

## Legal Speech and the Elements of Adjudication

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### 1. Introduction

In this study, we pursue two ideas about legal speech.<sup>1</sup> One is that this speech can be fruitfully studied if we approach it not as a *sui generis* phenomenon but as a variety of verbal interaction, with more uniting it than distinguishing it from other varieties, including ordinary face-to-face communication and literary texts. The other, which takes the first as its point of departure, is that we can gain a better understanding of legal speech by recognizing its complexity in speech act terms and distinguishing speech act content from more strictly legal content.

In much of our previous work, our interest in the speech act content of legal speech has been oriented toward the legal meaning that a legislature intends to convey through the enactment of a given statute, seen as a complex utterance that creates new social facts. Here, we focus on what judges do with legal speech in handing down judgments. While we have looked at the legislature as a “speaker,” any study of what judges do needs to look at their role as both “hearers” (of statutes and previous cases) and “speakers” (of judgments). Of course, the terms “speaker,” “hearer,” “legal speech,” and “utterance” are all an awkward fit for the legal context, given that statutes and judgments are typically presented in writing; and the use of these terms inevitably draws attention to the difference between this form of communication and the ordinary language interactions that these terms are more commonly used to describe. We will address this by sketching a general picture of verbal communication and then showing how legal speech represents a particular elaboration of this.

Doing so will allow us to set the stage for our discussion of adjudication and for the following central claim. This is that adjudication is best described in speech act terms as a “verdictive” (Austin 1962; Bach and Harnish 1979), also known as a “representative

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<sup>1</sup> We have defended these claims elsewhere (e.g. Allott 2013; Allott and Shaer, forthcoming; Allott and Shaer, submitted).

declaration” (Searle 1976, 15). Such speech acts are reports of findings that make them the case officially. Classic examples include a line-call in tennis and a cricket umpire giving a batsman out. On Austin’s (1962, 153) description, a verdictive is a “judicial act,” which “consist[s] in the delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact, so far as these are distinguishable.” As such, “[v]erdictives have obvious connexions with truth and falsity, soundness and unsoundness and fairness and unfairness.” Searle and Bach and Harnish improve on Austin here in making clear the contrast and relation between such acts and what Bach and Harnish call “effectives” and Searle “(nonrepresentative) declarations,” which are speech acts that make such and such the case without also reporting a finding, such as naming a ship or saying “I do” in the wedding ceremony. Searle makes both the relationship and contrast explicit in his discussion of the difference between representative and nonrepresentative declarations (Searle 1976, 15–16). Bach and Harnish class effectives and verdictives together as “institutional” speech acts.<sup>2</sup>

For us, two aspects of this work are especially noteworthy. One is its highlighting of verdictives as speech acts that function within a set of institutional rules and conventions (Bach and Harnish 1979; see also Sperber and Wilson 1986, 244–45). The other is the complex nature of this type of act, which involves at least assembling evidence or reasons and issuing a decision on the basis of them—all of which, of course, depends on a court coming to a reasonable understanding of the content of the laws and other legal texts that drive its ultimate decision. Characterizing judges’ adjudications in speech act terms as “verdictives” properly places decision-making rather than uncovering meanings at the heart of “judging” activity; but it also makes the point that the adjudication is not simply a free choice but a finding about how things stand.

That much is fairly uncontroversial. However, we suggest that this characterization of what judges do implies a contrast with the traditional picture of judging as essentially “interpreting what others have decided” (Endicott 2012, 110). We also take issue with the claim of Endicott and others that much of what is commonly placed under the rubric of “legal interpretation” is not, in fact, a matter of interpretation at all. For Endicott, interpretation is “a creative reasoning process of finding grounds for answering a question as to the meaning of some object” (Endicott 2012, 109), where this answer ascribes to this object not “what everyone [already] knows if they are familiar with the object, but [ . . . ] a meaning that someone else might dispute” (Endicott 2012, 110). Crucially for him, it does not involve

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<sup>2</sup> For more on the speech acts in legal speech, particularly the role of effectives, see Allott and Shaer (forthcoming).

various processes some might see as basic to any kind of interpretation. These include “[u]nderstanding the law,” which for Endicott only sometimes “requires a creative intellectual process of finding reasons for an answer to a question (which might have been answered differently) as to the meaning of the object” (Endicott 2012, 121). When this is not required, the law is understood “without needing to interpret” (ibid.). Endicott has also argued that what judges do when they precisify the meanings of certain terms in statutes is not interpretation, since it is not an investigative activity but a creative one.

Now, we agree with Endicott that whatever “legal interpretation” is, only part of it is plausibly identified as “utterance interpretation,” where this is a process of attempting to determine the utterance content of legislative speech. We likewise agree that the process of reaching a verdict that resolves a legal dispute may involve a great deal of “creative” activity, and thus that legal reasoning may include any or all of the five ingredients that Endicott enumerates. Where we depart from him, though, is in our claims that (1) understanding the law and (2) precisifying vague terms that have been left deliberately unspecific by the legislature are interpretive activities—the former necessarily, the second only in some instances, as we explain below. This makes it more natural to see these aspects of reasoning as parts of the complex interpretative process in which judges are engaged, rather than seeing them as outside of this process.

On the other hand, while the judicial activity in question is indeed traditionally (and no doubt strategically) called “legal interpretation,” at heart it is not an effort to interpret legislative speech. Instead, it is—as Endicott himself argues—an effort to resolve a dispute related to certain instances of legislative speech through an act of decision-making. Arguably, then, judges’ primary role in legal communication is not as the hearer of the legislature’s speech, called upon to understand what this speech means. Rather, it is as decision makers, called upon to do something: namely, to decide, on the basis of this speech, which party wins the dispute. In other words, adjudication responds to a request for action—in this case, making a decision that resolves a dispute.

