly inconsistent in light of background facts. He thinks this because he thinks that effective content is (nearly always) semantic content. As a result, he thinks that when the legislature enacts ‘Everyone may smoke’ and ‘No one may smoke’ smoking is *both* legally permitted and not legally permitted.

If the same action can be both legally permitted and not legally permitted, or both legally obligatory and not legally obligatory, then one’s legal obligations can be *inconsistent*. And if one’s legal obligations can be inconsistent, then the logic of legal obligation must allow for truth value gluts: sentences that are both true and false. Appendix A outlines a logic of legal obligation that allows for gluts; the logic of *deontic paradox* there outlined is the deontic logic that Priest endorses. The adoption of that logic is far from harmless, not least because legal obligation would then invalidate *reductio ad absurdum*, an inference scheme on which legal reasoning relies. Section 3 examines some of the consequences of adopting the logic of deontic paradox. This section examines the arguments for adopting that logic in the first place.

## 2.2 *Two cases*

Priest (1987, 184–85) constructs two cases in which one's legal obligations are allegedly inconsistent. First, Priest invites us to imagine that a country's constitution provides:

In a parliamentary election:

1. no person of the female sex shall have the right to vote;
2. all property holders shall have the right to vote.

When the constitution was written, women were forbidden from holding property. Women may now hold property. A woman owns a house. According to Priest, it follows from the constitutional provision that the woman has and does not have the right to vote, and so is and is not legally permitted to vote.

Second, Priest (1987, 185) asks us to imagine a law governing who has the right of way at unmarked junctions. The law provides:

At an unmarked junction at which two vehicles arrive simultaneously:

1. any female driver shall have priority over any male driver;
2. any older person shall have priority over any younger person.

A 40 year old man and a 30 year old woman arrive together at a junction. By clause 1, the woman has priority over the man. By clause 2, the man has priority over the woman. Priority is asymmetric: if A has priority over B, then B does not have priority over A. So by clause 1, the man does not have priority over the woman; and by clause 2, the woman does not have priority over the man. If A has priority over B, then A and only A is legally permitted to go first. So the man and the woman are each legally permitted and not legally permitted to go first.

Cases like these, according to Priest, bolster the case for dialetheism. Priest (1987, 188) claims that inconsistent provisions, like those in the cases above, fail to give rise to inconsistent legal obligations only if there is 'more to the law than the literal wording of statute', and so only if effective content is not semantic

content.<sup>27</sup>

Priest grants that effective content may *sometimes* differ from semantic content. His understanding of the law's interpretative resources is as follows (1987, 187). First, some laws take priority over others because of their place in a legal system's normative hierarchy (for instance, if a constitutional provision and a statutory provision are inconsistent then the former prevails). Second, if two statutory provisions are inconsistent and one provision was enacted after the other, then the later one prevails, given the principle of *lex posterior*. Third, 'the intentions of the legislators' revealed in the preamble to an Act may 'provide the basis for the existence of an implicit exceptive clause'. That is all.

Priest effectively assumes the validity of something like Soames's exceptional content principle (section 1.3), with semantic content in place of communicated content. In schematic terms, Priest assumes the validity of:

*Exceptional semantic content* If a lawmaking authority declares in  $c$  that  $A$  then the exceptional semantic content <sub>$C$</sub>  of  $A$  relative to  $c$  is the law.

The *exceptional semantic content* of  $A$  relative to  $c$  is the propositional content of  $A$  relative to  $c$  as determined by the three exceptional principles of interpretation Priest identifies. (These principles, unlike those in the exceptional content principle of section 1.3, are not assumed to be applicable in both legal and nonlegal contexts.) The *exceptional semantic content* <sub>$C$</sub>  of  $A$  relative to  $c$  is its exceptional semantic content relative to  $c$  if  $C$  and its semantic content relative to  $c$  otherwise.

Because Priest assumes that the circumstances in which effective content is not semantic content are so narrow, and that the principles which govern interpretation in those circumstances are so restricted, he concludes that the law lacks the ability to resolve many apparent inconsistencies in legislation. He acknowledges that 'there are procedures for resolving' apparent inconsistencies

<sup>27</sup> Priest's (1987, 186) examination (and rejection) of the argument that statements of legal obligation cannot be true or false is ignored for simplicity.

which cannot be resolved by his three exceptional principles (1987, 188). But these procedures, Priest maintains, are extralegal. In cases involving such apparent inconsistencies, ‘there are, *ex hypothesi*, no legal grounds on which to base the decision’, so the decision will be made ‘on extra-legal (socio-political) grounds’ (1987, 188). To suppose otherwise—that is, ‘to suppose that something could be a fact of law when grounded in no aspect of the legal process’—‘is just mystification’ (1987, 188).

