"Always speaking":

A relevance-theoretic approach to statutory interpretation

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I, Elizabeth Coulter, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

E.C. Coulter

Abstract

Linguists and legal theorists have considered whether theories of linguistic communication apply to the creation and interpretation of legal texts. This thesis considers the application of one theory of linguistic communication, relevance theory, to statutory interpretation.

Relevance theory posits that linguistic communication is an inferential process grounded in the recognition of speaker intentions. The thesis considers a) whether legislating is a communicative act and b) whether legislatures hold group informative/communicative intentions, as ordinary speakers do. It concludes: a) legislating is an act of communication of a limited kind - legislatures communicate their intention to enact a text, and b) while there is no theoretical reason why a legislature could not hold such group intentions, for practical reasons they do not. What judges do in interpretation is recover what could be termed an “as if” intention, effectively seeking to recover the intentions of the drafter “as if” they were the intentions of the legislature. The thesis also considers legislating as a speech act.

It is argued that it is generally the explicature of the text – its enriched, explicit content – that judges seek to recover, especially in the case of onerous provisions. The role of implicatures is limited, due to the particular implicated premises applied by judges which derive from the conventions and assumptions used in statutory interpretation.

The thesis looks at statutory interpretation in comparison with literary interpretation, considering the work of Marmor and Lewis on closed prefixed contexts, comparing authorial intention with legislative intention, and looking at the very different roles for implicature in both kinds of texts.

The thesis concludes that relevance theory can provide an account of statutory interpretation, while statutory interpretation in practice provides evidence supporting the relevance-theoretic notion of explicature. Some awareness among drafters and judges of cognitive processes involved in communication would aid the development of consistent and fair interpretive practice.

Impact Statement

In this thesis, I have considered statutory interpretation from the point of view of relevance-theoretic pragmatics. I have argued that (despite the significant differences between the process of statutory interpretation and that of ordinary communication, and between the process of statutory interpretation and that of literary interpretation) relevance theory provides a convincing account of the process of statutory interpretation, and of literary interpretation, and of the differences between them.

Academic impact

Within linguistic theory, I have shown that relevance theory provides a convincing account of statutory interpretation, with implicated premises (derived from the standard norms of legal interpretation, from the specific purpose of the legislation or from relevant moral precepts) providing an input into the interpretive process. I have shown that one output of this process is a restriction on the recovery of implicated conclusions (especially in the case of onerous provisions) with judges generally recovering the explicature of an utterance as its communicated content: what Parliament has asserted, not merely implied. This suggests that any account of linguistic communication without a notion equivalent to asserted content is unlikely to be descriptively adequate. I have also shown how relevance theory accounts for the very different experiences of reading statutes and reading literary texts, with implicated premises (about the nature of literature, genre, form etc.) licensing the recovery of a vast array of weak implicatures.

Within legal theory, I have provided an account of statutory interpretation that arguably sits within the “inclusive positivist” tradition, giving one explanation of how moral principles can be implicitly included as part of the content of the law by the sources of the law.

Wider impact

Improved understanding of the cognitive processes involved in linguistic communication and their application to statutory interpretation is likely to lead both to better drafting of laws and to better interpretive practice. While the processes involved (such as lexical modulation) are unconscious in ordinary communication, some conscious awareness of them on the part of those involved in drafting the law may lead to better outcomes (taking here a good outcome to be a reduction of the risk of a judge interpreting a provision in a way that was not foreseen in its drafting and enactment). To this end, I have presented some of the work contained in this thesis to both the UK Office of Parliamentary Counsel and the Law Commission, and I hope to present more of my conclusions to them in due course. I am grateful to both the Office of Parliamentary Counsel and the Law Commission for their interest.

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[1] along with that of Diggory Bailey as joint editors of *Bennion, Bailey and Norbury on Statutory Interpretation*.

