

## Legal Positivism and Originalist Interpretation

The topic I have been assigned for this keynote address is the relationship between legal positivism and originalist theories of interpretation. Fortunately for me, there is indeed a relationship between these two things, and a strong one at that. Or so I shall contend.

My plan is as follows: I shall first give an account of legal positivism. That account will be brief, no more than a sketch, but hopefully not a caricature. But it will be sufficient for demonstrating the relationship between legal positivism and originalist interpretation.

After my brief portrayal of legal positivism, I shall turn my attention to originalist interpretation. I shall show why legal positivism supports originalism. And I shall conclude by discussing various objections to originalism, objections that nevertheless can be successfully parried.

### I. Legal Positivism

Legal positivism is a family of theories about the nature of law. If I were to characterize the common element in these theories, the element that makes them all legal positivist, it would be that all regard law as at least in part a human artefact. Indeed, it is because law is at least in part a human artefact that provides support for the positivists' claim that a norm can be law even if it is morally infelicitous. For because human beings are fallible "crooked timber," the norms they construct, even if with the best intentions, will deviate from what morality would dictate.

Now there are many versions of legal positivism on offer. There is John Austin's version: law consists of the commands of the sovereign, he, she, or they who are habitually obeyed.<sup>1</sup> There is Hans Kelsen's version: law is the set of norms instructing officials when to apply sanctions, norms that are rendered valid by an assumed "grundnorm."<sup>2</sup> There is H.L.A. Hart's version: law is the set of norms generally obeyed and rendered valid by the rule of recognition, a master norm accepted by officials as obligatory.<sup>3</sup> There is Joseph Raz's version: law is the set of norms that are generally obeyed and that are the product of authorities, those whose determination of our obligations purport to be preemptive of the reasons on which they are based.<sup>4</sup> And there is Scott Shapiro's version: law is the set of norms that represent the plans

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<sup>1</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

<sup>2</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961).

<sup>3</sup> H.L.A. HART, *THE CONCEPT OF LAW* (1961).

<sup>4</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979).

of those who have the authority to plan for us and settle what we are obligated to do.<sup>5</sup> And these are not the only versions of legal positivism in the literature.

Moreover, these versions of legal positivism fall into two warring camps. Some versions—Raz’s and Shapiro’s, for example—are in the camp of exclusive legal positivism. Those in that camp believe that law consists entirely of social facts—what some human beings did—and in no part of moral considerations. To the extent that a legal norm purports to incorporate moral considerations, the latter are not part of the law. They are like references in the law to foreign law, or to mathematics, or to some other set of norms. The norms referenced are not constitutive of the law but are external to it.

The other warring camp, the inclusive legal positivists, is probably the more numerous one among legal philosophers today. The inclusive legal positivists believe that moral norms can be at least among the determinants of the law and thus that social facts need not be the only determinants of law.

Finally, there are those like me who believe the division between exclusive and inclusive legal positivism to be merely terminological and without theoretical significance.<sup>6</sup> What is significant is that all legal positivists regard law as necessarily a human artefact, at least in part. Legal norms are posited by human beings, those with the authority to do so. And therein lies the connection between legal positivism as an account of the nature of law and originalism as an account of the interpretation of legal norms. And it is to originalism that I now turn.

## II. Originalism and Legal Positivism: The Basic Connection

If law is a human artefact, and if legal norms are posited by those persons with the authority to do so, as legal positivism would have it, then it follows that the job of those who must interpret the texts promulgated by the authorities—texts meant to convey the norms the authorities have chosen—is to discover just what norms those texts convey. And it follows that the interpreters’ job is to seek the authorially-intended meanings of the legal texts. For the authorially-intended meanings just are the norms chosen by the authorities, those who are authorized to choose the governing norms. And seeking authorially-intended meanings of texts is what originalism is.

So originalism is nothing more than the corollary of the legal positivist’s claim that law consists of norms chosen by human authorities. And those norms are the uptake the authorities intend in their audience when they promulgate those norms in texts, whether in writing, orally, through semaphore, or through smoke signals. Originalism and legal positivism are thus a package deal.