But well-established legal principles govern the resolution of such inconsistencies. In *Project Blue Sky Inc v Australian Broadcasting Authority*, the High Court of Australia considered a statute which appeared both to permit and to prohibit the making of certain decisions by an administrative agency.<sup>28</sup> The court resolved the apparent inconsistency by working out the ‘hierarchy of the provisions’ in the statute,<sup>29</sup> and it did this by examining the statute’s structure and the obligations to which it purported to give rise. ‘Reconciling [inconsistent] provisions’, the court said, ‘will often require the court “to determine which is the leading provision and which the subordinate provision, and which must give way to the other”’.<sup>30</sup> Such determinations are themselves required by law, and so are ‘grounded in [an] aspect of the legal process’, and so provide legal grounds on which to base decisions. Effective content is not, as Priest assumes, exceptional semantic content; to hold otherwise is to cleave to an impoverished understanding of the law’s interpretative resources.

Of course, someone might construct cases intended to push the limits of legal rules about inconsistencies in legislation. Take a statute which says:

1. Everyone may smoke in playgrounds.
2. No one may smoke in playgrounds.
3. No legal rules governing the resolution of inconsistencies apply to the

28 (1998) 194 CLR 355.

29 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [70].

30 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [70], citing *Institute of Patent Agents v Lockwood* [1894] AC 347 (HL) 360.

interpretation of this statute.

The possibility of such statutes does not undermine the present argument. In some legal systems the third provision would not determine whether rules about inconsistencies applied to the interpretation of the statute. That is because in some systems the interpretation of statutes is a function reserved exclusively for the courts, which means that a legislature cannot control a court's exercise of that function. More importantly, whether or not the third provision were given effect, a court would presumably be entitled to conclude that the statute as a whole was inconsistent and so of no effect.<sup>31</sup> For the absence of any indication in the statute of whether the first or second provision is the leading one suggests that the legislature has enacted a contradiction; and as a nineteenth century text on statutory interpretation puts it, it is 'impossible to will contradictions' (Maxwell 1875, 133). If the statute is of no effect, then it has no nontrivial legal content, so by the legal content principle the legislature has effectively created no legal obligation at all.<sup>32</sup> Priest (1987, 187) is therefore wrong to maintain that the opponent of dialetheism must show that the law is *always* able to resolve apparent inconsistencies in legislation. The resolution may sometimes be that the legislation gives rise to no legal obligations at all.

Priest (1987, 184) may be right that 'the most cogent way' of arguing for the possibility of inconsistent legal obligations is to construct hypothetical examples instead of using real ones. But he is mistaken to think that 'the niceties of interpretation and scholarship tend to cloak the essential issue' (1987, 184). One cannot claim that the law lacks the resources to resolve apparent inconsistencies in legislation without looking at what those resources are.<sup>33</sup>

31 On the possibility that a legislature's 'attempt ... to frame a rule' might fail, see *Brown v Tasmania* [2017] HCA 43, (2017) 261 CLR 328 [489].

32 Kelsen (1960b, 206–7) constructs a similar case involving simultaneously enacted inconsistent provisions. He concludes that if no reconciling interpretation of the provisions is available, the legislature has enacted something meaningless and so created no legal norm.

33 Civil law systems contain principles analogous to those of the common law systems considered here. In German law, for instance, 'the principle of the unity of the legal system ... requires

### 2.3 Adjudication

Priest misunderstands the relation between statutory text and effective content in another way. He claims that the law is changed when a court hands down a decision resolving apparent inconsistencies in legislation, at least when that resolution relies on extralegal grounds. As a result, ‘*after* the ruling the law may be consistent. This does not change the fact that *before* the ruling the law was inconsistent’ (1987, 188). But the effective content of a statutory provision, even before any act of adjudication, is its legal content. In a slogan: ‘a statute is taken “as though it read precisely as the highest court of the State has interpreted it”’.<sup>34</sup>

To illustrate, imagine:

**KNIFE** Parliament has enacted (5), which sets the age of criminal responsibility at ten years, and (6), which forbids anyone from taking a knife to school. No court has yet considered the latter provision. A nine year old takes a knife to school at  $t_1$  and is charged with an offence under (6). The court determines at  $t_2$  that the legal content of (6) is (7), according to which anyone who is at least ten years old is forbidden from taking a knife to school.