Yet, it is equally clear that in responding to a request for a decision by parties to a dispute, the judge must (at least in cases not involving purely common law disputes) track the relevant intention or intentions expressed by the legislature in enacting the legislation that figures in the dispute. Accordingly, utterance interpretation in a strict sense is a necessary part of the process of judicially deciding the dispute. Moreover, although the legal content of the legislative speech on which judges ground their decision may contain indeterminacies, these are not obviously different in kind from the semantic indeterminacies that hearers must sometimes resolve in ordinary utterance interpretation. The information that the hearer can

appeal to may come from a range of sources; regardless of its source, however, it is no less part of the interpretative process if the hearer appeals to it in working out a speaker's meaning. This holds likewise for legal speech, as we will explain.

Another way to see our departure from Endicott on point (1) involves his understanding of "interpretation" itself, which is based on an effort to capture "legal interpretation" in terms of Wittgenstein's (1953) distinction between noninterpretative "rule-following" and true interpretation (Endicott 1994, 2012). We believe that this understanding misconstrues the process of arriving at the meaning in putatively "noninterpretative" cases as well as in some "interpretative" ones. In particular, it fails to recognize the degree to which meaning-seeking activities involve significant inference. As such, it pulls legal interpretation as a phenomenon away from what are plausibly seen as other (albeit highly differentiated) varieties of the same phenomenon.

The heart of the problem here, as we see it, is that Endicott's claims about legal reasoning and interpretation (and those of some other legal scholars such as Andrei Marmor) are not grounded in a realistic picture of the process of working out meanings. Here we agree instead with another strand of legal scholarship, including the work of Dworkin. Relevant here is Dworkin's remark that "[w]hen we are trying to decide what someone meant to say [ . . . ] we weave assumptions about what the speaker believes and wants, and about what it would be rational for him to believe and want, into decisions about what he meant to say," and his claim that the same process is involved, albeit with its "difficulties [ . . . ] greatly increased," in interpreting "the utterances [ . . . ] of an institution like a legislature" rather than a "real person" (Dworkin 1997, 117). Dworkin's views here are very much in line with much recent philosophy of language and with contemporary linguistic pragmatics—in the latter of which it has become a commonplace that the hearer's task of inferring what the speaker meant is basic to verbal communication.

In what follows, we will be sketching this consensus view of modern linguistic pragmatics as it has grown out of work by the philosopher Paul Grice, showing how it provides a firmer foundation for the analysis of adjudication—in particular, by highlighting the commonalities between legal and other speech. Among the happy consequences of such a foundation, we will suggest, is a clearer understanding not only of adjudication and other aspects of legal speech but also of the strong parallels between them and other forms of communication. This permits an understanding of adjudication as a phenomenon far less alien than legal scholarship sometimes makes it out to be. In this respect, then, our discussion of adjudication serves a demystifying (and perhaps deflationary) purpose, helping to remove some of the obscurity surrounding the legal domain and placing legal speech squarely within

the larger domain of verbal interaction.

Rejecting Endicott's claim about what counts as "interpretation" is not so much about substituting one meaning of the term "interpretation" for another. Rather, it is about seeing the working out of the content of an utterance or text, whether a legal or literary text or ordinary speech, as never simply about "grasping" rules and instead always about inferring speaker meanings. This is so even though the process may often be spontaneous and intuitive rather than voluntary and reflective. Pragmatic inference is often not occurrently conscious, although it is typically reconstructible after the fact.<sup>3</sup> We take this form of meaning determination as basic to all forms of verbal interaction—that is, driven by inference to the best explanation and exploiting whatever information is relevant to this task. It is this picture of verbal communication, then, that we take to describe the communicative aspects of adjudication and of legal speech more generally, the particularities of which emerge as a reflection of particular (institutional) assumptions, choices, and constraints, just as other varieties of verbal interaction, such as literary interpretation, reflect different ones.

Turning to the disagreement with Endicott about precisification, it is worth emphasizing that we are sympathetic to a key point he is making here: namely, that the term "legal interpretation" can obscure the distinctions between various things that judges do. In particular, we agree with Endicott that there are examples of such precisifications that are not instances of interpretation in the sense of recovering the meaning of the text or inferring what the legislature intended to convey. However, we think that there is a further distinction to be drawn in such cases. In some, the court does something that the legislature intended when it interprets a term more precisely than the legislature specified; in others, it acts against this legislative metaintention about how the statute should be read and used. Accordingly, the former are instances of proper interpretation, whereas the latter are something else.

In what follows we will be pursuing the idea that adjudication represents a complex event—that is, a constellation of activities that together form the act of judging—by laying out what we see as its components.

## 2. Legal Speech as a Variety of Verbal Communication

As already noted, we take as our point of departure for this investigation a picture of verbal interaction traceable to Grice (1957, [1967] 1989). This picture is captured in his claim that utterance content is constitutively determined by certain speaker intentions and—Grice's

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<sup>3</sup> On the availability of pragmatic inference, see Recanati (2004, chap. 3); Garcia-Carpintero (2001).

On tacit but reconstructible inference more generally, see Grice (2001); Boghossian (2014, 2).

great innovation—that interpretation is a matter of the hearer inferring those speaker intentions (Sperber and Wilson 1986, 25). As such, interpretation of an oral or written text is a type of inference to the best explanation, where the production of the text is what is to be explained and the explanation is in general a matter of what it was that the speaker intended to communicate. 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; if the hearer can infer these intentions, then communication succeeds.

