

# The Illocutionary Force of Laws

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## ABSTRACT

This article provides a speech act analysis of 'crime-enacting' provisions in criminal statutes, focusing on the illocutionary force of these provisions. These provisions commonly set out not only particular crimes and their characteristics but also their associated penalties. Enactment of a statute brings into force new social facts, typically norms, through the official utterance of linguistic material. These norms are supposed to guide behaviour: they tell us what we must, may, or must not do. Our main claim (contra Marmor 2011) is that the illocutionary force of such provisions is primarily 'world-creating', i.e. *effective* (Bach and Harnish 1979), or *declarational* (Searle 1976), rather than *directive* (behaviour-guiding). We assume that directive illocutionary force is either direct or indirect, showing that provisions need not contain the linguistic items that make for direct directives and that according to standard tests no indirect directive is present. A potential counter-argument is that any utterance serving to direct behaviour is necessarily a directive. We show that this behaviour-directing property is shared by some clear non-directives.

## KEYWORDS

illocutionary force; statute; directive; effective; criminal law; pragmatics; philosophy of language; jurisprudence; semantics; indirect illocutionary force; implicature; enactment

The enactment of a statute brings into force new social facts, typically norms, through the official utterance of linguistic material: sentences arranged in paragraphs, sub-sections, sections etc.. These new norms are supposed to guide behaviour: they tell us, as subjects of the law, what we must, or may, or must not do. Verbal behaviour that does something more or other than stating or asserting is the topic of the theory of speech acts pioneered by Austin and developed by Searle, Bach and Harnish, and others. In this paper we give a speech act analysis of those 'crime-enacting' provisions in criminal statutes, focusing on the illocutionary force of these provisions. The provisions in question, as illustrated in (1), commonly set out not only particular crimes and their characteristics but also their associated penalties.

- (1) Everyone who... challenges or attempts by any means to provoke another person to fight a duel... is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. (*Criminal Code* [Canada], s. 71)

We have chosen criminal statutes as our empirical focus largely because we take these to be the paradigm case of behaviour-directing statutes, which thus put our claim about the illocutionary force of statutes to the severest test. This claim, in a nutshell, is that—contrary to much received wisdom and perhaps even ‘common sense’—the provisions in question have primarily ‘world-creating’ rather than behaviour-guiding illocutionary force.

Since Austin’s work on speech acts, utterances have been widely thought of as having not only propositional content but also illocutionary force—that dimension of an utterance in contrast to its locutionary and perlocutionary aspects on which questions, assertions, orders, promises, and the like differ from each other. Generally speaking, we think of utterances of sentences like those in (2) as having forces similar to each other, but different from the forces of utterances of sentences like those in (3); and we think of utterances of sentences like those in (4) as having a third kind of force. Sincere utterances of the sentences in (2) are statements, assertions, or similar; and sincere utterances of the sentences in (3) are orders, requests, or similar. Utterances of the sentences in (4) are classic examples of what Austin originally dubbed performatives,<sup>1</sup> that is, utterances that primarily make something the case rather than describing it. For example, once the appropriate person has uttered (4a) in the appropriate manner and circumstances, the ship in question is called the QEII.

- (2) a. Apparently, this boat was called the Mary Rose.  
b. Oslo is the capital of Norway.
- (3) a. Put the gun down!  
b. I order you to put the gun down.
- (4) a. I name this ship the QEII.  
b. ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith  
To [name]  
hereby appointed an Officer in Her Majesty’s Canadian Armed Forces...

The labels we use here for the forces exemplified in (2), (3), and (4), respectively, are *representative*, *directive*, and *effective*. Our claim, then, is that ‘crime-enacting’ provisions in criminal statutes have *effective*, but not *directive*, illocutionary force. (For short, they are *effectives*, not *directives*.)

To claim that, at its official promulgation by the legislature, a statutory provision is an effective is to claim that its utterance is the sort of speech act that creates or is intended to create a certain new state of affairs, namely, one in which it is a crime to challenge another to a duel. In this way, the utterance is similar to the act of naming in (4a) and commissioning in (4b). In section I, we show that effective illocutionary force is explicitly indicated by the enactment formulae preceding statutes. This claim has been discussed in detail by Kurzon (1986) and Trosborg (1995), and we consider it uncontroversial—at least among those who consider illocutionary force to be a real phenomenon.<sup>2</sup>

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<sup>1</sup>Austin’s settled view was to reject any sharp distinction between performatives and constatives and instead distinguish between several types of illocutionary force. We follow him (and most speech act theorists) on this.

<sup>2</sup>Of course, those who do not e.g. Cohen (1964) would disagree with the enactment claim about statutes.

