The Fridge-Door Statute

Roderick A. Macdonald*

The archetypical statute, with its roots in the nineteenth century, remains the standard form of legislation, even though many parliamentary outputs today cannot be reconciled with its formal or functional constraints. The author argues that the plurality of audiences for legislation today makes the universalizing aspirations of the Classical statute problematic. An entirely new form of statute is needed.

The author begins with a critique of the assumptions behind the nineteenth-century statute, using Lon Fuller's principles of good legislative design as a starting point. Many of these assumptions are no longer reflected in legislative practice: not all law is explicitly enacted, or enacted by a legislature, or meant to function as commands, or promulgated in the same form or style, or easily understood by the public at large.

The changes in the needs and assumptions of the audience for legislation will lead to a new kind of statute—a statute that more resembles the varied normative messages posted to the family fridge door than it does the Classical nineteenth-century statute. The fridge-door statute will recognize that words are not the whole normative message: different forms of writing and different media will contribute to a shift from the semantic to the semiotic, as how the message is received becomes more important than the form of the message itself. Moreover, the fridge-door statute will embrace the interactive and negotiated character of legislation. Rather than positing unchanging rules, it will welcome experimentation and revision, and set out standards of aspiration, rather than minimum duties. Devising new statutory forms that acknowledge and exploit the potential of fridge-door normativity is a key challenge for legislative drafters today.

Né au dix-neuvième siècle, l'archétype du statut demeure aujourd'hui la forme courante de la législation bien que plusieurs publications parlementaires ne puissent se réconcilier avec ses contraintes officielle et fonctionnelle. L'auteur soutient que la pluralité du public auquel la loi est destinée rend problématiques les aspirations universalisantes du statut de l'époque classique. Une nouvelle forme de statut est donc nécessaire.

L'auteur commence par une critique des postulats du dix-neuvième siècle en posant comme prémisses de départ les principes de bonne conception législative de Lon Fuller. Or, la pratique législative ne reflète plus nombre de ces postulats. En effet, ce ne sont pas toutes les lois qui sont adoptées expressément ou par le législateur, destinées à servir de directives, promulguées dans la même forme ou le même style, ou facilement comprises par le public en général.

Les changements dans les besoins et les conjectures du public auquel la loi est destinée entraîneront la création d'un nouveau genre de statut ressemblant aux divers messages normatifs affichés sur la porte du frigo familial qu'à la formule du statut classique du dix-neuvième siècle. Lo statut porte de frigo reconnaîtra que les mots ne constituent pas le message normatif dans son entier: d'autres formes d'écrits et différents médias contribueront au transfert de la sémantique à la sémiotique, de telle sorte que la manière dont le message est reçue devient plus importante que la forme même du message. De plus, le statut porte de frigo comprendra la caractéristique interactive et négociée de la législation; mais au lieu de poser des règles immuables, il accueillera l'expérimentation et la révision, et établira des standards d'aspiration plutôt que des devoirs minimums. Le principal défi que se doivent de relever les auteurs de la législation aujourd'hui consiste à concevoir des formes de statut reconnaissant et exploitant le potentiel que représente la normativité de la porte du frigo.

* F.R. Scott Professor of Constitutional and Public Law, Faculty of Law and Institute of Comparative Law, McGill University. A first version of this paper was presented in Ottawa, Ontario on 17 November 2000 at the *CIAJ 2000 Conference: Legislative Drafting in the Global Village*. I am most grateful to Jean-Guy Belley, H.P. Glenn, Richard Janda, Daniel Jutras, Nicholas Kasirer, and Ruth Sullivan for their comments on various earlier drafts. I also wish to thank my former doctoral student Desmond Manderson for his inspiration. The usual disclaimer applies.

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I. In the Beginning Was the Word

For many citizens, the archetype of law is to be found in legislation, and in a particular kind of legislation at that—the statute. Five features epitomize the lay conception of statutes: (1) explicit enactment, (2) by a supreme rule-making body such as a parliament, (3) of relatively straightforward commands, (4) in a standardized style and form, (5) using the everyday vocabulary and syntax of a natural language (in Canada, for example, English and French). In the public mind, the *Criminal Code*[1] is thus the standard instance of the statute, and the whole of the law is simply a compendium of statutes like the *Criminal Code*.[2]

Jurists know, of course, that these popular understandings are radically open to question. The reasons are many. The place of legislation in the legal order is more contingent than the popular view admits. The statute is only one type of legislation. The style and form of statutes are quite varied. Consider the extent to which each of the five presumed characteristics of statutes are attenuated in contemporary experience.

Not all law, and not even all written law, is explicitly enacted. The conscious and deliberate laying down of legislative rules to govern behaviour is only one way in which official law is made manifest. Important legal rules also emerge in the decisions of courts or administrative tribunals; others result simply from settled patterns of interaction by which people reciprocally adjust their behaviour to perceived needs and expectations; still others are derived from religion, morality, and other ethical systems.[3]

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[1] R.S.C. 1985, c. C-46.

[2] Although most citizens have neither read nor even seen the Revised Statutes of Canada (or the Revised Statutes of the province in which they live), these collections apparently respond to their view of the corpus of Canadian law. There is some evidence that, among the general public in Quebec, the civil code has a higher profile as the deposit of written law than the Revised Statutes of Quebec. See the discussion in J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at No. 31 and accompanying footnotes.

[3] The idea expressed in this paragraph is normally treated in jurisprudence textbooks under the heading "sources of law". For a classical presentation, see P.J. Fitzgerald, ed., *Salmond on Jurisprudence*, 12th ed. (London: Sweet & Maxwell, 1966) at 109-212, which identifies legislation, precedent, and custom as principal sources of law in the common law tradition. As for the civil law tradition, see J. Ghestin & G. Goubeaux with M. Fabre-Magnan, *Traité de droit civil: introduction générale*, 4th ed. (Paris: Librairie générale de droit et de jurisprudence, 1994) at Nos. 236-572, identifying *la loi* (legislation), *la jurisprudence* (precedent), and *la coutume* (custom) as sources of law.

An alternative exposition that focuses on the normative character of these sources rather than on their pedigree and that presents them in an "ideal-type" taxonomy ranged in a four-cell matrix is set out in R.A. Macdonald, "On the Administration of Statutes" (1987) 12 Quecn's L.J. 488 at 504-09. The difference between these two approaches and its significance for the present discussion is developed *infra*, text aecompanying note 65.

In addition, many legislative instruments are not enacted by a supreme rule-making body. Besides parliamentary expressions of legislative will, citizens routinely confront reams of legal rules produced by inferior bodies like municipal councils, schools boards, and administrative agencies. More than this, legislative rules can be promulgated without the intervention of the State: examples include the by-laws and regulations of social clubs, cottage proprietors' associations, trade unions, universities, and corporations. Still other regimes of rules—codes of conduct, technical standards, apartment building regulations, and so on—are incorporated into documents like membership application forms, contracts of sale, collective agreements, and leases.[4]

Only some statutes are meant to function as a command, or as an instrument of social control. While every legal rule is, in one dimension, a limitation on freedom, the bulk of the law today is meant to facilitate human interaction through rules that coordinate behaviour. This is true not just of "power-conferring" rules governing the validity of private mediating documents and deeds such as wills, trusts, and contracts, but also of the everyday "duty-imposing" rules usually associated with regulatory statutes and the criminal law. To view legislation only as a command is analogous to viewing the rules of grammar and the definitions of words found in a dictionary as being primarily directed to constraining our ability to speak and write meaningfully.[5]

The form and style of statutes are impossibly varied. Some legislative texts, like the Ten Commandments, are a list of pretty simple prohibitions or injunctions: "Thou shalt not bear false witness against thy neighbour." Some, like thirteenth-century English statutes, are elaborate narrative texts that explain their purposes not only in lengthy preambles, but also in their various sections. Some, like the great nineteenth-century consolidating codes and statutes, are largely taxonomic: "Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely."[6] Some, like many late twentieth-century corporate, tax, and commercial law statutes, are quite detailed and technical. Some, like many consumer protection statutes, are little more than consolidations without an organizing concept, and resemble laundry lists of single instances. Some are no more than a legislative reversal

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[4] In *Anatomy of the Law* (New York: Frederick A. Praeger, 1968) at 43-84 [hereinafter Fuller, *Anatomy*], Lon Fuller elaborates a conception of legislation that refuses to draw a sharp distinction between the legislative rules enacted by the state and those resulting from other law-making activity. A good discussion of the implications of Fuller's refusal to limit the notion of legislation to the official product of Parliament or a legislature may be found in G.J. Postema, "Implicit Law" (1994) 13 L. & Phil. 361.