## III. Two Versions of Originalism?

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<sup>5</sup> SCOTT J. SHAPIRO, *LEGALITY* (2011).

<sup>6</sup> See Larry Alexander, “Was Dworkin an Originalist?,” in *THE LEGACY OF RONALD DWORKIN* (W. Waluchow and S. Sciaraffa eds., forthcoming).

I have identified originalism with seeking the authorially-intended meanings of legal texts. But haven't I neglected what is currently probably the most popular version of originalism, namely, that which identifies it with the search for the original public meaning of legal texts?<sup>7</sup> The latter view is originalist insofar as it claims that the public meaning of legal texts is fixed at the time those texts are promulgated—what Larry Solum, a proponent of the original public meaning view, calls the “fixation thesis.”<sup>8</sup>

The original public meaning view of originalism asks the interpreter of legal texts to seek the meaning that a reasonable member of the public at the time of the text's promulgation would have given the text. The interpreter is not to seek the authorially-intended meaning. There are two basic rationales the proponents of this version of originalism give for preferring it to the authorially-intended meaning version of originalism. One rationale is that the original public meaning view avoids the problem of discovering that a law means something other than what most people think it means. The other rationale is that the original public meaning view avoids the aggregation problem, the problem posed by legal texts whose authors, who are multiple, have different intended meanings.

But original public meaning does not avoid either of those problems. The reasonable person, who is the artificial touchstone of original public meaning interpretation, may not come up with a single unique interpretation. Every construction of this fictitious person, attributing to him or her different degrees of knowledge of the meaning the actual authors of the legal texts intended, will produce different interpretations. Two reasonable contemporaries, each possessed of different information, may interpret the same legal text differently. And each will presumably be seeking the authorially-intended meaning of that text. (They wouldn't be seeking their own meaning.) But if that is the case, why not seek the authorially-intended meaning rather than what some fictitious persons seeking that meaning would have concluded it was, especially if such persons, differently situated, would have come up with different meanings? And even if some people would have been surprised by that meaning in such a way as to make it unfair to hold them to it, the unfairness can be handled by methods that do not require denying that the norm truly means what its authors intended it to mean.<sup>9</sup>

With respect to the aggregation problem, which is a real problem, original public meaning versions of originalism are impotent. The reasonable person, who again is the touchstone of original public meaning, will be seeking the authorially-intended meaning but will also be aware of the aggregation problem; and if the aggregation problem sinks authorially-intended meaning originalism, it will also sink original public meaning originalism.

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<sup>7</sup> See, e.g., Lawrence B. Solum, “What is Originalism? The Evolution of Contemporary Originalist Theory,” in *THE CHALLENGE OF ORIGINALISM* (G. Huscroft and B.W. Miller eds., 2011) 12-41, 22-23.

<sup>8</sup> *Id.* at 33.

<sup>9</sup> See, e.g., Larry Alexander, “Originalism, the Why and the What,” 82 *FORDHAM L. REV.* 539, 541-42 (2013); Larry Alexander, “Simple-Minded Originalism,” in *THE CHALLENGE OF ORIGINALISM*, *supra* note 7, 87-98, at 90-91.

Thus far, then, the problems of *recondite meaning* and *aggregation* attributed to *authorially-intended meaning originalism* are not avoided by but are inherited by *original public meaning originalism*. But there is one final problem with *original public meaning originalism*, a problem that does not plague *authorially-intended meaning originalism*. That is the problem of *mindless law-making*. According to *original public meaning originalism*, the law that authorities intend to make may not be the law they end up making. That is because, if *original public meaning originalism* is to distinguish itself from *authorially-intended meaning originalism*, the laws that the *original public meaning* folks will claim to have been promulgated can theoretically differ from the laws the authorities intended to promulgate. Laws will be human creations, but they will not be laws any humans intended to create. They will be *mindless creations*. And any theory of legal interpretation that contemplates *mindless, accidental law creation* is a theory that has a serious burden to overcome. If such a theory is to succeed, it must show that the number of mistakes it produces—mistakes defined as the divergence between the laws actually intended and the laws the interpretive theory produces—are fewer than the mistakes produced by directly seeking the *authorially-intended laws*. That *original public meaning theories* can meet this burden cannot be ruled out a priori. Nonetheless, I remain doubtful that *original public meaning theories* can succeed. Thus, from here on the version of *originalism* that I claim to be a corollary of *legal positivism* is the *authorially-intended meaning version*.