Far more controversial, however, is our claim that crime-enacting statutory provisions do not have directive illocutionary force. Marmor (2011) explicitly argues that they do; and Searle (1976, 22) takes the promulgation of laws to have both effective and directive force.<sup>3</sup>

We begin by distinguishing between effectives and directives. We then set out our main argument (section II), starting from the assumption that an utterance is either direct or indirect with respect to each illocutionary force that it possesses—that is, either the utterance has a sentence form dedicated to that force, or the force is instead only implied by the speaker and (in successful communication) inferred by the hearer. We show that crime-enacting provisions need not have any of the forms dedicated to directive force, and so cannot in general be direct directives. We then show that the behaviour-directing content associated with these provisions does not pass standard tests for pragmatically implied utterance content, so these provisions cannot be indirect directives either.

Next, we try to defuse some challenges to our claim (section III). One involves the assumption that any utterance serving broadly to direct behaviour is necessarily a directive. We show that this behaviour-directing property is also shared by some obvious non-directives. We also argue that another, related, challenge assumes a faulty definition of directives in perlocutionary rather than illocutionary terms.

We conclude with some remarks on the implications of our thesis for attempts like Marmor's to ground the normative force of laws in their illocutionary force and also for certain other debates about legal interpretation.

## **I. 'Directives' and 'Effectives'**

To arrive at the terminology basic to our discussion, we start with Austin's taxonomy of speech acts and briefly trace the development of one of his terms. In this taxonomy, one category, 'exercitives', covered speech acts like those in both (3) and (4). According to Austin, such acts—which included 'appointing, voting, ordering, urging, advising, warning'—all involved 'the exercising of powers, rights, or influence' (Austin 1962, 151).

### **I.i. Partitioning 'exercitives'**

We follow Searle (1976) and Bach and Harnish (1979, 47) in dividing the category of exercitives in two.<sup>4</sup> Both Searle's and Bach and Harnish's taxonomies have the category of directives, including ordering, urging, requesting, asking, permitting and perhaps advising and warning.

Searle (1976, 21) categorizes speech acts such as voting, appointing, promoting, demoting, naming, and awarding as 'declarations'. In such speech acts, 'the speaker in authority brings about a state of affairs specified in the propositional content by saying in effect, I declare the state of affairs to exist'.

Covering much the same territory as Searle's declarations are Bach and Harnish's (1979) 'conventional illocutionary acts', which divide into 'effectives' and 'verdictives' (1979, 110ff.).<sup>5</sup>

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<sup>3</sup>In fact, we agree that laws are directive in purpose; what we dispute is that this purpose is expressed in the illocutionary force of laws. (See section III for discussion.)

<sup>4</sup>Here, both Searle and Bach and Harnish are following Strawson (1964, 443ff.), who argued that only some illocutionary acts, e.g. giving a batsman out, relied on conventions, while others, e.g. warning, did not.

<sup>5</sup>Searle (1976, 15–16) makes the same distinction between representative declarations i.e. verdictives and other declarations i.e. effectives. Austin ([1962] 1975, 151–155) also had a category of verdictives.

It is the former subcategory, *effectives*, that we shall be concerned with in this paper. These are utterances that ‘when issued by the right person under the right circumstances’ serve to ‘produce or alter institutional states of affairs’ (1979, 113). They contrast with *verdictives*, which, roughly, report that something is the case and in doing so, make that the official line. The distinction is exemplified in (5):

- (5) a. *Verdictive*: I find you guilty as charged.  
b. *Effective*: I sentence you to ten years imprisonment.

Since *effectives* are a narrower class than Searle’s declarations and the former on our view include enactments of statutes, stating our thesis in terms of *effectives* is more precise.<sup>6</sup>

### I.ii. Enactments

The speech act of a legislature’s promulgation of a law has been seen as having ‘the illocutionary force of enacting’ (Kurzon 1986, 9). Interesting support for this comes from the enactment formulae that begin many statutes in the common law world and elsewhere (Kurzon 1986, 9, 12; Trosborg 1995, 32). These are exemplified in (6):

- (6) a. ‘Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows...’ (Canada)  
b. ‘Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That...’ (USA)  
c. ‘BE it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows...’ (UK)

In general, these formulae represent explicit performatives (Kurzon 1986, 9) in that they make use of a verb, *enact*, naming the speech act performed.<sup>7</sup>

Enacting falls within the class of *effectives* discussed earlier: conventional speech acts that ‘make it the case that such and such’, where ‘such and such’ is some institutional fact (Bach and Harnish 1979, 113). Here the ‘such and such’ is a legal norm or set of such norms. On the ‘Standard Picture’ of how the content of the law relates to that of statutes (Greenberg 2010), these norms are just those set out in the provisions of the act, for which Searle’s definition of declarations, as given earlier, holds: ‘the speaker in authority brings about a state of affairs specified in the propositional content by saying in effect, I declare the state of affairs to exist’.<sup>8</sup> For example, the Canadian legislature in enacting the provision in (1) declared that challenging someone to a duel was a crime and in so declaring made it so.

One question raised by this enacting claim about statutes is whether each statute is one speech act of enactment or several: say, one for each provision. The former position is argued for by Trosborg (1995, 32), for whom ‘the enacting formula... establishes the illocutionary force of the whole text’. Taking the latter position is Kurzon (1986, 11–12), who claims that

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<sup>6</sup>Another advantage of doing so is avoiding potential confusion between ‘declarations’ a speech act type and ‘declaratives’ the sentence type whose primary use is assertion and the like.