Introduction

> *Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking'.*[2]

Relevance theory and statutory interpretation

Much has been written about whether pragmatics, the study of how hearers/readers recover "speaker meaning" by inferring the intentions of the speaker, can assist in the interpretation of statutes. Certainly it would be helpful if it could: to quote Justice Antonin Scalia, "Every statute that comes into litigation is to some degree ambiguous" (1997/2018, p. 28).[3] The existence of a legal system within a country, and of international legal systems governing relations between countries, gives rise to multitudes of political, philosophical and practical concerns of the greatest importance, and legal scholars have attempted to set out methodologies of statutory interpretation which best address such concerns. An approach to statutory interpretation founded in evidence-based analysis of human linguistic communication would seem an essential addition to the debate.

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[2] Per Lord Steyn, *R v Ireland; R v Burstow* [1998] A.C. 147, 158

[3] Here, Scalia appears to be using the word "ambiguous" in the general sense of "having different possible meanings; open to more than one interpretation" (*OED Online*, Oxford University Press, June 2022, www.oed.com/view/Entry/6145. Accessed 8 July 2022): this would include not only lexical and syntactic ambiguity but also cases of indeterminacy, underdeterminacy, and vagueness and the denotation of words (like "vehicle") whose boundaries are not sharply defined.

Rather less has been written about whether the interpretation of statutes can assist in the study of pragmatics. However, this would seem an important question and one closely linked to the preceding one. After all, if judges interpreting statutes undertake a process which is anything like the process of ordinary utterance interpretation, then case law would seem to be a useful source of evidence for how people, or at least a particular group of people, tend to recover the communicated meaning of a particular type of text. Note that the words “interpret”, “interpretation” etc. are used in slightly different ways in the legal world from the way in which they are used in the world of linguistics. A judge interpreting legislation not only attempts to recover the meaning of the text but also authoritatively lays down what the text means. In ordinary conversation, the hearer of an utterance generally attempts to recover what the speaker intended to communicate but has no authority over what the utterance means. In this thesis I shall try to be clear which sense of the word “interpret” I mean to convey.

Relevance theory is a pragmatic theory of communication which posits a three-way split between:

1. sentence meaning;
2. a pragmatically enriched meaning which is the truth-conditional content of the utterance and is what the speaker asserts in making the utterance (the explicature)
3. further propositions which are taken to be intentionally implied by the speaker and not asserted (implicatures).

To be clear, generally the fact that part of the communicated content of an utterance (its implicatures) is merely implied rather than asserted need not mean that this part is not communicated strongly or that it is unimportant or less important than its explicature. Take, for example, the following exchange:

Jim: So, is it true? Are you leaving me for Steve?

Mary: Steve is twice the man you will ever be.

To recover the explicature of Mary's utterance, Jim will have to perform a number of inferences: for example, Mary seems to be using language in a non-literal way in saying that Steve is "twice the man" Jim will ever be.[4] But the most important part of the communicated content of Mary's utterance, to Jim, is likely to be the implicature that yes, Mary is leaving Jim for Steve.[5] The fact that this part of the communicated content is merely implicated is not a measure of its importance nor of how strongly it is communicated.

So, generally speaking, in ordinary conversation whether a proposition communicated in making an utterance is its explicature (i.e. asserted) or its

[4] An outline of the processes by which communicated meaning is recovered is included in Chapter 1.

[5] Some linguists consider that a key test for whether the communicated content of an utterance is part of its implicature is cancellability, whether that part of the content can be gainsaid without an illogical result. So here:

Jim: So, is it true? Are you leaving me for Steve?

Mary: Steve is twice the man you will ever be.

The implicature is that Mary is leaving Jim for Steve. However, this can be cancelled without creating a semantic contradiction:

Jim: So, is it true? Are you leaving me for Steve?

Mary: Steve is twice the man you will ever be. Nevertheless, I've decided to stay.

implicature (i.e. implied) will not determine the importance of that proposition nor how strongly it is communicated, and participants in a conversation (such as Jim above) may not be particularly concerned as to whether the communicated content they recover is asserted or merely implied. In contrast, judges interpreting statutes pay a great deal of attention to the distinction between what Parliament appears to have asserted in passing a statute and what it merely appears to have implied. To be clear, I am not suggesting here that the communicated content of a statute never includes implicit (or implicated) content, only that the distinction between explicit and implicit content is an important one. Bennion et al[6] (2020) (hereafter, Bennion), the standard guide to statutory interpretation in England, states that:

> The meaning to be attributed to an enactment consists not just of what is expressed, but also what may properly be implied (11.5)

It goes on to draw distinctions between proper implications (those which contribute to the meaning to be attributed to an enactment) and improper implications (those which do not contribute to the meaning to be attributed to an enactment),[7] noting that the distinction between proper and improper will depend on a number of factors. For example, "it may be held improper to find an implication when it imposes onerous burdens" (11.5).

