

## **Inference and intention in legal interpretation**

Nicholas Allott and Benjamin Shaer

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Please send any comments or questions you have to: [nicholas.allott@gmail.com](mailto:nicholas.allott@gmail.com)

### 1. Introduction

In this paper we argue that the interpretation of statutes and other legal texts is of a piece with utterance interpretation more generally, where this variety of interpretation is best understood as a species of inference to the best explanation. Such an explanation of an utterance's meaning treats the text produced by the utterer as a clue to the "speaker's meaning" or "utterance content" — that is, in the general case, what the utterer intended to communicate.

This view of legal interpretation is controversial in legal scholarship, as demonstrated in two notable recent discussions, by Andrei Marmor and John Perry, that advance claims inconsistent with it. The claim advanced by Marmor (2008: 425) is that the content prescribed by the legislature is nearly always exactly "the content which is determined by the syntax and semantics of the expression uttered". That advanced by Perry is the "meaning-textualist" view that what is conveyed by the use of a particular word or words in a legal text is (at least generally speaking) an "ordinary" or "conventional" meaning of the word-type.

To pursue our argument, we first briefly review the basic ingredients in an "inferential-intentional" approach to utterance interpretation, then take up the two claims just described. In a nutshell, our point about Marmor's claim is that it incorrectly characterizes the content prescribed by the legislature. This is because what normally

determines this content is what is explicitly meant by the speaker, and this differs systematically from “the content which is determined by the syntax and semantics of the expression uttered” as Marmor defines the latter (2008: 425). Our point about the meaning-textualist view is that it cannot be right either, because in many cases words and sentences in statutes and other legal texts, as in other utterances, are used to convey meanings other than the conventional or dictionary meaning of the word-type.

In challenging these two claims, we will be offering an “inferential-intentional” alternative, based on the work of the philosopher H. Paul Grice, which, like most work in linguistic pragmatics since Grice develops his view of an utterance’s meaning as (in normal cases) constitutively determined by a complex “utterer intention”, applying it to the legal domain. To clarify the nature of this intention, we can say that it is the intention to modify the addressee’s thoughts so that the addressee grasps the utterer’s intention to modify the addressee’s thoughts. Crucially, this “intention-to-mean” is, like other intentions, constrained by rational expectations — in this case, by what the speaker can rationally expect the intended addressee to take the speaker to have meant. In the interpretation of statutes and other legal texts this constraint is (for various reasons and in various ways) tighter than it is in face-to-face conversation. Yet, it does not follow — nor, we will argue, is it actually the case — that the process of interpreting legal utterances is non-inferential. It is likewise not the case that words in legal texts can express only their ordinary or conventional meanings.

Our efforts to advance these claims will involve taking a leaf from Wilson’s (2011) approach to literary interpretation and arguing that the interpretation of legal texts, “draws on the same basic cognitive and communicative abilities used in ordinary, face-to-face exchanges”. We claim that “theoretical notions which apply to the interpretation of ordinary utterances — the notion of inferential communication itself, the distinction between explicit and implicit communication, [...] expressions of attitude, and so on — should carry over” to legal interpretation, just as they should, in Wilson’s view, to literary interpretation. The basic assumption guiding both inquiries, then, is that neither literary nor legal texts “are [...] entirely *sui generis*, but exploit at least some of the same abilities used in other varieties of verbal communication” (Wilson 2011: 70).

The distinctive features and goals of legal interpretation have led at least some legal scholars (e.g. Greenawalt 2010) to express scepticism of the explanatory utility of assimilating this form of interpretation to others. In particular, the fact that “legal interpretation”, in this expression’s common use by jurists, frequently describes activity that goes beyond simply ascertaining the meaning of, say, a contentious provision in a statute and extends to the task of determining how this provision applies to the case at issue strongly suggests that the complex activity of interpretation in the legal context is not congruent with its counterpart in other domains.

We agree that the term “legal interpretation” has this broad sense. However, it does not follow that the interpretation of legal texts is entirely different in kind from utterance interpretation more generally. We claim that a clearer understanding of legal interpretation requires factoring out certain aspects that, we will argue, following Endicott (1994, 2012) and others, fall outside the ambit of utterance interpretation proper — even if, as we will also be pointing out, their inclusion by jurists within the rubric of “legal interpretation” is justifiable on grounds internal to the legal domain. In excluding these aspects of legal interpretation, we will be appealing to Endicott’s (2012: 109) distinction between “interpretive” and “creative” activities in legal interpretation; and to a further distinction between the content of a statute as an utterance and the content of the law.

In making our case for an “inferential-intentional” approach to legal interpretation, our general strategy will be to demonstrate the limits of alternatives that do not exploit these processes in their own approaches to interpretation. This will involve demonstrating, through examples drawn from the legal texts, just where the linguistic or conventional meaning of an expression in a legal text underdetermines speech act (and legal) content. Our textual focus will be statutory and regulatory provisions, and we will be drawing our examples from international law as well as common law contexts. Granting important differences between these legal contexts, we believe that our claim applies across these and others, given the general nature of the interpretative principles at the heart of our claim. We also take this point to hold for legal texts other than legislation.

Although important differences again exist in the respective principles involved in interpreting statutes, regulations, constitutions, contracts, wills, and other legal documents, we see the utterer's "intention-to-mean" as playing a central (if not necessarily identical) role in the interpretation of all of these legal texts. For this reason, we will be using the umbrella term "legal interpretation" throughout our discussion in referring mostly to the interpretation of statutes, regulations, and other legislative "speech", with the idea behind this usage being that our remarks should be applicable to a wider variety of legal texts.

The rest of our discussion is organized as follows. Section 2 will offer a brief summary and motivation for the "inferential-intentional" approach to utterance interpretation that we will be defending in the rest of the paper. Section 3 will introduce two key distinctions into our analysis: between "investigative" and "creative" processes in the phenomenon of "legal interpretation" broadly construed; and between the content of a legal speech act and the content of the law itself. With this ground-work done, we will investigate Marmor's (2008) claims about the content of legal texts in section 4 and certain of Perry's (2011) claims about the legal doctrine of "textualism" in section 5. Section 6 will offer a summary and some conclusions.

## 2. "Inferential-intentional" theories of meaning and communication

In linguistic pragmatics, the dominant view of utterance content, and one traceable to two seminal papers by Grice (1957, [1967] 1989), is that it is constitutively determined by certain speaker intentions; accordingly, interpretation is a matter of the hearer inferring those speaker intentions. In other words, in order to understand an utterance, the hearer infers what the speaker has intended to convey, using the linguistic material uttered as a clue. Although we cannot offer a full defence of these assumptions here,<sup>1</sup> we can explain some of the rationale behind them.

Let us start by asking why it might be useful to think of meaning as dependent on speaker intentions. We can shed some light on this question

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<sup>1</sup> But see, e.g., Allott (2013).

with a non-linguistic example: someone pointing to something. When we see this action and want to know what the person pointing means by it, what we are, in fact, interested in is in finding out what she has intended to point to. In other words, while there will be, for example, many objects, parts of objects, and activities in the direction in which the pointer has pointed, what matters for determining the meaning of the pointing gesture is the one that the pointer has had in mind — and, crucially, has wanted her audience to come to have in mind.

The same observations can be made about determining the relevant meaning of indexical, or “pointing”, expressions, such as *he*, *it*, *here*, and *later*. Consider, for example, a speaker’s utterance of (1):

(1) It’ll be here later.

On the view just described, what *it*, *here*, and *later* signify in this utterance depends on what the speaker has intended to refer to.

To further clarify this point about intention, consider another example of non-verbal communication: raising an empty glass in the pub (Sperber and Wilson 2008: 89). What makes it the case that I am communicating that I would like another drink is simply my performing this action intending you to see it and to infer that this was my intention, and that I intended you make this inference. If I raised my glass for some other reason, such as to check whether the speck in the dregs is a fly, then intuitively I did not mean to ask for another drink — nor to communicate anything at all — and that is *because* I lacked an intention to convey something.

What emerges from these examples, and from the juxtaposition of examples of both verbal and non-verbal forms of communication, is not only that they all appear to require explanation in terms of speaker intentions, but also that verbal and non-verbal communication might have a unified explanation in these terms.

Grice’s work on speaker meaning provided the basic framework for such an explanation. His key innovation, however, was the claim that since speaker meaning is a function of certain speaker intentions, if the hearer can infer these intentions, then communication succeeds.<sup>2</sup>

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<sup>2</sup> For this claim that this was Grice’s great innovation, see Sperber and Wilson (1986: 25).

So far, though, it is not clear why we should think of utterance content as needing to be inferred. A simple answer is that a hearer does not have any direct access to a speaker's mind and thus has to work with available evidence of the speaker's behaviour, in particular, what the speaker says and does, which serve as (no more than) clues to what the speaker means. The action itself may, as in the glass-raising case just discussed, underwrite or not underwrite a communicative intention. This indicates that the determination of speaker meaning cannot simply be a matter of decoding. Generally speaking, a particular gesture or a spoken sentence does not communicate the same content whenever or by whomever it is used.