<sup>7</sup>This definition of ‘explicit performative’ is given at Austin ([1962] 1975, 33).

<sup>8</sup>Alternatively, if Greenberg is right that the content of statutory provisions in statutes is one among many determinants of the content of the law, then the relation between the norms expressed and the change effected to the law will have to be more complicated. This debate is, however, orthogonal to our concerns in this paper.

each provision is an enactment. One of Kurzon's arguments for this is historical. British practice until 1850 was for the initial formula to be of the form 'Be it enacted... that', with each subsequent section then beginning with 'And be it further enacted that...'. This was then changed by a statute, which established that 'all Acts shall be divided into sections, if there be more enactments than One which Sections shall be deemed to be substantive Enactments without any introductory words (13th and 14th Victoria, Ch 21, quoted at Kurzon [1986, 11]). Kurzon's other arguments are from present usage: statutory provisions can be 'applied individually without account taken of the entire statute'; and can also be struck down individually—say, for example, when one is found to be unconstitutional—without this entailing the striking down of the entire statute (Kurzon 1986, 19).

Seeing each provision as a separate speech act of enactment seems to us the more plausible possibility, although the evidence for even this possibility is far from decisive. If the intention of the legislature determines a statute's illocutionary force and the British Parliament explicitly signalled its intention in an 1850 statute that each provision be seen as a distinct enactment, then it would seem a reasonable conclusion that each provision from that time on is indeed a distinct speech act of enactment. However, this argument would apply to contemporary statutes in Britain and elsewhere only if contemporary law-makers (and drafters) are aware of and implement this understanding of statutes—something for which independent evidence would be required.

Still less compelling is Kurzon's evidence from current practice. This is because the reason that particular statutory provisions can be struck down separately may just be that they are distinct legal norms rather than the result of distinct albeit simultaneous speech acts. The same goes for the ability to apply provisions separately. To see this, consider the act of naming, another effective:

(7) I name these kittens Spot, Tabby, and Tiger.

Of course, each name will apply separately to the respective kittens named. And should one naming fail—say, because one of the kittens is not mine to name—the other names will not thereby fail to apply.

Given these doubts about the speech act status of distinct provisions, we leave this question open, concluding only that crime-enacting statutory provisions have the illocutionary force of enactments.

## **II. Provisions as Neither Direct nor Indirect Directives**

In the preceding section, we argued that at its promulgation, the statute or each of its provisions has effective illocutionary force. Although we considered only the force of enacting, statutes can clearly have other illocutionary forces. These are mostly effectives, typically employing an 'explicit performative' verb and serving to declare something to be the case, or to amend or repeal extant legislation (Kurzon 1986, 24). These three possibilities are illustrated in (8):

- (8) a. *declaratory*: '... it is hereby declared that the office of Lord Chancellor is and shall be tenable by an adherent of the Roman Catholic faith' (*Lord Chancellor Tenure of Office and Discharge of Ecclesiastical Functions Act 1974*, c. 25, s. 1)
- a'. *declaratory*: 'The purple finch is hereby designated as the official state bird of New Hampshire.' (*New Hampshire Statutes, Title I—The State and Its Government*, ch. 3—State Emblems, Flag, Etc., s. 3:10)

- b. *amending*: ‘... the Ontario Municipal Board hereby amends By-law No. 24982 Milliken Employment District, as amended, of the former City of Scarborough as follows’ (*City of Toronto By-Law No. 153-2011 [OMB]*)
- c. *repealing*: ‘The City Council hereby repeals Section 10-7.1 Sleeping in public places.’ (*City of South Daytona, Florida Ordinance No. 11-09*)

This observation leads us to the claim that these exhaust the illocutionary force of behaviour-guiding provisions—and that, as noted in the introduction, the illocutionary force of most behaviour-directing statutory provisions is not directive.

Key support for this thesis comes from provisions enacting new social facts that do not directly prohibit or enjoin behaviour, as illustrated by the two ‘declaratory’ provisions given in (8). Clearly, declaring that Lord Chancellors may be Catholic and that some bird is the state bird have no prescriptive action-guiding content. The latter, in fact, is simply ‘a symbolic act without any authoritative directive included’ (Marmor 2012, 20).

We conclude, then, that at their promulgation statutory provisions need not have double or hybrid illocutionary force—that is, that a provision whose illocutionary force is solely that of enactment is neither logically nor practically impossible.