[6] Bennion is the standard practitioner work on statutory interpretation and is frequently cited by judges in support of their interpretations.

[7] These questions are considered in detail in Chapter 6.

Judges, therefore, appear to recognise a three-way split in the potential content of a statute. In the terms used by Bennion, this division consists of:

1. what is expressed;[8]
2. what is properly implied; and
3. what is improperly implied.

With (1) and (2) together making up the meaning to be attributed to an enactment, and (3) being excluded from that meaning.

In this thesis, I shall do the following:

- I shall consider whether the three-way division of content which may or may not contribute to the meaning of a statute (between expressed/properly implied/improperly implied) broadly maps onto the three-way division posited by relevance theory:

<table>
<tr><th>Bennion's division of content</th><th>Relevance theory's division of communicated meaning</th></tr>
<tr><td>What is expressed</td><td rowspan="2">Generally, explicature (what is asserted), especially in the case of onerous provisions</td></tr>
<tr><td>What is properly implied</td></tr>
<tr><td>What is improperly implied</td><td>Implicature (what is merely implied)</td></tr>
</table>

[8] Akin to Grice's "what is said".

- I shall argue that, just as for Bennion there is a distinction between what is "properly implied" and "improperly implied", with what is "improperly implied" not contributing to the meaning of the statute, so a pragmatic approach to the meaning of a statute must be able to distinguish between content (other than sentence meaning) which judges should consider as contributing to the communicated meaning of a statute, and potential content (other than sentence meaning) which judges should consider as not contributing to the communicated meaning of a statute.
- I shall argue that generally in the case of onerous provisions this distinction will tend to correspond to the distinction between the relevance-theoretic notions of explicature and implicature, with the availability of certain implicatures being restricted.
- I shall argue that this is evidence of language users recognising a distinction between explicature and implicature "in the wild", and that this recognition is evidence that the notion of explicature is a necessary part of any adequate picture of communicated meaning in linguistic communication (contrary to some recent claims in the pragmatics literature)[9].

All this will make up the second part of my thesis. However, first things first: some pages back, I used the phrase "if judges interpreting statutes undertake a process which is anything like the process of ordinary utterance interpretation". This is what might be described as a "Big If". Accordingly, in the first part of this thesis I consider

[9] E.g. Borg (2016), Jary (2016).

the extent to which Parliaments passing statutes and judges interpreting them act like speakers and hearers in ordinary conversation, looking at whether the passing of a statute should be considered an act of communication at all, what can be said about the intentions of a Parliament in passing that statute and what sort of speech act the passing of a statute may be.

I am particularly interested in the application of relevance theory to statutory interpretation, rather than any other theory of communication, due to the relevance-theoretic notion of explicature (considered in detail in Chapter 6), which is a key concept in what follows. I shall argue that judges generally interpret statutory provisions in a way which tends to align with their truth-conditional, assertive, pragmatically-enriched content, or in other words their explicature. This allows for the sorts of modulations of word meaning which are common in statutory interpretation (see Chapter 7) and for which relevance theory provides a particularly convincing account.

While I do not look in depth at questions of legal positivism versus natural law in this thesis, any discussion of statutory meaning and interpretation necessarily involves their consideration. I have therefore also included a brief summary of these two positions in the first part of the thesis. I hope to show over the course of the thesis that the distinctions between positive and natural law are less acute than they may first appear.

I conclude by considering briefly the relation between my arguments concerning explicature and implicature and the broader debates around positive versus natural law. I also make some suggestions as to how an understanding of pragmatics generally and relevance theory specifically could aid lawyers and judges in good drafting and the sound interpretation of statutes.