A ready objection to this claim as it applies to verbal communication is that in using words and sentences, we do not merely provide clues to our meaning; instead, we say what we mean. Therefore, someone listening to us can in fact decode our meaning and does not need to infer it. Yet, there are at least two compelling reasons not to accept this objection.

One obvious response to this objection is that there are many ways in which the contribution made by the basic, stable meanings of the words uttered — what some linguists call their “encoded meaning” and (roughly) what many philosophers call their “conventional meaning” — falls short of what the speaker has intended to communicate.

When one considers, in particular, actual instances of verbal communication, it becomes clear that an analysis in terms of coding and decoding, which makes no appeal to inferential processes, cannot be the whole story. Strong evidence for this already emerged in our consideration of one type of interpretative process, that of assigning a referent to indexical expressions like *it*. In these cases, a simple decoding of this word in the sentence determines at most that there is some inanimate entity being referred to, with the hearer still left to infer what that entity is. Many other types of interpretative processes exist, including resolution of ambiguity and polysemy and what have been called “completion”, “saturation”, “enrichment”, “narrowing”, and “broadening” in the pragmatics literature. The crucial point that we will be making in the discussion to follow is that such processes must also figure in legal interpretation.

A subtler, but no less important, response to the objection that in verbal communication you simply say what you mean is one offered by Bach (2006: 24). This is that even if the message that the speaker intends to communicate by uttering some sentence corresponds exactly to the semantic content of that sentence, the hearer still needs to infer that this is the case. In other words, the hearer must still determine that the speaker means precisely what she has said and thus must rule out other possibilities, such as that the speaker has been speaking ironically or metaphorically, or rehearsing a line from a play.<sup>3</sup>

The response just offered to the “say what you mean” objection can also be couched in the following, somewhat more technical, terms. This is to point out that arriving at the semantic content of an utterance and inferring that this is what is meant by the speaker involve — at least on a view of utterance interpretation that is arguably the consensus view among linguists — two kinds of analysis and processing, seen as not only conceptually distinct but even as subserved by distinct mental architectures.

The first, or “lower” level, of the two processes, which is “linguistic” narrowly construed, takes as its input the stream of sounds coming from the speaker, segmenting this stream into linguistic units and assigning a syntactic structure to these units. The second or “higher” level, process, that of pragmatic inference, is a conceptually distinct process or processes that takes material that has undergone linguistic processing and arrives at utterance content, that is, (in general) what the speaker has intended to convey. However, this process makes use of far more than just the linguistic input. It also needs to take account of information pertaining to the particular circumstances and manner of a sentence’s utterance, and other available clues such as relevant background knowledge.

On this view of utterance interpretation, linguistic processing is clearly a crucial input, yet only one among others, to what is in essence an

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<sup>3</sup> A more fundamental question raised by Marmor’s claim is whether a speaker *can* intend to communicate precisely the semantic content of the sentence she utters, given doubts expressed in the linguistics and philosophy literature that the linguistic meanings of words and sentences are plausible candidates for speaker meanings or components of these meanings. We will briefly take up this point later in the discussion.

inferential process of utterance interpretation proper.<sup>4</sup> These sources of information come together in helping the hearer to arrive at the best available explanation of the speaker's utterance. This typically consists of a proposition expressed as well as any implicatures and other utterance content. Returning to the "what you say is what you mean" objection, we can see it in terms of this two-level analysis of utterance interpretation as simply failing to distinguish two conceptually distinct, and perhaps even mentally distinct, processes.

### 3. The activities of "legal interpretation"

Having sketched what we see as a very well-motivated approach to utterance interpretation, we now wish to show how this view can be applied to legal interpretation — that is, to the interpretation of legal speech acts such as (provisions in) statutes.<sup>5</sup> Admittedly, the move from one to the other may strike many jurists and others as unhelpful or even misguided, relying on a glossing over of crucial details and differences to achieve any apparent explanatory success. While sensitive to this concern, we hope to show that the "inferential-intentional" view does indeed provide a compelling framework for analysing all forms of purposive human communication, and sufficient ancillary means to capture the distinctive aspects of legal interpretation.

Before arguing for our thesis, we need to do some of the ground-clearing alluded to earlier regarding what reasonably counts as legal

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<sup>4</sup> Although we might recognize certain cases of linguistic communication where very little linguistic processing is required of the hearer, such as that illustrated in (i):

- (i) A: Do you speak Japanese?  
 B: Banshun, kaze tachinu, oku no hosomichi, fūshikaden, nantoka nantoka.  
 (see Sperber and Wilson 1986: 227, ex. 98)

Here, just determining that B is speaking Japanese rather than fully processing B's utterance is sufficient to work out the gist of B's answer to A. Of course, cases of non-verbal communicative activities as pointing, miming, or nodding involve no linguistic processing at all.

<sup>5</sup> We leave open here the question whether the enactment of a statute is a single speech act or a series of speech acts corresponding to the various provisions in it. For one response to this question, see Allott and Shaer, to appear.



interpretation proper. The basic idea here is that that not everything called “legal interpretation” is utterance interpretation, in the sense of investigation into the meaning of a speech act.

### 3.1. “Investigative” versus “creative” processes

As noted earlier, scholars such as Endicott (1994, 2012) have observed that the term “legal interpretation” has been used to refer to activities that are (as we will describe them) “creative” as well as those that are “investigative”. One activity, legal interpretation proper, consists in attempting to understand the utterance content of legislative speech. This is a variety of utterance interpretation, which, we claim, is an attempt to infer what the utterer intended to convey by her utterance.

The second activity is a kind of creative decision-making. Endicott has convincingly argued that what is called legal “interpretation” can be creative in part: for instance, when the rule that the statute sets up does not determine an action in the matter in question.<sup>6</sup> To see this, consider one of the cases that Endicott discusses, *Bankovic v. Belgium* (2001), heard by the European Court of Human Rights. The case revolved around a rocket strike conducted as part of the NATO bombing of Belgrade, which hit a radio and television station, killing 16 people. The question at issue was whether, as the victims’ families had argued, the European NATO countries had, by this action, violated the victims’ right to life in the *European Convention on Human Rights* (ECHR) or whether, as the defendant countries had argued, the military operation was an extraterritorial one outside their jurisdiction, to which the Convention did not apply.

Endicott observes that the Court presented the task before it as that of determining the interpretation of the word *jurisdiction* in Article 1 of the ECHR, as given in (2):

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<sup>6</sup> Endicott (2012: 111) actually makes the stronger claim is that “most legal reasoning is not interpretative” and that “[m]uch of what is commonly called ‘interpretation’ can be done with no interpretation at all”. We address this claim in more detail in Shaer and Allott (to appear).

- (2) “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

On this question, the Court concluded that the meaning of the term in this provision was “primarily territorial”, thus ruling in favour of the defendant countries. Yet, as Endicott emphasizes, the Court’s “interpretative” activity narrowly understood actually would have ended with the conclusion that the ECHR’s framers had not established any territorial limits to a member state’s jurisdiction as referred to in Article 1 (2012: 113). In other words, the content of this provision in the Convention, in the sense of what the framers meant by what they uttered, encompassed the establishment of an obligation on member states to secure certain rights within the sphere of their legal authority, leaving open this sphere’s actual extent.

We agree with Endicott that “legal interpretation” as generally understood includes many instances of what are more perspicuously described as legal decision-making. On Endicott’s (perhaps mischievous) description, judges have a tendency to see their decision-making activities as merely interpreting previous decisions, so that understanding the utterance content of, say, a statutory provision that is at issue is a part, but only a part, of legal “interpretation” in this broader sense:

Judges, instead of claiming authority to invent a resolution to a dispute, have a natural inclination to see what they are doing as interpreting what others have decided (the parties, the legislature, framers of a constitution, states that signed a treaty, previous courts...). Conversely, when judges are moved (legitimately or illegitimately) to depart from what others have decided, they have a natural inclination to see what they are doing as interpreting what those others have done. (Endicott 2012: 110)<sup>7</sup>

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<sup>7</sup> Cf. Raz (2001: 419): “One kind of discretion, or context of discretion, enjoyed by courts is the discretion to make law, either by repealing existing law, or by making a rule where there was a gap in the law. One case in which they have such discretion is where the law is vague.”

It is worth noting, however, that even decomposing “legal interpretation” broadly construed into these distinct components does not resolve the question of what the characteristics of “legal interpretation” narrowly construed actually are. Endicott and others, for example, offer a view of interpretation in the legal context as necessarily involving reasoning about the meaning of the law — that is, of finding and presenting reasons for a conclusion — the chief merit of which seems to be its highlighting of the deliberative aspect of determining legal meaning.