### II.i. Standard forms of behaviour-directing provisions

We turn now to what we see as paradigmatic criminal provisions: those enacting norms that serve to guide behaviour.<sup>9</sup> Interestingly, these have fairly standard forms, as illustrated in (9a), (10a), (11a), and (12a) (repeated from [1]), and schematized in (9b), (10b), (11b), and (12b), respectively:

- (9) a. ‘... it is an offence to contravene subsection 14.11.’ (*Importation and Exportation of Firearms Regulations Individuals, SOR/98-215, s. 14.2*)  
b. *Simple form*: Let it be that [behaviour *x* is a crime/the crime of *y* and the penalty is *z*].
- (10) a. If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude... (*Perjury Act 1911, 1911 c. 6 Regnal. 1 and 2 Geo 5, s. 1[1]*)  
b. *Explicit conditional form*: Let it be that [If behaviour *x*, then a crime *y* has been committed and the penalty is *z*].
- (11) a. If any person, in giving any testimony ... otherwise than on oath, where required to do so ... makes a *statement* a which he knows to be false in a material particular, or b which is false in a material particular and which he does not believe to be true he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment ... or a fine or both. (*Evidence Proceedings in other Jurisdictions Act 1975 UK, 1975, c. 34, s. 1A*)  
b. *Explicit conditional form*: Let it be that [If behaviour *x*, then a crime has been committed and the penalty is *z*]
- (12) a. Everyone who... challenges or attempts by any means to provoke another person to fight a duel... is guilty of an indictable offence and liable to imprisonment for a term

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<sup>9</sup>Such provisions are only one of the kinds that appear in criminal statutes. Among the others are those that define terms, those that give orders or directions to the court, and those that indicate possible defences.

not exceeding two years. (*Criminal Code* [Canada], s. 71)

- b. *Implicit conditional form*: Let it be that [Every/anyone who engages in behaviour *x* commits a crime *y*, for which the penalty is *z*].

In the schematizations given above, 'Let it be that' indicates the force of enactment that applies to each provision. The content in the scope of that force generally has two parts: (i) a specification of the proscribed behaviour, often listing necessary conditions for the behaviour to count as a crime; and (ii) the applicable penalty or range of penalties. Two kinds of variation are displayed in these provisions. One is in the basic form in which the behaviour and penalty are set out: this may be simple, as in (9); as an explicit conditional, as in (10) and (11); and as an implicit conditional, expressed with a universal quantifier, as in (12). Another kind of variation involves the naming or not of the crime; (10a) names the crime that it creates as 'perjury', whereas (9a), (11a), and (12a) each identify crimes but do not name them.

## II.ii. Directives

Having examined crime-enacting provisions, we can now ask whether these provisions are directives. A directive is a speech act whose 'illocutionary point... consists in the fact that they are attempts... by the speaker to get the hearer to do something' (Searle 1976, 13). These have a range of related illocutionary forces: certainly including ordering, requesting, beseeching; perhaps also including permitting and advising.<sup>10</sup> We define directives as follows:

- (13) directive =<sub>defn</sub> speech act whose illocutionary force is that the speaker wants the hearer to do or not to do something.<sup>11</sup>

But are provisions directives? We say no. As noted in the introduction, our argument for this has two prongs. First we show that provisions are not direct directives, then we show that they are not indirect directives. On the assumption that each illocutionary force possessed by an utterance is either direct or indirect i.e. that these exhaust the possibilities, it follows that provisions are not directives.

We can dispense quickly with the possibility that provisions are in general direct directives, for two reasons. One is that no one has obviously held this view; the other is that few sentence types can be used as direct directives and crime-enacting provisions are clearly not of these types. We consider three sentence types that can be used as directives: imperatives, explicit performatives, and modals that encode speaker commitment.

The imperative, exemplified in (14), is the sentence type specialised for directive speech acts:

- (14) Turn yourself in to the police.

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<sup>10</sup>Luckily, we do not have to settle here the difficult question of the domain of directive speech acts. We suspect though that much of speech that is, loosely speaking, advice does not need to be recognized *as advice* to have its effect and that the right treatment of such utterances is as having purely representative illocutionary force (cf. Sperber and Wilson [(1986) 1995, 244–245], who give such an analysis of predicting).

<sup>11</sup>We have defined directives as a kind of illocutionary force; we do not try to define illocutionary force, beyond the ostensive definition given in the introduction. For some reasons why it is difficult to define, see Kissine (2008, 1197ff.).

Arguably, imperative sentences are, to use Austin's (1962, 69) term, 'primary' directives—that is, the primary form that language provides to express directive force.<sup>12</sup> Statutes, however, do not contain imperatives but are, with few exceptions, composed of indicative sentences. As it happens, statutes containing imperative forms do exist, but these serve to amend other statutes and are not addressed to subjects of the law.<sup>13</sup> We take these to be orthogonal to our point.

Direct directive speech acts may also be performed by means of explicit performative verbs. We mentioned explicit effective performatives in section I. Verbs that can be used to form explicit directives include *request*, *beg*, *command*, and *order*:

- (15) a. I beg/command/order you to turn yourself in.  
b. Citizens are hereby requested/ordered not to smoke in enclosed public spaces.

With the possible exception of some uses of *authorize* and *entitle*, statutes do not contain explicit directive performatives (Trosborg 1995, 41). Certainly, crime-enacting provisions do not contain explicit directive performatives, so we can set these aside.