Legal systems and precedent

In this thesis, I will look primarily at the jurisprudence of the Courts of England and Wales. While I occasionally refer to cases from the United States of America (in particular *Smith v United States* 508 U.S. 223 (1993)), this is primarily to illustrate a broader point rather than to comment on that jurisdiction. I also discuss standard interpretive practice in the Courts of England and Wales (often by reference to Bennion) and note here that standard interpretive practices in other jurisdictions may be very different. That said, I consider that the arguments I make in this thesis about the application of relevance theory to statutory interpretation could generally apply in any jurisdiction (mutatis mutandis).

Except where otherwise indicated, in this thesis I am primarily concerned with questions of judicial interpretation which are novel (i.e. where a provision, or the relevant part of a provision, has not previously been judicially interpreted) or which concern interpretation by a higher court not bound to follow the interpretation of a lower court. As such, I do not look in detail at the law of precedent, which is briefly summarised in footnote 43.

Law and literature

Statutes are written texts and as such have things in common with other written texts. Writing can be a method of communication with a person or people who are separated from you in time and space, and this brings with it a number of issues. A writer may not know the context in which a text will be read and so, to communicate successfully, will need to make assumptions about that context. Carston (2008, p. 326) gives the example of a departmental secretary's written note which says, "I'll miss my office hour today" and is pinned to an absent professor's office door one evening. Here the correct referents of "I" and "my" are the professor and not the secretary, and the correct referent of "today" is not the day on which it was written but the following day (this example is discussed further in Chapter 5). In order to communicate the desired proposition (that the professor will be absent for his office hour the following day) the secretary must make a number of assumptions: about the time at which the note will be read and about the assumptions which people reading the note the following day will make about the referent of "I" (i.e. that "I" refers to the professor because the note is pinned to his door), despite the fact that the reader may well know or guess that the note was actually written by the secretary (for example, because it is in her handwriting).

Making such assumptions becomes harder when writer and reader may be separated by long periods of time and where what the writer intends to communicate is more complex than the simple fact that a professor who was expected to be in his office at a particular time is not in fact there. For example, the meaning of words can change over time, as can their extension (see further discussion in section 5.2). The

social or technological contexts of writing and reading may be greatly different. What is more, while oral communication face-to-face can allow participants in a conversation to correct miscommunications in real time, corrections may be much harder when participants are separated by time and space and may not be possible at all (for example, where the writer of a letter has died and there is no evidence of what he or she intended to communicate other than the text of the letter).

Works of fiction (such as novels) are a particular type of written text which bear comparison with statutes. The meaning of the text of a novel can be discussed, with readers disagreeing as to whether the writer meant one thing or another (as well as disagreeing as to the relationship between what the writer herself may have meant and the meaning of the text); likewise lawyers debate the meaning of the text of statutes, whether the legislature (or individual legislators) had particular intentions as to meaning and what the status of any such intention might be (see further discussion in Chapter 3).

At various points in this thesis, I compare and contrast the drafting and interpretation of statutes with the writing and interpretation of literature (looking at narrative prose fiction and at poetry). From the perspective of theoretical linguistics, why is a comparison of law and literature of interest? Legislation and literature are created in very different ways and play very different roles in the world: it is not surprising that the experience of reading a statute and the experience of reading a novel or poem are very different. I will seek to address this question in the thesis, taking account of the perspectives of Andrei Marmor (2018), David Lewis (1978) and Kathleen Stock

(2017). I shall argue that law and literature (in particular, literary fiction) have a substantial number of things in common with one another which they do not hold in common with other types of utterance, such as everyday speech.[10] I shall also identify where legislation and literature work differently, contrasting the literary case and the legal case in order to show what is particular to legislation.

In section 3.5 I look at the role of authorial intentions in fiction and contrast this with notions of legislative intention in legal contexts. I consider Marmor's analysis of law and fiction as closed prefixed contexts, performatives and compound expressive artifacts in section 4.4. Finally, in section 6.6 I develop my arguments about "standing" implicated premises (which I discuss in relation to statutes in Chapter 5) by considering whether similar kinds of standing implicated premise are in play when we read literary texts such as poems.