Yet, it is unclear how far highlighting this deliberative aspect of legal interpretation can take us. Unless legal interpretation is a *sui generis* phenomenon that does not involve the same basic cognitive and communicative abilities used in ordinary, face-to-face exchanges — and, as we have already noted, we do not believe it is — then this form of interpretation, like literary and utterance interpretation, among others, must involve at least some spontaneous and intuitive processes and not just voluntary and reflective ones.<sup>8</sup> This is, in particular, because utterance interpretation itself is widely understood to be mostly fast and free from conscious effort, albeit with greater effort sometimes required given various contingent factors such as the familiarity of the utterance to be interpreted and the accessibility of the information required to do so. We do not believe that scholars like Endicott have offered sufficient reason to depart from a similar understanding of legal interpretation.

It is also worth noting that Endicott’s placing of explicit reasoning about meaning at the heart of that legal interpretation properly understood likewise prejudices the outcome of many ongoing debates about the nature of inferential and reasoning processes. One of these debates concerns whether either process is necessarily conscious (whether in the sense of occurrently conscious or available to consciousness — on this, see Grice 2001; Boghossian 2014: 2). Another concerns whether intuitive and reflective inferential processes — the latter of which “involves attending to the reasons for accepting some conclusion” (Sperber et al. 2010: 377, n. 4; see also Mercier and Sperber 2009) —

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<sup>8</sup> We might speculate further that while most episodes of utterance interpretation are spontaneous and intuitive, even those episodes that are to some degree reflective, laboured, or occurrently conscious involve interpretative work that is still mostly performed subliminally and automatically.

should be distinguished and if so, whether utterance interpretation is better captured in terms of one or the other. A third concerns whether activities of utterance interpretation are “personal” or “sub-personal” (that is, respectively operating at or below a level to which the notion of personhood applies; e.g. Dennett 1969: 90–96) and “central” or “modular” (that is, respectively having access to central memory, in the form of beliefs and the like and operating in an “encapsulated” manner without such access).<sup>9</sup>

For our purposes, the relevance of these debates is simply this: given our current understanding of what cognitive processes are involved in any form of interpretation, it seems best to remain neutral on such questions and assert only that legal interpretation, narrowly construed, includes all of the cognitive processes involved in determining the utterance meaning to a legal text and excludes further “creative” processes of decision-making that take this utterance meaning as input and are aimed at reaching a conclusion on the matter at issue.

### 3.2. The content of utterances and the content of the law

In the previous section, we conducted a ground-clearing effort to isolate in the broad phenomenon called “legal interpretation” what we take to be its interpretative or “investigative” aspect from its more “creative” or “decision-making” aspect, arriving at a process that more clearly resembles utterance interpretation. Here we will conduct a second ground-clearing effort, revealing an additional distinction within the former aspect itself.

What we wish to distinguish here is activity targeting the content of an utterance and that targeting the content of the law itself. In other words, “utterance interpretation”, on our view, is an investigation into utterance content; but this investigation is analytically distinct from one

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<sup>9</sup> For some opposing views on these questions, see e.g. Recanati (2004) (arguing that the interpretation of implicatures is personal, consciously available, and reflective) and Sperber et al. (2010) (arguing that utterance interpretation as a whole is modular, sub-personal, and intuitive).

into the law beyond or distinct from the meaning of the utterance of a legal text.<sup>10</sup>

Since this step in our argument is an important one but may sound very puzzling to some, it is worth clarifying. The basic idea is an obvious one: that the utterance of a legal text has content by virtue both of being a kind of utterance, of having legal content in and of itself, and of interacting with a larger body of law; accordingly, various splits between speech act and legal content may arise. In particular, the speech act content of the statute might fall short of determining the legal content of the statute.

Similarly, a statute's legal content may not determine by itself the content of the law, which may instead emerge from a court's consideration of the statute itself together with the relevant case law and perhaps other statutes. Moreover, the court may need to determine what priority to give to one or another sources of law under consideration in making a conclusion about the current state of the law. One famous illustration of this divergence between a statute's legal content and broader legal content is the 1889 American case *Riggs v. Palmer*. In that case, the court decided that a murderer could not inherit from his victim, even though the relevant "local wills legislation was silent on the issue" (Holland and Webb 2003: 101). Although it is possible to understand this result, following Holland and Webb, as involving the court's discovery of implied statutory meaning, it is more plausible, we believe, to see this ruling as involving the court's recognition that the law applicable to this case did not end with the speech act meaning of the statute, nor with the legal content of the statute *itself*. Rather, it encompassed an important principle of common law, that a wrongdoer should not benefit from his own wrong.

Admittedly, the distinctions just outlined between the content of legal speech act and that of the law may seem highly abstract ones that can be easily glossed over. Our point in offering them here, though, is simply

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<sup>10</sup> We do not see this claim of the occasional splitting apart of legal speech act content and the content of the law as original, but see it as reflected, for example, in Raz's (2001: 418) observation that "[t]he law is systemic, and each of its rules derives its meaning not only from the utterance that created it but from other parts of the law." However, we make finer distinctions here than Raz's point requires.

to allow us to further restrict the ambit of our claim. In this way, we can avoid the charge that our analysis seeks to address everything that has been or could be called “legal interpretation”, and advance a view of legal interpretation as a matter of working out the speech act content of legal speech acts. This will prove to be crucial as we confront two recent, and prominent, claims about legal interpretation, those of Andrei Marmor and John Perry. We do so in the following sections.

#### 4. Legal interpretation and linguistic underdetermination

In the previous section, we arrived at a highly circumscribed claim about legal interpretation, after further restricting the scope of our analysis. This is that this form of interpretation is of a piece with utterance interpretation generally and thus a species of inference to the best explanation for the utterance. Our thesis is *prima facie* at odds with two recent claims by prominent scholars, the legal philosopher Andrei Marmor and the philosopher of language John Perry. These claims are, respectively, that the content the legislature prescribes is determined by the syntax and linguistically encoded meaning of the expressions uttered; and that the kind of meaning that is key to legal interpretation is “the meaning the words and phrases used in the text had at the time the text was written”. In what follows, we will explore these claims and what we believe to be the compelling evidence against them.

##### 4.1. Marmor’s (2008) claims about legislative content

In his (2008) study of legal language, Marmor says “that what a speaker *says* on an occasion of speech is the content which is determined by the syntax and semantics of the expression uttered” (p. 425; his emphasis). He later qualifies this statement by granting that there may be “some cases in which it is quite obvious that the content the legislature prescribes is not exactly what it says”, although speculating “that such cases would be very rare” (p. 429).

Taken together, these remarks can be seen to produce the following claim about legal interpretation: This is that the content prescribed by the legislature is (but for rare exceptions) exactly the content determined by the syntax and linguistically encoded meaning of the expressions that the legislature has uttered. Accordingly, this is content that the hearer could

arrive at by linguistic decoding alone, by taking the meanings that the words stand for and combining them according to the relevant syntactic rules.

As we noted earlier, such a position seems to reflect the common-sense view of legal interpretation whereby legislative texts say what they mean and the task of the interpreter is simply to decode this meaning from the text. Given what we have already argued, it should be clear that we see this claim as oversimplifying the activity of legal interpretation. To be sure, we do take the content prescribed by the legislature to be (nearly always) exactly what it *says*, in that what matters here is *explicit* rather than *implicit* utterance content — that is, the proposition expressed, with its direct illocutionary force, and not implicatures. Yet, as we have already argued, what the legislature “says” in this sense must quite often go beyond the decoded (or linguistic, or compositional, or conventional) meaning of the sentence and thus be inferred.<sup>11</sup>

Note that the distinction just appealed to between implicit and explicit utterance content is a mainstay of modern pragmatics and a key part of Grice’s insight that when speakers produce an utterance, they can mean more than the meaning of the sentence-type that they utter. Grice made use of the notion of implicit utterance content to give a unified account of such diverse cases as indirect answers to questions and ironic utterances, as illustrated in (3), in which at least part of what speakers mean is something quite different from what they say:

- (3) a. Mary: Have you changed the litter tray? John: I’ve only just  
got in  
from work.

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<sup>11</sup> We do think that there is a way of understanding “semantic” that might make Marmor’s claim compatible with ours: If lexical words (e.g. nouns and verbs) encode Kaplanian characters rather than concepts, the proposition expressed is a matter of the composition of the concepts determined by those characters in context, and “semantic” refers to the level of the concepts, then it will be the case that what a speaker says on an occasion of speech is the content determined by the syntax and semantics of the expression uttered (as Marmor claims) and that what is said goes beyond the decoded (linguistic, compositional) meaning of the sentence (as we claim). However, what Marmor (2008) says about non-legal utterances, as we have quoted in the text, shows that this is not his view.