Searle (1975, 64) suggests<sup>14</sup> that imperatives and explicit performatives exhaust the possibilities for direct directives. However, some modals can be used to express directive force (cf. Williams [2005, 56]), and on the standard test for directness of content some of these appear to be direct directives. In English, the modal auxiliaries that can be used to express directive force include *must*, *shall*, *should*, *ought*, and *may*.<sup>15</sup> Now, modals are clearly not a necessary ingredient of crime-enacting provisions, given examples such as (1). However, statutes do contain modals used with directive force, so we briefly look at their role.

Uses of most modals with directive force, as in (16), are direct representatives and indirect directives. That is, they are normative statements implying rather than indicating directly that the speaker wants the hearer to comply with the norm described. Evidence that the directive force is implied rather than asserted is that it is cancellable (cf. Searle [1975, 67]). In (16a), the follow-up sentence cancels any directive force conveyed by the utterance of the first sentence.

- (16) a. You ought to/should turn yourself in. But for goodness' sake, don't!  
b. You must turn yourself in. ?# But for goodness' sake, don't!<sup>16</sup>

However, the infelicity of the attempted cancellation in (16b) seems to indicate that sentences of this sort with *must* are *direct* directives. (This difference is sometimes described as *ought* and *should* being 'weaker' than *must*: e.g. Huddleston and Pullum [2002, 186]).

The modals most common in statutes are *must*, *shall*, and *may*,<sup>17</sup> although the use of *shall* is now deprecated as old-fashioned in at least in some jurisdictions and replaced by *must*, among other expressions (Office of the Parliamentary Counsel 2010, 14). We take the uses of modals

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<sup>12</sup>Although note that it is not at all clear that all utterances of imperatives have directive force (Wilson and Sperber 1988): they can also be used to express good wishes and hopes, inter alia. 13. For example, 'In section 1, after subsection 1 insert...' (Office of the Parliamentary Counsel 2010, 40).

<sup>14</sup>Although he does not actually say so.

<sup>15</sup>Quasi-modals e.g. *have to* can also be used to express directive force. Note that we are following Coates (1983, 15) in classifying *ought* as a modal rather than a quasi-modal, although nothing hangs on that here.

<sup>16</sup>Our use of the marker '?#' signals that the infelicity may be semantic or pragmatic, or both.

<sup>17</sup>The use of *shall* is, however, still current in Canada and elsewhere (see e.g. *Interpretation Act*, R.S.C., 1985, c. I-21, s. 11). Interestingly, the 'obligation' use of *shall* was already 'virtually restricted to formal legal contexts' and 'fossilized' by the early 1980s (Coates 1983, 190).

in statutes to fall into three categories: directives to officials, definitional uses (which are not, or only marginally, directives), and directives to subjects of the law in non-criminal statutory provisions. These are illustrated, respectively, in (17):

- (17) a. ‘The Advisory Committee shall transmit to the Secretary of State a copy of every report...’ (*Fair Trading Act 1973* [UK], 1973, c. 41, s. 14[5])  
b. “‘military’ shall be construed as relating to all or any of the Canadian Forces’ (*Criminal Code* [Canada], s. 2)  
c. ‘No person shall manufacture, possess, handle, store, transport, import, distribute or use a pest control product that is not registered under this Act...’ (*Pest Control Products Act* [Canada], S.C. 2002, c. 28, s. 6[1])

Significantly, the uses of *shall* found in older crime-enacting provisions like (10a) and (11a)—which seem to have been replaced by *is*, as in (12a), rather than *must*—might accordingly be definitional rather than directive in use, and (as Williams [2005, 47] suggests about other uses of *shall*) served largely to ‘enhance “the flavour of the law”’. If they were directives, though, they were clearly directed not to subjects of the law themselves but to judges and other officials.

In sum, while the data here are somewhat messy, it is clear (i) that modal directives do appear in statutes, and some of them might be direct directives; but (ii) that, given examples like (1), they are not necessary ingredients of crime-enacting provisions.

Based on the foregoing arguments, we conclude that provisions are not in general *direct* directives. If they are generally directives, then, they must (mostly) be *indirect* directives. This seems to be Marmor’s (2011, 4) view:<sup>18</sup>

Legal instructions are typically exhortatives... An expression might be an exhortative even if formulated as a simple descriptive statement. Saying, for example, ‘It is very cold in here’ might well be a request from someone to close the window, depending, of course, on the conversational background and mutual knowledge of the relevant circumstances. Similarly, a legal descriptive statement such as ‘It is a misdemeanor to  $\phi$  in circumstances C’ is not a description of how things are in the world, but rather, a prescription that one ought not to  $\phi$  in C.

Before we proceed, note that as argued earlier the initial promulgation of a statute is a matter of enactment, not description: before the statute was officially ‘uttered’, it was not a misdemeanour to  $\phi$  in circumstances C; after the utterance it is. Putting aside this issue, we want to focus on what we take to be Marmor’s main suggestion here: that—in at least some cases—statutory provisions convey directive illocutionary force implicitly.

As a starting point, we can observe that several types of sentences exist that might be uttered as indirect directives. Consider (18):

- (18) a. I want you to turn yourself in.  
b. The right thing to do is to turn yourself in.  
c. There’s no point running away.