[5] Once again, Lon Fuller has offered a close analysis of these two dimensions of legal rules. See L.L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" [1975] BYU L. Rev. 89. For the context of Fuller's analysis, see K.I. Winston, "Legislators and Liberty" (1994) 13 L. & Phil. 389.

[6] Art. 983 C.C.L.C.

of a specific judicial decision. And some, like the declaratory enunciations one finds in a *National Flag of Canada Manufacturing Standards Act*[7] or a *National Anthem Act*,[8] are not directly normative at all.[9]

Finally, the notion so neatly expressed centuries ago by Gaius that legislation is "written custom" no longer captures the logic of the statute book. Written custom implies a textual law that is accessible to the average, reasonably literate person. Today, many regulatory statutes are cast in highly recondite language (sometimes complemented with mathematical equations, chemical formulae, diagrams, and genetic codes), directed to a highly specialized audience, and meant to be interpreted by a highly sophisticated judge. This is not all. Even statutes ostensibly directed to the public at large—marriage, divorce, and family legislation; home warranty acts; occupier's liability laws; landlord and tenant enactments—are beyond the ken of most citizens. While Parliament may think it is using canonical forms of words to speak to all Canadians in the manner that God spoke to all Israelites, the reality is otherwise. The contemporary statute, far from being the key by which citizens are enfranchised to know, to interpret, and to criticize law, has become the means by which they are excluded from debates about normative meaning in society.[10]

Despite professional acknowledgement that the enterprise of legislation is more complex than lay understandings appear to allow, it is not at all clear that contemporary law-making aspires in theory, or typically even manages in practice, to present this complexity in a manner apprehensible to citizens. In popular perception, the legal institution known as the statute systematically "disses"—disenchants, disempowers, disengages, and disrespects. Its general form, substance, vocabulary, syntax, manner of drafting, organization, and material appearance are indisputably arcane. Although the linguistics of legislation do not now line up with its presumed ontology, there is notwithstanding something mystical about the Word when it is deployed to frame *ex*

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[7] R.S.C. 1985, c. N-9.

[8] R.S.C. 1985, c. N-2.

[9] For a compelling historical review of how these different aesthetics shaped the form of legislation between the thirteenth and fourteenth centuries in England, see D. Manderson, "*Statuta* v. Acts: Interpretation, Music, and Early English Legislation" (1995) 7 Yale J. L. & Human. 317 [hereinafter Manderson, "*Statuta* v. Acts"]. See, on the general point, D. Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000) at 51-89 [hereinafter Manderson, *Songs without Music*].

[10] The reader will immediately perceive in this description of inaccessible statutes a counterpoint to Adam Smith's conception of legislation as empowering citizens to take control of law away from judges. See A. Smith, *Lectures on Jurisprudence*, ed. by R.L. Meek, D.D. Raphael & P.G. Stein (Oxford: Clarendon Press, 1978) at 312-15. An excellent contemporary account of the communicative properties of legislation is given in W.J. Witteveen, "Significant, Symbolic and Symphonic Laws: Communication through Legislation" in H. van Schooten, ed., *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Liverpool: Deborah Charles, 1999) 27.

ante legal rules. And that mystery sharply constrains how jurists conceive the forms and functions of the legislative endeavour today.[11]

The so-called nineteenth-century statute[12] and its compendious presentation, the nineteenth-century statute book (both of which really achieved their apotheosis only in the mid-twentieth century) were remarkable social, intellectual, political, and technical achievements. The conjuncture of Enlightenment rationalism, widespread literacy, the decline of status-based constraints on human action, the ideology of the secular state, and the emergence of an exchange economy dependent on recognizing the moral agency of citizens, made it possible to conceive of the enacted *ex ante* statute as a (if not the) dominant form of law.[13]

Take first the impact of rationalism. No longer was law—whether it be traditional customary law or new law given by a sovereign—to be seen only as the human rendition of divine will mediated through the "natural law". Despite Lord Mansfield's suggestive prodding about the common law working itself pure,[14] in the early nineteenth century customary norms arising in human interaction had not yet been conceptualized by jurists as a living sociological phenomenon; they remained, as in the myth of Blackstone's common law inheritance, beyond the reach of day-to-day practice-driven reformulation.[15] At the same time, the State emerged as a secular God. Parliamentarians saw that statutes could be deployed as more than just a once-off pragmatic corrective to a common law rule gone awry; they could also be constitutive—a novel and privileged form of world-making.

Standardized spellings, dictionaries, grammars, and syntaxes provided the technical capacity to marshal language consistently. The language form began to achieve a degree of referential precision previously associated only with musical notes, Eucli-

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[11] On the character of legislation as a normative type, see Winston, *supra* note 5; R.A. Macdonald, "Legislation and Governance" in W.J. Witteveen & W. van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 279 [hereinafter Macdonald, "Legislation and Governance"]; W.J. Witteveen, "Laws of Lawmaking" in Witteveen & van der Burg, *ibid.* 312.

[12] The epithet has become a convenient shorthand to describe the standard model of legislation in common law jurisdictions. For a brief exposition of the major technical features of the "nineteenth-century statute", see R. Sullivan, "Some Implications of Plain Language Drafting" (January 2000) [unpublished], especially Part 2, "The Meta-Legal Messages of R.S.C. 1985" [hereinafter Sullivan, "Implications"].

[13] The thought is not entirely new. For example, a number of commentators have reflected on how utilitarian theory galvanized a new consensus about the potential of legislation. Among them are, notably, G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) [hereinafter Postema, *Bentham*]; D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989).

[14] *Omychund* v. *Barker* (1744), 1 Atk. 21, 26 E.R. 15 at 23.

[15] See Postema, *Bentham*, *supra* note 13 at 33-34.

dian figures, and mathematics. Moreover, as popular education widened the cohort of those to whom texts might reasonably be addressed, it became possible to frame legal rights and obligations discretely and limitatively. Distinctions could be propounded between "law strictly so called" and other less precise and less obtrusive normative forms. No longer was the social order dependent on inculcating citizens with a generalized, and perhaps overdetermined, legal instinct flowing from "their station and its duties".

With the advent of theories proclaiming the democratic legitimacy of legislative assemblies, the statute acquired its own independent rationale as a way to apprehend, organize, and control the unruly social world unleashed by the Enlightenment. The great Benthamite codification project was not meant to achieve an *elegantia juris* for its own sake. It was a philosophic program to facilitate the transition to a political economy driven by utilitarian ethics. The vocation of legislation was to be the vehicle by which law could be rendered unto the people, thereby advancing human happiness and freedom.[16]

At the dawn of the twenty-first century, a somewhat different set of circumstances obtains. Consequently, the challenge for Parliament and for legislative drafters is to take the measure of the key social, intellectual, political, and technical forces now at work. With hindsight, the genesis of the nineteenth-century statute and the nineteenth-century statute book is not all that difficult to comprehend; with foresight, the ways in which contemporary contexts will shape both professional and lay understandings of legislation over the next few decades might be predicted. In raising the possibility of such predictions, however, there is no implication that law is only a dependent variable in human endeavour. Those who have witnessed the substantial power of the *Canadian Charter of Rights and Freedoms*[17] to shape both citizen vocabulary and governmental action would dissent from any such thought.

Nonetheless, because law does not exist in a socio-cultural vacuum, its institutions and processes will always bear the stamp of period and location. The early nineteenth-century moment has already been noted. At the outset of the twentieth century, all fields of human endeavour in the western tradition were buffeted by broadly similar currents and movements. American legal realists shared with practitioners of cubism, composers of atonal music, theorists of quantum mechanics, novelists, and poets a pervasive skepticism about the claims of formalist modernity. An explosion of instrumental and functionalist regulatory legislation from the 1930s through the 1960s was the result. Today, the literary and cultural perspectives of postmodernism and post-structuralism are mapped onto much legal analysis. Does this

[16] See generally *ibid.* at 425-34.

[17] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

suggest that the theory and practice of legislation should now abandon a Classical frame and consciously embrace a Romantic perspective?[18]

My aim in this article is to attempt an answer to that question. In doing so, I make one rather large, though quite speculative, claim. This is it. The flux that attends the manner of drafting statutes and materially presenting the statute book today need not be taken only as evidence that the legislative endeavour is moving from a Classical to a Romantic period. It may be, rather, that this flux is an indication of the emergence of an entirely new kind of statute (perhaps even an entirely new kind of legal normativity)—as conceptually distinct from statutes as they appear in contemporary consolidations, as statutes now are from customary and common law rules.[19]

To develop the argument, I elaborate two allegories. The first, evoking the assumptions and aspirations of the nineteenth-century statute book, is Lon Fuller's allegory of King Rex. The second, pointing to the challenges of the twenty-first-century legislative art, is an allegory of the "fridge-door statute book".