### 2.1. Inference in Verbal Communication

Now, for some readers, the claim that utterance content must be *inferred* might be an implausible one. Yet there is a simple, and compelling, argument for it: this is that hearers do not have direct access to speakers' minds and so must work with available clues to what the speaker means, in the form of the audible and visible traces of the speaker's behavior. The insight is that no simple decoding story can adequately explain verbal communication—there is in general no simple connection between movements and sounds (or marks on paper or a screen), on the one hand, and the content of an utterance, on the other.

Some might object that in verbal communication, we simply say what we mean rather than providing clues to our meaning. In other words, finding out what the speaker means is indeed a matter of decoding rather than inferring this meaning. This, as we have described elsewhere (Allott and Shaer, submitted), appears to be the position of Andrei Marmor (2008), who claims that, except in very rare cases, the content the legislature prescribes is precisely the content determined by the syntax and semantics of the expressions uttered. It also seems to be what Endicott (2012) is suggesting (in a rather different philosophical idiom) in claiming that “rule-following” processes such as responding appropriately to “a red traffic light” when “approach[ing it] in your vehicle” are “non-interpretative,” given that these do not involve “the interpreter’s task of finding reasons for ascribing one meaning to it rather than another” (Endicott 2012). He likewise seems to be suggesting this in quoting the “attractive” view of Marmor (2005, 117) that the term “interpretation” is best reserved for cases in which “there is nothing more to explain or understand about [the] meaning” of the particular formulation of a rule and “a new formulation of the rule” is required, “which would remove the doubt.”

The cogency of this objection to the inferential view of determining meanings is undermined by a number of considerations. One is Bach’s (2006, 24) observation that even in cases where the speaker means precisely what she has said, the hearer must infer that that is so. The speaker might have been speaking ironically or metaphorically, rehearsing a line from a play, or the like. Another is that it is not obviously even possible for a speaker to mean

precisely what is encoded by the sentence that she utters, given that the linguistic meanings of words and sentences may not be plausible candidates for speaker meanings or components of these meanings. It is well known that this applies to the interpretation of indexical expressions like *it*, where decoding of the sentence at most determines that there is some singular inanimate entity being referred to and thus still requires the hearer to infer what that entity is. But there is also an emerging consensus in lexical semantics (Levin 1993; Levin and Hovav 2005; Chomsky 2000; Leben 2015; see also Laurence and Margolis 1999, 54) and in pragmatics and the philosophy of language (Carston 2002, 359–60; Carston 2012; Recanati 2004, chap. 9; Pietroski 2010; Allott and Textor submitted; Collins 2011) that even standard “content” words such as *red*, *car*, and *pour* have “gappy,” “partial,” or “schematic” encoded meanings that fall short of determining properties or extensions. According to this view, parsing a sentence and combining the meanings of its words according to the rules of syntax and semantics will never or almost never yield a proposition, that is, something with truth conditions.

Even if we assume that compositional sentence meaning (abstracting away from indexicals) is truth-apt (i.e., capable of being true or false), there is still another reason to see pragmatic inference as ubiquitous in arriving at “what is said” by a speaker in uttering a sentence. This is that the contribution made by the basic context-invariant meanings of the words uttered typically falls short of what the speaker intends to communicate (Sperber and Wilson 1986; Bach 1994). We argue elsewhere that this is so even for legislatures enacting statutes (Allott and Shaer submitted). Here we will have more to say about the roles of both inference and relevant evidence in guiding inferences when we discuss Endicott’s claims about “noninterpretative” aspects of legal reasoning in section 3.

## 2.2. Legal and Other Forms of Communication

The picture of verbal interaction just sketched forms the basis of the claim that we wish to defend about legal speech in general and adjudication in particular. This is that these can be characterized in essentially the same way, modulo the properties of legal speech that derive from institutional constraints on it. As we have argued elsewhere (Allott and Shaer submitted), legal speech, like ordinary communication and literary interpretation (among other varieties of verbal interaction), displays the properties of the picture just sketched, “draw[ing] on the same basic cognitive and communicative abilities” and thus plausibly captured in essentially the same terms. As we have seen, these include “the notion of inferential communication itself, the distinction between explicit and implicit communication, [ . . . ] expressions of attitude, and so on” (Wilson 2011, 70).

Also important to this general picture of verbal interaction is the role of information

that is “relevant” to the process of inferring speaker meaning, in the sense that it can be related to available background information “to yield conclusions that matter” to the hearer (Wilson and Sperber 2004, 608). As defined by Sperber and Wilson, the notion of “relevance” involves a trade-off between cognitive effects and processing effort, so that an input to cognitive processing will be worth attending to because “it is *more* relevant than any alternative input available to us at that time” (Wilson and Sperber 2004, 608). In this technical sense, then, “relevance” applies to a cognitive trade-off. However, we suggest that this notion can usefully be—indeed needs to be—extended to other trade-offs between effects and the expenditure of resources involved in legal and other forms of “offline” interpretation, as we briefly describe in what follows.

Given this picture of verbal interaction, we can attribute many of the key differences between legal and other forms of communication to the specific ways in which these different forms of communication elaborate this picture in drawing on the principles that structure the institutional domains to which these forms respectively belong.<sup>4</sup> In the case of legal communication, these principles—rich enough to constitute a “culture of law,” as Kahn (1999) describes it—commonly engage broader institutional goals to shape and constrain legal communication in various ways. Such principles include “the near-total ban on testimony about legislators’ private understandings” (Nelson 2005, 359), which—though decidedly alien to most face-to-face communication, where the hearer’s ability to immediately confirm or disconfirm what the speaker has meant can be taken for granted—speaks to such concerns as “the need for citizens and their lawyers to have fair notice of the law’s requirements and for voters to be able to understand what their elected representatives are up to” (Nelson 2005, 359). Such principles also include interpretation-guiding ones such as *stare decisis*, substantive canons of construction such as the rule of lenity (“penal laws are to be construed strictly”), and textual canons such as *eiusdem generis* (prescribing that the meaning of general terms be restricted to the same class as the specific terms that precede them in a list).