- b. What delightful weather! [said in a downpour]

More specifically, what speakers mean in such cases includes something that the speakers intentionally imply by (or in) making their utterances. Such intended implications of an utterance are now known as “implicatures”.

As Searle (1975) pointed out, this account naturally extends to “indirect” speech acts, as illustrated in (4), in which the speech act force must be inferred:

- (4) A cup of tea would be really nice just now.

Although a sincere utterance of (4) is a statement (and accordingly might receive a response like “That’s true” or “That’s not true”), such a sentence may simultaneously be used as a request — that is, with directive illocutionary force. Such examples are also standardly considered to be cases of implicature.

Now, we should emphasize that we take as eminently reasonable Marmor’s claim that legal instruments rarely if ever have implicatures as part of their utterance content, which we ourselves have pursued in another context (Allott and Shaer, to appear).<sup>12</sup> Marmor’s claim, however, is a broader one: that in the case of legal instruments, it is very rare for the propositions expressed to be linguistically underdetermined in these texts. Now, there is considerable agreement among scholars of communication that the proposition expressed by an utterance is in general, as Marmor himself puts it, “not fully determined/explicable by the meaning (and syntax) of the sentence uttered” (Marmor 2008: 425). The question that Marmor’s claim about legal interpretation raises is whether legal texts are different in kind in this respect. We do not believe that they are, and in what follows, we will provide substantial evidence against Marmor’s claim and in favour of our own. This will take the form of numerous legislative

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<sup>12</sup> In that work, we argue that the illocutionary force of statutory provisions is just that of enactment, bringing into effect a new state of affairs, and is explicitly encoded in the enactment formulae that often introduce statutes. In particular, they do not (pace Marmor 2011b; Searle 1976: 22) function as implicit directives, as does the sentence in (3).



examples of various kinds of linguistic underdetermination of legal speech act content, as described in Carston (2002), Allott (2016), and elsewhere. The idea, then, is that whenever the linguistic material uttered does not encode a single proposition, there remains inferential work for the hearer to do.

Before we do so, however, it is worth briefly revisiting an earlier remark we made about the ability of sentences to encode propositions. This is that the claim that sentences are even able to do so has been challenged by a number of researchers (e.g. Chomsky 2000; Carston 2002: 359–360; Recanati 2004, 2010; Pietroski 2005; Rayo, 2013; Sperber 2014). There are at least two bases for this challenge, to which we ourselves are very sympathetic (see e.g. Allott & Textor, to appear). These are that words may not encode concepts and that it is speakers and not linguistic expressions that are plausibly seen as referring to individuals and expressing propositions. Yet, the assumption that sentences typically encode propositions remains the standard one among linguists and philosophers of language, and is, moreover, compatible with the claim that we are defending: namely, that inference plays a major role in the elaboration of a proposition. Since we do not wish to proceed on the basis of an assumption that entails the conclusion that we wish to argue for and is also a non-starter for many linguists and philosophers, for the purposes of the following discussion we will instead adopt the assumption that sentences may encode propositions, examining ways in which explicit speech act content goes beyond what is unambiguously encoded by the sentence.

One form of underspecification already mentioned earlier is that reflected in the use of indexical expressions such as *it*, *she*, *over there*, and *that time*. These expressions do not encode their referent — compare, for example, the indexical *then* with the phrase *28 March 2015* — but nevertheless allow a speaker to refer to different people, places, times, and other entities. That the speaker may do so is, of course, dependent on the hearer's ability to infer what or whom the speaker has intended to refer to.<sup>13</sup>

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<sup>13</sup> Arguably, some uses of indexicals do not point to a specific referent, e.g. *I* used to indicate the speaker, whoever that happens to be (see Korta and Perry, to appear). We put this possibility aside in our discussion.

Indexical expressions are not difficult to find in statutes; the following provisions provide some examples:<sup>14</sup>

- (5) a. “This Act may be cited as the London Development Agency Act 2003 and  
 shall come into operation at the end of the period of two months beginning  
 with the date on which **it** is passed.”  
*(London Development Agency Act 2003*  
*(UK))*
- b. “Every copy of a consolidated statute or consolidated regulation published  
 by the Minister under this Act in either print or electronic form is evidence  
 of that statute or regulation and of **its** contents and every copy purporting  
 to be published by the Minister is deemed to be so published, unless the  
 contrary is shown.”  
*(Legislation Revision and Consolidation Act (Canada),*  
*s. 31(1))*

Although the referent of the indexical in (5a) is certainly easier to determine than that in (5b), this determination in each case nevertheless requires the hearer to make inferences in order to do so, given the number of potential antecedents that each indexical has in its respective sentence.

These cases clearly show, then, that linguistic meaning encoded in a statute may not fully determine what the statute prescribes; this supports our claim that further inferential processes are then necessary to derive the fuller legal speech act content. Admittedly, though, it remains possible to account for the resolution of indexicals while still maintaining Marmor’s claim that the legal speech act content does not go beyond the syntax and semantics of the words uttered. This involves adopting a common view of pronoun meaning, whereby their encoded meaning is something like a Kaplanian character and their contribution to utterance

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<sup>14</sup> In these and subsequent examples, we indicate the expressions at issue in bold.

interpretation is their content — typically their referent, which may be an object, time, event, or situation. On this view, the resolution of indexicals does not go beyond working out the syntax and semantics of what has been uttered, consistent with Marmor's claim.

Similar remarks apply to the resolution of ambiguity. Again, instances of this turn out to be fairly common in legal texts, further buttressing our contention that legal speech act interpretation must be inferential. Yet, these are again compatible with Marmor's claim, since the process of disambiguation can be reasonably described as a matter of inferring which one of two or more (homographic or homophonous) words or phrases was uttered rather than of inferring meaning beyond what is linguistically encoded.

Before examining some examples, we should note that our understanding of the term "ambiguity" here, based on its use in linguistics, is much narrower than its ordinary or legal use. We will say that an utterance is ambiguous only if it corresponds to a string (of graphemes or phonemes) that bears more than one linguistic meaning. This ambiguity may be "lexical", involving the meanings associated with a particular word, as is the case for both *case* and *bat* in (6a); or structural, involving the meanings associated with a particular phrase, as is the case for the phrase *those fleeing ISIL terrorists* in (6b):

- (6) a. I've made the case for your bat.  
 b. "I welcome President Obama's pledge to [...] get aid to those fleeing ISIL terrorists." (David Cameron, 8 August 2014)  
 = 'I welcome President Obama's pledge [...] to get aid to those who  
     are fleeing ISIL terrorists'; or  
 = 'I welcome President Obama's pledge to [...] get aid to those  
     ISIL terrorists who are fleeing'.<sup>15</sup>

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<sup>15</sup> There also appears to be a further restrictive/non-restrictive ambiguity associated with the phrase *those fleeing ISIL terrorists*. Moreover, Cameron's actual statement, which we have shortened for the sake of simplicity, was "I welcome President Obama's pledge to help the Iraqi government tackle this crisis and get aid to those fleeing ISIL terrorists", which admits of still further readings, which we leave for interested readers to determine.

From our own investigation of legal texts, we have found both forms of ambiguity to be quite common. It is easy to find statutes that make use of lexically ambiguous expressions, such as *banking*, as in (7):

(7) “An Act to make provision about banking” (*Banking Act* 2009)

And while there is very little doubt in this and many other cases about the relevant sense of the word in question, it is still true that the word *banking* in (7) can in principle mean ‘the business conducted or services offered by a bank’; ‘an embankment or artificial bank’; ‘the tilt of (e.g.) a plane in making a turn’; or ‘the act of providing additional power for (a train) in ascending an incline’ (*Oxford English Dictionary*). The absence of doubt about the likely meaning of (7) just shows that the inference involved in eliminating the other meanings from consideration is performed easily and automatically.

Instances of structural ambiguity, while perhaps just as common in legal texts as those of lexical ambiguity, may often go unnoticed, just as they do in ordinary speech — until they result in different understandings of the same utterance. In the legal context, this, of course, often gives rise to a lawsuit. This was true in the case of *Maersk Drilling USA, Inc. v. Transocean Offshore Deepwater Drilling, Inc.* (2012),<sup>16</sup> which revolved around two different interpretations of the phrase in an American statute, as given in bold below:

(8) “Except as otherwise provided in this title, whoever without authority **makes, uses, offers to sell, or sells any patented invention, within the United States** or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.” (35 USC § 271(a))

Because the sale was negotiated in Scandinavia, the question came down to whether ‘offers to sell’ fell within the scope of ‘within the US’.