II. Inventing Legislative Classicism

In *The Morality of Law*, Lon Fuller famously asserted that "law is the enterprise of subjecting human conduct to the governance of rules."[20] While Fuller understood law to embrace a wide range of social ordering processes—from custom and contract, through mediation and adjudication, to voting and deliberate resort to chance[21]—in *The Morality of Law* he was especially concerned with legislation. He offered up an allegory of King Rex to illustrate eight different ways in which the process of explicit

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[18] The expressions "Classical" and "Romantic" are being used in their conventional senses. See, for a standard interpretation, K. Wheeler, *Romanticism, Pragmatism and Deconstruction* (Oxford: Blackwell, 1993). Elsewhere I have sought to show how these intellectual fashions have also influenced the modes and methods of law reform during the twentieth century. See R.A. Macdonald, "Recommissioning Law Reform" (1997) 35 Alta. L. Rev. 831 at 834-47.

[19] I recognize that this claim is essentially one of epistemology. For a more detailed exposition, see R.A. Macdonald, "Les *Vieilles Gardes*. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in J.-G. Belley, ed., *Le droit soluble: contributions québécoises à l'étude de l'internormativité* (Paris: Librairie générale de droit et de jurisprudence, 1996) 233 [hereinafter Macdonald, "*Vieilles Gardes*"]. Nevertheless, the claim in the text also rests on certain semiotic premises—premises that have been nicely explored by Bernard Jackson in "Legislation in the Semiotics of Law" in van Schooten, *supra* note 10, 5.

[20] See L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) at 106 [hereinafter Fuller, *Morality*].

[21] A full exposition of Fuller's conception of social ordering processes may be found in K.I. Winston, "Introduction" in K.I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, N.C.: Duke University Press, 1981) 11 and in L.L. Fuller, "The Role of Contract in the Ordering Processes of Society Generally" in Winston, *ibid.* 169.

law-making could fail. Fuller recast these failures as eight aspirational canons of what he styled the "internal morality of law"—canons that were meant to encapsulate the requirements for ensuring the integrity of enactments under the Rule of Law.[22]

Through this allegory of King Rex, Fuller was continuing a long speculative tradition about the ontology of legislation whose notable earlier participants included Isidore of Seville, Thomas Aquinas, Francis Bacon, and Montesquieu.[23] But he went further than his predecessors. Fuller saw legislation less as the formal outcome of an official institutional process (for example, the statute enacted by an assembly or congress) than as the substantive outcome of any social ordering process conducing to behaviour governed by *ex ante* rules.[24] That the parliamentary statute has come to be the conceptual model for, and principal form of, legislation over the past two centuries is, on this view, a happenstance tied more to contemporary theories of the political state than to anything inherent in the idea of legislation. Fuller believed that idolatry of the state generated an unfortunate confusion between statutes as instruments of managerial governance and statutes as genuine legislation, with the consequence that fiat rather than intendment has come to characterize law-making.[25]

There is another singularity of Fuller's perspective—a singularity he did not really appreciate (or even articulate) until his views were attacked by other theorists. In response to his critics, Fuller sought to show how presuppositions about the capacity of citizens to act as rational agents, about the reciprocity of lawgiver and law-subject, and about the substantive goals that could be effectively pursued through *ex ante* rules are built into the traditional conception of legislation. These presuppositions, he concluded, actually determine the logic of legislation as a normative endeavour.[26]

If human beings are rational agents, legislation should focus on setting down baselines for self-directed action, rather than announcing non-discretionary commands. The goal of legislation is to make it possible for human beings to pursue their own purposes within a framework of rules that allows their conduct to be apprehended and understood by others; legislative regimes should be as simple and as uni-

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[22] See generally Fuller, *Morality*, *supra* note 20 at 38-44.

[23] Fuller was not insensitive to this inheritance. See, acknowledging Aquinas, *ibid.* at 241-42. For a critical assessment of the contribution of each of the authors noted in the text, see Witteveen, *supra* note 11 at 325-34.

[24] I have attempted to expand upon Fuller's notion by distinguishing not two, but three different contemporary uses of the word "legislation". See Macdonald, "Legislation and Governance", *supra* note 11.

[25] See Fuller, *Morality*, *supra* note 20 at 38-46.

[26] See *ibid.* at 187-224.

versal as possible.[27] Of course, legislation need not be directed just to the structuring of interaction through the private law—to setting the conditions in which the ambitions of the law of contracts, torts, restitution, and liberalities such as gifts and wills may be effectively realized. Legislation may also be used to allocate status, property, and discretionary power. It may constrain substantive outcomes through rules of public policy (*ordre public et bonnes mœurs*). It may establish minimum or non-defeasible standards of performance in contracts. But it should be wary of mandating a presumed or implicit intent. In brief, legislation should aspire to maximize the capacity of human beings to choose how they wish to structure their interaction with each other.[28]

Closely allied with the idea of human beings as rational agents is the assumption that there is a necessary reciprocity between lawgiver and law-subject. A lawgiver normally has some purpose in mind when legislation is brought into force. At a minimum, this requires attention to how the target of the legislation is going to understand and react to its prescriptions.[29] Because enactments can never exhaustively state the conditions of their own application, any particular statute is, at best, a lawgiver's hypothesis of normativity. Legal rules frame questions for citizens, advocates, and courts to debate. Statutes must, consequently, be written so that people will easily recognize themselves as legitimate regulatory targets. The aspiration is to imagine, draft, and promulgate rules that will induce responsible, voluntary adherence by those to whom they are directed.[30]

That not all substantive goals can be effectively pursued through *ex ante* rules is the third presupposition of the traditional concept of legislation. Just as certain social tasks are not well-suited to adjudication, certain managerial and decision-making tasks—for example, the everyday allocation of praise by a parent or employer, and the actual decision of, say, tort or contract disputes—do not lend themselves to effective achievement through the legislative form.[31] A recognition of these substantive limits lies behind the legislative drafter's "manual of style" that controls the syntactical and material presentation of statutes—titles, marginal notes, numbering, paragraphing,

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[27] The implications of such an approach in one substantive field are nicely traced out by D. Stevens, "The Reform of the Law of Immovable Security in Quebec" in *Meredith Memorial Lectures 1989: Current Problems in Real Estate* (Cowansville, Qc.: Yvon Blais, 1990) 419 at 425-38.

[28] The thought is fully argued in G.J. Postema, "Coordination and Convention at the Foundations of Law" (1982) 11 J. Legal Stud. 165.

[29] Fuller himself attempted to develop this point using an allegorical tyrant in "Freedom as a Problem of Allocating Choice" (1968) 112 Proc. Am. Phil. Soc'y 101 at 105-06.

[30] The most complete exposition of this aspect of Fuller's ideas about legislation may be found in Winston, *supra* note 5.

[31] This does not mean, of course, that legislatures do not routinely attempt to use statutes to regulate certain situations or to achieve certain dispute-settlement purposes for which they are ill-suited. Fuller explored this phenomenon in "Irrigation and Tyranny" (1965) 17 Stan. L. Rev. 1021.

definitions, use of active voice, and so on. This metric enables the lawgiver to control the set of discursive assumptions that readers bring to the task of reading. In doing so, it ensures that judges and others do not read legislation the way they read novels, newspapers, subway posters, instructions for assembling pre-fabricated bookshelves, advertisements, poems, and recipe books. This, in turn, minimizes the chances that they will ascribe to legislation substantive goals that it cannot effectively achieve.[32]

From these assumptions, Fuller distilled eight "implicit laws of law-making": the generality of laws; the requirement of promulgation; the prospective application of legislation; its intelligibility; the avoidance of contradiction; the constraints of possibility; relative stability through time; and interpretive congruence. His goal was to resurrect and to restate the logic and central features of legislation as manifested in the early ambitions of the nineteenth-century statute book. This restatement would then provide a framework for evaluating the extent to which the theory and practices of contemporary law-making continued to reflect traditional aspirations.[33]

Fuller's first canon holds that a legislative process should aim to produce enactments that are actually rules, rather than face-to-face, single-instance, ad hoc orders. Legislation must be pitched at a sufficient level of *generality* that it is impersonal and categorical. While some contemporary parliamentary outputs—such as a law putting an end to a strike—may be directed to a single situation, these statutes are not legislation in the sense here intended. Nor are enactments framed as general rules but meant to apply to only one case. The generality of some legislation, a genuine codification for example, lies in its summary of existing practices, just like a judicial precedent is a summary and a restatement of past individual cases. But the aspiration to generality of an ordinary statute lies more in the impersonality of how it reconfigures an indeterminate future for all citizens within a polity.[34]

A second principle of law-making integrity is the necessity of *promulgation*. If citizens are meant to orient conduct by reference to new rules, they need to know what these rules are. In a democracy, laws are rarely secret, unpublished, or hidden,

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[32] The impact on judicial interpretation of legislative form and conventions for reading is discussed in R. Sullivan, "The Promise of Plain Language Drafting" (2001) 47 McGill L.J. 97 at 120-23 [hereinafter Sullivan, "Promise"]. For their impact in a bilingual and bijural context see R.A. Macdonald, "Legal Bilingualism" (1997) 42 McGill L.J. 119 [hereinafter Macdonald, "Bilingualism"].

