

Count-As Norms¹

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'No one disputes the principle of the arbitrary nature of the sign, but it is often easier to discover a truth than to assign to it its proper place'
F. de Saussure

Abstract

Norms facilitating ordinary communication (making the sounds 'hello' counts as greeting) and norms facilitating exercises of legal powers (signing this form counts as contracting) belong to the same logical class. They are 'count-as norms': their structure is 'X counts as Y'. Like cooking recipes, they tell us how to go about doing something (expressing a message, changing normative positions), but, unlike cooking recipes, they create the very possibility of performing the action they guide. Hart forcefully argued for the distinctness of power-conferring norms from duty-imposing norms, but this distinction – so crucial to modern jurisprudence – is not stable until one explains what class of norms power-conferring norms belong to, if not mandatory norms. Neither Hart nor Raz offer this explanation. Philosophers of language are ahead of philosophers of law on this point. I draw on theses by, especially, JL Austin, Searle and Grice in order to articulate the class of count-as norms. Understanding that power-conferring norms are count-as norms is a key to understanding the idea of legal validity. (And the analyses by philosophers of language would, in turn, gain much clarity by operating consistently with the idea of a normative change.)

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It is a basis of the distinction between duty-imposing (mandatory) norms and power-conferring norms that each type of norms has a distinct social function as well as a distinct logical structure. The social function and the logical structure of a norm are like two sides of a coin – they are part of any sound principle of individuation. Hart convincingly argues, as against Austin, for the distinct social function of power-conferring norms (they provide people with facilities to shape legal relations as they deem convenient). However, neither he nor Raz articulate the logical structure of a power-conferring norm. (Raz only articulates the logical structure of a duty-imposing norm.) This is an urgent task for legal

¹ This paper is a draft chapter of my thesis on 'Legal Validity'. Though the argument in this chapter is relatively self-contained, some references to earlier and later chapters are inevitable. I have decided to keep these references, for the sake of clarity.

² I have received invaluable comments from, especially, John Finnis, and also from Timothy Endicott and John Gardner.

theory. Articulating the logical structure of a power-conferring norm is essential to the intelligibility of the duty/power distinction and, a fortiori, to a proper understanding of the notion ‘legal validity’ – a notion intrinsically tied to the idea of legal powers.

Following Hart’s scattered hints, the previous chapter suggested that power-conferring norms, like cooking recipes, tell us *how* to go about bringing about a certain result (rather than *whether* we ought to do so), but, unlike cooking recipes, they also create the very possibility of bringing about that result. They enable us to do things we would otherwise not be able to do – they render possible the performance of the very action they guide.

This chapter tries to elucidate this intriguing idea. I argue that power-conferring norms belong to a class of norms I call ‘count-as norms’. Power-conferring norms are not the only species of count-as norms. Many rules governing language are count-as norms as well. They too render possible the performance of the very action they govern. Exploring the similarities between power-conferring norms and language rules will steer us towards their common ‘bare bones’, i.e. the logical structure of a count-as norm.

My argument has three stages. The first section (4.1) makes a preliminary case for the existence of count-as norms by reflecting on familiar features of communication and of exercises of legal powers: both activities involve codes. Remarkably, the main conclusion of JL Austin’s famous analysis of ‘performatives’ turns out to reinforce the hypothesis that there is a distinct class of norms (codes) facilitating both ordinary communication of every kind and exercises of normative powers. The second section (4.2) takes a closer look at the nature of the *acts* facilitated by these norms. There is more to the acts than the count-as norms governing them. We must understand the act’s purpose in order to grasp how the count-as norm aids, facilitates, enables it. I call such acts ‘meaning-acts’: their general purpose is to make identifiable the agent’s reflexive intentions, for the sake of expressing a message or changing normative positions. Validity is a property of, in the first instance, meaning-acts, of acts that succeed in making identifiable the agent’s reflexive intention. Count-as norms can be crucial aids to this success. Codes are in the service of, and secondary to, intentions. In the final section (4.3) I return to count-as norms and analyse each element of their logical structure (X counts as Y) in light of the considerations advanced above.

A word on method. I will be bringing to bear some theses from the philosophy of language on the analysis of legal powers, in particular some points originally sketched by JL Austin and Grice. This may strike one as methodological recklessness, in view of Hart’s own disenchantment with ‘ordinary language philosophy’ as a tool for legal analysis. But my argument does not (chiefly) involve a study of *legal language*. It involves a *comparison between law and language*. I think that Hart had the right hunch when he sensed that some of JL Austin’s insights could shed light on legal powers³; unfortunately, he never pursued this line. JL Austin too, on his part, suggested that jurists might be better equipped to tackle the problems he addressed⁴. Whether or not the story of Hart’s forays into philosophy of language was a sad one⁵, the story I develop here has a different plot. Hart looked to the right discipline, but possibly in the wrong place. Perhaps as a result of this, philosophers of law and philosophers of language have been studying

³ Hart 1982, 217 (with a reference to JL Austin).

⁴ ‘Of all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of ‘the law’ is a statement of fact’ (Austin 1955, 4, note 2).

⁵ Raz 2001, 6.

legal powers largely independently of each other. It seems to me that both sides can gain from joining forces at this juncture. But even when scouting in the philosophy of language, I will only be concerned with capturing something useful to the philosophy of law⁶.

4.1 Are There Count-As Norms?

4.1.1 Codes, in Communication and Law

Some things could not be done but for the existence of codes⁷. Consider some simple techniques for conveying specific information. Smoke signals, for instance. By making certain patterns of smoke-puffs, someone conveys to someone else at great distance messages such as ‘danger’, ‘storm approaching’ or ‘we capitulate’. Or take the hoisting of particular flags by ships in order to convey certain predicaments to nearby ships (‘we have casualties’, ‘fuel needed’...). Under appropriate circumstances, the patterns of smoke-puffs and the colour of the flag somehow stand for a certain message. The message travels from the sender to the receiver packaged in a code. Such-and-such size and frequency of puffs is code for ‘danger’, and so on. It would not make sense to say that the puffs stand for a message unless there was or might be (in the suppositions of the sender) someone at the other end to receive it. The receiver must be able to decode the message. Sender and receiver must share the same code. A code, in this context, is something like an agreed association of certain actions with certain messages.

We all have used simple codes at some point. Before a multiple choice exam, kids often arrange codes to secretly exchange solutions – e.g., the number of sneezes represents the question number, the colour of the pencil indicates the chosen option. Literature teaches us that chalk marks on a park bench may mean that a letter has been delivered to dead drop, and that two empty milk bottles left outside the door could stand for ‘meeting tonight’. Simple codes may be relatively formalized and stable within a group (paging ‘411’ means ‘manager needed in front store’), or devised ad hoc (‘the one I kiss is the man’).

The above examples might wrongly suggest that codes are only needed in situations where communication in a natural language (oral or written) is unfeasible or unsafe or impossible. This is not so. Codes are not merely a *substitute* to communicating in English or a *complement* to such communication (e.g. Morse⁸). In an important sense, a natural language is *itself* largely a matter of codes. When you speak to me, you emit a combination of vocal sounds. When I read, I decode a message on the basis of a pattern of traces with certain shapes. Someone unfamiliar with the relevant rules of phonology, morphology, semantics, etc. would be unable to receive the message. The codes in a natural language are very complex as compared to smoke-signals. There are several interrelated layers of codes in a natural language such as English, and you need to master them all (as well as other important things) to successfully communicate with other English-speakers.

⁶ It is not my aim to assess the state of the art of the relevant debates in the philosophy of language.

⁷ I will be using ‘code’ non-technically. Technically, only a subset of the cases I discuss involves codes (e.g. Morse). But I think that our informal notion of a code helps bringing out some important features that common to all those cases.

⁸ Morse code consists of combinations of short and long elements (sounds, marks or pulses) which represent letters, numerals and punctuation. In order to communicate in Morse, you must know the natural language as well. Other examples include Braille and most children’s ‘secret languages’.

Despite the differences in complexity, all the situations I have described as involving codes share two important features. First, the thing that the code associates with (part of) a message is always a combination of *perceptible changes in the world* that result from *intentional human action*. Smoke-puffs, chalk-marks, sneezings, sounds, traces on paper... are results of intentional human action, and they have a visibility appropriate to their identification in the relevant circumstances. They can be easily perceived by the relevant interlocutor. Second, these changes, and their combination according to the code, are *arbitrary*. They are arbitrary in the sense that there is no natural relation between the content of the message and the physical changes or their combination. There is nothing about two short smoke-puffs or the shapes ‘d a n g e r’ that relates to the idea of danger in the absence of a code. The relation is created by the code. That is its role. The absence of a natural relation between act and message (usually) entails that there is more than one combination of acts that would, in principle, have been appropriate to carry the same message. Three short smoke-puffs or ‘G e f a h r’ would have done as well. But the code picked others. This is the other aspect of arbitrariness. The code determines which, out of all appropriate and available acts and their combinations, stands for (part of) a message. And this is so even where the appropriate and available acts have *some* sort of natural relation with the message, as in onomatopoeias or interjections: as long as there is room for choice of the exact combination (‘peep-peep’, ‘pip-pip’...), there is an element of arbitrariness and hence there is room for a code⁹.

These two features – perceptible intentional changes in the world, and the arbitrariness of their relation to the message – shed light on the main reasons why codes are needed. Codes are needed for at least one of two related reasons: (i) precision and (ii) ease of identification. (i) Where the message is too complex to be expressed through pictures, mimics or other uncoded means, a rich palette of available sounds, shapes, etc., renders possible a nuanced and detailed communication. If Saussure is right that linguistic signs are characterised by their contrast with one another (rather than by any positive quality), it is probably true that increased arbitrariness makes for increased possibilities of contrast and thus for increased precision¹⁰. (ii) Where uncoded means of communication are not available because of the constraints of the situation (distance, time, privacy), one is bound to resort to changes in the world that can actually reach the recipient (puffs, chalk-marks, etc.). Here arbitrariness comes imposed by the constraints of the situation. Changes that are easily identifiable are unlikely to also have a natural relation to the message. (i) and (ii) are normally combined. Codes enable us to communicate in ways and in situations in which we would not be able to communicate without codes.

I will refer to a combination of perceptible intentional changes in the world that stands for a message as an *utterance*. The notion ‘utterance’, as Grice reminds us, has an act-object ambiguity¹¹: it can refer to the act of making the changes (sounds, traces...) or to the changes made. Where necessary, I will distinguish between utterance-act and utterance-object. As I argue below (4.3.1.1), although the utterance-act is primary, it is part of its nature to tend to be objectified, i.e. to vanish behind the utterance-object. What is important to note at this point, mainly to avoid confusion, is that not all communicative

⁹ Saussure 1916, 68 ff and 75 ff, on degrees of arbitrariness of linguistic signs. Locke writes: ‘... words... came to be made use of by men as the signs of their ideas... by a voluntary imposition, whereby... a word is made arbitrarily the mark of... an idea’ (Locke 1690, B III, Ch II, 1).

¹⁰ Saussure 1916, 117-118.

¹¹ Grice 1957, 380; also called ‘process-product’ ambiguity (Korta&Perry 2006, 44; more generally, Searle 1968, 422).

utterances are governed by a code, and probably none of them is entirely governed by a code. There are crucial uncoded factors that codetermine the content of our messages – tone of voice, cadence, gestures and context may determine whether the utterance ‘he is coming’ is an announcement, a complaint, a question, a warning or just a string of sounds used for exemplification. I will briefly return to uncoded factors below (4.2.4). Pervasive as they are, their presence must however not obscure the equally pervasive degree to which our communication is *facilitated* by codes, by arbitrary combinations of elements. In this sense, codes are a fundamental aspect of human communication¹², and I will henceforth focus on this aspect unless otherwise indicated.

Can we point to any similarities with legal power-conferring norms at this stage? They too, says Hart, provide facilities for doing certain things. A bit like the code governing smoke-signals, or the rules of morphology and syntax, a power-conferring norm tells you *how* to go about doing something, not *whether* you ought to do it. Communication codes (to use a joint name) and power-conferring norms both establish criteria of success – as opposed to standards of (moral) rightness or propriety. The criteria of success in exercising legal powers are, to a significant degree, arbitrary too: sign *this* form within *this* deadline under *these* conditions in order to enter a valid contract. The requirements of manner and form of legal transactions, and of legal enactments, seem to share the two features characteristic of communication codes: they are one amongst a number of combinations that would in principle have been appropriate and available to fulfil the same function, and they consist of perceptible intentional changes in the world (stamp, declaration, signature, form-filling, arm-raising, button-pressing...). So communication codes and power-conferring norms *guide* action in similar ways: we follow them in order to succeed in doing something, and failing to conform to them typically will result in failure. They guide action like cooking recipes guide action. But, unlike cooking recipes, they also *enable* action. They create the very possibility of doing what we do when we following them. We could bake brownies in the absence of a recipe, but we could not communicate (in the ways and situations that we do) in absence of a communication code, nor could we contract in the absence of the law of contracts (or of a set of conventions approximating to law).