As Searle (1975, 59) notes, the direct illocutionary force of utterances of sentences like (18a) is representative: the sentence describes a speaker desire. Yet such sentences may be uttered as implicit directives, with this force being the main point of the utterance. Sentences like (18b) can have a similar use, differing from those like (18a) in they describe not the speaker’s desire but his or her opinion about the right action. In each case the indirect nature of the

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<sup>18</sup>Note that Marmor uses the term ‘exhortative’ to designate the same class as ‘directive’ does.

utterance's directive illocutionary force is highlighted by the fact that it is cancellable: each may be felicitously followed by, for example, 'But I am not telling you to do so, nor requesting that you do, nor anything like that' (cf. Searle [1975, 67]).

Uttering (18c) as a directive to the hearer to turn him- or herself in is a still more indirect way of directing hearer behaviour. In fact, it is doubly indirect: not only is the linguistic form used here not one dedicated to directives, but the content of the directive, to turn oneself in, is (unlike [18a] and [18b]) not encoded in the sentence and must be inferred. Marmor's example, 'It is very cold in here' uttered as a request to close the window, is also of this doubly indirect type. If provisions were indirect directives, they would have more in common with examples like (18a) and (18b), since in the latter the content is spelled out explicitly and it is just the directive force that is implied.

The next step in verifying the indirect behaviour-directing force of crime-enacting provisions is to test for the cancellability of this force, much as we just did for indirect speech acts. This now-standard 'cancellability test', introduced by Grice (1975, 57), serves to identify the utterance content implied by the speaker and in successful communication inferred by the hearer. There are two modes of cancellability. One is *explicit cancellability*, where material inferred by the hearer as part of the intended meaning can be cancelled 'without logical absurdity' or 'linguistic offence' (Grice 1981) through the addition of words that contradict what was implicated. This contrasts with the infelicity that arises with the addition of words that contradict linguistically encoded material. The other mode is *contextual cancellability*, where a change in the context of the utterance effaces implied content but not the encoded content. Grice (1978, 115–116) formulates these two tests as follows:

a putative conversational implicature that *p* is explicitly cancellable if, to the form of words the utterance of which putatively implicates that *p*, it is admissible to add *but not p*, or *I do not mean to imply that p*, and it is contextually cancellable if one can find situations in which the utterance of the form of words would simply not carry the implicature.

Illustrations of explicit and contextual cancellation are given in (19) and (20), respectively:

- (19) a. I broke a finger yesterday. Not one of my own, though.  
b. I broke a finger yesterday. ??But I didn't break anything.
- (20) Mafia enforcer: I've spent the whole week breaking people's bones. I broke three legs on Monday, and fractured two skulls on Tuesday, but yesterday I had a very light workload. I only broke a finger.

Note that cancellation is fine in (19a), in contrast to (19b), since what is contradicted in the former is something inferred and not encoded in the words used: a conversational implicature on Grice's account, or on more recent views of pragmatics (e.g. Carston [2002]) perhaps a pragmatically inferred component of the proposition expressed. The contextual cancellation illustrated in (20) yields analogous results.<sup>19</sup>

As these examples show, Grice's cancellability test can help to determine whether some part of utterance content is also part of the encoded/conventional content (such as the direct illocutionary force) or part of the implicit content (such as an implicature or indirect illocutionary force).<sup>20</sup> In the case of statutory provisions, however, the dispute is over whether directive illocutionary force is part of the overall utterance content or not. For Marmor,

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<sup>19</sup>We do not give examples of failed attempted contextual cancellation parallel to (19b), but the reader can verify that successful contextual cancellation is at best difficult here.

<sup>20</sup>See Carston (2010, § 2) for discussion of why and how cancellation works.

directive force is, in at least some cases, part of implicit content; it should follow, then, that in those cases this force should be straightforwardly cancellable. Our claim, however, is that the ‘directive force’ of each enacted provision is part of neither direct nor indirect content, but simply embodies the normative force of law by virtue of being enacted law.

We predict, therefore, that the test will deliver somewhat mixed results: attempted cancellation should not be felicitous, since there is no relevant indirect content to target; but it should not be as infelicitous as cancelling material that is explicitly present. And indeed this is what we see, for several possible formulations of the cancelling clause:

- (21) It is hereby enacted that everyone who challenges another person to fight a duel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- a. ?? But that does not imply that one should not challenge another person to a duel.
  - b. ?? But the law doesn’t tell you not to challenge another person to fight a duel.
  - c. ?? But Parliament isn’t telling you duelling is bad.

Contextual cancellation seems a more decisive test. It is hard to imagine any circumstance in which a legislature successfully enacts a new criminal provision without there being the implication (in some loose sense of the word) that the behaviour constituting the offence is to be avoided—precisely because it *is* now an offence. Of course, it is possible to imagine contexts in which the utterance of the statute fails to establish new legal norms—perhaps the legislature has overreached its authority or been officially suspended by a higher body—and in such contexts no obligation will generally arise to follow the proposed new norm. But this would be because the proposed norm has not been felicitously enacted, offering no support to the indirect directive theory.