[33] In the following discussion complementary themes from two of Fuller's books are woven together: the eight canons themselves, taken from Fuller, *Morality*, *supra* note 20 at 33-94, and the contrasting presuppositions of common law adjudication, taken from Fuller, *Anatomy*, *supra* note 4 at 89-108.

[34] A comprehensive historical treatment of the difference between general rules and specific directives, as worked out in connection with delegated legislation, may be found in C.K. Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law*, 3d ed. (London: Stevens & Sons, 1965) at 24-62.

but they can be passed in a manner that escapes the attention of the public. Examples include legislation passed quickly, statutes that have purposely misleading titles or that hide bizarre provisions within lengthy texts, and laws that are shell enactments where everything is stated in regulations or in masses of rules incorporated by reference. The temptation to use the legislative form as normative camouflage arises because an enactment need not offer any justifications for its contents. Unlike the common law, where the rule and the narrative reasons for the rule are usually intertwined, a statute rarely contains meaningful titular or preambular indications of its rationales.[35]

The idea of *non-retroactivity* constitutes a third canon of legislative morality. If the goal is to promote a community of law-abiding citizens who seek to coordinate their activities by reference to shared rules, these rules must be, for the most part, prospective. While retrospective statutes may occasionally be necessary to overcome a technical problem or to remedy an oversight by enlarging a benefit, where *ex post facto* legislation becomes habitual the necessary reciprocity of lawgiver and law-subject is compromised. Underlying this disinclination for retroactivity is the belief that the individual statute, if not the individual statutory rule, is the basic unit of normativity: most statutes contain their own definitions and their own scope of application clauses. By contrast with the backward-looking nature of common law interpretation, where the declaratory theory maintains the image of a complete pre-existing normative field, a statute usually seeks only to project itself forward in time. Statutes do not just draw out the interpretive implications of known legal principles or merely provide a new formulation of old norms—they typically present a new normative idea.[36]

A fourth dimension of the internal morality of law is captured by the principle of *intelligibility*. If statutes are so detailed, complex, and confusing that they cannot be understood except by professionals, they can hardly be said to provide baselines for self-directed human action. Legislation need only be transparently intelligible to its primary intended audience; statutes enacting industry standards may well be both technical and detailed. Where legislation is meant for citizens it carries an additional burden of intelligibility. It must also track the common morality of the population, so that its prescriptions may be easily transposed to the conduct of everyday affairs. A judicial decision, in continually reformulating the rule being applied and continually drawing on practices, experiences, and principles, also validates these complementary

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[35] Of course, some statutes are beginning to recover the historical approach to text found in early English legislation through the use of extensive preambles, and even purpose statements interspersed with the various operative sections of the statute. On the forms and uses of preambles, see K. Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129.

[36] Almost forty years ago Grant Gilmore wittily noted the parallels between the declaratory theory of the common law, codification, and the problem of legislative retroactivity in "On Statutory Obsolescence" (1967) 39 U. Colo. L. Rev. 461.

forms of law. Not so a statute. Legislation is specifically meant to preclude the continued invocation of customary or common law rules within its field of application.[37]

That legislation cannot be *contradictory* is Fuller's fifth principle. Rarely do statutes contain explicit contradictions. But as between two or more statutes, implicit contradiction, or policy objectives working to cross-purposes, are common. For example, when parliaments use tax incentives and disincentives to induce certain types of behaviour, these may inadvertently conflict with policy goals promoted in enactments relating to employment, housing, or consumer protection. Unlike a signed judicial decision, which is intended to resolve the congeries of issues comprising a dispute, there is neither personification nor attornment to multiple purposes in legislative texts. Well-crafted judicial decisions are authoritative because they do not require the reader to divine an ulterior purpose; legislative texts, by contrast, are typically authoritarian because their several purposes must be hypostatized and made singular.[38]

A sixth tacit law of law-making is that legislation should not require the *impossible*. Here impossibility does not mean ouly absolute impossibility, although this obviously places a constraint on Parliament. Rather, the principle of impossibility also embraces the idea that legislation should not require people to make moral or ethical decisions that are beyond the capacity of the average citizen. Since not all citizens are saints, statutes should not be framed on the assumption that they are. The aspiration reflected in this principle is that citizens can be oriented towards appropriate behaviour incrementally and instrumentally. Where law emerges in judicial decisions, the *stare decisis* (or law-making) function of decision-making is necessarily constrained and shaped by the material context presented in attending to the *res judicata* (or dispute settlement) function of decision-making. Because the logic of legislation is less to resolve existing conflict than to frame the way the future is to be imagined, the temptation in statutes is to give freer reign to the instrumental *stare decisis* function without sufficient respect for the actual capabilities of statutory addressees.[39]

Constancy over time constitutes a seventh principle of legislative integrity. Admittedly, one of the main purposes for inventing the statutory form was to ensure Parliament's capacity to modify both law and previous legislation to accommodate novel or unanticipated situations. Good initial legislative design will often mean that enactments do not require constant tinkering to ensure that they achieve their intended pur-

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[37] The point is beautifully made by Montesquieu in *The Spirit of the Laws*, ed. and trans. by A.M. Cohler, B.C. Miller & H.S. Stone (Cambridge: Cambridge University Press, 1989) at book 29, c. 16.

[38] There is no better exploration of why certain forms of law carry authority, and how they can fall into institutional practices that transform their claims to authority into mere authoritarian assertions, than J. Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986).

[39] On the different weight of legislative texts that recognize the constraints of instrumental normativity, see N. Kasirer, "Honour Bound" (2001) 47 McGill L.J. 237.

poses. The tenacity of particularistic drafting conventions conduces, however, to constant textual mutation and a preoccupation with law reform rather than with law "resubstance".[40] Fundamental to normative constancy in legislation is the presumption of system. To change the common law through judicial decision-making is to reframe the law's conclusions through an iteration over time of the norm that these conclusions reflect: it is not to make visible systemic alterations. To modify a statute is to reframe the law's premises by changing its canonical expression; doing so thereby makes systemic alterations patent.

The final canon of the internal morality of law speaks as much to interpretive method as to legislative design. There must be a *congruence* between what the average citizen thinks a statute means and the interpretation given to it by judges. If judges do not mediate between lawgiver and law-subject in applying legislative rules, citizens are no better off than if the statute in question were initially unintelligible. Understanding for every audience what prior knowledge to retain and what to put aside is key for generating interpretive congruence. When common law courts began to develop a methodology for discerning the "artificial reason of the law", they assumed, as common law courts assume today, a professional audience for their normative outputs. Parliament, by contrast, enacts legislation for everyone, under the assumption that all audiences are, in fact, one audience.[41]

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These reflections upon Fuller's eight principles of good legislative design suggest how difficult it is to translate "ideal-type" performative aspirations into everyday practice.[42] Fuller explicitly acknowledged this difficulty in his refusal to characterize

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[40] The neologism "resubstance" is meant to signal the limited capacity of legislation to change the substance of law directly. The reforming effect of statutes is more subtle: by changing how legal rules are framed, legislation changes how human problems are apprehended. The principle of constancy is thus meant to ensure substantive changes to law by limiting the pace by which statutes reframe the questions that citizens are to acknowledge. This point is wonderfully considered in R. Simmonds, "Some Notes on the Reform of Personal Property Security Law in Australia" in M. Gillooly, ed., *Securities Over Personalty* (Sydney: Federation Press, 1994) 192.

[41] On the inherent tension between legislation as a normative phenomenon meant to seize the particularity of human conduct and legislation as a normative phenomenon meant to "objectify" experience, see P. Noreau, "Comment la législation est-elle possible? Objectivation et subjectivation du lien social" (2001) 47 McGill L.J. 195.