#### IV. Of Rules, Standards, Principles, and Concepts

If, according to *legal positivists*, *legal norms* are human creations, just what kinds of *legal norms* can humans create? I contend that there are only two kinds: *rules* and *standards*. *Rules* are rather *determinate norms*, or at least they are norms that require no *moral* or other *practical reasoning* to apply. (They may require *complex factual* or *mathematical reasoning*, however, so long as the required *epistemology* is not itself *controversial*.) In other words, whatever their differences in values, all can understand what the rule requires. A *stop sign* or a *numerical speed limit* is a good example of a rule.

*Standards*, on the other hand, are norms that do require *moral* or other *practical reason* to apply. As I sometimes put it, a *standard* is a norm that requires for its application that its audience do the right thing, *morally* or *prudentially*, within the constraints set by *rules*. (When the *standard* instructs its audience to consider only certain factors, that is tantamount to a *rule* instructing them to treat all other relevant factors as *cancelling each other out* and thus incapable of determining the outcome.) “*Drive reasonably*” and “*pay your fair share in taxes*” would be good examples of *standards*. People with different values would apply such *standards* differently.

So far, what I have said—that *legal norms* consist of *rules* and *standards*—is commonplace. Moreover, insofar as *interpretation* is concerned, *rules* require *interpretation* but *standards* require *practical reasoning*, not *interpretation*. What *interpretation* seeks are *authorially-intended meanings*, and the *deliverances* of *practical reasoning* are independent of

such meanings. Interpretation itself ends when the interpreter discovers that the authors intended to promulgate a standard.

Notice that I have limited legal norms to rules and standards. I have not mentioned legal principles, norms that are human creations but which have the dimension of weight. Rules either apply or do not apply. If the former, then their “weight,” at least within the legal system, is infinite. If the latter, their weight is zero. And standards may require consulting external values that have the dimension of weight; but those values and their weights are not themselves human creations.

Some legal theorists, however, believe there are distinctly legal principles, human creations that have weight that is neither infinite nor zero. Robert Alexy, for example, believes that legal principles, as I have described them, can be directly enacted.<sup>10</sup> Ronald Dworkin believes that legal principles are created indirectly. They are the most morally acceptable principles that “fit” with the legal rules and legal decisions.<sup>11</sup>

I have argued elsewhere that legal principles do not exist.<sup>12</sup> Principles with weight cannot be humanly created. Nor can they be created indirectly in the way Dworkin contends. Weight, which is the dimension that will govern whether or not the principle will determine the outcomes of an indefinite number of possible cases, cannot be created. Nor can a finite body of legal rules and decisions create such weight. Complex rules, with conditions and exceptions, can mimic weight, but they are but a series of on-off switches between infinite and zero. Moral principles with weights may exist, but legal principles do not.

Dworkin at times also claims that some legal norms contain words that refer to moral concepts, words such as “cruelty,” “equality,” and “freedom of speech.”<sup>13</sup> I claim, however, that unless morality itself contains joints that correspond to such words in legal norms, so that it is possible that such words have moral referents, then, contra Dworkin, those words must refer to their authors’ particular conceptions, the authors’ criteria for the words’ applications.<sup>14</sup> And note that one consequence of deeming such words to refer to principles in the moral ontological cupboard, aside from the worry whether morality has distinct principles that correspond with the words that are meant to refer to those principles, is that the final authority within the legal system, such as the Supreme Court, will have the final say over what morality really does require—at least within the legal system.<sup>15</sup> Only by the Court’s reversing itself, by constitutional

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<sup>10</sup> See Larry Alexander, “Legal Objectivity and the Illusion of Legal Principles,” in *INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY* (M. Klatt ed., 2012), 115-31.

<sup>11</sup> See RONALD DWORKIN, *LAW’S EMPIRE* (1986).