Such instances of structural ambiguity, which typically come to light only when a disagreement arises as to which reading of a phrase

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<sup>16</sup> This case is discussed by Liberman (2013).

should prevail, certainly indicate that determining utterance meaning involves inferential work and not merely linguistic “decoding”. This is true whether the authors of a given legal text have actually been aware that two or more meanings are available and have intended to convey only one or have simply been unaware of the availability of more than one meaning; this is because in either case the hearer must still infer which of the available meanings the authors have intended.<sup>17</sup> Nevertheless, as we have already noted, such cases can still be thought to revolve around

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<sup>17</sup> Alternatively, the authors of a legal text might have no specific intention regarding which of the two meanings is to govern. This could arise, for example, as a way of reaching a compromise on a contentious provision. (Such cases might be seen to involve the phrasal counterparts of deliberately vague single-word expressions like *jurisdiction*, as described earlier.) Such strategic considerations are arguably a common aspect of the drafting of legislation, contracts, and other legal texts, raising the question of whether the goal of the interpreter of an ambiguous legal utterance is always to infer the intended speaker meaning.

There are certainly cases where this is not the goal. One is in the interpretation of ambiguous contracts, where the common law “*contra proferentem*” (‘against the offeror’) rule applies to resolve ambiguities in favour of the party that did not draft a contract. As Sorenson (2001: 412) points out, this rule applies “even if the speaker proves that he intended” the other reading. Another is in (at least some instances of) “dynamic” statutory and constitutional interpretation, such as *Re B.C. Motor Vehicle Act* (1985). In this case, the Supreme Court of Canada disregarded parliamentary committee evidence of the intended meaning of the expression “fundamental justice” in the *Canadian Charter of Rights and Freedoms*, arguing that legislative intent related to the Charter was “a fact which is nearly impossible of proof” (para. 52) and that relying on such historical evidence might “stunt [the] growth” of the “newly planted ‘living tree’ which is the *Charter*” (para. 53).

The existence of such cases might, however, be reconciled after all with our claim that the process of inferring speaker meaning is central to legal interpretation. This would involve appealing to the distinction between interpretation proper and “creative” decision-making and seeing such rulings as involving departures from the results of the former process for the purpose of advancing certain institutional goals in the latter. Since further discussion of the complex issues involved here would take us too far afield, we will leave this for another occasion.

determination of the linguistically encoded meaning of the sentences uttered and thus as consistent with Marmor's claim.

However, many other kinds of underspecification, to be described in what follows, appear to be incompatible with Marmor's claim in that their resolution requires the interpreter of a legal text to make inferences that cannot plausibly be seen as determining meaning that goes beyond what is linguistically encoded. One such form of underspecification is that involving "missing constituents", as illustrated by the sentences in (9), which look as though they are missing a constituent relative to the logical form of the proposition they are understood to express:

- (9) a. Paracetamol is suitable.  
 b. He is ready.  
 c. This milk is sufficient. (see Carston 2002: 22)

Thus, in interpreting (9a–c), the hearer must infer, respectively, what it is that paracetamol is suitable for, what he is ready for, and what the milk is sufficient for. According to our own (informal) investigations, occurrences of words like *suitable*, *ready*, and *sufficient* with "missing constituents" appear to be quite rare in legal texts. When these words occur, they typically have a complement that specifies what the subject is suitable for, ready for, and the like, as is the case in (10), where *for immediate manoeuvre* is the complement of *ready*:

- (10) "Every vessel shall proceed at a safe speed adapted to the prevailing circumstances and conditions of restricted visibility. A power-driven vessel shall have her engines **ready** for immediate manoeuvre." (*Collision Regulations* (Schedule 1: *International Regulations for Preventing Collisions at Sea*, 1972, with Canadian Modifications)

It is possible, however, to find examples in which the intended complement is implicit and thus must be inferred. These include the following examples from the Canadian *Criminal Code* of *suitable* and *adequate*, as is given in (11); and *sufficient*, as given in (12):

(11) “Every one commits an offence who (a) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed; or (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide **suitable and adequate** food, water, shelter and care for it.” (s. 446(1))

(12) a. “Except where otherwise expressly provided by law, a court, judge, justice or provincial court judge before whom anything that is seized under this section is brought may declare that the thing is forfeited, in which case it shall be disposed of or dealt with as the Attorney General may direct if no person shows **sufficient cause** why it should not be forfeited.” (s. 199(3))

b. “If an accused alleges that he or she believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is **sufficient evidence** and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to consider the presence or absence of reasonable grounds for that belief.” (s. 265(6))

In the provision given in (11), clause (b) makes it is an offence to fail to provide food, water, shelter, and care that is suitable and adequate for (roughly) the well-being of the animal in question. That is, *suitable and adequate* must be “enriched” to (something like) ‘suitable and adequate

for the reasonable maintenance of the pet's well-being'.<sup>18</sup> In the provision given in (12a) and (12b), the expressions *sufficient cause* and *sufficient evidence* are respectively understood as something like 'sufficient cause to provide a legal basis' and 'sufficient evidence to establish that the accused had a reasonable belief in the complainant's consenting to the conduct'.

As regards *sufficient cause* in (12a), it might be argued this expression is a kind of legal shorthand, which in practice involves a "short-circuiting" of the inferential process. While this might be true, it actually supports the claim that the expression was originally the result of a full-fledged inference. However, even if we grant such a "short-circuiting" analysis for the occurrence of *sufficient cause* in (12a), such an analysis is a rather implausible one for *sufficient evidence* in (12b), where a full-fledged inference is clearly necessary. This is because the "sufficiency" of evidence in question — that is, its kind, quality, and quantity — is quite specific to this provision, and is even further specified to be of a kind such "that, if believed by the jury [...] would constitute a defence". This means, then, that the sufficiency of the evidence in question is relative to these specific purposes and must be worked out on the basis of the information provided in this provision and elsewhere, including the case law (as well as ordinary "common sense"). This, it should be noted, is also true of *sufficient cause* in (12a).

In sum, what is communicated in these "missing constituent" examples obviously goes beyond the linguistically encoded meaning of the words uttered. However, like the "indexical" examples described earlier, these examples are considered by most pragmatics researchers to involve no more than a "filling in" of values (or "saturation") that is necessary for the sentences associated with them to express a proposition.<sup>19</sup> As it

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<sup>18</sup> Of course, it is fair to ask just what this provision requires in order avoid contravening it: must the food, water, shelter and care be sufficient only to keep the animal alive, or in good condition, or something else? Presumably the legislature intended to leave this somewhat open (as in the case of *jurisdiction* discussed earlier) and further determined through judicial interpretation. Regardless of the ultimate answer to such questions, the intended content of the law clearly goes beyond the linguistic meaning of the words *suitable* and *adequate* themselves and accordingly must be inferred.

<sup>19</sup> As it happens, this claim about the necessity of such "saturation" for a proposition to be expressed has been challenged by some researchers, who have claimed that the decoded



happens, there are many other cases of linguistically underdetermined legislative content that provide even more compelling evidence of the need for inference in legal interpretation. These are ones, as we will illustrate below, in which the words of a legislative provision might unambiguously encode a proposition, but not the one intended by the speaker. Thus, arriving at the latter must involve inferential enrichment of the encoded proposition.

Such cases include those in which a sentence contains a quantifier expression such as *all*, *some*, *most*, *somewhere*, and *nothing*, which indicate what proportion of some class of entities under consideration a claim applies to. More technically speaking, this class of entities is the “domain” that a quantifier “ranges over”, and the “entities” in question may be individuals, places, and times, among others. Arguably, most uses of quantifier expressions in ordinary speech, such as *nothing* in (13), involve an implicit “restriction” of the quantifier’s domain, so that the speaker’s assertion that she has nothing to wear is implicitly “restricted” — for example, to things suitable for wearing to job interviews (or perhaps a particular job interview) and does not range over absolutely all things.

(13) I’ve got nothing to wear.

However, Parmenides’ claim in (14) reminds us that quantifiers may sometimes be intended and interpreted as unrestricted and as ranging over absolutely all types of things:

(14) Nothing comes from nothing.

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words of the utterance themselves suffice for a minimal proposition; on this, see Korta and Perry (to appear) as the claim applies to indexicals, and the work of semantic “minimalists” such as Borg (2004) as it applies to “missing constituents”. Even if these researchers are right that decoding alone can result in a minimal proposition, the “indexical” and “missing constituent” cases in statutes strongly suggest that the proposition expressed can (and, we speculate, generally does) go beyond the content of the decoded words of the utterance.