A further parallel between communication codes and power-conferring norms concerns how strictly the code needs to be complied with for the act to be successful. Not all criteria of success set out by the code are always equally essential, both in communication and in law. Incorrect spelling can sometimes change the meaning of an utterance or straightforwardly amount to gibberish, but usually spelling mistakes will not prevent our interlocutor from identifying the message we’re trying to convey. In fact, his ‘correcting’ our spelling presupposes that he was able to identify our message *despite those flaws*. It is telling that we speak of incorrect spelling *of a word*, or incorrect syntax *of a sentence*. The things that are incorrect *are* words or sentences, as opposed to being random traces; they are words or sentences at least in the sense that they can be identified as such. It takes significant competence in a language to make this type of mistakes. I tend to think that one is still speaking English when one makes such mistakes, although I realise that some people might want to deny this. My argument does not hinge on the answer to this classificatory question. Whether or not we say that ‘a c c o m o d a t i o n’, with one ‘m’, is an English word, the truth is that English-speakers will invariably recognise in that combination of signs the English word ‘accommodation’ and, as a result, we will have to say that the speaker has succeeded in making himself understood to the English-speaker

¹² Besides what I’ve called uncoded factors, it is also likely that deep aspects of a language’s grammar are not arbitrary, and thus not governed by a code. My argument is compatible with all this.

qua English-speaker¹³. Things are similar in law. Formal (or substantive) deficiencies of legal acts will often lead to rectification claims or annulment requests. What is *annullable* is not null – as a matter of law, something exists which calls for rectification or annulment. Even where this challenge results in annulment, we speak of, say, the annulment *of a resolution*. In the realm of law, as in the realm of communication, there is a threshold beyond which acts are no longer identifiable as specimens of their kind, not even as deficient ones, and a grey zone in which acts are successfully identifiable despite minor breaches of the code.

Notwithstanding these similarities, there is no denial that communication codes and power-conferring norms differ in significant ways. They enable us to do different things. Communication codes do not bestow on us the capacity to marry, appoint Prime Ministers, dismiss appeal cases, buy houses or disinherit our children. The bearing of fundamental legal rights is altered, constitutions are changed, in following power-conferring norms. Power-conferring norms can transform a squatter into a tenant, an ordinary citizen into a president, a friend into a husband. They can change the world in ways that communication codes cannot. Mistakenly describing my dog as male will not alter her gender, nor does a waxing moon change its course each time someone calls it waning.

So, what are we to make of the similarities between communication codes and power-conferring norms? The preceding reflections suggest that communication as well as exercises of normative powers are decisively facilitated (and, in many ways, enabled) by codes, i.e. arbitrary combinations of perceptible intentional changes in the world. In both realms, utterances must typically follow a code to be successful, although, in both realms, this is compatible with some flexibility at the margins (provided the relevant act is identifiable). And yet, there are obvious and important differences between the two realms. The question is: are the similarities *enough* to speak of norms of the same logical class?

4.1.2 A Lesson from JL Austin

Towards the end of his *How To Do Things With Words*, JL Austin famously reaches a conclusion that strongly echoes the parallel between communicative acts and exercises of normative powers I've been drawing. In fact, his analysis sets the basis for developing an account of the codes governing both kinds of acts as norms of a distinct logical class. Several of Austin's followers, notably the early Searle, undertook that development. I will be referring to their work below. Let us first see how Austin laid the seeds for this development¹⁴.

Austin's famous conclusion is that utterances like 'I acquit you' are similar to utterances like 'The cat is on the mat' in the sense that not only the former type, but also the latter, have a dimension of success/failure. It is a mistake, according to Austin, to think that the

¹³ Until roughly the 17th century, English spelling rules were notoriously lax; they are more rigid now (despite a continuing tolerance for certain variations, e.g. 'judgement/judgment'). In my view, there has been a change in the stringency of (social) mandatory norms, which make it now (but not then) a requirement of politeness or good citizenship (or decorum) to avoid spelling mistakes even in contexts where correct spelling is not essential to making oneself understood.

¹⁴ I will not touch upon a number of controversial aspects of Austin's theory, notably his master classification 'locutionary/illocutionary act' and related notions ('force', 'meaning'...). Later authors have, in my view, successfully corrected or revised Austin on a number of points. These corrections and revisions are mostly irrelevant to my argument; where necessary I will refer to them in footnotes.

difference between the two utterances is that 'I acquit you' is either successful or unsuccessful (in acquitting), whereas 'The cat is on the mat' is either true or false. The utterance 'The cat is on the mat' is successful qua assertion even if it is not true that the cat is on the mat. The utterance is successful *regardless* of whether it is true or false. It is successful inasmuch as it correctly uses English rules to make an assertion. Indeed, there must be an assertion in the first place before one can evaluate it as being true or false, or for that case, as being elegant, polite, or fair. Truth, elegance, politeness and fairness are standards for evaluating a successful utterance¹⁵. Something must *be* an assertion before it can be judged a true or false assertion; something must *be* a question before it can be judged a polite or impolite question. Similarly, something must *be* an acquittal before it can be judged a fair or unfair acquittal.

Thus Austin draws attention to an aspect of utterances – particularly of assertions – that had long been obscured by those exclusively focused on the truth or falsity of the *content* of the assertion, thereby neglecting the study of the assertion as an *act*. When one looks at this aspect of assertions – at the 'total speech situation' – one can begin to see a crucial parallel between them and all other utterances, be they warnings, appointments, complaints, questions or acquittals. Austin expresses the parallel by saying that all utterances are 'speech acts', i.e., that one *does* things with words whenever one makes a meaningful utterance, and not only when one makes utterances like 'I acquit you', 'I marry you' or 'I bet you sixpence'. Acquitting, marrying, betting, asserting and asking are all instances of *doing*. One's attempt to do these things can succeed or fail.

I should hasten to add that Austin does not suggest that there is no relevant difference remaining between various types of utterances. In fact, at the end of his lectures he proposes a five-fold classification – though I will argue below that it is not a very helpful one. What is now important is that the types of utterances he initially distinguishes, and amongst which he gradually identifies a parallel, strongly echo our distinction between communicative acts and exercises of normative powers. *All* his initial examples of utterances which are not amenable of being true or false – like 'I acquit you' – are exercises of normative powers, particularly of legal ones¹⁶. (He does, however, not jointly characterise them in this way.) So Austin's claim that there is a parallel between utterances like 'I acquit you' and 'the cat is on the mat' is of utmost interest to us. Austin argues that they are *comparable* along similar lines: in each case, one can distinguish the *act of uttering* from the *content of the utterance*. Austin's plea, in his lectures, is for drawing this distinction, and for giving the former aspect – the act – its due prominence. Halfway through his lectures he labels this shift of emphasis from the content to the act a 'fresh start'¹⁷, and spends the second half of his lectures sketching a theory of 'speech acts' – that is, a theory of the dimension of success/failure common to all utterance-acts. (In my terminology, to be explained below, 'speech acts' will become 'meaning acts', and the content of an utterance will be its 'meaning'.)

What does Austin say about the success/failure of all utterance-acts? The key idea is that success depends on something. It depends on correctly following 'an accepted conventional procedure having a certain conventional effect'¹⁸. By 'conventional' Austin means roughly what I have been calling 'coded'. (I prefer to avoid the notion 'convention')

¹⁵ I am disregarding the possible asymmetry between truth and others standards.

¹⁶ Besides marrying, bequeathing and betting, he discusses naming (a ship), promising, appointing, acquitting, selling and other contractual utterances.

¹⁷ Austin 1955, 91.

¹⁸ Austin 1955, 34.

given its multi-faceted connotations.) You succeed in *doing* things with words by correctly following a code. In the absence of an agreed code, you wouldn't be able to do such things as asserting, asking, marrying or acquitting. Attempts to do any of these things can 'go wrong' in similar ways. Austin calls the failure of attempted utterances their 'infelicity', and develops a doctrine of 'infelicities' that we need not go into¹⁹. I argue below that success ('felicity') can be translated as 'validity' (and hence 'infelicity' as 'invalidity'). The success of utterance-acts is the validity of utterance-acts. And one of the points Austin stresses is that the success of utterance-acts depends chiefly on following a code.

John Searle, one of Austin's students, developed an account of such codes. He characterised them as a distinct class of norms, a class he called 'count-as rules'. I will discuss some of his ideas section 4.3 below when I turn to analysing the logical structure of count-as norms. For, as I will argue, what I have been referring to as codes are indeed a distinct logical class of norms: they're count-as norms.

But before we can say more about the codes/norms we must get clearer about the *acts* governed by them. Austin's inspiring discussion leaves at least two important problems unsolved – and they both have to do with the utterance-acts, not (primarily) with the codes. The first problem is that Austin's account seems to leave out the cases of uncoded communication. Sometimes success in conveying a message is not a matter of 'convention' at all, and often not entirely. The conclusion that those are an altogether different *kind* of act appears counterintuitive. If we are to avoid it, we must explain what determines success in cases of utterance-acts which are not (entirely) coded. If success is at least sometimes not a matter of codes, perhaps it is never really a matter of codes, after all. In order to grasp the proper place (if any) of codes in the success of utterance-acts, we need to first understand the nature of that success, their purpose qua acts.

The second problem concerns the typology of utterance-acts. I said above that Austin's emphasis on a parallel between utterance-acts is compatible, in his view, with the presence of relevant differences between types of utterance-act. I also said that, at the end of his lectures, Austin proposes a 5-fold classification of utterance-acts. The problem is that the classification in no way matches the original contrast that his lectures were meant to explain, i.e. the contrast between utterances like 'I acquit you' and utterances like 'the cat is on the mat'. I argue below (4.2.2) that Austin gave up the original contrast too quickly: a proper grasp of the two kinds of act renders intelligible that contrast while preserving the parallel Austin so carefully identified.

Ironically, the way to solve these problems Austin left us with is to pursue further the very line of enquiry he had advocated: the study of the *act* as the primary phenomenon²⁰. It is a fruitful line, I think; I hope to show how it illuminates the analysis of legal acts, of acts whereby normative powers are validly exercised.

¹⁹ Saying 'I bet' when the race is over, or 'I marry you' to a woman and a monkey, are '[cases] in which something goes wrong and the act – marrying, betting, bequeathing, christening, or what not – is therefore at least to some extent a failure: the utterance is then, we may say, not indeed false but in general unhappy. And for this reason we call the doctrine of *the things that can be and go wrong* on the occasion of such utterances, the doctrine of *Infelicities*' (Austin 1955, 14).

²⁰ 'The total speech act in the total speech situation is the *only actual* phenomenon which, in the last resort, we are engaged in elucidating' (Austin 1955, 148; similar formulations at 20, 52, 139). Searle follows in Austin's footsteps ('The unit of linguistic communication is not... the symbol, word or sentence, but rather the production or issuance of the symbol or word or sentence (...) A theory of language is part of a theory of action...', Searle 1969, 16-17).

4.2 Meaning-Acts

We need to understand the acts that Austin was concerned with in order to understand the norms that typically govern them. The parallel Austin draws between communicative acts and exercises of normative powers – albeit not under these names – points us to the features that are common to both types of act, and the common features in turn point us to the nature and basic purpose of the acts. This will be the order of argument in this section.

Accordingly, I begin (4.2.1) by characterising communicative acts and exercises of normative powers. This is the distinction with which the chapter started, and which also dominated the first part of Austin’s enquiry. I show that the distinction is both intelligible and robust, and that, despite a minor asymmetry, the two types of act exhibit an analogous basic framework. I then undertake a brief survey of alternative typologies of utterance-acts (by Austin and some of his followers) and argue that they are unstable (4.2.2). This reinforces the soundness of my distinction. In subsection 4.2.3 I flesh out the elements of the basic framework of the acts. The core of these acts is the agent’s reflexive intention and the possibility of its identification by others. My explanation draws on Grice’s analysis of ‘speaker’s meaning’; this is why I call these acts ‘meaning-acts’. Success in performing these acts involves making identifiable the agent’s reflexive intention. An act’s success is its ‘validity’ (4.2.4). I discuss the various ‘criteria’ for identifying the agent’s reflexive intention (the ‘criteria’ of validity) and make some final remarks on the extent to which codes – count-as norms – aid the success of different types of meaning-acts (4.2.5).