Other criteria for pragmatically implied material include non-conventionality, non-detachability, and calculability (Grice 1975, 57–58) and reforcability (Sadock 1981). Non-conventionality has already been covered in the discussion of direct directives and modals. Reinforcement is the obverse of explicit cancellation, as demonstrated in (22). In (23), as in (22b), the last sentence strikes native speakers as otiose, although, as we predict, not to the same degree:

- (22) a. I broke a finger yesterday. One of my own, I mean.  
b. I broke a finger yesterday. ?? It was a finger, I mean.
- (23) It is hereby enacted that everyone who challenges another person to a duel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.  
?And one should not engage in duels.

Non-detachability is the property whereby changing the wording of the utterance does not change the implicature, since the implicature derives from the speaker’s having said what she has said, not from how she has said it. In the case of the directive force of statutory provisions, this property provides no clear test: on a dual-force analysis, enacting a provision involves an implied directive illocutionary force, while on our analysis, enacting a norm has implications for behaviour generally. Earlier, we mentioned certain cases e.g. enacting purely symbolic content that show that behaviour-directing ‘force’ is detachable from enactment. But, of course, it is impossible in principle to detach the behaviour-directing quality of norms that direct behaviour!

Calculability, Grice (1975, 50) argued, was the most important, and indeed defining, quality of conversational implicatures:

The presence of a conversational implicature must be capable of being worked out; for even if it can in fact be intuitively grasped, unless the intuition is replaceable by an argument, the implicature if present at all will not count as a CONVERSATIONAL implicature...

For indirect speech acts, one can provide a Gricean explanation of how they might be calculated. Searle (1975, 61ff.) provides such a derivation of 'I have to study for an exam' as an indirect refusal to the invitation 'Let's go to the movies'.

Applying this consideration to statutory provisions, we are left wondering how a Gricean derivation of directive illocutionary force for statutes would go. The crucial step in Searle's derivation is that the reply 'I have to study for an exam' would not be relevant unless it was 'acceptance, rejection, counterproposal, further discussion etc.' (1975, 63) of the cinema invitation, so that something more than the speaker's need to study must have been meant. In other cases, such as using 'Can you pass the butter?' as a request, something other than the encoded meaning must have been meant because this meaning is not relevant at all—the speaker already knows that the hearer is capable of passing the butter. In each case, what we might call the surface meaning of the sentence uttered is of necessity not sufficiently relevant, this fact warranting the hearer's pragmatic inference. But in the case of a legislature enacting statutes, it is not at all clear that the statute's surface meaning is not sufficiently relevant—nor that its utterance would contravene any of Grice's other maxims. How does the enactment of a statute fall short of reasonable expectations about what the legislature's utterance would convey?

Essentially the same point can be made in terms of relevance theory (Sperber and Wilson [1986] 1995), a framework for describing utterance interpretation in psychologically realistic terms. Given the explicit presence of 'It is enacted that', the first interpretation that would likely come to mind is that this is an enactment; and this interpretation would be accepted, since the emergence of a new law provides cognitive effects sufficient to warrant the effort required to process the utterance (relative to the hearer's expectations about utterances made by legislatures). Other potential interpretations, such as one on which the utterance is an indirect directive, would never even be considered. Since speakers would know this (at least tacitly), they would have to choose a different form of words if they wanted to convey directive force.

We have thus shown that provisions are in general neither direct nor indirect directives. Although statutes do contain modals used with directive force, these are not necessary features of crime-enacting provisions. So we conclude that statutory provisions are, in general, not directives at all.

### III. 'Behaviour-directing' Non-directives

The case we just made for a 'non-directive' view of statutory statutes is, we believe, a compelling one. Here, however, we wish to consider some possible responses to our claim. One involves our view—which we have not offered any arguments for—that the direct/indirect taxonomy is exhaustive. If it could be shown that there are directives that are neither direct nor indirect directives, then our argument would fail. Because exploring this possibility would take us too far afield, we shall not address it here. But we shall address what we take to be a similarly basic challenge to our thesis, which builds on the assumption that every utterance serving to guide behaviour is a directive speech act.

To flesh out this challenge, we can say that it is an argument that combines the following premises: (i) typical provisions in statutes tell one what to do or more usually what *not* to do; and (ii) (as just noted) every utterance that tells one what to do or not to do is a directive

speech act. The conclusion is that crime-enacting provisions are directive speech acts. We claim that this argument fails because its second premise is false: not all utterances that (in some sense) tell one what to do or not to do have directive illocutionary force. There is at least one other possibility, namely, that the utterance enacts a norm and that norm is behaviour-directing. This is what we think statutory provisions do.