If we return now to legislative texts, we can easily find cases of explicit quantifier domain restriction, such as that given in (15), from a Canadian provision:

- (15) **Every motor vehicle** with a GVWR of 4 536 kg or less [...] and **every tire rim** manufactured for use on those vehicles shall conform to the requirements of Technical Standards Document No. 110, Tire Selection and Rims for Motor Vehicles With a GVWR of 4,536 kg or Less (TSD 110), as amended from time to time.  
*(Motor Vehicle Safety Regulations (Canada), s. 110(1))*

Yet, further investigation reveals many examples of quantifier expressions that plausibly involve implicit domain restriction. These include very clear cases, such as the following one (from the same regulations just quoted):

- (16) “A System A mirror and a System B mirror shall be tested as follows:  
 [...] (b) **every mirror** shall be adjusted in accordance with the manufacturer’s recommendations to the driver’s eye position and is not to be moved or readjusted during testing for that eye position but may be readjusted for subsequent tests for different eye positions...”  
*(Motor Vehicle Safety Regulations, s. 111(25))*

Here the intended domain of the quantifier is not all mirrors in the world, but “System A” and “System B” mirrors installed on school buses. Although that can be worked out from the linguistic context here — what is sometimes called the “co-text” — it still needs to be inferred.

Other cases of implicit domain restriction include ones like the following, which cannot be inferred on the basis of a provision’s

immediate co-text. Consider, for example, *every one* in the following provision:

- (17) “Every one is a party to an offence who  
 (a) actually commits it;  
 (b) does or omits to do anything for the purpose of aiding any person to commit it; or  
 (c) abets any person in committing it.” (Canadian *Criminal Code*, s. 21(1))

At first sight, this provision might seem to apply to absolutely all people. Yet, on further reflection, we can see that it applies only to those subject to the criminal laws of the jurisdiction that enacted them, in this case Canada, and thus as restricted with respect to jurisdiction, geography, and even age.<sup>20</sup> Such cases of such implicit domain restriction might in turn lead us to recognize it as a feature not only of examples like (17) but also of examples like (15), since in each case there must be an implicit geographical restriction on the entities subject to the provision.

These examples of implicit quantifier domain restriction provide additional evidence in favour of our claim that inference is a key part of legal interpretation, since the intended restriction is not given and must therefore be inferred. Do they also tell against Marmor’s claim? We believe that they do, on the view that such cases are best handled as ones in which the logical form of the proposition expressed has a constituent, namely, the restrictor, with no corresponding constituent in the syntactic structure of the sentence uttered. However, Marmor’s claim would be compatible with these examples of implicit quantifier domain restriction on the alternative analysis (e.g. Stanley 2000) according to which every quantifier brings to the linguistic structure a covert “slot” or variable corresponding to the domain, and that inferring the restriction is a matter of filling in this “slot”.

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<sup>20</sup> More specifically, the *Criminal Code*, s. 13 provides that “[n]o person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.”

(18) I've often been at the Korean ambassador's parties, but I've  
never had  
kimchi. (based on Wilson and Sperber 2002: 611)

The analysis of sentences like (18), like those involving implicit domain restriction, remains a matter of debate between the same two positions, which treat them, respectively, as lacking corresponding constituents in linguistic structure and as having such (albeit unpronounced) constituents, which must be assigned values. In the latter case, this idea would mean that, for example, the pronounced [have had kimchi] would be accompanied by unpronounced variables for time, place, and perhaps manner of eating. There are, however, good reasons to think that this “variable” approach cannot be right for all cases (Carston 2000: 36; Wilson and Sperber 2002: 611ff.; Recanati 2012: 186). Generally, we believe, following Pietroski (2010: 267), that while linguistic expressions may encode such implicit variables, their occurrence is not sufficient “to track all the ways in which truth can depend upon context”. What nevertheless remains true regardless of which of the two approaches is correct is that the hearer must infer the interpretation intended, given that the information needed for interpretation does not occur explicitly in the speaker’s utterance.

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- (19) a. John's a man.  
       b. France is hexagonal. (Wilson 2003: 345; Austin 1975: 143)

In certain contexts, the more likely reading of (19a) is one that involves “narrowing”: that John has some property more specific than that of being an adult male human being, namely, that of being a (stereo)typical or ideal male adult. As this example shows, “narrowing” involves arriving at a more specific concept than the lexically encoded sense of some term such as *man*, so that the extension of the occasion-specific sense is, as a proper subset of the extension of the lexically encoded concept, narrower than the latter extension. The standard reading of (19b), exemplifying the converse process of “broadening”, is that whereby France is more or less hexagonal, so that the property being predicated of it is “broader” or less specific than hexagonal shape as strictly construed.

Of course, the phenomena of free enrichment, narrowing, and broadening are of interest to us here because of their possible occurrence in legal interpretation. As we will see, they both turn out to figure crucially (if perhaps not commonly) in the interpretation of legislation, again providing compelling evidence for the role of inference in such interpretation. Although these phenomena have been treated as distinct in the pragmatics and philosophy of language literature, both are cases in which underdetermination of the proposition expressed is purely pragmatic. In other words, in neither case can the hearer determine the speaker's intended proposition merely by resolving linguistic ambiguities through a choice of one or another available linguistic structure, or by assigning referents to indexical elements and filling in “slots” in a linguistic structure (cf. Neale 2004 on “pragmatic ellipsis”). A further reason for treating these types of case together is that they are difficult to distinguish in the legal examples that we will be considering.

Arguably, free enrichment or narrowing are institutionalized in legal interpretation in the technique of “reading down”, which Sullivan (2008: 165) describes as “add[ing] words of restriction or qualification” to legislation). Of course, this technique does not involve literally adding words to legislation but rather interpreting it as if such words had been added. A clear illustration of this technique is given in the Canadian case

*Montreal (City) v. 2952-1366 Québec Inc.* (2005), which hinged on the following provision in a city by-law:

(20) “[T]he following noises, where they can be heard from the outside, are

specifically prohibited:

(1) noise produced by sound equipment, whether it is inside a building or installed or used outside. (*Montreal By-law concerning noise*, art. 9(1))

In this case, the court interpreted *noise* in clause (1) as meaning “noise that interferes with the peaceful enjoyment of the environment” (Sullivan 2008: 166). This can be seen as an instance of either free enrichment, where a constituent is added whose meaning pertains to the effect of the prohibited noise; or narrowing, whereby the phenomenon expressed by *noise* is understood in a more restricted manner as a more specific kind of noise in accordance with the court’s description. On either analysis, the proposition expressed is underdetermined by the words used and must be inferred by the interpreter of the text.

The same kind of inferential process — which can again be understood as either as free enrichment or narrowing — can be seen in instances of the application of traditional principles of legal interpretation such as *noscitur a sociis* (‘it is known from its associates’). According to this principle, the meaning conveyed by a particular word may be determined from the words accompanying it, where all of these words typically occur in lists. For example, in *Pengelly v. Bell Punch Co Ltd* (1964), the word *floors* in the following provision was understood as (something like) ‘floors used for passage’ and excluded a floor used solely for storage (Powell and Simmonds 2006: 143):<sup>21</sup>

(21) “floors, steps, stairs, passageways and gangways” (*Factories Act* 1961 (UK))

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<sup>21</sup> Another legal example of “narrowing” is that at the heart of the Canadian “Persons” case, which hinged on the interpretation of the word *qualified Persons* in the *British North America Act*, s. 24. For discussion, see Shaer (2013: 289).

Legal instances of “broadening”, whereby a meaning of an expression “broader” or less specific than its standard meaning is understood to be what the legislature itself meant (and not reached by a more creative act that serves, for example, to make the law constitutional), seem far rarer than cases of “narrowing”, although plausible cases of this process do still emerge. One such case, a well-known application of the “Golden Rule” (whereby a court departs from the ordinary meaning of an expression in order to avoid an absurd result) is the British case *R v. Allen* (1872), which considered the following statutory provision in determining whether Allen, who was already married, had committed bigamy in engaging in a marriage ceremony with a woman called Harriet Crouch:

- (22) “whosoever being married shall marry any other person during the lifetime of his spouse” (*Offences Against the Person Act 1861* (UK))

Allen’s defence was that he had not succeeded in marrying Crouch, since someone who is already married cannot marry, and so had not committed bigamy by the terms of the statute. Of course, on this argument no bigamous “marriage” would ever be illegal, and the statute would become a dead letter. The court’s solution was to construe *marry* as ‘go through the marriage ceremony’ (Holland and Webb 2003: 216). Worth noting here is that the court’s “broadened” interpretation of *marry* can plausibly be seen as respecting not just the purpose of the law but also the legislature’s intention-to-mean — which involved understanding, and intending, the use of *marry* in the provision in such a way as to make it an offence for people who were already married to engage in a marriage ceremony. After all, it is unclear how else the statute could make any sense.<sup>22</sup>

The cases of free enrichment, narrowing, and broadening that we have just discussed are all clear examples of pragmatic inference in legal interpretation. They are also clear counterexamples to Marmor’s claim, since they indicate the need of the legal interpreter to venture well beyond

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<sup>22</sup> Another case in which it is plausible that what the legislature meant by its legislation is broader than the legislation’s linguistic meaning is the interpretation of *speech* in the US constitution as something like self-expression, which notably includes such acts as flying (and perhaps burning) flags (Lawrence Solum, personal communication 2015).

the syntactic and semantic features of the linguistic material itself in interpreting *noise*, *floors*, and *marry* as respectively conveying ‘noise that interferes with the peaceful enjoyment of the environment’, ‘floors used for passage’, and ‘go through the marriage ceremony’.