Another special (although not unique) feature of legal communication is the possibility of a significant displacement in both space and time between the creation of a text and its interpretation. This gives rise to another special feature: namely, the potentially wide and temporally as well as spatially dispersed nature of the intended audience of legal speech. This feature, in turn, leads to a calculation of “relevant” information very different from that associated with ordinary utterance comprehension, whose “almost instantaneous” nature

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<sup>4</sup> This discussion is based on Allott (2013).



means that normally “in practice the only evidence and hypotheses considered are those that are immediately accessible” (Sperber and Wilson 1986, 66). In legal communication, by contrast, both the time available to assemble evidence and the range of potential evidence are considerable, meaning that the trade-off is between professional or institutional as well as cognitive effort and effect. As we have already noted, this trade-off is a very complex one, which involves identifying evidence that is not only relevant but also consistent with legal principles that serve to avoid the consideration by decision makers of evidence that may have a prejudicial effect on their decisions, even if relevant.

Of course, legal communication is also distinguished from other varieties of communication by the particular institutional speech acts that it gives rise to. These acts can be seen as complex, consisting of a number of subevents. In other words, it is possible to see legal communication from a bird’s eye view as well as from increasingly closer views. From the furthest remove, legal speech might seem to consist simply in an authoritative speaker, the legislature, conveying a message, a statute, to an authoritative hearer, the court. But this is not accurate. At the least, we need to replace this picture with one that contains at least two types of speech act: one of enacting a statute, in which the legislature is the main actor; and another of rendering a verdict related to this statute, in which the court is the main actor.

A more interesting insufficiency of a conception of adjudication simply in terms of the author and receiver of a legal text is signalled by the frequent observation in the legal literature (made recently by, for example, Tushnet [2014, 58] and Marmor [2011]) that the relationship between legislatures and courts is “dialogic”; this underscores the roles of both courts and legislatures as actors and their anticipation of each other’s actions. As we have put it elsewhere (Allott and Shaer, submitted):

What the legislature intends to communicate is constrained by how it expects its utterance to be interpreted, and at least some members of the legislature (or the drafters working on their behalf) will know about *noscitur a sociis*, reading down, and the like, and in fact rely on them. That is, they are aware that courts will interpret what they say in a manner that extends beyond strictly linguistic meaning, so that the text that they create reflects their anticipation of that fact.

Legal communication can also be decomposed into an array of further subevents on both speaker’s and hearer’s sides of the interaction. For example, the enactment of legislation in certain jurisdictions involves development and drafting of a bill, debates and committee examination in the legislature, votes, publication in an official gazette, and then formal enactment, including official assent by the head of state. Moreover, the actual “communication” of the contents of the statute takes the form of its final publication and dissemination to the public and arguably does not “crystallize” until some member of the

public is subject to it and some court authoritatively establishes its interpretation.

In previous work (Allott and Shaer forthcoming), we have described the speech act of “enactment,” associated with the legislature. As already noted, our focus here is on the “verdictive” speech act, associated with the courts. We pursue an analysis of the latter speech act in the next section.

### 3. The Speech Act of Adjudicating

To proceed with our discussion, it might be helpful to first see how the activity of adjudication is generally understood. The standard legal definition, as found, for example, in *Black’s Law Dictionary*, is “[t]he legal process of resolving a dispute; the process of judicially deciding a case.” What this definition naturally highlights is the decision-making at the heart of adjudication. This understanding of adjudication is reflected in Austin’s (1962) speech-act description of it, quoted earlier, as a “verdictive,” which likewise highlights the act of decision-making involved in making a finding based on “evidence or reasons.” This understanding can also be found in a second prominent definition of “verdictive,” that of Bach and Harnish (1979, 111), which emphasizes verdictives’ institutional nature:

*Verdictives* are judgments that by convention have official, binding import in the context of the institution in which they occur. Thus, to call a runner out, to find a defendant guilty, or to assess a piece of property is not just to make a judgment; given the position and attendant authority of an umpire, a judge, or a tax assessor, it is also to make it the case, if only so far as the relevant institution is concerned, that what is judged to be so is so in fact.

Moreover, although Bach and Harnish do not say so explicitly, adjudication seems to be a clear case of a verdictive that “create[s] institutional rights and obligations” and, like other conventional illocutionary acts, also both “further[s] . . . some institutional practice, process, or procedure” and “affect[s] the institutional status of persons or things.”

What both of the above definitions of “verdictive” also very clearly signal is the complexity of this speech act. As it happens, the nature of this complexity has received considerable attention in the legal and philosophical literature (e.g., Endicott 1994, 2012; Solum 2010, 2013; Sorensen 2001), which has highlighted its “creative” or “inventive” aspects as well as its more narrowly “interpretative” ones.

#### 3.1. “Interpretative” and “Noninterpretative” Aspects of Adjudication?

One very compelling analysis of adjudication, as described earlier, is that of Endicott (1994, 2012). Noting the traditional description of what judges do, which is mostly “interpreting what others have decided (the parties, the legislature, framers of a constitution, states that

signed a treaty, previous courts . . . ),” Endicott points out that judging may involve far more than essentially following rules laid down by others—although in cases where judges “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). We agree with all of this.