<sup>12</sup> See Larry Alexander, “The Objectivity of Morality, Rules, and Law: A Conceptual Map,” 65 *ALABAMA L. REV.* 501 (2013); Alexander, *supra* note 10; Larry Alexander and Kenneth Kress, “Against Legal Principles,” in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* (A. Marmor ed., 1995), 279-327.

<sup>13</sup> See Ronald Dworkin, “Comment,” in A. SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997), 115-27.

<sup>14</sup> See Larry Alexander and Frederick Schauer, “Law’s Limited Domain Confronts Morality’s Universal Empire,” 48 *WILLIAM & MARY L. REV.* 1579, 1599-1601 (2007).

<sup>15</sup> *Id.* at 1595-96.

amendment, or by revolution can the people escape from being ruled by moral principles that they do not believe exist or have a different shape and weight than what the Court has decreed.

Finally, I should say a word about morally freighted language in legal regimes, such as, for example, Canada's, that officially renounce originalism. The Canadian Supreme Court, for example, has denied that it should interpret the words of the Charter based on what those who adopted it may have meant by those words.<sup>16</sup> To repeat an earlier point, however, words are only words, and words in a particular language or idiolect, rather than mere marks or sounds, if they were produced by an author or authors intending to communicate something thereby to an audience. By disregarding authorially-intended meaning, the Canadian courts are essentially appropriating the marks on the page to author their preferred meanings—much as a kidnapper, who cuts out words and phrases from a magazine to fashion a ransom note, appropriates others' marks in order to convey his own meanings. And the Canadian courts are undoubtedly concerned that their meanings in their opinions be followed by those over whom they have authority rather than treated as the Canadian courts treat the words of the Charter's authors.

My conclusion then is that legal norms are either rules or standards. Standards are not norms that are interpreted. They call for the application of practical reason, not for deciphering linguistic expressions. Rules, on the other hand, are legal norms that must be interpreted. They are human creations that mean what their creators intended them to mean. Attributing any other meaning to them is to take the symbols employed by the authors and in a sense reauthor them and give them a new meaning. The authors' symbols—the marks or sounds (or flags or smoke)—may remain the same, but the “texts” those symbols create be different. And the relevant question will be who had the requisite authority to create the legal norms, the original authors or the persons who have proclaimed the original authors' symbols to mean something other than what they intended them to mean?

## V. Problems

I have now made the case for the relation between legal positivism—the view that law is a human creation—and originalism, the view that symbols mean what those employing them intend them to mean. The case is, I believe, relatively straightforward. Why then is it so often and vehemently resisted? In this section I shall take up a variety of problems that might affect originalism, some of which flag real concerns, but none of which is either fatal or shows the appeal of some opposing view.

### 1. The Kripkenstein Problem

I will be brief here. The so-called Kripkenstein problem refers to Sol Kripke's elaboration of a puzzle raised by Wittgenstein, namely, how can we know whether we are

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<sup>16</sup> See Larry Alexander, “Of Living Trees and Dead Hands: The Interpretation of Constitutions and Constitutional Rights,” 22 CANADIAN J. OF L. & JURISP. 227 (2009).

properly following a rule.<sup>17</sup> Kripke's elaboration uses the example of addition: how can someone who has never added two particular numbers—in Kripke's example, 67 and 58—know that the rule of addition has been “plus,” which would produce the answer 125, rather than “quus,” which would produce the answer, 125 up to now but now 5? Because the person has never added 67 and 58 before, what makes it the case that the rule of addition he has been following has been plus rather than quus? And as applied to interpretation, the problem would be, what makes it the case that at the time the author intends a meaning, that meaning properly extends to cases that were not present in his mind at the time he intended the meaning? If, for example, he intended to ban pets from restaurants, what makes it the case that “pets” refers to my pet German Shepherd, which the author knew nothing of, rather than to dogs other than my German Shepherd? After all, nothing in the finite contents of his mind at the time he authored the intended ban would seem to make it the case that it did or did not include my dog.