The third section of this chapter (4.3) will be concerned with count-as norms, and hence only with meaning-acts that are code-governed. Exercises of normative powers are the paradigm case.

4.2.1 Types: Communicative acts, Exercises of normative powers

The acts I call ‘communicative acts’ are aimed, by the agent, to communicate something to somebody. ‘Communicating’ involves not only making oneself understood to the audience, but also typically eliciting a certain response from it. The response is a matter of the affecting of the audience’s beliefs, attitudes and possibly courses of action. Asserting, asking and warning are communicative acts. When I assert ‘the cat is on the mat’, I want you to understand that I am asserting that the cat is on the mat, and I want you to believe that the cat is on the mat. When I ask ‘is the cat on the mat?’, I want you to understand that I am asking whether the cat is on the mat, and I moreover hope that you will reply. When I warn you that ‘the cat is on the mat!’, I want you to understand that I am warning you that the cat is on the mat, and I also expect you to believe that it is and to consider responding appropriately to this danger. When I communicate with you, I not only want you to understand what I am doing but I want to elicit a certain response from you. I do not conceal the latter aim from you. Quite the contrary. It is part of your understanding of what I am doing that you understand that I aim to elicit a certain response from you. When I ask ‘is the cat on the mat?’ and you understand me, it means that you have realised that I am *asking* you whether the cat is on the mat. You know, as it were, what it means to ask, not only what it means that the cat is on the mat. You know that if I ask you something, I typically want you to reply. You don’t know this because you are acquainted with my habits, but because you are an English speaker. At an early age you began to grasp what it is to ask a question, and you learned to identify when people ask, as well as how to make it clear to others when you do. You gradually learned many other types of communicative act, along with phonological, syntactical, semantic and other rules, and eventually became

an English-speaker, i.e. someone with the *ability* to communicate with other English-speakers.

Ability to communicate does not entail ability to elicit the sought response from the audience. You may understand that I ask, and yet not reply. You may realise that I make an assertion, and still not believe me. You may be aware of my warning but refuse to act accordingly. In such cases, one of my aims has been frustrated. You have understood what I was doing, but you have not responded as I hoped you would. Am I to blame? Perhaps my persuasion skills are to be blamed, but my ability to communicate is certainly not. I have succeeded in making myself understood. The rest is not in my control. It is not even in my control to make it the case that you understand me. All I can do is express myself in such a way as to make it *possible* for you – for a reasonable observer – to understand me. We will say that I *did* assert, ask or warn you, even where you failed to realise that I did; and, a fortiori, where you realised but failed to respond accordingly.

When you understand me, you understand my aim to elicit a certain response from you. And I want you to understand it. So my aim to elicit a certain response from you is part of the ‘message’ that I send to you, and that you receive from me. I will call the ‘message’ that my communicative act expresses the *meaning* of that act. It is communicational meaning. The meaning of the utterance ‘is the cat on the mat?’ includes the sense and reference of its words, as well as the fact that it is a question²¹.

In sum: Communicative acts have (communicational) meaning. This meaning is the message which is conveyed to the audience when the audience understands the agent. It is part of this meaning/message that the speaker wants to elicit a certain response from the audience (such as making them believe him, reply to him or act upon an averted danger). The meaning of the act is coextensive with the agent’s aim.

It is crucial to distinguish the agent’s *aim* in performing the act from what counts as *success* in performing it (**Fig. 1**). Eliciting a response is part of the agent’s aim, but achieving it is not within the agent’s control (qua speaker). Nor is it within the agent’s control whether the audience actually understands him. All the speaker can do is make it *possible* for his audience to understand him, i.e. make himself *understandable*. to a reasonable observer. We should reserve the idea of *success* in performing communicative acts for this idea of *understandability* by a reasonable observer²². After all, this is the standard of success that we implicitly invoke when saying ‘I told you but you didn’t pay attention’ or ‘I greeted him but he looked away’. Success in this sense is something that is in the agent’s control (not in the audience’s).

The ideas of the audience’s ‘understanding’ and its ‘response’ are certainly not new. Austin referred to the latter as the utterance’s ‘perlocutionary effects’; Grice spoke of ‘effect in an audience’²³ and Strawson of ‘response’²⁴. The idea of ‘understanding’ is what Austin famously called ‘uptake’ and Grice and Strawson helpfully articulated as the

²¹ One may distinguish between these two aspects of the utterance’s meaning (see note 60 below) but this is not relevant for our purposes.

²² Cohen hints at this when arguing that an utterance is ‘happy’ if it is ‘of a kind that [the speaker] could reasonably expect to secure uptake’ (Cohen 1964, 129). Strawson suggests that ‘at least the aim, if not the achievement, of securing uptake is an essential element in the performance of the illocutionary act’ (Strawson 1964, 448). Searle, by contrast, speaks of success when there is actual uptake (Searle 1969, 47).

²³ Grice 1957, 385.

²⁴ Strawson 1964, 446 (‘The word “response”... is intended to cover cognitive and affective states or attitudes as well as actions’).

‘recognition’ of the utterer’s intention²⁵. I will return to this important articulation. Echoes of the idea of ‘understandability’ can be found in Austin (‘make explicit’) and, especially, Strawson (‘overtness’, ‘avowability’)²⁶.

The acts I call ‘exercises of normative powers’ are not aimed at communicating in the above sense. They are aimed at changing normative positions. (This is not to deny that a given utterance may be aimed *both* at changing normative positions and at informing about the normative change; in this case we shall say that the speaker has performed two meaning-acts.) When the judge utters ‘I marry you’, his aim is to marry the two persons in front of him. This involves a number of changes in the legal rights, duties and powers of these persons and others. Anyone who witnesses the situation, and is acquainted with the relevant legal rules, should be able to understand what the judge is doing. Changing normative positions is the *meaning* of his act. This act has legal meaning, not communicational meaning. Understanding what the judge is doing involves understanding that he aims to marry that couple by uttering ‘I marry you’. There is, strictly speaking, no further aim which we attribute to him as part of understanding what he is doing, no aim to elicit a certain response from someone. A judge may, of course, have such a further aim on any given occasion; for instance, he may hope to please the bride’s father by uttering ‘I marry you’. But understanding that the judge is marrying does not involve understanding that he aims to please the bride’s father. If the judge says to the bride’s father, after the ceremony, ‘You have a charming daughter’, there it *is* part of our understanding of what the judge is doing that he aims to please the bride’s father – whether or not he manages.

In exercises of normative powers, success is equivalent to a full achievement of the aim we attribute to the agent. The agent aims to change certain normative positions and his act succeeds inasmuch as it brings about that change. Here again, success is in the agent’s control (as opposed to being in the control of the audience). The judge must follow the relevant formalities in order to successfully marry the couple. Success is independent of whether anyone ever finds out that the marriage took place.

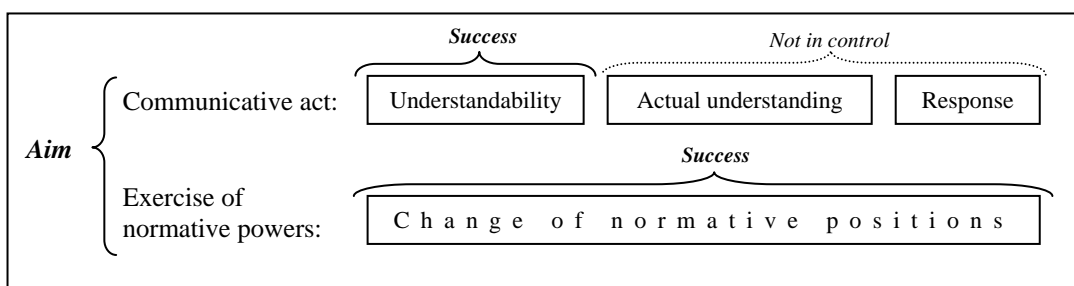


Fig. 1: Aim and success of meaning-acts

Fig.1 sums up the aims of each type of act, and what counts as their success. It brings out a slight asymmetry between them²⁷. The asymmetry can be stated like this: when we perform communicative acts we typically aim for more than we can control, whereas when we exercise normative powers we can control all that we aim for²⁸. When we

²⁵ Grice 1957, 383; Strawson unpacked Grice’s notion of ‘recognition’ in terms of the audience’s ‘understanding’ and tied it to Austin’s ‘uptake’ (Strawson 1964, 446 ff.). Searle is wrong to claim that Grice’s account does not leave space for the idea of ‘understanding’ (Searle 1969, 46 ff.; cf. Grice 1989, 351-352).

²⁶ Strawson 1964, 450, 451, 454, 457 ff. Also Searle 1995, 60-61.

²⁷ See Strawson 1964, 457 ff.

²⁸ This remark is bold, but useful for my current purposes. I will qualify it in Chapter 5.

understand someone as exercising normative powers, we understand him as aiming to change normative positions, *and as changing them*. He cannot fail in this aim, provided he follows the relevant (power-conferring) rules. By contrast, when we understand someone as asking, we understand him as aiming to be given an answer, *but not as being given an answer*. Whether or not he is given an answer is not in his control. This asymmetry should, however, not be overstated. In both cases we have control over our *success* in performing the relevant act. To successfully ask, I need to make it understandable that (and what) I am asking: success does not require actual understanding, just like success in making a contract is independent of anyone ever finding out about it. Success is always in our control, yet in the case of communicative acts our aims are larger than success, and those further aims are beyond our control.

The difference between the two types of act is not one of degree (of formalization, for instance). Communicating and changing normative positions are fundamentally different *functions* of utterances; they answer to different *needs*. When I exercise normative powers, my aim is not to convey a message to an interlocutor in order to engage with his beliefs or feelings, in order to interact with him at the level of conversation²⁹. Although we usually exercise normative powers through the same means we use to communicate (verbal utterances...), and though we often do so in the presence of other people expecting that they will understand what we are doing, legal meaning and communicational meaning are different, and their difference becomes most patent when an utterance is amenable to having both types of meaning but discrepancies exist (e.g., oral agreement to sell, where written form is required; ‘I marry you’ where one of the spouses is still married to someone else).

4.2.2 Alternative Typologies – And How They Fail

The distinction between communicative acts and exercises of normative powers is probably not the only intelligible classification of meaning-acts. But it seems to me a robust and pretty fundamental distinction. In this subsection I defend this claim indirectly, by examining alternative typologies proposed by philosophers of language and arguing that they are unstable. I suggest that one reason why these typologies fail is that they do not consistently operate with the notion of a (change in) normative position.

Austin’s tentative typology, presented at the end of his lectures, is this: veridictives (‘exercise of judgment’), exercitives (‘assertion of influence or exercising of power’), commissives (‘assuming of an obligation or declaring of an intention’), behabitives (‘adopting of an attitude’), and expositives (‘clarifying of reasons, arguments, and communications’) ³⁰. Austin’s own hesitations about this typology might perhaps be enough to set it aside and look for a ‘fresh classification’ ³¹. Note that four out of his five categories cut across the communication / normative changes distinction, despite the labels suggesting the contrary. So, under ‘veridictives’ we find reckoning and acquitting, ‘exercitives’ include begging and appointing ³², ‘commissives’ has verbs like meaning to

²⁹ The need to which exercises of legal powers are a response is discussed in Chapter 3 (Hart’s argument) and Chapter 5.

³⁰ Austin 1955, 151 ff.; his summary explanations (in brackets) are at 163. Technically it is a classification of ‘explicit performatives’.

³¹ ‘[I]t could well be... that some fresh classification altogether is needed’ (Austin 1955, 152); he admits to being ‘far from equally happy’ about the five classes (151).

³² The very definition of ‘exercitives’ as ‘assertions of influence or exercises of power’ is ambiguous between power as influence and normative power.

and favouring alongside contracting and promising, and under ‘expositives’ we come across describing as well as hybrid cases like testifying or classing³³.