More controversially, though, Endicott claims that many components of legal reasoning “need not involve interpretation.” The components in question are the following ones (Endicott 2012, 111):

1. Resolving indeterminacies as to the content of the law
2. Working out the requirements of abstract legal provisions
3. Deciding what is just
4. Equitable interference with legal duties or powers or rights
5. Understanding the law

Let us focus first on the last of these components. In order to understand what Endicott is getting at here, it is necessary to see that his analysis of legal interpretation is based on Wittgenstein’s (1953, §201) view of interpretation as contrasting with (mere) “rule-following,” as captured in the following: “There is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call ‘obeying the rule’ and ‘going against it’ in actual cases.” Endicott appeals to this distinction in his attempt to distinguish legal “rule-following” from legal “interpretation,” as in the traffic light example mentioned earlier and in the following passage:

Deciding what is to be done according to law sometimes takes interpretation. But no need for interpretation arises if no question arises as to the meaning of an object. If you approach a red traffic light in your vehicle, you need to know what it means, but the legal rule does not give you the interpreter’s task of finding reasons for ascribing one meaning to it rather than another. (2012, 109)

Endicott himself concedes that Wittgenstein’s distinction is controversial (Endicott 2012, 120), and it seems fair to ask how convinced we should be by it—and in particular by Endicott’s claim that there may be no need for interpretation in deciding what is to be done according to law.

Recall our earlier discussion about the role of inference in utterance interpretation. If we apply our conclusions to Endicott’s claims about “noninterpretative” phenomena, including the aspects of legal reasoning just enumerated, we can see that these claims clash with more realistic accounts of how we work out meanings in a range of cases.

Consider first Endicott’s traffic light example, as just given. On reflection, this description of traffic light “rule-following” is not very convincing, since responding appropriately to a signal or utterance quite certainly requires both inference and decision-making. After all, even understanding what is meant by a particular red light involves

appropriately inferring that it is directed, for example, only at drivers in control of road vehicles and not, say, at pedestrians, to whom a different signal may apply, or at tram drivers on an adjacent track; and that it is used here with its conventional meaning and force, is not used in accordance with some different code, is not merely decorative or part of a film set, and so on. This is so even if such alternatives are not actively considered.

Moreover, the red light is part of a system of signs, appropriate responses to which clearly involve a great deal of decision-making—including whether a driver should proceed left on a green light when there is oncoming traffic or should slow down or speed up when seeing the traffic light turn yellow. Admittedly, many of the inferences and even decisions involved here become routinized for experienced drivers, who usually make them with little conscious thought or consideration of alternatives. Yet, if not only interpreting but also *responding* to traffic lights involved no such processes, it would arguably be difficult to explain why two drivers at the same light might respond differently to it—accelerating at a yellow light, say, rather than slowing down—and cause an accident in one case but not the other.

Similar comments apply to Endicott's claim about understanding the law. In his (1994) study, he asserts that “[u]nderstanding is an ability, and interpretation is an activity” (461). In Endicott (2012, 121), he elaborates on this claim as follows:

you might, if you wish . . . say[] that all understanding requires interpretation. Yet sometimes, gaining an understanding requires a creative intellectual process of finding reasons for an answer to a question (which might have been answered differently) as to the meaning of the object. Some understanding does not require that process. . . . A good grasp of the context and the language may mean that there is no question as to how a person is to be understood.

If these remarks are meant to imply that the understanding of a text can be achieved without a process of inferring meaning, then we disagree. Of course, there is a distinction to be drawn between activity aimed at understanding an utterance and activity aimed at providing reasons for an interpretation. These are examples in the domain of utterance interpretation of what Mercier and Sperber have recently dubbed “intuitive” and “reflective” inference, respectively (Mercier and Sperber 2009). Modern pragmatics shows that “grasping” meanings of utterances involves not only the decoding of conventional signs but also inference—albeit often intuitive rather than reflective. And as far as we can see, it makes no sense to deny that intuitive inference is an activity.

We also doubt the wisdom of assuming that any particular process of reading of law involved in judging falls purely on the intuitive side, given the “offline” nature of this reading process, which grants time for judges to ponder alternative readings—as, of course, there is very good reason to do, since the stakes are so high. There is an interesting parallel here with

literary interpretation. Carston (2010) argues that interpretation of novel and extended metaphors involves occurrently conscious inference, and we suspect that something similar is true of much judicial interpretation of statutes and case law.

In these respects, then, we disagree with Endicott's claim that interpretation need not be involved in understanding the law. As we have said, though, we are inclined to agree with him that judges also make creative decisions about the content of the law, beyond what the legislature has strictly intended to convey, on the basis of principles of justice and equity. In other words, part of what is commonly called "legal interpretation" need not be a matter of working out the meaning of the text.

However, we think that it is worth looking closely at actual cases to see what respective roles interpretative and purely creative judicial activities play in them. Given that coming to understand speaker meaning is a matter of inference to the best explanation and that, we suggest, a key aspect of such an explanation in the judicial context is the attribution of intentions to enact just laws, not to infringe against equity, and so on, then appealing to considerations of equity and justice may often not be independent of the interpretative process after all but instead part of it.

To take an item from Endicott's list, "equitable interference with legal duties or powers or rights," Endicott says the following about "an ambulance enter[ing] [a] park to rescue a person who has been injured," notwithstanding "a town bylaw [that] prohibits vehicles in the park" (2012, 118):

The driver's behavior may show no disrespect for the rule of law. Is that because the bylaw is best interpreted as meaning something like "vehicles are prohibited in the park except in an emergency"? Or is it because of noninterpretative considerations?