[42] It bears notice that the common law tradition has long reflected an analogous set of tacit principles in its presumptions governing the making and interpretation of delegated legislation. These include: (1) an implied condition of reasonableness attaching to delegated legislation; (2) the principle that subordinate instruments cannot modify primary instruments; (3) the principle preventing the subdelegation of regulatory or enforcement authority; and (4) the principle of strict construction of delegated prohibitive legislation. Even in the presence of a well-developed theory and practice of judicial review of subordinate legislation, however, achieving a consistent respect for these principles is no

the "internal morality of law" as a morality of duty.[43] His aim was to describe the nature of legislation and the aspirations attending to this nature. In so doing, of course, he was "inventing" what might be called legislative Classicism.

Recognizing the aspirational character of these canons, the purpose of the above discussion has not been to take legislatures and statutory drafters to task for acting on assumptions about language, purpose, and audience that they may have good reason to believe are questionable.[44] Nor has it been to criticize specific drafting conventions or principles governing the material presentation of statutes today.[45] Nor, finally, has it been to disparage legislation or to suggest that the statutory form should no longer have a privileged place in the law.[46] Rather, the discussion is meant to suggest two second-order themes.

The first of these is the contingency of current conceptions of the legislative endeavour in the common law tradition. While at some more general level Fuller's notion of the "internal morality of law" captures an understanding of legislation that would be recognizable by Bracton, Glanvil, Littleton, Coke, Blackstone, and Mansfield, in their detail his canons reflect a consensus that only came to exist within the past two hundred years. What is more, this nineteenth-century statute book did not really emerge fully formed in the early 1800s; the better part of a century elapsed before its logic took hold. Yet this logic never achieved anything like the dominance that the codal model exercised in France. Only because of the perversion of the statutory form in Nazi Germany, and because the detailed regulatory statute became ubiquitous

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mean feat. For a detailed and nuanced review of these principles, see R.P. Barbe, *La réglementation* (Montreal: Wilson & Lafleur/SOREJ, 1983).

[43] See Fuller, *Morality*, *supra* note 20 at 91-94.

[44] An illuminating discussion of the impact of these questionable assumptions on the principles of legislative drafting can be found in Jackson, *supra* note 19.

[45] One methodological choice does merit notice, however, since it defines how the nineteenth-century statute book is actually constructed. At the turn of the century, legislative consolidations frequently were organized thematically, with all the various statutory provisions numbered consecutively up into the thousands. In this they reflected the semiotics of a civil code—the idea of legislative output as a coherently organized, mutually informing whole. Compare this with the contemporary non-thematic and non-integrated alphanumeric presentation of compendia called Revised Statutes. Here, each statute is held apart from all the others, often with particularistic definitions, and the provisions of each commence at the number one. For a brief discussion of the differenee, see Sullivan, "Implications", *supra* note 12, especially Part 2, "The Meta-Legal Messages of R.S.C. 1985".

[46] Scholars in the United States have been arguing this case for half a century, typically by asserting that judges should assert the supremacy of the common law. The polemic reached a crescendo in the 1960s and 1970s. The following law review articles are illustrative: W.H. Page, "Statutes as Common Law Principles" [1944] Wis. L. Rev. 175; C. Morse, "Theories of Legislation" (1964) 14 DePaul L. Rev. 51; Hon. R.J. Traynor, "Statutes Revolving in Common-Law Orbits" (1968) 17 Cath. U. L. Rev. 401; J. Davies, "A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act" (1979) 4 Vt. L. Rev. 203.

in the latter half of the twentieth century, did scholars begin to contemplate the central prescriptive features of legislative Classicism. In themselves, that is, these features have no permanent censorial claim over law-making activity.

The second theme is that just because the canonical statute acquired normative ascendancy over the past 150 years, it should not be presumed that all other types of law—customary law and judicially declared common law, for example—disappeared from the legal landscape in consequence. Indeed, to acknowledge the substantive limits of legislation is also to acknowledge that modern official law involves a continuing competition between different types of legal rules. The pervasive deployment of statutes in settings for which traditional legislative regulation is not especially well-suited has had a demonstrable effect. There is no longer a close connection between the parliamentary statute (as a vehicle for expressing law) and the idea of legislation as a form of normativity. Many legislative outputs today have both a form and a function that is offensive to the Classical understanding.

Does this mean that current parliamentary ambitions and drafting conventions need to be revised in order to scale back "parasitic and perverted" uses of the legislative form?[47] Does it mean that the Classical theory should be recast in order to account for what appears to be a new Romanticist model of legislation? Or might it mean that the social forces and movements lying behind these apparent misdeployments are actually driving contemporary law towards a new normative form? To a consideration of these questions I now turn.

III. Beyond Legislative Romanticism

In trying to make sense of complexity and uncertainty, human beings typically locate themselves towards one or the other end of a spectrum that runs from "Nothing ever changes; all remains the same" to "Nothing ever stays the same; all is in constant flux". Jurists are not exempt from the polarizing vice. Consider the influence of broader social tendencies on contemporary responses to perceived disorder in the legislative enterprise.

Faced with a growing disjuncture between the theory and practice of law-making, it is entirely predictable that some theorists would devote substantial effort to explicating and revitalizing legislative Classicism. In their view, disorder arises mainly because of intellectual laziness on the part of parliamentarians and their advisers; a renewed understanding of the limits of legislation, of what can actually be accom-

[47] The thought and the terminology are derived from Fuller's classic essay, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353, reprinted in abridged form in Winston, *supra* note 21, 86 at 121-24.

plished with statutes, will nurture a recommitment to traditional ways.[48] Of course, it is equally predictable that other theorists would want to explore what an explicit adoption of Romantic skepticism about system, rationality, formal integration, completeness, structural-functionalism, and "a priorism" might mean for the legislative endeavour. For them, the incoherence of the statute book just proves how outdated received ideas about legislation and its purposes are; a new concept of legislation, better able to respond to modern conditions and practices, needs to be developed.[49]

To assess the weight of these competing perspectives, it is helpful to recall the particular synthesis of social, intellectual, political, and technical forces that fostered the invention of the nineteenth-century statute book. The four main motifs of this synthesis were the decline of status-based constraints on human action, the ideology of the secular state, standardized forms of communication and widespread literacy, and Enlightenment rationalism leading to the emergence of an exchange economy dependent on recognizing moral agency. How are analogous socio-economic and cultural forces playing out today?

One of the great achievements of the Enlightenment was the destruction of feudalism and status-based constraints on human action. Today it is less certain that the unitary citizen identity of Enlightenment ideology actually advances the cause of social justice in capitalist democracies. Fundamental challenges are being mounted to the idea of abstract citizenship. The socio-demographics of the modern territorial state are incorrigibly plural: ethnicity is plural, ancestry is plural, race is plural, language is plural, religion is plural, even gender is now plural. More than this, people are discovering the plurality of their individual selves—as parent, spouse, worker, neighbour, and so on. What does this pluralization of audience and, ultimately, interpreter tell us

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[48] The whole of Fuller's corpus of writings about social ordering processes was predicated upon this type of understanding. See Winston, *ibid.*, especially the essays "Means and Ends" at 47-64 and "The Lawyer as an Architect of Social Structures" at 264-70. See also L.L. Fuller, "American Legal Philosophy at Mid-Century" (1954) 6 J. Legal Educ. 457. Both Kenneth Winston and Willem Witteveen have attempted to specify key features of legislative classicism in a manner consistent with Fuller's project. See K.I. Winston, "Toward a Liberal Conception of Legislation" in J.R. Pennock & J.W. Chapman, eds., *Liberal Democracy*, Nomos XXV: Yearbook of the American Society for Political and Legal Philosophy (New York: New York University Press, 1983) 313; W.J. Witteveen, "Legislation and the Fixation of Belief" in R. Kevelson, ed., *The Eyes of Justice: Seventh Round Table on Law and Semiotics* (New York: Peter Lang, 1994) 319.

[49] Surprisingly, most revisionist approaches to legislation do not actually propose novel forms of legal normativity. The standard approach is, rather, to propose the subordination of legislation to the common law as a form of law. One of the most pungent critiques of contemporary law-making, complete with a proposal that judges take jurisdiction to overrule statutes, was penned by Guido Calabresi in the early 1980s. See G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982).

about the continued viability of general legislation framed on the assumption that formal equality between law-subjects is a guarantee of substantive justice?