What is most disturbing about Austin’s final classification is that his initial contrast is entirely lost. Recall that his initial contrast strongly echoes the communication/normative changes distinction. Austin sets himself the task of explaining that contrast, and what he in fact does is explain the parallel features. It is critical that he does, but once he has identified the parallel features (dimension of success/failure) he gives up the original contrast altogether. And when he finally gets to offering a typology, he looks for differences elsewhere. It seems that, in the process of purging the shaky aspects of the initial contrast, Austin threw out the baby with the bathwater.

I think that the communication/normative changes distinction would render more conspicuous several of Austin’s claims, quite apart from explaining his initial contrast. There are scattered references to the idea of a normative change throughout the first part of his lectures³⁴; he even shows awareness that one of the two types of utterances he is examining is of special concern to the jurist³⁵. At some points during the second half of his lectures his initial distinction timidly resurfaces, e.g. when he notes that expressions like ‘I shall...’ in some cases merely indicate that you ‘have certain intentions’, while in other cases they are designed to ‘inaugurate’ ‘a certain further action... (whether making it obligatory or permissive)’. Of these latter cases he says that they involve a ‘more specialised procedure’ that ‘make[s] certain subsequent conduct in order and other conduct out of order’; he adds that ‘with... legal formulas, this goal is more and more nearly approached’³⁶. Unfortunately, he does not go as far as to articulate this distinction in terms of two different *kinds* of case. Instead, he makes it sound as if the difference was one of *degree*, as if meaning-acts could be arranged along a spectrum according to *how much* they make certain subsequent conduct ‘out of order’. On this view, the difference between announcing and promising is this: in both cases, my utterance makes it ‘out of order’ for me to behave otherwise, only more so where I promised.

But this is a mistake. The respective utterances make my conduct ‘out of order’ in different *ways*, not to different degrees³⁷. When I do not behave as I announced, I may wrong you if you had relied on my words, and I am responsible if I could have anticipated your reliance. I am similarly to be blamed if ‘I give you advice and you accept it, but then I round on you’³⁸. We are responsible for all our intentional actions, and saying things is no exception. Our general obligation not to harm others translates into specific obligations not to deceive, insult, etc. in the realm of communication. This is not how promising

³³ Classing may be done authoritatively (‘smoothies are hereby classed as taxable’) or merely be an expression of one’s judgement (‘I class this painting as authentic’). Agreeing is similarly hybrid (‘I agree (to sell)’, ‘I agree (with you)’).

³⁴ ‘If performative utterances of at least some kinds are happy, for example contractual ones, then statements typically of the form that I ought or ought not subsequently to do some particular thing are true’ (Austin 1955, 53); “‘I promise to do X but I am under no obligation to do it’ may certainly look... like a self-contradiction’ (54).

³⁵ ‘[M]any of the “acts” which concern the jurist are or include the utterance of performatives’ (Austin 1955, 19); jurists are ‘ready ... with a terminology to cope with [infelicities]’ (24). Several juridical terms (‘special terms’) appear in the subsequent discussion (“‘ultra vires”, “incapacity”, “not a fit or proper object (or person, etc.)”, “not entitled”, and so on’; 34).

³⁶ Austin 1955, 44-45.

³⁷ Austin complicates matters by asking ‘Or am I just “not expected” to do so?’ (Austin 45), thereby introducing the further ambiguity between expectations in the predictive and in the normative sense.

³⁸ Austin 1955, 45.

creates obligations. Promising is an exercise of (moral) normative powers: one acquires an obligation to do something *by saying* that one promises to do that very thing³⁹. The strength or intensity of the speaker's expressed intention is, at best, a *cue* we use in practice to determine whether someone promised or merely announced. It does not explain what the cue is a cue *of*, namely the fundamental difference between announcing and promising, or between a friend's advice and a legislator's command, or between giving an opinion and sentencing, or between match-making and marrying. It was probably Austin's scepticism about the fact/norm dichotomy that prevented him from conceiving of a normative change as something substantially different from actual states of mind or predictions of behaviour⁴⁰.

Searle revised his teacher's five-fold classification. He distinguishes between: assertives (express a belief), expressives (express some other attitude such as gratitude or remorse), commissives (involve obligations on the part of the speaker), directives (involve obligations on the part of the hearer) and declaratives (bring about changes in the world, e.g. adjourn a meeting or marry)⁴¹. This classification is sensitive to the fact that some utterances, and not others, create obligations, and that these obligations are not always obligations for the speaker (directives)⁴². However, normative changes are not his organising principle: the vague notion of 'direction of fit' is⁴³. Commissives and directives, he says, have a word-to-world direction of fit, while assertives have a word-to-world direction of fit; expressives have no direction of fit and declaratives bring about the fit between word and world. But Searle doesn't see that the category 'declaratives' consists of normative changes too, though these are not (always) changes for the speaker or immediate hearer, and do not (always or only) involve obligations. Depending on what 'fit' means, *both* promising and marrying may be said *either* to have a word-to-world direction of fit (they create obligations for some people) *or* to bring about the fit between word and world (they create promises and marriages).

Other accounts suffer from the reverse classificatory problem. They give too much, rather than too little, prominence to the notion of a normative change. These authors make the assumption that only exercises of normative powers are code-governed, and then go on to argue one of two things: either that all meaning-acts involve normative changes (I criticised this view above) or that meaning-acts which do not involve normative changes are not code-governed⁴⁴. Bach & Harnish commit the latter mistake: they distinguish between 'communicative' and 'conventional' acts, where the label 'conventional' is

³⁹ Watson (2004) makes a similar point in his discussion of asserting and promising as two different forms of 'commitment', although he fails to characterise promising as an exercise of normative powers. Ransdell also distinguishes between 'general communicational obligations' and obligations incurred 'solely in virtue of his having performed the sort of act in question' (1971, 398-399); an early paper by Austin pointed in the same direction (contrasting 'I promise' to 'I am sure' and 'I fully intend'; Austin 1946, 99-100).

⁴⁰ '[T]he familiar contrast of 'normative or evaluative' as opposed to factual is in need, like so many dichotomies, of elimination' (Austin 149). He also says that all dimensions in which utterances can be assessed (except felicity) are matters of 'correspondence with facts' (Austin 146 *passim*).

⁴¹ Searle 1979, chapter 1.

⁴² On occasion, Austin appears to assume that voluntary obligations are the only kind of obligations.

⁴³ This may be due to Searle's 'naturalistic' approach, according to which 'ethics and esthetics' are 'matters of opinion or sentiment or emotion' rather than 'objective facts' (Searle 1969, 51). However, more recently (especially 1995 and 2001) he presents this approach as compatible with, indeed as grounding, a complex theory of an 'objective social reality' that, at various junctures, operates (somewhat unsystematically) with the ideas of ('deontic') 'powers' and 'normativity' – sometimes alongside (1995, 110), sometimes as including (1995, 109, 69 ff, 146) 'linguistic' phenomena. I will not deal with his theory of social reality.

⁴⁴ Ransdell makes the question whether speech acts are 'constitutive-rule-governed' turn on whether they involve an 'implicit promise' (Ransdell 1971, 398-399).

meant to indicate that these acts are code-governed. The examples of conventional acts (marrying, acquitting, arresting, resigning...) make it clear that the authors have in mind exercises of normative powers⁴⁵, though they do not invoke this notion⁴⁶. Instead they group such acts by a feature that is *derivative* of their being exercises of normative powers: this feature is essentially what I above called a minor asymmetry between them and communicative acts (*Fig. 1*). Although the asymmetry is real, it does not warrant the authors' much larger claims (i) that only 'communicative' acts involve the recognition of intention and (ii) that the latter acts cannot be 'conventional' in a way comparable to the way marrying and acquitting are. My argument below shows that (i) and (ii) are false. So the typology of Bach & Harnish is triply misleading: first, it is based on a surface difference only; second, it mischaracterises the role of intentions (and codes); and third, it thereby conceals the fundamental difference, i.e. the difference in social function between communicating and exercising normative powers. Not surprisingly, their grouping of acts ends up cutting across this difference ('commissives' and 'directives' are included under 'communicative acts' alongside 'constatives' and 'acknowledgements')⁴⁷.

4.2.3 Identifiable Reflexive Intentions

The comparison of communicative acts and exercises of normative powers shown in *Fig. 1* must now be taken further. There I pointed at some parallel features: acts of both types have a dimension of success/failure, success is in the agent's control (not in the audience's), and understanding what the agent is doing involves attributing to him certain aims. In the case of a communicative act, these aims are: understandability by a reasonable observer, actual understanding by the audience, and response by the audience. In the case of an exercise of legal powers, the aim is only one: a change of normative positions. I said that to each type of act corresponds a different type of meaning: communicational meaning and legal meaning⁴⁸. The nature of these acts as capable of 'having meaning' still needs to be explained. What makes them meaning-acts?

The word 'meaning' is ambiguous and many of its senses will not be touched upon here. My aim is not to elucidate any or all senses of 'meaning' but to show how the nature of the human acts under discussion can be clarified with the aid of some existing philosophical analyses of (one sense of) 'meaning'. Grice's notion of 'speaker's meaning' (as developed by later authors) is central to my argument. I will first apply it to communicative acts, and then argue that it similarly sheds light on exercises of legal powers.

What is the meaning of a communicative act? I said above: it is the 'message' the agent aims to convey. The message conveyed by the utterance 'is the cat on the mat?' includes the sense and reference of the words as well as the fact that it is a question. That is, the message includes the agent's aim to be given a reply. If we fail to understand that he aims to be given a reply, we have not understood the meaning of his utterance. So the meaning of an utterance encompasses all of the agent's aims. Understanding the meaning of his act

⁴⁵ Conventional acts, we are told, are 'endemic to particular institutions' (Bach&Harnish 1979, 111), and they either 'produce or alter institutional states of affairs' ('effectives'), or involve 'determinations of fact, natural or institutional, which have official consequence' ('veridictives') (113).

⁴⁶ Ironically, their distinction between 'conventions' and 'rules' (Bach&Harnish 1979, 121) clearly echoes Hart's distinction between power-conferring norms and (social) duty-imposing norms.

⁴⁷ 'Communicative' acts include roughly Searle's categories except 'declaratives', which the authors consider to be a combination of constatives and other illocutionary acts (Bach 1975, Bach&Harnish 1992; cf. Searle 1989).

⁴⁸ We may speak more broadly of 'normative meaning' to encompass non-legal normative powers.

involves attributing to him the aims to make himself understandable, to be actually understood and to be responded to (the latter aim includes the others). Meaning is closely tied to the agent's aims. Let us call the aims 'intentions'. Meaning is closely tied to the agent's intentions. Of course, not any and every of his intentions. Only to the intentions, to the aims, that he renders understandable through his utterance. Let us call them the 'identifiable intentions'. Only identifiable intentions make up the utterance's meaning: a message is only a message if a reasonable observer in the relevant circumstances could identify it. A final specification must be made about the *kind* of identifiable intentions we are dealing with. Grabbing three piled boxes makes identifiable (at least presumptively) my intention to hold them all. However, whether or not I manage to hold them all does not depend on anyone identifying my intention. The act has no communicational meaning. There is something special about the intentions involved in meaning-acts. They are intentions to bring about something – be understood, responded to – *by making it identifiable that one so intends*. The agent intends to bring about something by making that very intention explicit. The intention, as it were, concerns itself: it is reflexive. Meaning is a matter of identifiable reflexive intentions.

Here is an example. Suppose we want to explain, as accurately as possible, what goes on when I ask you 'how much will the dinner cost?'. Consider the following explanations:

Explanation 1: My aim is to be told how much the dinner will cost.

Clearly this explanation is insufficient, for I may have this aim in silence, just hoping that someone will tell me. ('Aim' can be replaced by 'intention'; I will distinguish 'aim' and 'intention' to simplify the explanation of the reflexivity).

Explanation 2: My aim is to be told how much the dinner will cost, and I intend to achieve that aim by getting you to identify that I aim to be told how much the dinner will cost.

This explanation is better, because it acknowledges that I am doing something to achieve my aim, and that this something is my utterance. However, the explanation is still too broad: it would also be true of the case where – unlike in the example – I make sure you overhear me asking the question to a friend.

Explanation 3: My aim is to be told how much the dinner will cost, and I intend to achieve that aim by getting you to identify both that I aim to be told how much the dinner will cost and that I intend to achieve that aim by getting you to identify that this is my aim (and that I intend to achieve it thus).

This indeed captures the main difference between *asking* you something and making sure you know I'm wondering about it.