The [latter] considerations . . . are that driving the ambulance into the park in an emergency is morally justified . . . by a concern for the injured person, and is compatible with due respect for the local authority's jurisdiction to regulate the use of the park, even though the authority has banned vehicles. (2012, 118–19)

Elsewhere, we have analysed a possibly analogous example from the Canadian case *Montreal (City) v. 2952–1355 Québec Inc.* This involved article 9(1) of Montreal's noise bylaw, which provided that "the 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." The majority judgment in this case interpreted "noise" in clause (1) as meaning "noise that interferes with the peaceful enjoyment of the environment" (Sullivan 2008, 166), in accordance with the technique of "reading down," according to which a provision is read as if "words of restriction or qualification" have been added (Sullivan 2008, 165). We took this technique to be the institutionalized legal version of either one or another

process familiar in the pragmatics literature: “free enrichment,” whereby a constituent for the effect of the noise is added to the proposition expressed; or “lexical narrowing,” whereby the property indicated by an expression—in this case “noise”—is “narrowed down” to a more specific property, in this case the one described by the court. Significantly, the inferential process of moving from a less to a more specific property may, in ordinary and legal communication alike, be motivated by any number of data that come to the hearer’s attention and are deemed relevant to the determination of the speaker’s meaning. That these data may come from different sources does not make them any less a part of an interpretative process.

We think that it is an open (and interesting) question whether a judge in the hypothetical vehicle case would infer in a similar way that the bylaw is best understood as meaning something like “vehicles are prohibited in the park except in an emergency.” In a real case of this type, we suspect that the police or a public prosecutor would choose simply not to prosecute, on grounds of equity and the general policy of serving the public interest. If the case were actually to reach a court, a judge might solve the problem by attributing to the legislature the enriched meaning that we suggest. And we do not think that it is clear that the judge would be wrong in doing so, given that this decision would be based on the reasonable assumption that the legislature intends the laws it enacts to be equitable. Similar remarks apply to another putatively noninterpretative aspect of legal reasoning, that of “[d]eciding what is just.”

Endicott also discusses two more obviously compelling instances of “noninterpretative” reasoning processes: namely, “[r]esolving indeterminacies as to the content of the law” and “[w]orking out the requirements of abstract legal provisions” (2012, 111). What makes these more plausible candidates for the “noninterpretative” claim is simply that a case can be made that there truly is no content to determine here and thus no interpretation to be performed: what is left for the judge, then, is to create content rather than to probe existing content.

Endicott offers as an example of resolving indeterminacies in legal content the European Court of Human Rights case *Bankovic v. Belgium* (52207/99) (2001), in which the court had to decide whether the article 1 right to life had been contravened by actions taken by the Belgian military in bombing Belgrade. The judges treated this as a question of the interpretation of the word *jurisdiction* in the sentence “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Endicott argues, however, that interpretation ends with the understanding that “the framers [of the ECHR] had not determined the jurisdiction at all” (2012, 113). The content of the relevant part of the convention, in the sense of what the framers meant by what

they uttered, was just that there was an obligation to secure the rights within the jurisdiction.

We find convincing Endicott's characterization of the legal content of this instance of *jurisdiction* and of the court's activity in determining the meaning of this term as an activity that creates rather than investigates legal content. However, we are less convinced by the conclusion that he draws from this. Endicott remarks about these cases that it is a "mistake," though an "easy and attractive" one, to think of them "as a matter of interpretation," given "just how extravagantly the law may leave matters for decision by the parties to a transaction, or by an institution that must resolve a dispute" (Endicott 2012, 109–10). A tacit premise of this argument, and the locus of our disagreement with him, is that interpretation is exhausted when the existing content of the law has been discovered. We think that a better criterion for what is properly called judicial "interpretation" is activity that aims to discover and respect the intention of the legislature. And while this may seem to be no more than a verbal dispute, we think that our way of describing the situation has two virtues: it naturally allows for a distinction between two importantly different modes of creative judicial behavior, and it may provide an answer to a general worry raised by Sorensen (2001) about judicial adjudications.

Here is the connection to Sorensen's point. If the process of resolving legal indeterminacies involves no interpretative considerations, then we face the following problem. At least in "absolute borderline" cases, in which legal indeterminacies cannot be resolved even in principle by the provision of additional information, this resolution would seem to be open to Sorensen's (2001) worry about judges' decisions. This is that given a judge's duty "to be decisive" but also to uphold the law, the judge "cannot say 'The defendant is guilty but I have no belief one way or the other about his guilt' [but instead] quietly resigns himself to an insincere verdict" (388). Endicott regards resolving such indeterminacies as a "noninterpretative" process, but Sorensen's worry suggests that we should not reach that conclusion unless we have no reasonable alternative.

Of course, one might try to address Sorensen's worry by pointing to Bach and Harnish's (1979, 111) nonveridical characterization of verdictives, according to which all they do is make it the case that such-and-such rather than constituting true or false assertions. According to this view, judges cannot be insincere in rendering a verdict, since they are simply creating new social facts. This, however, is unlikely to satisfy those sympathetic to Sorensen's point. Sorensen (2001, 402) himself acknowledges the possibility of responding to the claim of judicial insincerity in speech act terms by highlighting the "performative" nature of adjudication, remarking that "when a judge declares the defendant guilty, the defendant is thereby guilty. Saying so makes it so." But this would not address his worry, which is not over whether the verdict as a speech act does or does not have truth conditions vacuously satisfied

by the making of the act but over how the judge can *justify* the verdict. This point is crucial, since verdicts, while they certainly “make it the case that such-and-such,” must nevertheless be grounded in (good) reasons for doing so (unlike effectives, as noted earlier).