Having made the determination in **KNIFE**, the court will not find that, because the law at  $t_1$  was that no one may take a knife to school, the child committed an offence at  $t_1$ . It will instead find that the child committed no offence at  $t_1$ , since the law at  $t_1$  was that no one who is at least ten years old may take a knife to school.

Similarly, imagine:

**DETENTION** The executive detains at  $t_1$  a person under a statutory provi-

that each legal norm is interpreted in such a way that the consistency of the legal system is preserved’ (Hellwege and Wittig 2015, 123). For discussion, see Zippelius (2006).

<sup>34</sup> *Brown v Tasmania* [2017] HCA 43, (2017) 261 CLR 328 [507], citing *Amsterdam* (1960, 74), citing *Minnesota ex rel Pearson v Probate Court* 309 US 270, 273 (1940).

sion which purports to give the executive the power to do so. No court as yet has considered this provision. The detainee challenges their detention in court, seeking damages for false imprisonment. The court determines at  $t_2$  that the legal content of the provision does not permit the detention.

If the court in DETENTION awards the detainee damages for false imprisonment, those damages will be calculated on the basis that the false imprisonment began at  $t_1$ . That is because the executive violated the law from  $t_1$ .<sup>35</sup>

Courts typically adjudicate disputes about events in the past and resolve those disputes in accordance with the law as it stood at the time of those events. This means that courts typically determine at one time how the law stood at an earlier time. Of course, ‘determine’ here is ambiguous: it might mean that courts *declare* at a later time how the law at an earlier time operated; or it might mean that courts *fix* at a later time how the law, from that time onwards, is to be taken to have operated at an earlier time. On the former understanding, a court’s determination discloses the content of the law; on the latter understanding, it lays down that content. The common law conventionally favours the former understanding: ‘judicial power is concerned with existing rights, that is, those which the parties actually have at the inception of the suit’; ‘a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist’.<sup>36</sup>

An explanation of how a court may declare the law rather than fix it lies beyond present concerns.<sup>37</sup> It is also dialectically unnecessary. For present purposes, it does not matter whether courts declare legal content or fix it or do both, since in any event it is only the legal content of a provision that has legal effect. This is what KNIFE and DETENTION illustrate. Something other than

35 A structurally analogous example is given in *Brown v Tasmania* [2017] HCA 43, (2017) 261 CLR 328 [509].

36 *United Engineering Workers’ Union v Devanayagam* [1968] AC 356 (PC) 384; *Prentis v Atlantic Coast Line Co* 211 US 210, 226 (1908).

37 For criticisms of the possibility of such an explanation, see Kelsen (1934, 80–84). For discussion, see Raz (1979, 90–97) and Endicott (2020).

the legal content of a provision never gives rise to legal rights or obligations: effective content is always legal content, and so apparently inconsistent provisions do not operate one way before, and another way after, a court resolves the apparent inconsistency.

#### 2.4 *Functions*

There is an independent reason to doubt the possibility of inconsistent legal obligations. That possibility is inimical to the law's functions of guiding behaviour and settling disputes.<sup>38</sup> The law cannot guide behaviour if an action is both legally permitted and legally forbidden; nor can it settle the question of whether an action is legally permitted if it must answer both 'yes' and 'no'.

Admittedly, the law allows for conflicting legal obligations (such as a legal obligation to dance and a legal obligation not to dance), and so the law may sometimes fail to guide behaviour (Currie 2020). (One's legal obligations *conflict* if two jointly incompatible actions are both legally obligatory; one's legal obligations are *inconsistent* if the same action is both legally obligatory and not legally obligatory.) But conflicting legal obligations, unlike inconsistent ones, may arise from contract: they may arise from the exercise of a power to bind oneself in law. Arguably, if the law recognizes conflicting but not inconsistent legal obligations, it is in part because the former but not the latter may be willingly assumed. On this understanding, the recognition of conflicting legal obligations flows in part from the recognition of the autonomy of those in a community governed by law.