The utilitarian moment lay in its claim to provide a justification for the secular state, and a measure of commensurability for apprehending, organizing, and controlling an unruly social world through legislative action. Today it is less certain that the enterprise of law can be reduced to a secular theology of rules providing facilitative baselines for self-directed action. A much richer sense of the components of the human psyche and human motivations opens for question whether it is possible to control abuse and exploitation with nothing more than discrete and specific legal norms. Moreover, sociological and anthropological perspectives on law suggest that generalized legal instincts may be more important than rules for expressing and inculcating normativity. Does this mean that legislation can no longer speak as ukase in the manner of the Ten Commandments, but must from now on render its messages by parables?

The nineteenth-century project to objectify intersubjective communication by fixing the syntactical properties of language was thought to ensure that legal rights and obligations could be framed in a manner accessible to most citizens. Today it is much less certain that human beings, even in the same polity, communicate in uniform or even similar ways. The computer and the Internet are reshaping our symbolic lives. Just as widespread literacy made the production of the written word a central feature of intersubjective symbolization, technology is again changing the way human beings communicate, by making information cheaper, more accessible, and more open to contestation. What will these new modes of acquiring knowledge—which have changed the form and substance of human symbolizing—mean for the classical notion of legislation as a relatively stable, text-based mode of normative communication?

Finally, Enlightenment rationalism provided the engine for a conception of constitutive law, in which each political community could escape the constraints of tradition and deploy legislation to remake the world. Today it is not certain that the enacted law of the territorial polity can continue to remake the world in the face of globalization. The globalization of goods and services has given rise to a globalization of ideas. As domestic concepts, ideas, and language find reflection in canonical treaties (and authoritative interpretations of canonical treaties), they are subtly shaped by the understandings of others. International pidgin English is becoming the new lingua franca of law. Can the idea of legislation as an intelligible and interpretatively congruent expression of normativity survive if the bureaucratic pidgin of treaties and international regulatory standards becomes the model for a bureaucratic pidgin of everyday legislation?

Together these four socio-economic and cultural dimensions of the contemporary world pose a substantial challenge for jurists for they suggest that many presuppositions and internal procedural canons of the legislative endeavour—however this endeavour is characterized—cannot be sustained across the range of regulatory activity we expect the State and other institutions of governance to undertake. In other words, scholarly apprehension about the fate of the nineteenth-century statute book today may rest on much more than simple discomfort with the transition from legislative

Classicism to legislative Romanticism. It may signal the recognition that the predominant form of contemporary law has already moved beyond the late twentieth-century model of legislative Romanticism.

In pursuing this line of inquiry, I ask you to indulge in a little fantasy. Imagine that the self-referential texts called statutes were no longer to serve as the principal vehicle for expressing legal rules. Imagine also that the compendium of written words called the statute book were no longer the privileged material deposit of this law. These two exercises of imagination are not really as fantastic as might initially appear. Twice before the common law tradition has been witness to a shift in normative hegemony—first, when the common law imposed by the Royal Courts (notably King's Bench) displaced the customary law of manor, market, and municipality, and later, when parliamentary legislation overtook the judicially created common law itself.[50] For present purposes, the fantasy is to imagine that the official law of the State were to find primary expression in a manner and form similar to that by which the internal law of a family finds expression on the refrigerator door. What would individual enactments look like, and how would they be compiled, consolidated, and published, were we to imagine a "fridge-door statute book"?[51]

The first thing to be noticed in examining the fridge door is that *words comprise only a small part of the total normative message.* The fridge door is a jumble of duplicative, sometimes partly overlapping, sometimes contradictory messages in a variety of different forms. There is a monthly calendar taped up; there are smiling faces from the dentist's office; there are individual phone numbers and telephone lists; there are computer print-outs and Internet downloads; there are cartoons clipped out of newspapers; there is a plethora of magnets; there are messages coded to the telephone answering machine and the e-mail account; there are reminders and encouraging aphorisms. The point is that normativity on the fridge door uses other human communicative symbolisms besides words strung out discursively. Art, formulae, flow charts,

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[50] The first shift occurred between the early seventeenth and the mid-nineteenth century, and was finally crystallized in the *Judicature Acts* of 1873 (36 & 37 Vict., c. 66) and 1875 (38 & 39 Vict., c. 77). The second began in the early nineteenth century and is still ongoing. For a masterful summary of these shifting expressions of normativity, see C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964).

[51] I am conscious of the contingency of this image. As far as I can recall, the fridge-door phenomenon about to be described is of relatively recent vintage—perhaps twenty years at most. There is probably a good sociology of the fridge door to be written, in which changing family structures, changing dynamics of family interaction, and changing modes of intergenerational communication loom large. See, for intimations of these micro-sociological features, W.M. Reisman, *Law in Brief Encounters* (New Haven: Yale University Press, 1999). See also, for a slightly different use of the image, J.B. White, "The Desire for Meaning in Law and Literature" (2000) 53 Current Legal Probs. 131 at 132-33.

pictograms, timelines, music, tables, diagrams will be key forms of law.[52] Moreover, the fridge-door message is often reinforced by duplication and alternative forms. There is no presumption of economy of presentation or non-redundancy in the use of these multiple forms.

Legislative texts reflect the effort to restate or reorient what is often unconscious social interaction. The lawgiver today is an author seeking to render into discursive language answers to the questions "What is going on?", "Why?", and "Would this continue were people to be conscious of what they were doing?" The lawgiver tomorrow will answer these same questions with many more normative resources—resources that both psychologists and sociologists understand as essential for inviting addressees to recognize themselves as appropriate law-subjects.

There is more. The fridge door also attracts several different *forms of writing*. Some messages are in capitals, some in italics, some in a scrawl, some permanently printed, some bold, some not. Variety can be seen not only in the physical form, but also in the structural form of writing. Some messages consist of a single word, some are more poetic, some are abrupt and some prolix, some are ironic, and some are funny. Not all messages are prospective. Some are of the "Why didn't you?" or "You should have" variety.

The fridge-door statute book will see some older forms of legislating re-emerge and some new forms develop. The re-emergence of older forms of legislating is likely to be manifest in the particularity of legal texts. A statute may yet again become a *statutum* in which long title and preamble are not dissociated from the text. Perversely, just as judicial decisions are coming, probably under the impulsion of the Supreme Court of Canada model of judgment writing, to resemble enactments—with introductions, formally divided chapters, normative precision, and the attempt to make the *stare decisis* trump the *res judicata*—statutes are on the verge of re-emerging in the form of early enactments of the *Curia regis*.[53] Stylized expressions, discrete numbered sub-clauses, and imperative language will be eschewed as the statute comes to be perceived more as a rhetorical attempt to persuade than as a canonical command to be obeyed.

As for new forms of enactment, it can be anticipated that Parliament will begin to take advantage of all the known literary forms through which normative meaning can be conveyed. For example, it could enact a document with a series of "examination hypotheticals" followed by a number of appellate court judgments disposing of the issues raised; or it could enact a document with a similar series of hypotheticals, this

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[52] The normativity of these other symbol systems is explored in N. Kasirer, "Larger Than Life" (1995) 10:2 Can. J. L. & Soc'y 185.

[53] A close semiotic study of these early legislative forms is presented in Manderson, "*Statuta* v. Acts", *supra* note 9.

time followed by an inventory of draft standard-form contracts; or again, it could enact a document with a series of hypotheticals followed by a modern-day equivalent of La Fontaine's *Fables* devoted to exploring the human dilemmas posed by the hypotheticals. The fridge-door enactment will overtly transgress traditional generic forms in order to convey particular substantive messages directly.[54]

This increased attention to the material form of legislation is only one feature of the change of focus from the *semantic to the semiotic* implied by the fridge-door statute. Legislative drafters have for some time been keenly sensitive to the semiotic properties of statutes, worrying about numbering, paragraphing, titles, subtitles, type size and typeface, paper quality and weight, form of binding, marginal notes, legislative histories, the placement of French and English versions, and so on. But the fridge-door image pushes this concern much further. If the statute of 1830 was essentially the product of typography, with only the occasional symbol, in this it was little different than the newspaper, the Bible, the encyclopedia, or the serialized novel. The statute of 2001 is still the product of typography, but the newspaper, the Bible, the encyclopedia, and the book have become very complex semiotic constructions.[55]

This is not to downplay the importance of traditional syntactical concerns. Semiotics is also concerned with mood and voice. Whether the addressee is engaged in the active or the passive voice, and whether indicative, imperative, interrogative, or subjunctive moods are deployed, is clearly open for debate on the fridge door. On the fridge door, the message writer is more concerned with how the reader receives the message than with the form of the message itself. So the legislative drafter's sensitivity to semiotics is likely to lead to statutes that actually look more like other printed media. And on the fridge door, the normative community is not constituted by unconnected and episodic encounters. So the legislative drafter's attention will be focused not so much on a magic moment when a statute comes into force as on how much of the past can be carried forward as interpretive context; fridge-door normativity speaks in silences as well. The message of the fridge door is not always, "See, I put the message right here!" Very often it is, "Why didn't you just figure out that this is what you were supposed to do?"[56]

Again, it can be predicted that in the era of global economy, *Internet pidgin English* will dominate communication. Just as children from diverse households—including, in cosmopolitan urban neighbourhoods, a diversity that reaches class, ethnic-

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[54] For a rich interpretation of the maintenance of form through its overt transcendence, see J. Fuller, *The Oxford Book of Sonnets* (Oxford: Oxford University Press, 2000).