A more promising avenue for addressing Sorensen’s worry is the one taken by Asgeirsson (2013). Asgeirsson’s argument is that “[w]hen legislatures deliberately use vague language” they are creating for courts the task not of “find[ing] out whether absolute borderline *F*s really are *F*s” but of “engag[ing] with the *normative question* whether *x* ought—relative to the purposes of the law—to count as an *F*.” Moreover, Asgeirsson takes this “judicial response to this legislative ‘request’” to be, under at least certain circumstances, a valuable one. From our perspective, what is worth emphasizing here is that what judges do with absolute borderline cases on this characterization, though clearly involving considerable creativity, can still be readily understood as part of interpretative activity and not outside of it. We see it as very plausible that judges are guided in these “hard” cases by the aim of respecting the intention of the legislature that enacted the relevant provision. The legislature’s meaning intention does not determine a jurisdiction in section 1 of the ECHR, but legislatures may—and, we suggest, typically do—have intentions other than their intentions to mean. The legislature may be presumed to have intended to leave it to the court to decide the extent of the jurisdiction using its best (normative) judgment. Thus, we think that it is possible to reconcile our claim that resolving legal indeterminacy in such cases is an interpretative activity with Endicott’s observation of the “extravagant” degree to which “the law may leave matters” to be decided by judges and others.

In considering this matter, it may also be useful to think about the distinction between legal speech act content and the content of the law. We have argued elsewhere (Allott and Shaer submitted), expanding on Raz (2001) and others,<sup>5</sup> that these do come apart in at least some instances. One familiar way in which they can come apart is that in which the speech act content of the statute falls short of determining its legal content, as it arguably does in American First Amendment doctrine, where the text of this amendment refers only to Congress’s lawmaking powers but the doctrine also “applies to judicially created defamation law” (Solum 2013, 480). Another is that in which a statute’s legal content falls short of determining the content of the law, as it did in *Riggs v. Palmer* (1889), an American case in which 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).

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<sup>5</sup> Raz writes 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” (2001, 418).



Arguably, this case is best understood as signalling that the content of the law was not fully determined by the meaning of the statute, since that would clash with the important principle of common law that a wrongdoer should not benefit from his own wrong.

The legal indeterminacies that Endicott points to might also be instances of a mismatch between utterance content and the content of the law, although their resolution is somewhat different from those just discussed. In both of the latter types of mismatch, the activity of the court can be seen as largely investigative. For example, in *Riggs v. Palmer* the content of the law, while fully determined neither by the speech act content of the relevant statute nor by the statute's legal content, was arguably determined by (supervened on) its combination with principles of common law. In Endicott's example of more purely creative activity by the court, the content of the law before the judgment does not seem to determine the content of the law after the judgment. The court, in setting out a jurisdiction, created new legal content, resolving the indeterminacy in the content of the law to at least the extent needed to give a verdict in the case.

We see this as an appropriate response by the court to the (literal) request from the parties to the case to resolve the problem at issue and to the figurative "standing request" from the legislature to resolve indeterminacies that it has intentionally created, to the extent necessary to determine each case, in a manner consistent with justice, equity, the common law, and so on. This accords with Endicott's claim that "the framers [of the ECHR] had not determined the jurisdiction at all"; however, it also offers a way to understand the task of resolving such an indeterminacy as part of an inferential process of determining what a court has been (as it were) "asked to do" in making a decision involving vague or general legal terms. From this perspective, the task of the judge when faced with such a legal indeterminacy is much like the task of the employee asked by the boss to choose the best candidate, as in an example discussed by Sorensen. To be sure, the encoded meaning of the phrase "the best candidate" does not determine a particular candidate. However, the employee cannot fulfill the task at hand without going beyond the phrase's linguistic meaning and, with the aid of whatever information is relevant, making a decision about who that "best candidate" is. Nevertheless, we are *not* claiming that the legislature, in enacting a provision of the nature of section 1 of the ECHR, makes a speech act of requesting a judge (or anyone else) to determine the jurisdiction. Rather, the court, in taking on the task of determining the jurisdiction, was respecting a metaintention of the legislature about how the speech act and legal content that it has enacted are to be treated.

We briefly consider two objections to our account of such cases. One is that it is a rather unsatisfactory answer to Sorensen's worry. While, according to our account, a court

can sincerely find a defendant guilty in an “absolute borderline” case when its finding rests on a vague term whose extension is at issue, that is only because the court has fixed the extension of this term *de novo* (at least to the extent of determining a verdict in the case in hand). A defendant might rightly claim that he could not have known that he was guilty before the verdict was handed down. A more philosophically inclined defendant might further claim that, as a metaphysical matter, his guilt must have been indeterminate until the verdict—including (and crucially, one might argue) at the time of the conduct in question.

One response to this objection might be to point out that it is well established that judicial decisions have retrospective effect, in that a “court setting [a] new precedent” is not merely creating new law “from [the] moment” it hands down its decision but is instead “stating the law as it always has been” (Holland and Webb 2003, 137).<sup>6</sup> In this sense, then, the content of the law at any given time supervenes on the content not only of extant statutes and case law, but also of future case law. Admittedly, though, this supervenience claim might well be seen only as a useful fiction and is one to which we would not wish to commit ourselves in full metaphysical seriousness. Even assuming that the response is plausible, the defendant’s epistemological objection would surely still have force. Returning to the *Bankovic* example, we can see that it was impossible to know prior to the decision what extension the court would give to the occurrence of *jurisdiction* in section 1 of the ECHR. But that, we submit, is just the way that the law works in such cases. While not especially satisfactory, the alternatives to this kind of judicial creativity—such as specifying at enactment all extensions of vague terms in statutes, or not legislating in areas that require the use of vague terms—are infeasible, undesirable, or both.