More importantly, however, conflicting legal obligations do not undermine the law's dispute settling function in the same way inconsistent legal obligations do. If one is legally obliged both to dance and not to dance, the answer to the question of whether one violated one's legal obligation to dance is *either* 'yes' or 'no' and not both. If one is both legally obliged to dance and not legally obliged to dance, the answer to the same question is *both* 'yes' and 'no'. The

38 For a statement of those functions, see Raz (1975, 154).

law's dispute settling function is not inhibited if the law countenances conflicting legal obligations. That function is inhibited if it countenances inconsistent ones.<sup>39</sup>

Priest's argument against the classicality of the logic of legal obligation is abductive, but the law provides no abductive evidence against classicality. Priest's argument fails because the data of which dialetheism is supposed to be the best explanation are no data at all. By refusing to look at actual legal systems and to reflect on the law's functions, Priest misapprehends the law; because he misapprehends the law, he misapprehends the logic of legal obligation. That logic is not glutty.

### 3 Reductio ad absurdum

There is another reason to doubt the gluttiness of legal obligation. Glutty logics typically invalidate the inference scheme of reductio ad absurdum, which says that if a set  $AA$  of sentences and a sentence  $B$  jointly entail a contradiction then  $AA$  entails the negation of  $B$ ,  $\neg B$ . The logic of deontic paradox allows for gluts and so invalidates this scheme. (That logic, outlined in appendix A, is endorsed by Priest.) Since legal reasoning relies on reductio, the logic of deontic paradox invalidates parts of legal reasoning. That logic thus invalidates arguments that are not only valid by classical logic but are also taken to be valid by the law.<sup>40</sup>

Take a common pattern in legal reasoning. One party to a dispute asserts that some legal right or obligation exists. Both parties to the dispute agree on

39 Kelsen (1945, 375) claims that the law does not countenance inconsistent legal obligations when he says that 'the specific function of juristic interpretation is to eliminate contradictions [in legal sources] by showing that they are merely sham contradictions'. (Kelsen, who does not always distinguish between inconsistent and conflicting legal obligations, may here intend 'contradictions' to include conflicting legal obligations.) Kelsen (1979, 127) later insisted that absent legal principles providing for the resolution of 'conflicts of norms' such conflicts could not be resolved by 'legal science' and so could not be resolved by legal interpretation.

40 On other abductive costs of dialetheism, see Williamson (2017).

the truth of a series of propositions of law. The court finds that, given those propositions of law, the assumption that the alleged right or obligation exists entails a contradiction. From this the court concludes that the alleged right or obligation does not exist. This reasoning is an instance of *reductio*.

*Reductio* fails in any logic that allows for gluts, given the standard assumption that logical consequence is truth preservation in all models. To see why, consider first why *reductio* is classically valid. Suppose that a set  $AA$  of sentences and the sentence  $B$  entail a contradiction. Then every model in which  $B$  and each sentence in  $AA$  are true is one in which a contradiction is true. But a contradiction is true in no model, so there is no model in which  $B$  and each sentence in  $AA$  are true, so every model in which each sentence in  $AA$  is true is one in which  $B$  is false. And this means that  $AA$  entails  $\neg B$ . On the other hand, if a logic allows for gluts, a contradiction is true in some model, so one cannot reason from the impossibility of such a model to the conclusion that  $AA$  entails  $\neg B$ . (For technical details, including a proof of the failure of *reductio* in the logic of deontic paradox, see appendix B.)

*Fejo v Northern Territory*, a decision of the High Court of Australia, illustrates the law's use of *reductio*.<sup>41</sup> That case examined whether the grant of an interest in land by the Crown extinguished native title rights in that land. An Aboriginal community held native title rights, including rights to hunt and fish, in respect of that land. In the late nineteenth century, the Crown granted an estate in fee simple in that land to someone else. Under Australian law, a native title right is extinguished if the Crown grants a right inconsistent with the native title right. The question in *Fejo* was whether the estate in fee simple was inconsistent with the Aboriginal community's native title rights.

Let us suppose for simplicity that the only native title right at issue was a right held by A to hunt on the land. The estate in fee simple was held by B. The accepted premises are these. Since B had an estate in fee simple in the land, B had a right to exclusive possession of the land. Since B had that right, no

<sup>41</sup> [1998] HCA 58, (1998) 195 CLR 96.

one else (including A) was legally permitted to go onto the land (without B's permission).<sup>42</sup> If A had a right to hunt on the land, A was legally permitted to go onto the land.