To see this, compare statutory provisions with other effectives. Many effectives and their close relatives, verdictives, are clearly behaviour-guiding in that they set up new norms or social facts that guide subsequent behaviour; but they are never—at least to our knowledge—analysed as indirect directives. For example, a successful act of naming bestows on some entity a new name; and using that name to refer to that entity is, in some sense, the right thing to do. As Austin says, referring to it by a different name would be ‘out of order’ ([1962] 1975, 117). In this respect, naming is a typical institutional speech act: it has a ‘conventional effect’ (Austin [1962] 1975, 14), which ‘consists of a change not in the natural course of events but in norms, that is, in something belonging to the realm of social conventions’ (Sbisà 2007, 464). Sbisà (2007, 464–465) argues that for Austin this was a necessary condition for the successful performance of any performative speech act, but that he may have overgeneralised from acts such as naming. Whatever one thinks of this—we agree with Strawson’s (1964) critique of Austin’s position—the proposed condition does seem necessary for conventional speech acts/declarations.<sup>21</sup> As we noted in section I, these speech acts are seen by the mainstream of speech act theory as distinct from directives, but both often do, in a loose sense, tell the hearer what to do.

We take the promulgation of a statute to work in the same way, except that the norms established by speech acts of enactment are typically more complex than those established by, say, acts of naming. In addition, the former norms commonly include articulations of the consequences of a failure to follow them. It is, we speculate, these properties of statutory provisions that lead some to think of them as being promulgated as directives.

A second challenge to our thesis—which, to our knowledge, no commentator has actually launched—is one that we can dismiss more easily. This involves the claim that statutes must be directives given an understanding of the latter as utterances made with the intention that the hearer perform or refrain from performing some action (or type of action). Statutory provisions will commonly fit this definition whenever the intention of a legislature in enacting them is to encourage or discourage certain behaviour.

Given, however, the distinction between illocutionary and perlocutionary acts performed in making an utterance (Austin 1962, 101ff.; Bach and Harnish 1979, 81–82), an illocutionary force must be defined not in terms of the actions that the speaker intends the hearer to perform or not to perform, but in terms of what the speaker wants the hearer to *grasp*. The important intentions are those directed at the hearer’s uptake, not at his subsequent behaviour. That this is correct is highlighted by the observation that the definition of directive just given would also cover many cases of undisputed effectives such as naming: no doubt the namer often intends that the name be used, or why bother naming at all? It would also cover cases of sentences like ‘I want you to do it’ used purely descriptively (i.e. not as orders, requests, or the like) but still with the intention that the hearer’s recognition of the speaker’s desire contribute to his or her decision to perform the action.

#### **IV. Conclusion**

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<sup>21</sup>An exception is supernatural declarations, such as ‘Let there be light!’ (Searle 1976, 15, n. 3).

In this article, we investigated crime-enacting statutory provisions, focusing on the speech acts that legislatures perform in issuing them. Our claim was that these provisions wear their illocutionary force on their sleeve: they are explicitly enactments, a kind of effective; and while they may contain modals clearly used with directive illocutionary force, these modals are marginal to the setting up of offences. Accordingly, the provisions themselves do not have directive illocutionary force.

Note that our investigation, though prompted by Marmor's (2011, 4) claim that '[l]egal instructions... are probably paradigmatic examples of exhortatives', has reached conclusions clearly at odds with his. Marmor's claim reflects a desire to capture the directive normative force of statutory provisions in terms of their putative directive illocutionary force. However, if our arguments are correct, then even paradigmatic behaviour-guiding provisions do not have such illocutionary force. Presumably, then, the normative force of statutes derives from the normative content that they realize—the ultimate source of the normative force remaining an open question.

One implication of our thesis is that the enactment of a statute or a provision in it is properly characterized as an institutional speech act—although one with distinctive properties flowing from its role in the rule of law. This distinctive institutional character can be seen, for example, in the basic legal principle *ignorantia juris non excusat*. To preclude the harm of a person's being able to claim ignorance of the law, legislative enactment must, to be effective, involve announcement to others and make a law 'reasonably known' to everyone within a polity to whom it applies.<sup>22</sup> Yet individuals remain subject to a law regardless of their actual awareness of it. By contrast, individuals are generally not held responsible for failing to comply with orders or requests that they did not in fact receive, given that the speech acts of ordering and requesting require actual and not simply 'deemed' communication to a hearer.

This peculiarity of legislative enactment might also elucidate the observation that 'cases in which what the legislature prescribes is not exactly what it says' (Marmor 2008, 429) are far rarer than their counterparts in ordinary conversation. While there may be many reasons for this, one promising starting point for investigation, we suggest, is our conclusion that promulgation serves, as an illocutionary act, to effect a change in social facts rather than to direct behaviour—even if the latter is its role as a legal act. What this conclusion highlights, then, is that the 'audience' of legislative enactments is radically different from the hearer in non-institutional speech acts—and that this difference may be the key to a fuller understanding of legislative enactment and legal interpretation.

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<sup>22</sup>'Reasonably known' means 'known by the common law's "reasonable person"'. On this point, see e.g. Guest (2009, 202): 'Try to imagine... a legal system in which there were no publicly expressed laws at all, one in which all laws are secret and unpublished; even if one could construct such a system on paper, it makes absolutely no sense in the real world.'

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