[55] For an intimation to this effect in the context of plain language drafting, see Sullivan, "Promise", *supra* note 32 at 122-25.

[56] A sharp assessment of the normativity of silence is offered by Maurice Tancelin in "Les silences du *Code civil du Québec*" (1994) 39 McGill L.J. 747.

ity, religion, and even language—can seize much of the meaning of their friends' fridge doors, so too in the enactments of the international trading economy, the natural language (the Esperanto) will be Internet English. The pervasiveness of a popular—whether local or international—rather than a professional symbolic medium is, not surprisingly, the key to interfamilial fridge-door communication. The fridge door depends on a generalized metacultural language that is deployed particularistically by different audiences. A statute book of general rules will give way to fridge-door specificity.

Some contemporary legislative drafters have already anticipated this idea through the plain language drafting movement. Plain language drafting assumes that normative messages may be communicated directly to audiences, without the mediation of expert interpreters. It presumes that different audiences will bring different assumptions to the act of reading—both semiotic assumptions and epistemic assumptions.[57] It assumes that language is not the norm itself, but is the vehicle by which the norm is constructed by the reader. The central concerns are about how citizens apprehend and respond to law. The fridge door, with its multiple ways of rendering the legal rule and its concern to communicate directly to the reader, is the paradigmatic vehicle of plain-language communication. Law aims at the structures through which people can make sense of their world. It follows, for example, that the more it is necessary to replace other structuring devices—family hierarchy, religion, ethnic attachment—with law, the more popular (rather than professional) language will become the vehicle by which legal normativity is engendered.[58]

Another feature of the fridge-door statute will be its overtly *pedagogical* role. In a just society, as in a just family, members should focus as much on reaching a standard of aspiration as on simply fulfilling a minimum set of duties. Posting some duties is, of course, unavoidable, but so is posting messages of inspiration and aspiration. Fridge doors that frame all family rules and expectations as particular duties are fridge doors that, in the guise and in the language of morality, evacuate all processes of social and personal learning from the province of normativity. The very belief that human beings can communicate rules and standards presupposes a metatheory about their ability to create processes and institutions by which their different symbolic, instrumental, and moral abilities can achieve expression.[59]

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[57] I have considered the distance between norm and legislative text, and the lessons of attending to other symbol systems such as American Sign Langnage or the *Langue des signes québécois* in Macdonald, "Bilingnalism", *supra* note 32. See also Sullivan, "Promise", *supra* note 32 at 108-18.

[58] This observation is not meant as an endorsement of J.L. Austin's common-language philosophy. See J.L. Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955*, 2d ed. by J.O. Urmson & M. Sbisà (Cambridge, Mass.: Harvard University Press, 1975). Rather, the point is that everyday language carries with it more normative significance for most citizens than the professional language of the law.

[59] This, of course, is the gravamen of Nicholas Kasirer's paper, *supra* note 39.

Legislation may, like the assembly instructions for an electric fan, or like a recipe for cherry cheesecake, provide suggestions about a structure for apprehending a task and a method for pursuing a purpose. It may even, like a list of New Year's resolutions, or like the Mass or the Seder, offer us a ritual to reflect upon our duties to ourselves and others. But neither legislation, nor instructions, nor ritual in themselves directly control behaviour. Human problems have no fixed form. We are constantly defining and redefining our situation, our relationships, and our problems in order to facilitate their presentation to and apprehension by known and familiar institutions. As applied to legislation of the future, the fridge door reminds us that while the messages are constantly changing, the message rarely does.

Of course, because messages rather than the message are constantly changing, and because the fridge door casts these messages in several different symbolic forms, one sees that the main purpose of normative direction becomes one of *experimentation and revision.* The fridge door does not shy away from confusion, contradiction, and alternatives. Sometimes the message is, "Either meet us at the park, or phone us, or stay at home so we can contact you." Sometimes the message is, "If you have a better idea, let us know." Just as the rules of grammar and syntax do not command that we write in the active or passive voice, but inform us of how to communicate effectively once we have made that choice, so too the fridge door hypothesizes alternatives and invites the addressees of its messages to choose the message they wish to receive.

In the fridge-door model of legislation a similar role for statutes can be imagined. They may propose alternative texts, from which addressees may select those that they find most helpful or convenient. Oliver Wendell Holmes' "bad-man" theory of law, in which all legal rules are meant to be nothing more than an option (follow the rule, or if you would rather, suffer the consequence of not following the rule)—will become, on the fridge door, an explicit choice put to citizens as to the manner in which they wish to act.[60] The difference, however, will be this. The "bad man" will not be choosing between accepting or rejecting the legislative hypothesis; the "bad man" will also be choosing among legislative hypotheses, and by so doing providing an indication of which hypothesis carries the most weight until someone comes up with a better alternative.

The notion that legislation may be essentially only hypothetical evokes one of the most interesting features of the fridge-door statute: its *interactive character.* A fridge-

[60] O.W. Holmes, "The Path of the Law" (1896-97) 10 Harv. L. Rev. 457 at 459. Although intended for a different context, and much less radical in its thrust, the idea that legislation may be drafted with multiple options and hypotheses of action has already been broached. See J. Carbonnier, "Tendances actuelles de l'art législatif en France" in J. Carbonnier, *Essais sur les lois*, 2d ed. (Paris: Répertoire du notariat Defrénois, 1995) 267; J. Carbonnier, "Sur la loi pédagogue" in J. Carbonnier, *Flexible droit: pour une sociologie du droit sans rigueur*, 8th ed. (Paris: Librairie générale de droit et de jurisprudence, 1995) 152.

door message or rule is rarely canonical in its form; even less does it imply that only the maker has the authority to modify or emend it. Of course, the interpretations of continuing practice by those who post a message could also modify its meaning, but only where they were given the power to control what other normative sources were deployed to shape interpretation. On the fridge door, there is no longer a hierarchy of interpretive interaction. Normativity is negotiated and interactive. Children write back and legislate for parents. The text is in evolution and the interpretive sources are multivariant.

Of course, the idea of an unofficially interactive legislation is not unknown today. Personally annotated criminal codes or civil codes, with references to cases, articles, and ideas scribbled as marginal annotations, are familiar to jurists today. But in the fridge-door statute, where electronic versions of statutes and hyperlinks to personally created sources of norms are common, the full dimensions of legal interactivity begin to emerge. Traditionally it is said that legal rules assist in dispute resolution and in dispute avoidance, but most importantly, legal rules assist in creating disputes—in taking the inchoate grievances and disruptions of everyday living and giving them a name. One might say that a legal rule works best when it has the capacity to "speak to" its addressee (that is, engage the addressee in a conversation), rather than "speaking at" its addressee (as if it were no more than an instruction manual). The delicate management of the participation of those whose conduct is in view, in the process by which that legal rule finds its textual expression, is the foundation of the fridge-door statute book.[61]

Recognizing the inherent interactivity of the fridge door will, ultimately, change the *nature of legal knowledge*. Gutenberg's invention of movable type allowed the accumulation of books, the spread of literacy, the transference of oral cultures to written cultures, the replacement of ritual by text. But it did more. It permitted the organization of knowledge by reference to linguistic signs and symbols: initially alphabetically, later by dictionaries. Because the written, discursive setting of language came to dominate the transmission of information, its organizational form came to dominate the structure of knowledge.[62] The Internet today is reorganizing modes of access to knowledge. Few of us really know how search engines work, the way we know how to look things up in an encyclopedia. We know how to use search engines, but not how to out-think them. Similarly, text forms are accessed and knowledge structured by the logic tree. I did a test with my son. I asked him to find me a street map of Paris.

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[61] Usually the interactivity of legislation has been cast as a reciprocity between courts and legislatures. The fridge-door statute book assumes that normativity is a reciprocal construction of lawgiver and law-subject. For further development of these ideas, see M.-M. Kleinhans & R.A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 Can. J. L. & Soc'y 25.