In accordance with our jargon, and to make room for non-specific audiences, we must replace 'getting you to identify' by 'making it identifiable' (i.e. making it explicit, overt). Also, note that the bracketed final clause in Explanation 3, particularly the word 'thus', is meant to capture the reflexivity. We can formalize the analysis:

When I ask 'how much will the dinner cost?':

My aim is to be told how much the dinner will cost [response], and

I intend to achieve it by making it identifiable that:

- my aim is to be told how much the dinner will cost, and
- I intend to achieve it thus.

What, in the scheme, is my reflexive intention? It is everything that comes after the first occurrence of ‘my aim is’. That first occurrence *is* my reflexive intention: my intention to achieve a goal by making that very intention identifiable. The response I aim to elicit from the audience is ‘be told how much the dinner will cost’. I have added ‘response’ in square brackets. That is my ultimate, overall aim, though, as we saw above, not my only one. I also want the audience to understand that (and what) I am asking; and more fundamentally, I want to succeed in asking the question. Those intermediate aims are steps towards achieving of my ultimate aim. Out of all these aims, only one is in my control: success in asking the question. So that is my *means*, the means I deploy to achieve the response. It is the underlined phrase: I aim to achieve the response *by making it identifiable that...*⁴⁹

So ‘success’ consists in making my reflexive intention identifiable. I call meaning-act an act that makes the agent’s reflexive intention identifiable. The agent’s reflexive intention, as made identifiable by the act, is the act’s meaning⁵⁰. Meaning-acts make it possible for thought – the ‘indefinite plane of jumbled ideas’⁵¹ – to be articulated and conveyed to other persons. That is their general point.

Exercises of normative powers are meaning-acts as well. It may seem less obvious how the idea of identifiable reflexive intentions can be applied to the exercise of normative powers. After all, we said above that here the agent has one and only one aim, namely changing normative positions. It is an aim the success of which is, moreover, in his control (not in the audience’s). Where does the idea of identifiability come in? It comes in right at the core. Exercises of normative powers are paradigmatically intentional acts: it is their social function, as Hart put it, to enable people to realise their wishes, or more accurately, to shape their own and others’ legal positions. And, crucially, the intention involved is a reflexive one. One enters a contract *by making identifiable one’s aim to enter a contract* – ‘yes, I agree to sell’. If I say ‘I hereby sell my red bike to Alex’, assuming no written form is required, I thereby make it the case that my red bike is indeed sold to Alex. Where a written form is needed, I sign my name under a text which articulates, more or less explicitly, my aim to enter into the relevant transaction (signing a document amounts to endorsing the document’s content). Many exercises of normative powers involve oral declarations (‘I acquit you’, ‘I marry you’); others are carried out in writing and by means of signatures (notably enactments); yet others are done non-verbally, for instance by raising one’s arm or pressing a button. Mixtures are frequent. Below I comment on the verbal/non-verbal distinction (4.2.4). Suffice it to note here that even in non-verbal cases, the context is such that performing a given bodily movement amounts to expressing one’s reflexive intention to make the relevant normative change (the context will tend to include a verbal articulation of the change, e.g. ‘by ticking this box I cast my vote in favour of...’, ‘by pressing this button I agree to buy this item...’). For the normative change to occur, your reflexive intention must be made identifiable to a reasonable observer. (If you intended to buy but never said so, you didn’t buy.) Here is a formalization:

⁴⁹ When Austin denies that utterances are ‘means to ends’ he is thinking of causal (empirical) means-ends relations (‘...the way buying a ticket and getting on a train stand to taking a railroad trip’, Austin 1955, 24).

⁵⁰ This must not be confused with the false claim that communicational meaning can be exhaustively represented in language. I think there are ways of understanding Searle’s ‘principle of expressibility’ (‘whatever can be meant can be said’, Searle 1969, 17 ff.) which do not commit him to this false conclusion (cf. Green 2007).

⁵¹ Saussure 1916, 112.

When I [the judge] say ‘I marry you’:

My aim is to marry the two people in front of me (change their normative positions in a number of ways), and

I intend to achieve it by making it identifiable that:

- my aim is to marry the two people in front of me, and
- I intend to achieve it thus.

Again, the judge’s reflexive intention is everything that comes after the first occurrence of ‘my aim is’. The legal meaning of the utterance is the judge’s reflexive intention as rendered identifiable. It is his identifiable aim, his identifiable intention, to marry those two people by making it identifiable that he so intends. Simplifying, the legal meaning is the change in normative positions. The utterance has legal meaning if it succeeds in bringing about the change. Otherwise it may have communicational meaning only (provided the utterance was also intended to convey a message⁵²).

Having sketched the parallel between communicational and legal meaning, arguing that both are a matter of identifiable reflexive intentions, it is worth revisiting the asymmetry. A communicative act has (communicational) meaning regardless of whether the agent is actually understood and responded to. The agent’s aims may fall short of being fulfilled, and yet his act is meaningful provided it makes identifiable his reflexive intentions to a reasonable observer. An exercise of legal powers has (legal) meaning regardless of whether the agent is actually understood by anyone present. The difference is that the agent’s aims here do not include being understood: the agent only aims to perform normative changes and the aim is fulfilled provided he makes his reflexive intentions identifiable to a reasonable observer. (A contract is perfected even if the offeror did not understand the acceptance, provided he could and should reasonably have understood it.) This asymmetry explains why utterances like ‘you are married’ are not addressed at a particular audience in the way that communicative utterances typically are⁵³. The specific purpose and social function of communicative acts and exercises of normative powers are distinct.

4.2.4 Validity and ‘Criteria’ of Validity (Identification)

I want to introduce the idea of the validity of a meaning-act. We have been invoking this idea throughout the discussion of meaning-acts, without calling it by this name. The validity of an utterance is its success.

This is easy to see in the legal realm. A successful exercise of normative powers is a legally valid exercise of normative powers. All successful exercises of legal powers are legally valid, and all legally valid acts are successful exercises of legal powers. (It is because of this intrinsic connection between legal powers and legal validity that our enquiry from Chapter 3 began with an analysis of legal powers.) If my above argument is correct, a legally valid act is an act that makes identifiable the agent’s reflexive intention to change a legal position.

⁵² If the normative change didn’t occur, the assertion that it was occurring was false. But it was nevertheless a successful assertion.

⁵³ Strawson notes this asymmetry (1964, 454 ff.) but infers from it that his analysis in terms of ‘understanding’ and ‘recognition of intention’ does not apply to exercises of normative powers (he also does not invoke the notion of a normative change; he speaks of acts that are ‘essentially conventional’ and belong to the ‘region of institutionalized procedures’). He is wrong to draw this inference.

In the realm of communication we hardly use the label ‘validity’ to refer to the success of utterances. Perhaps we might say that ‘I little speak English’ is not a valid sentence or that ‘morning-morgantown’ is not a valid word. But the fact that we hardly need this label in communication, whereas we need it in law, is not important now. (It has to do with the difference in social function⁵⁴). We have the *concept* of a valid, successful communicative act, and we invoke it all the time – from the very moment we start learning a language and become aware that our attempt to express ourselves in that language can fail, can go wrong. We know that some combinations of traces are (valid) English sentences and that others aren’t. We sometimes identify a word as valid – as a word *of this or that language* – but we have to look it up in a dictionary. In communication, a valid act is an act that makes identifiable the agent’s reflexive intention to express a message. It may be worth distinguishing between legal validity and communicative validity.

So valid acts (both legal and communicative) involve reflexive intentions made identifiable. There is a close link between validity and identifiability. (This link is crucial to understand some claims by Hart and by ‘legal positivists’, not least regarding the ‘rule of recognition’; see Chapter 5.) A valid act is an act that can be identified as valid by a reasonable and informed observer.

This brings me to the factors whereby we identify something as a valid act. I will jointly call these factors ‘criteria of validity’, to echo the widespread legal jargon. (I do so reluctantly, because ‘criteria’ is misleading: even in the law, factors determining validity are seldom as neatly demarcated and formalised as the word ‘criteria’ suggests.) Two main distinctions are relevant for our purposes, and they are summarized in **Fig. 2**.

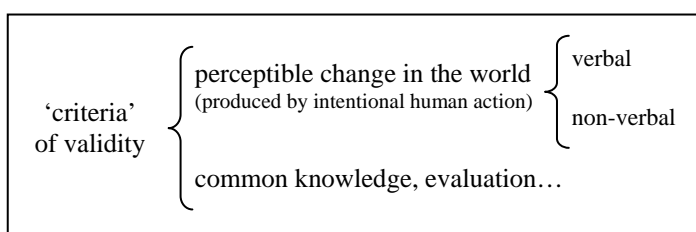


Fig. 2: ‘Criteria’ of validity

The first distinction is between criteria of validity that are perceptible physical changes in the world produced by human action, and those that aren’t. The second group includes what is sometimes called the ‘common knowledge’ between agent and audience; it also includes evaluations (moral or other value-judgements). Important as such factors are to shaping the meaning of many utterances, they are not the primary criteria of validity. The primary criteria of validity are always perceptible changes in the world. They are primary because there must be an act – in the physical, empirical sense – in order for anything to ‘have meaning’ in the first place. There must be something to which the common knowledge relates, something which activates the identification. Therefore, the changes in the world must be perceptible. Such perceptible changes in the world are sometimes called ‘sources’ in jurisprudential literature⁵⁵.

⁵⁴ This point is developed in Chapter 5. Essentially, the idea is that normative changes last in time and have manifold consequences. It is for the sake of clarity/efficiency that we use a special vocabulary to label the results of successful exercises of legal powers.

⁵⁵ I get to this in Chapter 5.

The second distinction is a distinction within the category of the primary criteria of validity. Perceptible changes in the world can be verbal and non-verbal⁵⁶. One may exercise normative powers wholly by no non-verbal means, e.g. by raising one's arm or pressing a button. Non-verbal exercises of normative powers tend to, but need not, be accompanied by verbal articulations of the relevant normative change ('by ticking this box I cast my vote in favour of...'). Many communicative acts are non-verbal too, e.g. nodding, bending forward or waving.

The distinction verbal/non-verbal should not be taken as a sharp dichotomy. It is a spectrum: meaning-acts can be more or less verbal, and hardly any meaning-act is *exclusively* verbal. Non-verbal factors such as tone of voice, cadence, emphasis, or facial and bodily expressions (not to speak of common knowledge) tend to play a chief role in determining the meaning of an utterance⁵⁷. The same string of sounds – 'she is first' – may be a question, an announcement, a protest, a warning, an appointment, a parody, a mere exemplification⁵⁸... depending on non-verbal factors. The more verbal the act, the more explicit, as it were, the agent's reflexive intention is rendered. I may warn you by uttering 'I warn you that...' or just through a pointed glance. Similarly, I may vote by uttering 'I vote for...' or simply by staying silent. The more verbal the act, the more we feel that the agent *does* something by *saying it*. This is the thought that captivated Austin, but he failed to fully grasp that what lay behind was a reflexive intention⁵⁹. At their most explicit, utterances may include the verb of the meaning-act along with 'hereby' ('I hereby appoint', 'I hereby bequeath'). Explicit formulae are rare in communication ('I hereby assert...') and frequent in the law. Where certainty matters, subjective appreciations of non-verbal factors are kept to a minimum.

The close interplay of verbal factors with non-verbal factors reveals another virtue of Austin's advice to study the utterance as an act, to focus on the 'total speech situation'. Making an utterance is not passively putting in circulation units of meaning previously and independently bundled. It is creating, here and now, a meaningful act⁶⁰. The meaning of your act is determined by factors that are tied to the very act/situation of uttering. The focus on the act/situation is not so much an option as a necessity. Incidentally, there is no

⁵⁶ For this reason I find the label 'speech acts' misleading. Austin also considers a number of non-verbal 'speech acts' (Austin 1955, 119-122 passim). 'Speech act' is sometimes used to include verbal acts only (e.g. Korta&Perry 2006, 43).

⁵⁷ Austin discusses these factors ('primitive devices in speech') (Austin 1955, 73 ff.), as do many other authors (e.g. Grice 1957, 386-387, Cohen 1964, 123, 126).

⁵⁸ See Hare 1952, 18-19, Hare 1970, 19 ff., on the idea of 'subscription' to an utterance (an 'element of meaning').

⁵⁹ Strawson 1964, 449 ff.