The question was whether the grant to B of the right to exclusive possession of the land extinguished A's right to hunt on the land. The question, in other words, was whether the accepted premises were consistent with A's having a right to hunt on the land. They were not, since those premises, together with the supposition that A had a right to hunt on the land, entailed that A was and was not legally permitted to go onto the land. It followed by *reductio* that A did not have a right to hunt on the land. A's right to hunt on the land was therefore inconsistent, in the legal sense of that term, with B's right to exclusive possession of the land. As a result, A's native title right was extinguished by the grant of the estate in fee simple to B.

There is nothing artificial about this reconstruction of the court's reasoning. *Western Australia v Brown*, handed down fifteen years after *Fejo*, confirmed that Australian law takes two rights to be inconsistent if and only if (sentences expressing) those rights, together with background facts, entail a contradiction.<sup>43</sup> Two rights are inconsistent when 'one right necessarily implies the non-existence of the other . . . : that is, when a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right'.<sup>44</sup>

It is unsurprising that courts should rely on *reductio*, for *reductio* is a part of our everyday, nonlegal reasoning (Williamson 1994, 152). Since courts rely on *reductio* to reason about legal rights, they rely on *reductio* to reason about legal obligations. (One has a legal right to exclusive possession of some land if and only if everyone else is legally obliged not to enter the land without one's permission; and one has a legal right to enter some land if and only if one is not legally obliged not to enter the land.) Since courts rely on *reductio* to

42 The qualification 'without B's permission' is ignored in what follows for simplicity.

43 [2014] HCA 8, (2014) 253 CLR 507.

44 *Western Australia v Brown* [2014] HCA 8, (2014) 253 CLR 507 [38].

reason about legal obligations, any logic that invalidates reductio is a wrong logic for legal obligation. Since reductio is invalid if the logic of legal obligation is glutty, the right logic for legal obligation is not glutty. So much is assumed by the courts in *Brown* and *Fejo*; and a plausible hypothesis, given the place of reductio in everyday reasoning, is that this assumption is shared by every legal system, even if the assumption is not explicitly articulated.

Priest (1989, 614) argues that the failure of reductio in logics such as the logic of deontic paradox does not prevent arguments by reductio from succeeding in ‘criticizing and thereby changing the beliefs of others’. The general invalidity of reductio, claims Priest, does not stop us from rejecting a contradiction and the premise that leads to it, ‘provided that it is reasonable to suppose that the domain in question is not a paradoxical one’ (1989, 620). Unfortunately, the paradoxical domains for Priest include the law: ‘paradoxical sentences occur in only certain logico-mathematical, legal and dialectical situations (and maybe a few others)’ (1989, 616).

Happily, according to Priest, we can rely in paradoxical domains on arguments by reductio (even if formally invalid) so long as the contradictory sentences at which those arguments arrive are not themselves paradoxical (1989, 620). (That is, if  $AA$  and  $B$  jointly entail  $C \wedge \neg C$  then we can accept the inference from  $AA$  to  $\neg B$ —in some unspecified sense of ‘accept’—provided that  $C$  is not potentially both true and false and so paradoxical.) However, in standard legal arguments by reductio, the contradictory sentences at which the arguments arrive are tantamount to sentences of the form ‘ $C$  is (not) legally obligatory’. And every sentence of that form is for Priest potentially both true and false and so paradoxical. The allegedly paradoxical potential of such sentences flows, for Priest, from the alleged ability of the legislature to make nearly *anything* legally obligatory or not legally obligatory or both, simply by enactment (section 2). On Priest’s account, then, the range of  $C$  in ‘ $C$  is (not) legally obligatory’ is effectively constrained only by the imagination of the legislator. Hence the risk that sentences of that form are paradoxical can never be excluded, and so arguments by reductio in law cannot be relied on, even by Priest’s own lights.

Is there another way to salvage legal applications of reductio? Priest (1989, 619) says that ‘certain special cases’ of the inference scheme might be valid, even in logics in which it otherwise fails. But arguments by reductio in law display no special structure. Even if the accepted premises in such arguments are usually equivalent to sentences of the form ‘*B* is (not) legally obligatory’, they need not be. At most, such arguments are distinguished by the form of the contradictory sentences at which they arrive: as already seen, each such sentence is tantamount to one of the form ‘*C* is (not) legally obligatory’.