There is a vast literature on the Kripkenstein problem and its possible solutions.<sup>18</sup> What is important is that neither Wittgenstein, Kripke, nor their commentators are skeptics about rules and rule-following, whether they are the rules of mathematics or the rules we create through our intentions. We can be certain that we know how to add numbers we have never before added. And likewise, we can be certain about whether we did or did not intend to ban particular dogs in restaurants even if we did not know of or contemplate those particular dogs at the time we authored the ban. There will be occasions when we are not certain—more on that possibility in the next section—but in general we will not be plagued by Kripkenstein doubts. In short, there is no reason to doubt the existence of intended meanings that are beyond the particular contents of the mind of the author of those meanings at the time of authorship.

## 2. The Infelicitous Result Problem

Suppose the authorially-intended meaning of a legal rule leads to what interpreter believes are infelicitous results. Indeed, suppose the interpreter believes that the authority or authorities who promulgated the legal rule would themselves regard its results as infelicitous. Should that lead the interpreter to believe that the intended meaning of the rule is other than it appears to be? In general, the answer is “no.”

The relation between the authorially-intended meaning and infelicitous results can take four forms. First, the authors might say, we agree our rule leads to these infelicitous results, and we regret intending the meaning that leads to those results. We simply made a mistake and authored a bad legal norm. This problem is the banal problem of bad law, a problem legal positivism surely contemplates and in a sense embraces.

Second, the authors might say, yes, these results are infelicitous, but we knew our rule, like all rules, would be over and under-inclusive and that therefore would lead to infelicitous results in some cases. But we still believe that having a rule rather than a standard is on balance

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<sup>17</sup> See LARRY ALEXANDER AND EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* (2008), 160-65; LARRY ALEXANDER AND EMILY SHERWIN, *THE RULE OF RULES* (2001), 112-14.

<sup>18</sup> See, e.g., the authorities cited in *DEMISTIFYING LEGAL REASONING*, *supra* note 17, at 161 n. 69.

preferable despite occasional infelicitous results, such as those here. This problem is the problem of rules, a problem that is well known.<sup>19</sup> But it is not a problem that undermines the proposition that rules can be on balance beneficial, much less undermines the possibility of their existence.

Third, the authors might say, these results are so terrible that it is absurd to assume that our intended meaning produces them.<sup>20</sup> If we had said “no vehicles in the park,” would anyone really assume we meant to exclude emergency vehicles, such as ambulances, even if we made no specific exception for them? Or if we had said “no cell phone use in the library,” would anyone really assume we meant the ban to cover reports of a violent crime or a fire, even if we made no specific exceptions for such uses? Our intended meanings often extend beyond and sometimes fall short of what we literally say.<sup>21</sup> This problem is merely a problem endemic to interpreting language use.

Fourth, there will be some cases where the author will say, I do not know whether my intended meaning covers this case, whether or not the result it would produce is infelicitous.<sup>22</sup> In other words, I am not sure what I intended with respect to this kind of case. Once again, this problem is one endemic to interpreting language use.

### 3. The Aggregation Problem

This problem is the one most often raised against legal interpretation based on authorially-intended meanings. For many legal norms are the product of multi-member bodies—legislatures, constitutional conventions, panels of judges or administrators, and so forth. And if one denies the existence of group minds, then the norms those bodies promulgate have many authors, not just one. And how do we determine the authorially-intended meaning of a text that has several authors?

One answer, the one Richard Kay and I favor, is to look for a shared intended meaning, a meaning intended by at least the number of legislators required to enact the law.<sup>23</sup> In many instances, a shared intended meaning will exist. When my wife and I created a trust document to deal with our assets and their distribution, the meanings we each intended to be expressed by that document were, I believe, the same meanings. They were shared intended meanings. So, too, I believe, are the intended meanings expressed in the academic rules enacted by my faculty. And if just married couples and law faculties can have shared intended meanings, so too can legislatures, panels of judges, and other multi-member legal authorities.

On the other hand, if there is no intended-meaning shared by the number of legislators required to enact legal norms, then the texts they promulgate are, for purposes of expressing

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<sup>19</sup> See ALEXANDER AND SHERWIN, *THE RULE OF RULES*, *supra* note 17, at ch. 4.

<sup>20</sup> *Id.* at 249 n. 63; ALEXANDER AND SHERWIN, *DEMISTIFYING LEGAL REASONING*, *supra* note 17, at 168-70.

<sup>21</sup> See RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012), ch. 7.