⁶⁰ I have therefore not distinguished between an utterance-act and its content, but rather between an utterance-act and its meaning. 'Content' invokes a contrast with form which is unhelpful here. I do not wish to deny, however, that helpful distinctions may be drawn within the meaning ('content') of an utterance, such as Searle's distinction between 'propositional content' and 'force' (Searle 1968; cf. Cohen 1964). But there is a standing risk that 'force' is regarded as not being part of the utterance's meaning. This risk originates in Austin's confusing claim that (illocutionary) 'force' is what an utterance *does*, not its (locutionary) 'meaning' (but this claim is seriously qualified in the end: 'the theory of "meaning" as equivalent to 'sense and reference' will certainly require some weeding-out and reformulating...', Austin 1955, 149). Searle's account is potentially misleading too, especially since he has no joint name for propositional content plus force, and his discussion of 'meaning' is scattered and elusive (Searle 1969, 17-18, 42 ff., Searle 1995, 21). It is tempting to map the distinction propositional content/force onto the distinction verbal/non-verbal, just as it is tempting to assume that non-verbal factors do not determine meaning. It strikes me that, once these two temptations are resisted, a good number of dichotomies proposed by philosophers of language lose much of their strength (e.g. semantics/pragmatics, near-side/far-side pragmatics, what is said/what is conveyed, explication/implication, literal meaning/speaker meaning).

bright line separating the ‘act’ from the situation or ‘context’ in which it takes place. (This may be a further reason to follow Austin’s lead.) Distinctions between an act and its context can be useful, but they are always relative. When a document is signed in a courtroom, where does the act end and the context start? Does the act include the room or only the traces of ink on a paper? Is signing an act? Or is the act only the bodily movement, with ink and paper being part of the context (so the same act in another context can be rubbing grease from a pan)? I therefore will not draw a general distinction between an act and its context: hence my formulation of count-as norms (‘X counts as Y’) does not include Searle’s ‘... in context C’⁶¹.

4.2.5 How Coded?

‘Criteria’ of validity of utterances are factors we use to identify them, to understand what the agent is saying or doing. Sometimes the relation between such factors and the meaning of his act is pretty natural: an angry tone of voice suggests indignation, pointing at someone is referring to them. Often, however, the relation between the factors and the act’s meaning is artificial, i.e. arbitrary. Where the connection is arbitrary, a code is at work: the code *creates* the connection between the factor and the meaning, a connection which would not exist but for the code. Accordingly, we need to draw a third distinction amongst criteria of validity. Some are coded, some aren’t. This distinction applies chiefly to perceptible changes in the world⁶². It cuts across the verbal/non-verbal distinction. That is: verbal factors can be more or less coded (spelling v onomatopoeia), non-verbal factors can be more or less coded as well (nodding v smiling).

My main interest in this chapter lays in the codes, the count-as norms. Hence, the next section will focus on coded meaning-acts only. But before I turn to them, it is important to stress that not all meaning-acts are coded, and to properly understand why this is so. As I said at the beginning of this section, there is more to meaning-acts than codes. This section has made an argument to this effect. Meaning-acts are essentially a matter of identifiable reflexive intentions. This helps putting the code’s role in its place: the code is merely an *aid* to rendering identifiable one’s reflexive intentions. What matters is that intentions be identifiable. Codes often *facilitate* this, especially where reflexive intentions are complex and/or need to be shared across distance or time (4.1.1 above).

The distinction between coded and uncoded meaning-acts is not sharp, at least in the realm of communication. Most communicative acts have uncoded elements⁶³. Exercises of legal powers, by contrast, are entirely coded. By this I mean that the law aspires to regulate every aspect of what counts as valid and what doesn’t. Of course legal powers are often exercised in ways that strike us as ‘informal’: not every transaction requires specific forms, stamps, deadlines and explicit articulations of the normative change (‘I hereby purchase this apple’). But where a contract can be perfected by a simple nod, it is because

⁶¹ Searle 1969, 35; Searle 1995, 43.

⁶² I have trouble thinking how common knowledge could be coded, but do not want to discard the possibility.

⁶³ Austin erred in suggesting that all communication was coded; he insisted that the difference between ‘illocutionary force’ and ‘perlocutionary effects’ lay in the coded nature of the former. Strawson showed that the difference is not a matter of code, but of reflexive intention. ‘Illocutionary force’ is not always coded but, unlike ‘perlocutionary effects’, it is always part of the speaker’s reflexive intention (Strawson 1964, 449 ff.), i.e. of the utterance’s meaning. On the distinction between conventional and non-conventional implicatures, Grice 1989, 41 ff.; on conventions about ‘subscription’, Hare 1952, 19; 1970, 22. Uncoded non-verbal factors should not be confused with a speaker’s ‘body language’ of the kind which provides cues about his state of mind without being part of his message.

the law does not require otherwise. The law aspires to control every detail of the procedure and substance of normative changes. While poetry benefits from the open-endedness of meanings, legal certainty would suffer.

4.3 Structure of Count-As Norms

The ‘codes’ governing meaning-acts are count-as norms. I propose the following formulation:

Count-as norm (CAN): X counts as Y

I borrow this formulation from Searle, with the minor amendment already indicated. My characterisation also draws on some of his claims. I believe that Searle is the author who has done most work towards articulating this logical class of norms. I speak of ‘norms’, rather than ‘rules’ (as he does), because individual (power-conferring) norms also belong to this category. The acronym CAN, moreover, nicely captures the *enabling* function of these norms⁶⁴.

Before commenting on each variable separately in the subsections below, I would like to suggest how count-as norms may be placed within a general typology of norms. It is the typology that I find most helpful, and rely on in this work. Count-as norms, according to this typology, are one of the two main classes of norms. The other main class of norms consists of norms that prescribe, prohibit and permit action. I call this other class mandatory norms⁶⁵. The contrast between count-as norms and mandatory norms is, at its most basic, this: count-as norms tell us how to make something happen, not whether we should, should not, or are permitted to make it happen; they establish means to ends, rather than telling us which ends we should, should not or are permitted to pursue⁶⁶. (Thus formulated, this contrast would seem to require including technical directives – recipes – in the first cluster, alongside count-as norms, and hence finding a more general label for the cluster. I want to leave it open whether this is needed; the reason is that I am not fully comfortable with the idea that technical directives are a *main* type of norms, given their essential subservience to independently existing means-ends relations⁶⁷.) According to this, Hart’s duty/power contrast is one between mandatory norms and a species of count-as norms, namely legal power-conferring norms.

⁶⁴ Searle’s label ‘constitutive’ rules is misleading given its manifold connotations: e.g. Marmor 2001 (‘constitutive conventions’), Glüer 2000 (‘constitutive’ as necessary for an activity’s existence), Williamson 1996 (‘constitutive rules’, in a sense different from Searle’s), Hohfeld 1913, 25 (‘constitutive (operative) facts’ are facts that suffice to change legal relations; they include violating duties).

⁶⁵ The term ‘mandatory’ is used by Raz (1975, 49 ff) to encompass norms of the first two types only. Searle’s distinction between ‘regulative’ and ‘constitutive’ rules is, I believe, essentially the same distinction that I draw (Searle 1969, 33-34).

⁶⁶ One can think of alternative organising principles for the classification of norms, such as whether or not they give reasons. This would place (strong) permissions alongside count-as norms (on strong permissions, Raz 1975, chapter 3.1). My argument does not involve proving alternative organising principles wrong, as my defence of the distinctness of count-as norms does not proceed *by contrasting* them to mandatory norms, but rather (positively) by articulating the peculiar features of norms of the count-as type. The organizing principle I favour emphasises those features and is continuous with the works of Hart and Searle, who first devised the notion of a count-as norm.

⁶⁷ Technical directives would not fare better under a classification based on the norms’ reason-giving character (see note 66 above), since they don’t even give reasons conditionally or instrumentally: the means-end relation gives reason to deploy the means, directives merely reflect it. Cf. von Wright 1963, 6 ff, who considers directives a main type of norms, alongside count-as norms (‘rules’).

The difference between count-as norms and mandatory norms is best appreciated where norms of both classes govern the same action. The count-as norm is always prior to the mandatory norm: it must be *possible* to speak for the question to arise whether one is obligated to do so (on a given occasion); one must be *able* to sell before one can be legally bound to sell (expropriation) or forbidden to do so (stolen item). They guide behaviour differently. In the realm of normative powers, the interplay between count-as norms and mandatory norms has an additional dimension. Mandatory norms are *created* by following count-as norms (or their incidence is affected). This is what it means to exercise normative powers: to change normative positions. The ‘internal relations’ between legal power-conferring norms and mandatory norms are further discussed in Chapter 5. To be sure, the logical distinction between count-as norms and mandatory norms is compatible with the existence of hybrid cases. A case is hybrid if, even after all relevant facts are known, it remains uncertain whether the action is governed by a count-as norm or by a mandatory norm⁶⁸. Hybrid cases abound, but their very characterisation as hybrid presupposes the distinction between the two logical types. At any rate, my analysis is not aimed at providing a *test* for spotting count-as norms (what would it be anyway?⁶⁹), but at explaining what we find when we find a count-as norm.

4.3.1 Analysis of ‘X’

‘X’ is an utterance.

It might seem obvious by now that X is an intentional act that involves perceptible physical changes in the world. Yet we tend to predicate ‘validity’ of (other kinds of) things as well: we speak of valid contracts, valid tickets and even valid passwords. I show below (4.3.1.1) that these uses are ultimately elliptical for the validity of an *act*; my discussion brings out something important about meaning-acts, especially legal ones, namely that their valid result tends to become objectified, isolated from the original act and thus able to circulate relatively independently. In Chapter 5 we will see how this objectification connects to the function of the notion ‘(legal) validity’, its function as a ‘shell’ that is largely opaque for what it holds inside. The other two subsections concern familiar hazards that result from the fact that X is an *intentional* act and yet it is an act governed by a *code*.

4.3.1.1 Act or (other) Thing? The Tendency to Objectification

Several classes of things can be, can count as, valid. I discuss them in ascending order of difficulty, the least difficult ones being those that are most transparent for the act that has brought them about.

a) Valid combination, move...

Certain combinations of traces mean something in a language. We can say that a certain combination counts as a word or sentence, and may speak of valid and invalid combinations (‘speak I English little’). ‘Combination’ is a nominalized verb form which,

⁶⁸ For example, a requirement to register with the police any valuable property found in a certain area, in order to be considered its lawful owner. Is this a criterion of the validity of the acquisition (exercise of normative powers) or a duty imposed on those who acquire property by ‘occupatio’ (i.e. without exercising normative powers)?

⁶⁹ The norm-formulation is insufficient (Searle 1969, 36; on the distinction between norm and norm-formulation, von Wright 1963, 93). It may help to ask whether the law-maker judged it desirable to facilitate certain normative changes for certain purposes (Raz 1975, 102 ff), but that involves new complications.

like many others, has an act-object (or process-product) ambiguity. ‘Combination’ does not only mean the act of combining, but also the result of that act. In contexts like the above it is, I think, used mainly in the latter sense. To be sure, here ‘combination’ is not the final result of our act. One can distinguish the act of combining, the combination, and the word or sentence. ‘Combination’ refers to an *intermediate* result of our act. But, although the noun has an intelligible reference of its own, it will always (in these contexts⁷⁰) be transparent for the act of combining, much as ‘arrangement’ is transparent for the act of arranging, ‘composition’ for the act of composing. There is no valid combination without a valid act of combining; we cannot conceive of a combination without postulating, in the background, an agent intentionally combining. (This argument applies *a fortiori* to expressions like ‘valid traces’ or ‘valid sounds’, as traces and sounds are even more *immediate* results of our acts.)

An equivalent notion in the realm of normative powers is the idea of a ‘move’ in a game. In Parcheesi, moving one’s pawn out of the nest into the adjacent darker space when the dice shows 5 counts as entering the play. We can say that moving the pawn etc. counts as an entry, or instead speak of a valid move. The ‘move’ is more than the act of moving (gliding, pushing) and less than the entry: for the purposes of the game, the move is the intermediate result of the act of moving, whereas the entry is its final result. The law does not offer many examples. ‘Text’ is, perhaps, a name for the intermediate result of an intentional act ultimately aimed at changing normative positions. There is no text without an author. ‘Statement’ or ‘clause’ could be further instances.

b) Valid sentence, contract...

Final results, such as sentences, entries, contracts, marriages and statutes, are more opaque for the creating act than intermediate results. This is not merely because they are one step further removed from the act. That step is important. Legal systems could hardly exist without that step, and communication would be seriously hampered.