One suggestion, then, is that arguments by reductio in law exhibit this structure:

If *AA* and *B* jointly entail ‘*C* is legally obligatory’ and ‘*C* is not legally obligatory’ then *AA* entails  $\neg B$ .

On this suggestion, the accepted premises (*AA*) in legal applications of reductio can be sentences of any form, so long as they, along with the assumption to be tested (*B*), entail contradictory sentences of the form ‘*C* is (not) legally obligatory’. Yet this suggestion does nothing to save legal applications of reductio from invalidity in the logic of deontic paradox. For the displayed inference scheme, a special case of reductio, fails in that logic, as does the general case (appendix B).

To suppose that legal obligation is glutty—in particular, to suppose that it obeys the logic of deontic paradox—is to suppose that legal applications of reductio are invalid. This supposition is implausible, not least because the law assumes that reductio is a reliable guide to truth. The law is not a paradoxical domain.

#### 4 Conclusion

Statute books are full of provisions which on their face are jointly inconsistent. But that observation provides no evidence for the possibility of inconsistent legal obligations, and so provides no evidence for the gluttness of legal obliga-

tion. For one, legal systems standardly contain principles directed to the resolution of inconsistencies in legislation. What those principles say matters because the law controls the interpretation of its own instruments: effective content is legal content. (If a legal system contains no such principles, apparently inconsistent provisions may simply yield no legal obligations at all.) Moreover, the possibility of inconsistent legal obligations is inimical to the law's function of settling disputes. Countenancing such obligations even risks undermining established legal reasoning, because the law assumes the impossibility of such obligations when determining people's rights and duties. The law does not force us to reject classical logic. The law may be complex, but it is skilled at managing that complexity.<sup>45</sup>

45 Thanks to Timothy Endicott, Alex Kaiserman, Kevin Toh, and Timothy Williamson for detailed comments on earlier versions of this paper.

## Appendix A The logic of deontic paradox

This appendix presents the logic DLP of deontic paradox.<sup>46</sup> The language of DLP contains countably many propositional variables ( $P, Q, R, \dots$ ), the sentence operator  $\bigcirc$  (read as ‘it is obligatory that’), and the connectives  $\wedge$  (conjunction),  $\vee$  (disjunction), and  $\neg$  (negation).

A DLP frame is a pair  $\langle W, R \rangle$ , where  $W$  is a nonempty set and  $R$  is a binary relation on  $W$ . Informally, the members of  $W$  are worlds and  $R$  is an accessibility relation on those worlds. If  $wRw'$  then  $w'$  is a state of affairs compatible with what is obligatory at  $w$ .

A DLP model is a triple  $\langle W, R, \rho \rangle$ , where  $\langle W, R \rangle$  is a DLP frame and  $\rho$  is a three-place relation between propositional variables, members of  $W$ , and the values 0 and 1. We write  $A \rho_w 1$  for  $\langle A, w, 1 \rangle \in \rho$ . The relation  $\rho$  satisfies:

*Exhaustion* For every atomic sentence  $A$  and every world  $w$  of every model, either  $A \rho_w 1$  or  $A \rho_w 0$ .

Exhaustion validates excluded middle for nonmodal sentences: that is, it validates  $A \vee \neg A$  for each sentence  $A$  that does not contain  $\bigcirc$ .<sup>47</sup> Logical consequence is defined, as usual, as truth preservation in every world of every model.

A sentence  $A$  is *true* in a model  $M = \langle W, R, \rho \rangle$  at a member  $w$  of  $W$  if and only if  $A \rho_w 1$  and *false* in  $M$  at  $w$  if and only if  $A \rho_w 0$ . The relation  $\rho$  is extended to arbitrary sentences as follows:

$$\begin{aligned} \neg A \rho_w 1 & \quad \text{if and only if} \quad A \rho_w 0 \\ \neg A \rho_w 0 & \quad \text{if and only if} \quad A \rho_w 1 \end{aligned}$$

46 DLP is the paraconsistent deontic logic now favoured by Priest, although he does not give the logic this name (Priest 1987, 282–83). (Originally, Priest favoured an alternative paraconsistent deontic logic, which is not equivalent to DLP: Priest 1987, 188–95.) DLP is a modal extension of the logic LP of paradox. LP is itself an extension of the logic FDE of first degree entailment; LP extends FDE by validating excluded middle. The semantics presented for DLP in this appendix is the so-called relational semantics for FDE and its extensions (Priest 2008, chapter 8).