Note that one who still wished to defend Marmor’s claim would not be left without arguments to do so. One argument, in particular, would involve appealing to the distinction, introduced earlier, between “investigative” and “creative” processes in legal interpretation broadly construed, and claiming that these cases of free enrichment, narrowing, and broadening reflect creative acts of legal reasoning rather than investigations into what the legislature intended to communicate.

Yet, there is good reason to doubt the plausibility of this move, at least for some of the cases that we have discussed. As pointed out by many commentators, including Marmor (2011a), the legislature and the courts engage in a kind of strategic dialogue. This means that what the legislature intends to communicate is constrained by how it expects its utterance to be interpreted — which includes its recognition that courts interpret what legislatures say in such a way that their interpretation extends beyond the strictly linguistic meaning of legislative utterances, and in particular by appealing to *noscitur a sociis*, “reading down”, and other “extralinguistic” rules of legal interpretation. The text that a legislature creates thus reflects its members’ anticipation of that fact; and the courts, in turn, take it as read that legislatures will know that the courts will interpret in this way, and so on.<sup>23</sup> This suggests that the inferential processes of free enrichment, narrowing, and broadening are, at least in some cases, better seen not as part of a court’s creative decision-making but as part of its basic

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<sup>23</sup> An obvious parallel can thus be drawn between this “dialogic” interaction between legislatures and courts and Grice’s schema for working out conversational implicatures, which he formulates as follows:

‘He has said that *p*; there is no reason to suppose that he is not observing the maxims, or at least the [Cooperative Principle]; he could not be doing this unless he thought that *q*; he knows (and knows that I know that he knows) that I can see that the supposition that he thinks that *q* is required; he has done nothing to stop me thinking that *q*; he intends me to think, or is at least willing to allow me to think, that *q*; and so he has implicated that *q*.’ (Grice [1967] 1989: 31)



interpretative work, which it undertakes in the reasonable anticipation that a legislature, in crafting legislation, is responding to interpretative decisions that courts have previously made.

That such a “dialogic” interaction between legislatures and courts may indeed figure in legal interpretation is highlighted in *R. (Evans) v. Attorney General* (2015), a recent UK Supreme Court decision that dealt with the expression *reasonable grounds* in a provision of the *Freedom of Information Act 2000*. As Lord Neuberger pointed out in the decision’s leading judgment, this statute was passed after two court decisions had ruled out as inappropriate certain grounds for making executive decisions, “[s]o it [was] not as if the[se] grounds [...] could have been unforeseen by Parliament” (para. 88), which would therefore not have counted them as “reasonable grounds”. In other words, the legislature could, and indeed should, have anticipated how a court would interpret this expression given previous court decisions on closely related matters.

We can conclude this section, then, by reiterating its main point: namely, that there are very clear cases in which syntactically and semantically encoded content does not fully determine what the legislature has communicated, and a process of inferring this additional content is thus a necessary part of legal interpretation.

## 5. Inference and textualism

In the previous section, we presented detailed evidence in favour of our claim that the task of legal interpretation crucially involves inferring various aspects of author (or speaker) meaning. We considered this claim in relation to Marmor’s claim that the content of legislative texts is determined by their linguistically encoded structure and meaning; and found that, taken as a whole, the evidence we presented cast substantial doubt on Marmor’s claim.

In this section, we push our “intentional-inferential” claim further by investigating how it relates to (Perry’s [2011] characterization of) the doctrine of legal interpretation known as “textualism”. Before we do so, however, we might offer two caveats about “textualism” and Perry’s analysis of it. One is that, for the purposes of legal as well as pragmatic analysis, this doctrine should probably be recognized as a moving target, which exists in a profusion of versions and which has also given rise to rather different understandings of even some of its main tenets — facts

about it highlighted by studies with such titles as Tutt's (2013) "Fifty Shades of Textualism" and Nelson's (2005) "What is Textualism?".<sup>24</sup> The other caveat is that textualism, at least in most of its varieties, is best understood in normative terms, as a prescription about how legal interpretation *should* work, rather than a claim about how legal interpretation generally *does* work.

We will be addressing the first caveat simply by focussing on Perry's characterization, which is admirably clear, in the hope that the various other versions and understandings available should not significantly affect our conclusions. The second caveat may seem a more serious one, since it suggests that we and advocates of textualism may simply be talking past each other. We can, however, address this caveat, too, by observing that in order for textualism to be worthy of serious consideration as a doctrine of legal interpretation, it must be consistent with what we know about how interpretation actually works. Otherwise, it can hardly offer much insight into the interpretation of legislation or much guidance to jurists about how such interpretation should proceed.

About Perry's study itself, we might note that, in addition to clarifying and motivating textualism as a legal doctrine, it also shows how this doctrine can underwrite progressive interpretations of certain disputed expressions in the US Constitution, in particular, the Eighth Amendment's prohibition of "cruel and unusual punishments".

For our purposes, what is important about Perry's discussion is what it claims about the role in textualist doctrine of speaker intention and hearer inference and whether the doctrine is compatible with our own claims about these. Perry envisages a very limited role for hearer inference about speaker intention in legal interpretation, rehearsing textualism's emphasis on "ordinary" meaning without probing the ways in which this and other encoded legal content come to be shaped and elaborated in the process of legal interpretation.

### 5.1. "Meaning-textualism" and "conception-textualism"

A key result of Perry's examination of textualism is the distinction he draws between two understandings of the doctrine; these he dubs

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<sup>24</sup> See, e.g. Shaer (2013) for some discussion about these and other difficulties in characterizing and understanding textualism.

“meaning-textualism” (which he endorses) and “conception-textualism” (which he rejects). He defines the former as follows:

the view that the content of a statute is determined by the words in the text of the statute, given the meaning that those words had at the time of enactment or ratification, or, in the case of ambiguity, those meanings or senses, among those the words had at the time, which the enactors intended to exploit and the ratifiers understood the text as written to be using. (2011: 106)

The latter, “conception-textualism”, Perry defines as follows:

the view that the conceptions that the enactors had of the states, conditions, phenomena, and the like referred to by their words, used with their commonly understood meanings, in the operative senses, are determinative [of the statute’s content].

(Perry 2011: 106)

As Perry (2011: 107) points out, for the former variety of textualism, “it is the *sense* of the words that was originally operative [...] that is at issue” for the enactors of legislation, whereas for the latter variety it is the enactors’ conceptions of what is “referred to by their words”.

This difference between meaning-textualism and conception-textualism is reflected, in turn, in what Perry calls the “functional” and “fixed” varieties of interpretation respectively licensed by them. Perry explains these varieties of interpretation by considering the example of the following (fictitious) legislative prohibition:<sup>25</sup>

(23) “Endangered species shall not be hunted.” (Perry 2011: 114)

On a functional interpretation of *endangered species*, the particular set of species that this expression picks out may vary over the time the legislation in question is in force. Accordingly, “hunting for minks might be prohibited, by the original meaning of the statute, even though at the time it was enacted it did not outlaw the hunting of minks, and was even

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<sup>25</sup> This is based on an example from Dworkin (1997: 121).

part of legislation that licensed hunting for them” (Perry 2011: 114). By contrast, on a fixed interpretation of this expression, what the expression will capture is only “the set of species that are endangered at the time of the legislation that cannot be hunted, even if they cease to be endangered, or if other species come to be endangered” (Perry 2011: 114). It is on the basis of such considerations that Perry concludes that conception-textualism is “confused, implausible, and unworkable” as an approach to legal interpretation.

Perry’s rejection of conception-textualism is consistent with our own claims about utterance content. According to modern inferential-intentional views of communication, including ours, what is expressed by the use of a word is (in normal cases) the concept that the speaker intends to convey by that use of the word or words used. Other mental representations of the speaker — which might include beliefs about what might be in that concept’s extension — are not the target of utterance interpretation. In the legislative examples of the expressions *reasonable grounds* and *noise* that we discussed earlier, we can say that an interpreter arrives at the relevant meanings of these expressions by working out the legislature’s intended sense of these expressions. Now this task *may* include assessing whether a particular event or thing indeed falls under the intended sense. It is worth emphasizing, though, that on our view, this assessment is primarily the task of the interpreter and not the legislator: legislators may well have certain referents of an expression in mind when they enact legislation, but these are not determinative of the legislation’s utterance content.