We pervasively treat words, sentences, contracts, wills, statutes as independent, free-standing ‘entities’; we qualify them (elegant, unfair, detailed, outdated...) and engage with them in manifold ways. Words and sentences are *signs*. When put in circulation, signs carry content from an agent to an audience. Signs can perform this *mediating* function precisely by virtue of being intelligible in relative isolation from the circumstances of the utterance, the circumstances of the reception, and the identity of the agent and the audience. The relative independence of the sign facilitates communication over distance and across time. This has a crucial parallel in the law. Legal transactions and enactments have a *lasting* character. It is in their nature to ‘live on’ beyond the moment of their creation, and often beyond their creator’s death, in the face of his change of mind, or throughout changes in the identity of the persons obligated or empowered. As a matter of law, valid transactions and enactments have *continued relevance* until, again as a matter of law, this relevance is brought to an end by repeal, discharge of duties, resolute condition... ‘Legal validity’ is the logical and technical clothing of this continued relevance.

The relatively self-contained entities are not physical things. They have, of course, physical *manifestations* like sounds, wedding rings and signatures – some of them are the

⁷⁰ In other contexts, ‘combination’ etc. can be unrelated to intentional human acts, e.g. the combination of clouds or chemical elements in natural substances.

factors we use to identify them⁷¹. But over and above physical manifestations, in the legal realm the entities tend to have physical *representations* as well: deeds, certificates, records, stamped documents, forms... This is yet a further step away from the creating act. We tend to go as far as to call the inscribed piece of paper itself ‘contract’, ‘will’, or ‘application’, although the inscribed paper only represents the contract, will or application. Physical representations are essential to the functioning of a legal system. Their legal importance can be such that, when it comes to determining the content of a contract, the written representation takes evidential priority over the parties’ actual intention. The law may stipulate that the content of the contract (abstract entity) *is* the content of the traces on the paper (physical entity).

Valid entities have a tendency to cut themselves loose from their creator. This answers to a practical need tied to the very social function of communicative acts and exercises of normative powers. But it ought not to obscure the logical priority of the creating act over the created product. When we ask whether ‘contract’ is transparent for the act of contracting, we are not asking whether a contract can be legally binding after the death of one party, nor whether the written clauses take evidential priority over what was spoken at the time of perfection. We ask whether there can be a valid contract without a valid act of contracting. Similarly, the question is not whether a sentence of an unknown author can be intelligible, but whether there can be a sentence without someone having uttered it. And the answer is, of course, negative. Nor is the law blind to the logical priority: doubts about the validity of a transaction will often be solved by retracing the steps of its *formation*. For all their objectivity, deeds and certificates capture the fact *that* the transaction was *made*; they express the content of what the parties *contracted* about.

‘Valid contract’ is elliptical for ‘validly made contract’. There is no legally valid thing that has not been validly made (and everything validly made is valid). The close tie between formation and product has accompanied legal systems at least since Roman times (Chapter 2). Its linguistic counterpart is to be found in pairs of verbs and corresponding nominalized verbs forms that designate, respectively, formation and product: to enact/enactment, to contract/contract, to appoint/appointment, to resolve/resolution, to judge/judgement... Moreover, all verbs that designate the formation of valid entities in the law are verbs of a special kind, namely *success verbs*. Success verbs designate purposive actions that have succeeded in attaining their purpose, or are expected by the speaker to succeed when carried out. ‘To purchase’ and ‘to enact’ are success verbs; ‘to paint’ and ‘to read’ are not. We may call the latter activity verbs. They designate activities which do not have any other purpose beyond that of being carried out. Compare ‘I am (right now) purchasing a car’ with ‘I am (right now) painting a car’. The first sentence sounds unusual, because we don’t think of purchasing as an activity stretched over a period of time. ‘I am about to purchase a car (as soon as I have finished signing my name)’ would seem more appropriate. The success in success verbs is instantaneous. It is also an all-or-nothing matter: the act is one of its kind inasmuch as it is *fully* successful. If I didn’t end up purchasing the car after all, I was wrong when I told you I was purchasing it; whereas it was right for me to say that I was painting the car even if I later ran out of paint before I finished. So the accomplished product is built into the verbs that designate the formation. But it is the latter that succeeds. Success verbs, qua verbs, designate actions, not their product. What succeeds is the act.

⁷¹ Searle sometimes makes it sound as if these physical manifestations *were* the ‘X’ term (‘physical features specified by the X term’, ‘brute facts’; Searle 1969, 44-45), although his general argument stresses the priority of acts over facts and objects (1969, 16-17, 56 ff.).

c) Valid ticket, ID card...

Contracts and statutes are abstract entities, often represented in paper. Tickets and ID cards are physical entities. They are not names for transactions therein represented. And yet we call them – the tickets, ID cards, passports, vouchers – valid. They even seem to have their *own* criteria of validity, such as shape, colour, texture or a printed date. These are not, directly, criteria of validity of any legal transaction (contract of transport, club affiliation...). Yet tickets and ID cards do not float in a vacuum. Other physical objects, like milk bottles, have a date printed on them, and are sensitive to that date, but that does not render them valid or invalid. When I show the bus-driver that I have a valid bus-ticket I am showing him that I am entitled to something. If he refuses to take me (when seats are available) he will be in breach of contract. His contract with the bus company binds him to execute *my* contract with the bus-company. It is my prior contract with the bus-company, not the ticket itself, which entitles me to a bus-ride. The ticket is not the representation of this contract. It is its *proof*. Tickets, ID cards, passports, vouchers are ‘portable’ proofs of legal transactions or institutional decisions. Here the original act – contracting, admitting, conferring rights – has receded even further into the distance. But the point of a system of portable proofs is precisely to aid the effectiveness of the original acts, particularly where the execution of a transaction is detached from its formation by time, circumstances, or the parties’ identity. The validity of the transaction shines through the ‘validity’ of the ticket.

d) Valid password, PIN number, credit card...

Sometimes when I try to sign into an email account the computer screen reads ‘invalid password’ and I do not get access to my email. Similarly, when I try to withdraw money from the ATM I am asked to ‘introduce a valid card’ and then to ‘enter a valid PIN number’. If I fail to do so, I do not get the money. Unlike the bus-driver, the customs officer or the library porter, here it is a machine that ‘refuses’ to grant me access. It does not literally refuse to do so. It has been set up such that it will not perform certain mechanical operations unless particular keys are pressed or a certain magnetic band is swiped through. Passwords, credit cards, PIN numbers, etc. have something in common with door keys: if you use the wrong one, the door will not open. Using an invalid password, or an expired credit card, makes the operation fail – both as a matter of law and as a matter of mechanics. A valid password not only entitles me to something but it also gives me the physical ability to make the computer or the machine respond. A valid password is halfway between a valid passport and the right door key.

Correspondingly, there are two types of success involved in the use of passwords. On the one hand, there is normative success: your prior contract with the bank entitles you to withdraw money. The credit card or password serve as a proof of that contract; in this sense, they are like ID cards. But, on the other hand, there is mechanical success: the bank discharges its contractual duty towards you *inter alia* by giving you the ability to access your money from a machine set up in a certain way. We have no rights against the machine, but we have the right that the machine be programmed in such a way that it ‘recognises’ the proof of our valid contract. By calling passwords and credit cards ‘valid’ we abstract from their mechanical properties and focus on their normative ones. (For we do not speak of valid door keys.)

e) Other uses

Some senses of ‘validity’, despite not being wholly unrelated to the sense I consider here, do not constitute further stages in the process of abstraction. It is worth distinguishing them. Logicians speak of valid arguments, valid deductions, etc. Here ‘validity’ is a

highly technical notion and I will not attempt to characterise it. However, in ordinary conversation we loosely emulate the logicians by speaking of valid points, valid arguments, valid questions, valid objections... What do *we* mean? We express approval; a valid argument is appropriate, it stands up against the criticism of being silly or misplaced. It is more than just an argument, even if it often falls short of being altogether persuasive ('that is a valid argument, *but...*'). 'Valid' involves a favourable judgement on the merits. What kind of merit? Not simply intellectual merit, for we do not speak of valid essays or valid books. There is an extra element in 'valid argument' that invokes a goal which the argument is supposed to strive towards. Let us call this goal persuasiveness. Persuasiveness is a goal that relates to other people, that has to do with eliciting a certain response from them; when we make a valid argument we are entitled that our interlocutor takes it into account. A valid argument, unlike a lucid book, has some sort of continued relevance for the purposes of the reasoning at stake – this does echo our main sense of validity. But the presence of a merit-based judgement sharply distinguishes both senses. A valid sentence or contract is a specimen of its kind, not necessarily a good one. One can make an invalid point in uttering a valid sentence.

4.3.1.2 *The Problem of Surplus Intentions*

X is an intentional act. The function of the count-as norm is to facilitate making identifiable the agent's reflexive intentions. His act has meaning inasmuch as it makes identifiable reflexive intentions. The act's meaning is the meaning a reasonable observer would identify.

There is a potential tension between identifiable intentions and actual intentions. This tension is at the core of any meaning-act. The act's meaning may not correspond with whatever (if anything) the agent intended to mean⁷². This risk is particularly stark in the case of coded meaning-acts. The code may fail to make identifiable the agent's actual intentions, or it may make identifiable intentions that the agent never actually had. I will call to these two scenarios respectively 'the problem of surplus intentions' and 'the problem of missing intentions'. They are not mutually exclusive, but for the purposes of the discussion it is worth disaggregating them.

In cases of surplus intentions the agent wants to do more than the code can offer. His intentions do not fit into the narrow straightjacket of the code. In communication this is very common and generally results in a non-coded communicative act. The agent will resort to uncoded factors to convey the relevant nuances. This is the way (some) poetry is written. Things are different in the law. Strictly speaking, there aren't any non-coded exercises of normative powers. To the extent that the code does not leave room for what you intend to do, you will fail to do it (e.g. marry a married person, sell smoke). Your act will be void, i.e. non-existent as a matter of law. We may speak of a *purported meaning-act*. (This connotes that there is at least the attempt to conform to a norm.)

In other cases, which may or may not involve surplus intentions, the agent only commits minor mistakes in using of the code. These cases help qualifying the claim that acts governed by a code are unsuccessful if they do not conform to it. Not every mistake triggers invalidity. In communication, competent interlocutors are able to see beyond minor slips of the tongue. One's message is identifiable as long as one's errors are identifiable too. The same is true in the law: many kinds of flaws merely trigger voidability (as opposed to voidness). Here the law itself foresees the violation of its own

⁷² Colloquially, we would say '...with what the agent really meant'. This use of 'to mean' is confusing. It is a non-technical use, similar to the use in 'I meant to go shopping this morning'.

code, of its own grammar, and grants that violation a legal status, a legal meaning, if precarious. As long as the agent's intentions are identifiable, there is usually *some* flexibility regarding the use of the code – both in communication and in law (4.1.1 above). This shows, once again, that meaning-acts are primarily a matter of identifiable reflexive intentions, and only derivatively a matter of codes⁷³.

4.3.1.3 *The Problem of Missing Intentions*

Sometimes the code does too much rather than too little. I may end up doing what I never intended to do, because of the code. In communication, this tends to be of small moment: when you accidentally say something you didn't intend to say (wrong word, wrong tone...) you can normally tell your interlocutor and that settles the matter. But when you accidentally buy something you didn't intend to buy (one mouse-click too many) things are not that simple: your mistake has normative consequences, and you may be held to a transaction you never intended to enter into. The code, as it were, 'takes over'. Your act brings about a result you never intended to bring about⁷⁴.

Paradoxical as it may seem, when the code makes identifiable a non-existent intention it does so for the sake of intentionality. The agent's intention is central to the *raison d'être* of count-as norms: they enable individuals to do things they would otherwise not (or hardly) be able to do, like shaping legal relations as they deem appropriate or conveying messages. Doing those things involves showing to others what one's intentions are. When things go well, what is shown to others are one's actual intentions. If things didn't go well most of the time, it is safe to say that the point of having count-as norms would be defeated. The law reflects this concern. It goes to some length to ensure that those exercising normative powers do so intentionally and with full awareness of the legal meaning of their action. Typical criteria of validity include handwriting, signatures, witnesses or extended public declarations: these procedural steps have in common that it is hard for someone to go through them without being or becoming aware of the act's legal meaning. And where such steps are not viable, as in online transactions, the law tends to require the display of appropriate warnings. But if, despite the precautions, one ends up following a count-as norm accidentally, others are entitled to rely (in good faith) on the validity of what *looked like* an intentional act. This, too, is sensitive to the social function of count-as norms. The law protects good faith reliance by the reasonable observer. And this, too, is sensitive to the social function of power-conferring norms. The ability of individuals to shape their own or others' legal positions has as its counterpart the possibility of individuals to be reasonably *certain* about the shape of their own or other's normative positions. Without some degree of certainty, it would not be true to say that there is a shared code for identifying successful normative changes. Ability to change normative positions goes hand in hand with identify-ability.