[62] This point is developed in J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1986), especially at 127-85.

Had I given myself the task, I would have started by going to France, then Paris, then tourism, then map. He started out with the Eiffel Tower, and then went to location. The fridge door works like this.

The implications of the Internet for the organization and accessibility of legal knowledge are profound. This is quickly apparent in comparisons of different modes of organizing and researching law even now. Consider, for example, the differences between searching the *Canadian Encyclopedic Digest* or "Shepardizing" or using a statute citator. We have statutory indexes and citators, and we present statutes in a curious non-developmental form. The index (or text) becomes the clue to understanding. The common law, by contrast, is organized by ideas, and encyclopedic digests are organized around these ideas. With the infinite capacity of electronic connectivity, all users will be able to create their own legislative resources, their own libraries, their own semiotic constructions, and their own modes of legal knowledge. The challenge of the fridge door for the statute book is one of creating a structural form that does not collapse into extreme nominalism, as its internal conceptual organization becomes superseded by a material logic.[63]

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The new dimensions of normativity suggested by the allegory of the fridge-door statute confirm that the challenge facing jurists today is not just to manage a transition from a Classical to a Romantic moment in legislative design. Rather the challenge is to imagine the nature and structural properties of the new form of legal normativity that the fridge-door statute book evokes. There is a precedent for such an imaginative endeavour. After all, it took three centuries for statutes and common law judgments to develop their distinctive linguistic and structural conventions fully.[64] Even acknowledging the relatively faster pace of legal development today, it might well take several decades for this new form of normativity to free itself from current conventions applicable to statutes.

The type of normativity implied by the fridge door can best be visualized by comparing it with other normative forms—custom, judicially declared common law, and legislation.[65] Two analytical axes can be posited. Along one, ranging from the formulaic to the inferential, normativity can be plotted by how precisely the legal rule is expressed. Along the other, ranging from the explicit to the implicit, normativity can be plotted by the extent to which it finds expression in official forms.

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[63] See D. Howes, "e-Legislation: Law-Making in the Digital Age" (2001) 47 McGill L.J. 39.

[64] See the analysis in Manderson, *Songs without Music*, *supra* note 9 at 51-89.

[65] I first had occasion to develop a typology of legal forms in an essay on the continuing importance of custom in modern law. See R.A. Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et 'inférentielle'" (1986) 18:1 Sociologie et sociétés 47.

The central features of judicial decisions as expressions of rules are their official (explicit) yet presentational (inferential) character. They are crafted through an official process, but do not claim to state canonical rules. The central features of legislation are that it too is official (explicit), but is discursive (formulaic). Legislation is the outcome of a formal process, and the resulting norm has a fixed formulation. The central features of fridge-door statutes are that they originate in interactional reciprocity (are implicit) and are presentational (inferential). In this, they differ from customary norms, which while originating in interactional reciprocity (are implicit), also tend to have a relatively discursive (formulaic) character.

From this "ideal-type" taxonomy of norms it is possible to conceive of properties of the fridge-door statute that will ultimately require it to be conceived and labelled as something other than legislation. When this occurs, it will then be possible to plot the normative universe of modern law within a four-cell table. Some legal norms are reflections of a normativity that is both explicit and formulaic (manifest normativity); legislation is the standard instance. Some norms express a normativity that is implicit and formulaic (routine normativity); these are epitomized by custom. Still others evidence a normativity that is explicit and inferential (allusive normativity); paradigmatically one envisions judicial precedents. The fourth cell embraces a normativity that is implicit and inferential (latent or tacit normativity); this is the normativity of the fridge door.[66]

IV. In the Word Was the Beginning

I should like to conclude by inverting the title to the first part of this essay. The organizing motif of post-Enlightenment legislation and the nineteenth-century statute book can be captured in the set piece of Johannine theology: "In the *beginning* was the Word ..."[67] The Word (of God, of the legislature) precedes human action; both God and Parliament make the world through a canonical Word. By contrast, the organizing motif of the fridge-door statute book lies in the aphorism, "In the *Word* was the beginning ..."[68] The beginning (human interaction) creates the Word; human beings make the world by imagining and reimagining, by fashioning and refashioning, the Word.

The fridge-door statute, like the nineteenth-century statute, presupposes human agency and a reciprocity between lawgiver and law-subject, and recognizes substantive limitations on the social tasks that can be managed by any particular form of law. But human agency may well be further promoted by fridge-door normativity because citizens will be enabled not only to choose whether to submit to the law, but also to

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[66] For an elaborate exposition of this matrix, see Macdonald, "*Vieilles Gardes*", *supra* note 19.

[67] John 1:1 [emphasis added].

[68] The phrase recalls K.N. Llewellyn, "A Realistic Jurisprudence—The Next Step" (1930) 30 Colum. L. Rev. 431.

choose their own law. Moreover, the reciprocity between lawgiver and law-subject is likely to be more acknowledged in fridge-door normativity because its interactivity necessarily recognizes the law-creating capacity of citizens. Finally, there will be less inducement to wield fridge-door legislation to accomplish social tasks for which it is ill-suited because it does not claim normative exclusivity or predominance. In other words, the three presuppositions of democratic law-making that made it possible to imagine the nineteenth-century statute will also inform the fridge-door statute.

This does not mean, however, that the "implicit laws of law-making" or aspirational canons of "internal morality" associated with the fridge-door statute will be those of the nineteenth-century statute. Indeed, one can hypothesize that the canons of the fridge door will stand in sharp counterpoint to those reflected in the theory of legislative Classicism. This counterpoint, I believe, can be presented as follows:

- The nineteenth-century statute prized generality and universality of audience; the fridge-door statute will embrace specificity and particularity of audience.
- The nineteenth-century statute prized one-off public promulgation as authority; the fridge-door statute will often incorporate existing normativities, including normativities of silence.
- The nineteenth-century statute prized the future-directedness and non-retrospectivity of normativity; the fridge-door statute will not draw a sharp distinction between refashioning existing norms and announcing new norms.
- The nineteenth-century statute prized intelligibility generated through a written text that pre-empted other normative forms; the fridge-door statute will embrace multiple, non-linguistic forms of human communicative symbolisms and will not arrange these hierarchically.
- The nineteenth-century statute abhorred textual contradiction and redundancy; the fridge-door statute will incorporate alternative rules and embrace normative experimentation.
- The nineteenth-century statute prized normative possibility through an *ex ante* evaluation of human ethical and material capacities; the fridge-door statute will achieve this aspiration through its interactive iteration.
- The nineteenth-century statute prized formal normative constancy through time; the fridge-door statute will be more focused on normative pedagogy through narrative and reflexivity.
- The nineteenth-century statute prized interpretive congruence by officials assigned the task of applying the law; the fridge-door statute will recoil from the artificial reason of the law and will call forth a more particularistic and more contextualized interpretive knowledge.

The challenge for theorists of legislation today is to recognize and to articulate the ontology of the fridge-door statute as a distinctive normative form. The challenge for legislative drafters is to develop the technical standards to ensure that the fridge-door statute achieves in practice the form given by this internal morality. For both, the challenge is to recognize the forms, functions, potentials, and limits of the fridge-door statute as an independent legal artifact, and not to conceive it simply as a failed instantiation of the nineteenth-century legislative endeavour.[69]

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[69] It is important to be clear about the claim advanced in this essay. Much modern legislation has certain properties that are similar to the fridge-door statute. Regulatory statutes that incorporate by reference technical standards and chemical formulae developed by industry can be seen as an attempt to enhance interactivity. Again the *Tobacco Act*, S.C. 1997, c. 13, along with the *Tobacco Products Information Regulations*, S.O.R./2000-272, requires cigarette manufacturers to print photographs on packages. These photographs appear neither in the statute, nor in the regulations published in the *Canada Gazette*. They are available only in Health Canada, *Health Warnings and Information for Tobacco Products*, looseleaf (5 December 2000), a binder that may be obtained from the federal government, or on the Internet at "New Tobacco Regulations: Product Information Labelling and Reporting (June 2000)," online: Health Canada <http://www.hc-sc.gc.ca/hppb/tobacco/ehd/tobacco/legislat/legis_april00.html> (date accessed: 5 October 2001). These recent legislative endeavours illustrate some of the characteristics of the emerging fridge-door statute. They do not, however, reveal the full range of possibilities canvassed in this essay. Moreover, they are not generally understood as instantiating a new kind of legislation. They are conceived, that is, simply as Romantic variations on legislative Classicism.