47 For a proof, see Priest (2008, 148 n. 4).

$A \wedge B \rho_w 1$	if and only if	$A \rho_w 1$ and $B \rho_w 1$
$A \wedge B \rho_w 0$	if and only if	$A \rho_w 0$ or $B \rho_w 0$
$A \vee B \rho_w 1$	if and only if	$A \rho_w 1$ or $B \rho_w 1$
$A \vee B \rho_w 0$	if and only if	$A \rho_w 0$ and $B \rho_w 0$
$\bigcirc A \rho_w 1$	if and only if	for all $w' \in W$ , if $wRw'$ then $A \rho_{w'} 1$
$\bigcirc A \rho_w 0$	if and only if	either not $\bigcirc A \rho_w 1$ or for some $w' \in W$ , $wRw'$ and $A \rho_{w'} 0$

The first disjunct of the semantic clause for  $\bigcirc A \rho_w 0$  guarantees the validity of excluded middle for modal sentences. That disjunct and exhaustion together validate excluded middle.

DLP invalidates explosion, the principle that a contradiction entails anything at all; it is thus *paraconsistent*.

## Appendix B Failures of reductio

Where  $AA$  and  $BB$  are sets of sentences,  $C$  and  $D$  are sentences, and  $\vDash$  expresses logical consequence, the general form of reductio ad absurdum is:

(RAA) If  $AA, C \vDash D$  and  $BB, C \vDash \neg D$  then  $AA, BB \vDash \neg C$ .<sup>48</sup>

To see the classical validity of (RAA)—for definiteness, in the modal logic  $K$ —assume  $AA, C \vDash_K D$  and  $BB, C \vDash_K \neg D$ . Now  $\vDash_K$  is monotonic, so  $AA, BB, C \vDash_K D$  and  $AA, BB, C \vDash_K \neg D$ . But then  $AA, BB, C \vDash_K D \wedge \neg D$  by the semantic clause for  $\wedge$  in  $K$ . And so, by the definition of  $\vDash_K$ , for every world  $w$  of every  $K$  model  $M$ , if every sentence in  $AA \cup BB$  is true in  $M$  at  $w$  and  $C$  is true in  $M$  at  $w$  then  $D \wedge \neg D$  is true in  $M$  at  $w$ . But  $D \wedge \neg D$  is not true at any world of any  $K$  model, so for every world  $w$  of every  $K$  model  $M$ , if every sentence in  $AA \cup BB$  is true in  $M$  at  $w$  then  $C$  is not true in  $M$  at  $w$ . By the semantic clause

<sup>48</sup> As is usual,  $AA, BB \vDash C$  stands for  $AA \cup BB \vDash C$  and  $AA, C \vDash D$  for  $AA \cup \{C\} \vDash D$ .

for  $\neg$  in  $K$ ,  $C$  is not true in  $M$  at  $w$  just if  $\neg C$  is true in  $M$  at  $w$ . Hence, by the definition of  $\models_K$ ,  $AA, BB \models_K \neg C$ .

For a counterexample to (RAA) in the logic DLP of deontic paradox, set  $C$  to  $P$ ,  $D$  to  $Q$ ,  $AA$  to  $\{Q\}$  and  $BB$  to  $\{\neg Q\}$ . Then  $AA, P \models_{DLP} Q$  and  $BB, P \models_{DLP} \neg Q$ . Now take a DLP model  $M = \langle W, R, \rho \rangle$  where  $W = \{0\}$ . Let  $Q$  be true and false at 0 and  $P$  not false at 0. Then every sentence in  $AA \cup BB$  is true in  $M$  at 0 but  $\neg P$  is not, so there is a world of a DLP model at which every sentence in  $AA \cup BB$  is true but  $\neg P$  is not. Hence  $AA, BB \not\models_{DLP} \neg P$ .

Consider the suggestion that legal applications of reductio have the form (with  $\circ$  for legal obligation):

(ORAA) If  $AA, C \models \circ D$  and  $BB, C \models \neg \circ D$  then  $AA, BB \models \neg C$ .

(ORAA) fails in DLP. The reasoning is as for (RAA), except  $AA = \{\circ Q\}$ ,  $BB = \{\neg \circ Q\}$ , and the model must be such that 0 can access itself.

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