In light of this, we should characterise meaning-acts as *presumptively intentional*. By this I understand: that they are ought to be intentional (in the sense that this is part of their social function); that they appear to be intentional (in the sense that a reasonable observer would judge that they were); that they are devised to be intentional (in the sense that their regulation makes it likely that they are); and that, even when they are not in fact

⁷³ This point is made forcefully by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997].

⁷⁴ This must be sharply distinguished from the familiar experience of conforming to count-as norms without consciously following them (Searle 1969, 41-42, Searle 1995, 145 *passim*). When we follow rules we are not able to formulate, our act is unreflective but not unintentional: it is intended to bring about the result by the appropriate means.

intentional, they tend to bring about the same results as if they had been intentional. Meaning-acts have two closely related facets: intentions ('subjective') and their identifiability ('objective'). It is a bit like your face and your portrait. The interplay of both facets is particularly crisp where identifiability is a matter of codes. Intentions and codes often reinforce each other, but sometimes virulently clash. While, on the positive side, the prominent role of intentions in exercises of legal powers sharpens and opens up a wide range of subtle mechanisms to perform normative changes, the price for this, on the negative side, is that exercises of powers can miscarry in multiple ways. This is a tension at the very heart of the law's operation, and the law must be, and normally is, responsive to it (e.g. by enabling the challenge of transactions entered by mistake, intimidation or force, notably where the other party ought to have known – but then again, within the deadlines and forms).

4.3.2 Analysis of 'counts as'

'Count as' means, basically, 'can be identified as'.

Because meaning-acts signal the agent's reflexive intention to successfully do something, and because success consists in the agent's reflexive intention being identifiable, meaning-acts also signal the agent's success. In the case of coded meaning-acts, the code that *signals the intention* is the same code that *signals the success*. It is by virtue of the relevant power-conferring norm that signing a purchase contract not only signals the agent's intention to purchase but also signals that he successfully purchased, i.e. the valid purchase.

How do we get from the intention to the successful result? What explains the transition from physical changes in the world to normative changes, or messages? And what exactly do those results consist in? These issues are central to a full understanding of exercises of normative powers and communicative acts, but they cannot be tackled merely by reference to the logical structure of a count-as norm. They go far beyond what logic alone can offer⁷⁵. As far as logic is concerned, signing *counts as* purchasing.

What does this tell us? It tells something to the agent, and something to those who interact with him (audience). To the agent it tells *how* to validly purchase. To the audience it tells how to spot *that* someone has validly purchased⁷⁶. Both aspects are closely related: validity (success) is intrinsically tied to identifiability. Count-as norms, unlike cooking recipes, tell us how to make contracts *and* how to spot them.

What does this *not* tell us? It does not tell us, first, *what exactly* the successful result is. The result is referred to (a purchase, a question), but not explained. Even when the legal power-conferring norm specifies the legal regime of a contract, it does not philosophically explain what contracting is, let alone what it is to exercise normative powers. Second, and by the same token, a count-as norm does not tell us *how exactly* the result is brought about. It tells us what we need to do to bring it about – but that is, of course, only the beginning of the full story about how it is possible that we can do things like changing normative positions simply by manifesting our willingness to do so.

⁷⁵ Chapters 5-6 address these issues in connection with exercises of legal powers.

⁷⁶ Proofs of legal transactions (4.3.1.1) allow us to spot that a transaction has been made without necessarily knowing how ones goes about making it; but that identification is derivative.

In sum: the logical structure of a count-as norm connects, as it were, the two extremes of a black box (**Fig. 3**). At one extreme is *how* to bring about the result, and at the other extreme is the identification *that* the result has been brought about. The nature of the result (*‘what exactly’*), and the exact way it is brought about (*‘how exactly’*), are – as a matter of logic – a black box of which we know little more than the name (purchase, question). The *‘what exactly’* and the *‘how exactly’* are bracketed, by-passed, perhaps assumed. We ordinarily need not know the answers, nor indeed ask the questions, in order to operate in the realms of normative powers or communication. It would impair our operation if we thought too much about it. The main function of the notion ‘legal validity’ is precisely to make such bracketing possible.

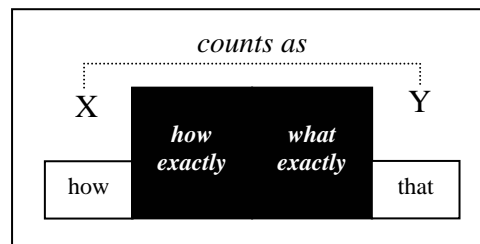


Fig. 3: The bracketed ‘black box’

A count-as norm guides our conduct by tells us just what we need to know to successfully operate in the relevant realm. Not more, and not less. One can successfully enact, purchase or vote without grasping every detail about such operations. All one needs to know is (i) what roughly the operations consist in, (ii) how to do them oneself and (iii) how to spot them. Each variable of the formula ‘X counts as Y’ corresponds to one of these three legs. The previous section dealt with (ii), that is, with the utterance ‘X’. The next section concerns (i), that is, the valid result ‘Y’. And (iii) is the connection between the two, that is, how to identify that the result has been validly brought about. This is precisely the logical significance of ‘count as’. As a matter of logic, X *counts as* Y means X *can be identified as* Y. More explicitly, it means that the agent *can be identified as reflexively intending and thereby succeeding in bringing about* the result.

I should warn about two frequent mistakes regarding the logical import of ‘count as’. First, ‘count as’ is not a shorthand that can be unpacked in obligation-imposing terms, for example ‘X is to be identified as Y’ or ‘X is to be treated as Y’. The normativity of a count-as norm consists in its creating the *possibility* that X be identified as Y. The count-as norm is silent as to whether we ought or ought not to seize this possibility. That is a role for mandatory norms. Following the rules of English in your ordinary dealings may be a duty of good citizenship, even a requirement for our own well-being, but none of these prescriptions is contained in the count-as norm establishing that ‘bird’ counts as ‘bird’. When I make a valid contract, I thereby change other people’s legal positions and I can hold them to duties they did not previously have. But these duties stem from the (created or altered) mandatory norms now applying to them; the power-conferring norm only tells them that *this* and not *that* is their legal duty. The power-conferring norm provides you the means to change or identify legal positions, not the reason to do it. It tells you how, other norms tell you whether. Call it a normative division of labour. The second mistake comes from the opposite end. If ‘count as’ is not mandatory, the argument goes, then it is not a norm: it just means ‘X is Y’. But that overlooks the essential difference between ‘Hesperus is Phosphorus’ and ‘signing this form is a valid contract’. The code *creates* the possibility that ‘X *can* be identified as Y’ (that it is identifiable as

Y). In the absence of the code, X would not *be* Y. Count-as norms make a difference that cooking recipes will never make.

So the logical import of ‘count as’ is thin but important. Crucially, it captures the logical distinctness of acts governed by count-as norms vis-à-vis other intentional acts that produce normative changes⁷⁷. While both ‘purchasing’ and ‘committing theft’ are legal labels that invoke normative configurations, and while there is a superficial sense in which the respective agents’ intentions are ‘presumptive’ as a matter of law (we may well be bound by what *appeared* to be our intentions), the act of deliberately taking alien property is not a meaning-act: one does not steal by saying ‘I hereby steal’, but by a very different behaviour. Similarly, when one changes residence to avoid tax one is not performing a meaning-act: the tax liability is not reduced as a result of one signalling one’s intention that it be thus reduced; it is reduced as a result of one’s moving house. We have now explained the logical counterpart of Raz’s distinction between duties and powers in terms of their different social function (Chapter 3). It is true that, in the eyes of the law, it is not desirable that individuals change residence for tax reduction⁷⁸, whereas it is desirable that they arrange the distribution of their property after their death. It is true, but it does not yet explain by what mechanisms the law acts upon these judgements, i.e. how it guides conduct differently in each case. The missing explanation is provided when count-as norms are logically distinguished from mandatory norms.

4.3.3 Analysis of ‘Y’

‘Y’ means, basically, ‘valid’ (meaningful).

‘X’ is an intentional act, but one of a very special kind. It has *meaning*. Unlike the intentional act of swimming, the intentional act of nodding counts as something beyond itself. What does a meaning-act count *as*?

A count-as norm does not provide anything remotely resembling a full answer. *What exactly* is brought about when a meaning-act is performed is left opaque by the code that governs it. The code chiefly concerns *how* to do it and how to spot *that* it has been done (**Fig. 3**). Inevitably, though, the code must at least *refer* to the ‘thing’ to be done and to be spotted – or the norm would not be intelligible. Legal provisions tend to do more than just referring: they provide a sketch of what it is, if scattered across various articles of a statute or judicial decisions. The more one knows about the law, the more one can fill placeholder words like ‘lease’ or ‘testament’ with details about the legal regime they encapsulate. The law is, of course, filled with placeholder words; but here we are only concerned with those that name normative changes brought about by exercising legal powers. Some things that are true of them are true of all placeholder words, of all legal labels. They simplify legal discourse by providing shorthand for complex internal relations between norms; a point stressed in Alf Ross’ ‘Tû-Tû’⁷⁹. But placeholder words

⁷⁷ Sometimes meaning-acts produce normative changes in ways not governed by power-conferring norms, e.g. defamation (criminal liability for an offensive utterance) or de facto representation (becoming legal representative after repeated contracting without powers). And, conversely, normative changes that are typically governed by power-conferring norms may be produced by other acts or events, e.g. ‘common-law’ marriage or acquisition of citizenship by birth.

⁷⁸ That it is not desirable does not entail that it is illegitimate. Legal systems offer plenty of opportunities for anyone to legitimately ‘adjust’ their actions to the preannounced regime, and good lawyers are trained in seizing such opportunities – e.g., interrupting a prescription, preventing the loss of an easement, avoiding tax. But none of them are meaning-acts.

⁷⁹ Ross 1957.

that name results of exercise of normative powers have one peculiar feature, one that has a linguistic reflection despite going well beyond language. They all are (can be) accompanied by the word ‘valid’.

‘Validity’ is the master-placeholder. All successful exercises of legal powers are legally valid, and all legally valid acts result from successful exercises of legal powers. No matter how different the normative changes involved, the acts all share this one predicate. We can predicate ‘validity’ of more or less specific act-descriptions. An agreement to cede the use of equipment in exchange for money may be referred to, interchangeably albeit with decreasing specificity, as a ‘valid equipment lease’, a ‘valid lease’ or a ‘valid contract’. ‘Valid equipment lease’ is not very specific either, but will be specific *enough* in a number of contexts. Part of the point of placeholder words is to cut the degree of specificity to a manageable size. This relates to the tendency of valid ‘objects’ to break loose from their original acts (4.3.1.1 above): it is often more expedient to speak of ‘valid contract’ or ‘valid enactment’ than of ‘valid contracting’ or ‘valid enacting’. Valid entities circulate relatively independently of their creators and the circumstances of their creation. What renders this circulation possible, the common currency as it were, is the master-placeholder word ‘validity’. It can be placeholder of placeholders – sometimes we simply say that an act or its result or product ‘is valid’.

Things are equivalent in communication. We all have the *concept* of a valid, successful communicative act, although we rarely label it. We can identify successful utterances without fully grasping their meaning, as every literature student knows. Although ‘validity’-talk is largely absent from this realm, we know that some combinations of traces are (valid) English sentences and that others aren’t. When learning a foreign language, we may recognise a word as valid – as a word *of that language* – but have to look up its meaning in the dictionary. The legal equivalent of looking up an expression in the dictionary is reading through a newly passed statute, or checking the small print on your movie ticket. We know that the statute or contract has changed normative positions, but not which. In communication, as in law, we can identify things as valid without knowing what exactly they consist in.

In sum, the variable ‘Y’ is a minimal expression of the successful result of the meaning-act. It indicates *that* the result has been successfully brought about. The result itself is never fully articulated (*what exactly, how exactly*). It is *referred to*, with more or less specificity. At its most minimal, the reference may consist of the word ‘valid’ alone. Thus ‘validity’ functions as a ‘shell’, and its opacity allows it to circulate widely and so make possible complex social phenomena like law. To this function I now turn.

* * *

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