<sup>22</sup> See ALEXANDER AND SHERWIN, *THE RULE OF RULES*, *supra* note 17, at 118.

<sup>23</sup> See ALEXANDER AND SHERWIN, *DEMISTIFYING LEGAL REASONING*, *supra* note 17, at 171-73, 182-85.



valid legal norms, meaningless. They are gibberish.<sup>24</sup> No norm was enacted and expressed through them.

Now some originalists wish to avoid this conclusion at all costs. That explains the attraction of the original public meaning version, as I said when I discussed that version in section III. There, I expressed my doubts that original public meaning originalism, which relies on a construct, the reasonable member of the public at the time of the enactment, who in turn is seeking the original authorially-intended meaning, could improve upon authorially-intended meaning originalism. Some proponents of original public meaning originalism believe that it can avoid the aggregation problem of authorially-intended meaning originalism. As I said in section III., I do not believe that it can. So let me give an example of a failure of shared meaning that cannot be avoided by original public meaning.

Suppose a three-person legislature enacts a rule banning X by a two to one vote. X is ambiguous and can mean either A or B, which are exclusive of each other. Legislator 1 intends by X to mean A and would have voted against the rule if X meant B. Legislator 2 intends by X to mean B and would have voted against the rule if X had meant A. Legislator 3 voted against the rule and would have voted against it regardless of whether X meant A or meant B.

Now suppose our construct, the reasonable person at the time of the enactment, knows this. What meaning would he or she think X means? Of course, if we stipulate that the reasonable person knows X can mean A but does not know X can also mean B—or vice versa—then the reasonable person will believe X means A (or B). But such a stipulation is completely arbitrary. And furthermore, as I said in section III., proceeding that way produces a law—in this case, a ban on A—that was not intended by the body with the authority to make law. It was produced by only one member of a three member legislature that is authorized to make law only by a majority vote. And although a majority voted in favor of banning X, a majority did not vote in favor of banning A. The latter ban was produce by an arbitrary stipulation. It is an example mindless law creation.

Now some critics of the authorially-intended meaning version of originalism and proponents of the original public meaning version are not put off by this degree of mindlessness. They believe that some background rules of interpretation can produce law in cases in which the authorially-intended meaning approach produces gibberish.<sup>25</sup> Such rules might be instruction such as “when a word has multiple meanings, choose the first meaning of it listed in such-and-such dictionary.” If these rules can handle all the cases of failed aggregation of authorially-intended meaning, then even though the laws they produce will be partially the result of a mindless process, such laws may still be preferable to having legislators fail to enact laws and instead enact gibberish. For if the legislators know that these rules will operate on their texts, presumably they will take care to see that the rules produce the meanings that they intend. There will be more cases of mindful law than would be enacted without those rules, when the

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<sup>24</sup> Id.

<sup>25</sup> See, e.g., ALEXANDER AND SHERWIN, DEMYSTIFYING LEGAL REASONING, *supra* note 17, at 173-85.

alternative to mindful law is gibberish. Such background rules can, it is argued, bring a good deal of convergence of authorially-intended meanings and meanings the background rules produce. They cannot eliminate the gap between the mindful and the mindless, but they can narrow it.

Ultimately, whether reliance on background rules will produce enough convergence between mindful law creation and mindless law creation is, like all rule-consequentialist prescriptions, an empirical matter, as is whether the mindless laws that remain are better than or worse than sticking solely with the search for authorially-intended meanings and the possibility of finding gibberish. It also depends on there being a determinate set of background rules, moreover background rules of which legislators are aware and understand. I cannot say these things are impossible, although I admit to being skeptical.

## VI. Conclusion

In concluding, I can be brief. Legal positivism views law as a human creation. It is created by those who have the authority to create it. Originalism has it that texts are only texts and not marks, sounds, smoke, flags, or some other mute item when those marks, sounds, or other items are used by an author or authors to convey the authors' intended meaning to an audience. When the authors are those with the authority to create laws, and the authors are intending by their texts to create laws and communicate their content to the relevant audience, then it seems natural to assume that the laws mean what their authors intended them to mean. Legal positivism and originalism go together and cannot be pried apart.