A second objection to our account of judges’ resolution of legislative indeterminacy is that the metaintentions of the legislature that we postulate are mysterious entities whose existence calls for considerable suspension of disbelief. What might likewise elicit skepticism is the use of the term “interpretation” in cases of the type that Endicott sets out, which might seem nothing more than a conventional fig leaf. We submit that a distinction between cases

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<sup>6</sup> This notion of judicial decisions as “retrospective” is well established in law, as its appearance in Holland and Webb (2003), a standard English text on legal rules, makes clear. Holland and Webb (2003, 137) go on to observe that “[t]his retrospective effect of precedents” was plainly signalled in the 1998 House of Lords case *Kleinwort Benson Ltd v Lincoln City Council* (1998). They also point to the significant consequences that may arise “when a higher court alters the law by overruling a line of established precedents.” For example, “commercial contracts concluded on the old law are in danger of being open to a different interpretation from that intended when they were formed; so too property deals, licences, employment contracts and so on.”

such as *Bankovic*, where a court acts properly in fixing an extension, and ones in which it acts improperly in doing so is at the least intuitively plausible. The much-discussed American case of *Smith v. United States* (1993) (see, e.g., Scalia 1997, 23–24, 116) is for many commentators an example of such improper adjudication. In that case, the majority decided that the phrase *use or carry a firearm* in the relevant statute had an extension that included a barter in which a gun was exchanged for drugs. Many commentators have agreed with Justice Scalia’s dissenting opinion that the meaning of the phrase was in fact “to use a firearm as a weapon”—even if many (including us) might see this meaning as the relevant one simply because this is almost certainly what the legislature meant by the phrase and not because it was this phrase’s “ordinary meaning.” We would add that the majority was also wrong to think that the legislature had intended to leave the meaning open to judicial determination of this sort, at least on this dimension.<sup>7</sup> What is more, we think that a felicitous way to describe this intuitive difference between *Smith* and *Bankovic* is as a difference in the metaintentions of the legislature and the extent to which the court has complied with them.

### 3.2. So, What Is Adjudication After All?

In the previous section, we cast a skeptical eye on Endicott’s claim that much of what is commonly placed under the rubric of “legal interpretation” is not in fact “interpretative” at all. What we argued for, instead, was a broader conception of the interpretative process involved in judicial decision-making. We argued that understanding the speech act content of the legislature is necessarily an interpretive activity, although not one that is necessarily reflective or occurrently conscious, and that this is consistent with a cognitively plausible account of verbal interaction more generally. On the other hand, we agreed with Endicott that some judicial rulings involve creative (rather than investigative) activity in determining whether some behavior falls within the extension of a vague term. But here, too, we argued that this activity should be regarded as genuinely interpretative, in the sense that the aim of the activity is to respect a legislature’s intentions about the way that its laws will be interpreted and used (and thus intentions that must be discovered, or at least “intuited”).

A point worth emphasizing, however, is that notwithstanding our skepticism about some of Endicott’s claims, we think he has shed much-needed light on the complexity of

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<sup>7</sup> However, we do think the legislature had intentionally left the meaning of the vague terms *use (as a weapon)* and *firearm* open to judicial precisification. A court could properly consider (given a case that turns on it) whether, for example, paint guns or laboratory lasers are firearms for the purposes of the act and whether firing a gun as a signal counts as using it as a weapon.

adjudication and on the implausibility of the traditional picture of judging as essentially limited to interpreting the content of others' speech. The question that inevitably remains, though, is how this complexity is best characterized.

If we return to the definitions of “verdictive” given earlier, we can see these as pointing directly to some plausible candidates for description as the components of adjudication. Austin’s (1962, 153) description is especially helpful here, since it lays out many of these components. We suggest that they include at least the following (which in practice may not reflect separate processes): (1) identifying the question or questions facing the court; (2) working out the utterance content of relevant statutes, court documents, and other legal texts; (3) assembling relevant evidence and reasons and making the relevance of each explicit; (4) reaching a decision about the question or questions in (1); and (5) making it the case that a new legal situation holds. One benefit of recognizing this complexity in adjudication is that it offers some insight into why, even though a verdictive does not (or not only) constitute an assertion but creates a new situation (as already noted), a court cannot justify a verdict simply “by citing the performative nature of [the judge’s] declarations” (Sorensen 2001, 403). This is because it is component (3) of the adjudicative process that serves to justify the decision. This component normally culminates with the communication of the relevant evidence and reasons by “representative” speech acts—typically, assertions. It is often inappropriate for judges to simply write, say, “I would uphold this appeal”—that is, just producing the verdictive itself—without also stating their reasons for doing so.<sup>8</sup> The clearest example of this point is when a judge concurs with the lead opinion given by a colleague, since she could simply produce the verdictive but will usually say something about her reasons, even if it is just that she agrees with the lead opinion.

#### 4. Conclusion

In this study, we have sought to show that legal speech is best seen not as a radically distinct verbal phenomenon but rather as one variety of verbal interaction, albeit with various distinctive properties that follow from the institutional nature and goals of the legal domain. We first sketched a general picture of verbal communication as essentially inferential, drawing on recent work in linguistic pragmatics that takes its inspiration from the work of Paul Grice. We then focussed on the complex activity of adjudication. This we analyzed in speech act

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<sup>8</sup> In Canada, the duty of a judge trying a criminal case without a jury to give reasons for conviction or acquittal was established in law in the Supreme Court case *R. v. Sheppard* (2002). For discussion, see, e.g., Stewart (2009).

terms as a “verdictive,” explaining how this act encompasses a number of subactivities. In doing so, we paid particular attention to Endicott’s (2012) claims about the “interpretative” and “noninterpretative” aspects of judging. Significantly, we rejected some specific claims of his regarding the “noninterpretative” nature of certain components of adjudication. We argued (1) that the general picture of verbal communication that we had sketched earlier implies that understanding the speech act content of the law is an interpretative, inferential activity; and (2) that a court creatively determining extensions of vague terms is also performing interpretation, if it is attempting to respect certain intentions of the legislature in doing so. However, we affirmed Endicott’s insight that adjudication is a far richer activity than it is painted by the traditional views with which he took issue, according to which the judge’s task is largely to follow the decisions of others. We agreed, instead, that judging may also involve far more “creative” activity.

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