Also consistent with our view of legal interpretation — in particular, that it “exploit[s] at least some of the same abilities used in other varieties of verbal communication” (Wilson 2011: 70) — is Perry’s assertion that meaning-textualism “seems to apply to statutes the same apparatus we use to determine what some individual says when they are talking to us” (Perry 2011: 107). We also agree with Perry that a statute’s legal speech act content is (in general) precisely what it *says* — that is, “statutes prohibit or allow what the person who uttered the words, at the time they were enacted, said was prohibited or allowed” (Perry 2011: 107).

Where we part company with Perry, however, is in the role that we see for speaker intentions in fixing this legal utterance content. Perry restricts this to selecting among preexisting senses of ambiguous

expressions, that is, disambiguation. He claims that the kinds of word meanings relevant to legal interpretation “will typically be among the meanings a good dictionary of the time will explain”<sup>26</sup> and that what thus guides legal interpretation “is what we learn about a word in a specific text by looking up the meaning of the word in a dictionary, and, if more than one meaning is given, by figuring out which one is employed” (Perry 2011: 107).

As we have discussed earlier, speaker intentions (and their inferential recovery by interpreters) appear to play a much broader role than this, in cases such as the use of *noise* to express ‘noise that interferes with the peaceful enjoyment of the environment’, *floors* to express ‘floors used for passage’, and *marry* to express ‘go through the marriage ceremony’. If we are right about these cases, then Perry’s meaning-textualism must be wrong.

The problem for Perry is simply this: that the picture of interpretation that he has sketched allows for no departure from the assignment to words of their “ordinary” meanings save for “special meaning[s]” indicated for terms “in the text itself” (Perry 2011: 106) or, Perry might have added, in the case law and doctrinal statements. However, as we have noted, there are many varieties of textualism, and the late Justice Antonin Scalia himself, one of the chief architects of textualism, allows for departures both from “what is said” and from the dictionary meaning of statutory language. Since Perry’s analysis of textualism addresses Justice Scalia’s understanding of this doctrine specifically (see Perry 2011: 105–107), it seems only reasonable to consider Justice Scalia’s own exceptions to textualist dictates.

Justice Scalia’s writings about textualism recognize, for example, that “context is everything” and in particular that constitutional interpretation involves “giv[ing] words and phrases an expansive rather than narrow interpretation”, thereby licensing the interpretation of the words *speech* and *press* “as a sort of synecdoche for the whole” of “communicative expression” (Scalia 1997: 37–38). This suggests — notwithstanding Perry’s view — that some form of textualism might be

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<sup>26</sup> We take it that the hedge “typically” is intended to allow for the possibility that even good dictionaries may fail to record all the conventional senses of ambiguous words.

compatible after all with the kinds of pragmatic enrichment of word meanings described in the previous section.

Justice Scalia's writings also recognize a need for the correction of "scrivener's errors" "where on the very face of the statute it is clear to the reader that a mistake of expression [...] has been made" (Scalia 1997: 20). Such cases can be seen as analogous to those of misspeaking in ordinary conversation, as illustrated in (24), where the speaker has clearly meant to say *pigeons* but has said *penguins* instead:

(24) Those penguins we were feeding yesterday are back.

Of course, it might be objected that admitting such exceptions into textualist doctrine renders the doctrine incoherent, since they contradict the textualist tenet that "[t]he text is the law, and it is the text that must be observed" (Scalia 1997: 22). In response, one could say that the same objection that applies, for example, to the correction of scrivener's errors would also apply to the recognition of misspeaking in conversation, since here, too, the interpreter apparently disregards the speaker's words in favour of an intention-to-mean inconsistent with these words. Yet, in each case, the inference that the speaker has intended to say what she has in fact said is defeasible; this fact allows the hearer to make additional inferences in order to reconcile the *prima facie* incompatibility between the speaker's words and what the speaker most plausibly intended to convey.

It must still be recognized, however, that a tension does exist in textualist doctrine between accommodating such mismatches between what legislation says and what it is intended to convey, on the one hand, and maintaining the authority and predictability of the legal system, on the other, including the delicate balance that this system seeks to strike between legislative and judicial authority. This tension may account both for the discomfort expressed by Justice Scalia and other textualists for "certain presumptions and rules of construction that load the dice for or against a particular result", such as the "rule of lenity" (which resolves ambiguities in criminal statutes in a defendant's favour), and for the debates that continue to surround the treatment of such matters as scrivener's errors and the "Absurdity Doctrine" (e.g. Manning 2003; Doerfler 2016). Arguably, this tension exists not only within textualism

but very generally in jurisprudence that addresses such tensions, such as the treatment of different categories of “error”, which allow the “correction” of some but not other kinds of “error”.<sup>27</sup>

The upshot of these considerations is that while textualist doctrine may draw no clear line between permissible and impermissible pragmatic enrichments of linguistically encoded meaning, the more it permits such enrichments, the less sure its commitment becomes to preventing judicial encroachment on the legislative domain. Yet, if the pragmatic processes of enrichment that we have described are an inevitable part of legal interpretation cognitively speaking, then restraining such judicial encroachment by ruling out such processes would be misguided in any case.

## 6. Conclusion

We think that we have shown in this study that the interpretation of both legal speech acts and the speech acts in ordinary conversation are of the same general kind — or that we have at least shifted the burden onto anyone who would claim otherwise.

Our discussion began with an explanation of the role of speaker intentions in standard approaches in pragmatics, whereby certain speaker’s intentions normally determine what the speaker means by an utterance. Since intentions are not available to hearers, these intentions, which (in general) constitute the meaning of the utterance, must be inferred by the hearer from the material that the speaker utters.

We argued that this position applies straightforwardly to legal interpretation. In particular, we pointed out that legal texts, like virtually all verbal utterances, contain linguistically ambiguous expressions and that some of these expressions are clearly intended to convey one sense and not another, a fact that must therefore be inferred. We also adduced several types of counterexample to Marmor’s (2008) claim that legal speech act content is determined by what the linguistic material uttered encodes. These counterexamples included ones involving the resolution of indexical expressions and of “missing constituents”, “free enrichment”

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<sup>27</sup> For example, as Sullivan (2008: 177) observes, courts have historically distinguished between “drafting errors” and “gaps in a legislative scheme” and have the authority to “correct” the former but not to “cure” the latter.

and “narrowing” (which in their legal guises took the form of “reading down” and the application of the *noscitur a sociis* rule), and “broadening”. The logic of our argument was that if any of these kinds of counterexamples was correct, then Marmor’s claim could not be; and we took the *noscitur a sociis* and broadening cases to be particularly good counterevidence to his claim.

We next investigated the implications of our claims about the role in legal interpretation of speaker intention and hearer inference for the legal doctrine of textualism as described in Perry (2011). What we argued was that the role of these went far beyond the limited one that Perry has envisaged, and thus that textualism at least as he has characterized it does not sufficiently recognize the importance in legal interpretation of various processes of pragmatic enrichment of encoded linguistic content.

We believe, then, that we have offered a very compelling case for rejecting the idea of legal interpretation as a *sui generis* phenomenon and for treating it as a variety (albeit a rather distinctive one) of verbal communication. Admittedly, though, we might not have dispelled the doubts of some readers that we have ignored substantial differences between legal utterance interpretation, on the one hand, and both face-to-face and various kinds of written communication, on the other.

We have said that the utterance content of legal instruments rarely if ever includes implicatures, and have argued elsewhere (Allott and Shaer, to appear) that legislative provisions do not have the implied speech act force of orders, contra Searle (1975), Marmor (2008), and others. Moreover, we have noted in this study that implicitly restricted quantifiers and “missing constituent” cases, though common in normal talk, are relatively rare in legislative texts, although we did not offer any explanation of these differences.

Although we must leave a detailed explanation for another occasion, we can briefly offer some reasons for these differences. One of these is that the interpretation of legislative and other legal texts relies less on information from the context than do other forms of speech, including — indeed, in particular — face-to-face conversation. In other words, legislators know that they create laws for addressees who will often be distant from them in both space and time. Yet, this lesser reliance on inference cannot be plausibly attributed entirely to a lesser availability of shared context than in face-to-face conversation. Consider the



interpretation of literary texts, where there is often little physical context shared by author and reader but where texts are nevertheless rich in implicatures and in such figures of speech as metaphor and irony.

We suggest that legislators are aware not just that the rich context typical of personal interactions is not available to guide interpretation but also that the stakes are high, and that they as speaker are a corporate entity rather than individuals. For these reasons, they seek to achieve a high level of explicitness and thus to minimize or perhaps even eliminate implicated content and implicit domain restrictions, among other such departures from encoded content. That legislators might thus seek to minimize or eliminate these elements from their texts cannot, however, be taken to suggest that they might also seek to entirely eliminate, for example, indexicals and ambiguity, since the elimination of the latter elements would not obviously be consistent with the use of natural language. Despite whatever efforts legislators do make then, to minimize appeal to non-encoded content, there nevertheless remains, as we have suggested, a considerable amount of other content that must be inferred by the legal interpreter.

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