Chapter summaries

Part I: Law, statutory interpretation and linguistic communication

Part I consists of Chapters 1, 2, 3 and 4 and looks at general questions of whether legislating is correctly considered communication, the kind of communication is it and the role of intentions. I do not look here at relevance theory specifically but am laying

[10] Some of my arguments about law and literature also apply partially to other types of text. For example, religious texts may have qualities in common with both, for example where followers of a particular religion consider a statement to be true in virtue of the fact that it appears in a particular religious text.

the ground: I must first establish that legislating is communicating before I go on to apply a theory of communication to it. In Part 2 I will go on to apply relevance theory to the interpretive process.

Chapter 1

In this chapter I set out a brief summary of the main tenets of relevance theory, as well as a very brief summary of the key differences between legal positivism and natural law philosophies. I explain my intention to apply the tenets of relevance theory to the process of statutory interpretation and suggest how doing so might support an inclusive positivist approach to law (broadly, that judges often make use of moral precepts as implicated premises in a relevance-theoretic interpretive process).

Chapter 2

This chapter sets out some of the arguments for and against the communication theory of law, looking at the work of Mark Greenberg. I argue that legislation is indeed an act of communication, although of a more limited kind than is usually assumed in the communication theory of law.

Also in this chapter, I consider the relationship between the meaning of a statute and its contribution to the law, how that meaning might be determined, and the nature of enactments as performatives.

Chapter 3

This chapter deals with the role of intentions in the passing and interpretation of statutes. I consider the relevance-theoretic account of speaker intentions (informative and communicative intentions) and their role in the legislative process. I also consider the nature of group intentions. I look at whether a modern legislature (such as the UK Parliament) is capable of holding intentions at all, and if so of what sort. I consider the work of Ekins & Goldsworthy (2014) on these points and disagree with their arguments for subjective parliamentary intentions. I argue that a modern Parliament is theoretically capable of holding informative/communicative intentions but that, in practice, the actual group intention of Parliament in passing a statute is not an intention to communicate a set of propositions but rather an intention that a given text be attributed a particular legal status, be interpreted by judges according to particular traditions, and so on. I argue that the notion of "objective intention" is not well-defined, putting forward instead a notion of "as if" intention or hypothetical intention as being what judges look to recover in interpreting legislation.

In this chapter, I also look at the role of authorial intentions in fiction and contrast this with notions of legislative intention in legal contexts.

Chapter 4

In this chapter, I look at the passing of a statute as a speech act, considering the locutionary, illocutionary and perlocutionary acts performed. I contrast this with the notion of writing fiction as a speech act, considering the work of Andrei Marmor, David Lewis and Kathleen Stock on declarations and that of Marmor and Lewis on closed prefixed contexts (that is, that statements about legal content are necessarily prefixed by an implicit formula, 'According to law in legal system *S* at time *t*', just as statements about fictional content are necessarily prefixed by an implicit formula, 'In Fiction *F*…'). I also consider Marmor's arguments about law and literature as expressive artifacts.

<u>Part II: Relevance theory, context and the role of explicature and implicature</u>

Part II consists of Chapters 5, 6 and 7, and is where I go on to apply relevance theory to the process of statutory interpretation, having done the groundwork in Part I of establishing that legislation is communication and considering the role of intentions in the process.

Chapter 5

In this chapter, I consider what makes up the context in which judges interpret legislation, looking at how account is taken of social, technological and linguistic change. I argue that judges generally make use of contextual assumptions (implicated premises) in interpretation which derive from (inter alia) rebuttable presumptions which form part of standard interpretive practice. The effect of this is to

tend to limit the availability of implicated conclusions in the interpretation of onerous provisions.

Chapter 6

In this chapter, I argue that the notion of explicature is generally well-defined in relevance theory. I look at the objections raised to the notion by Emma Borg, as well as her arguments concerning minimal semantics and legal interpretation. Having defended explicature, I then consider it alongside implicature and the contribution of each to the communicated content of legislation, comparing on the one hand the distinctions drawn by legal scholars between what is expressed, what is properly implied and what is improperly implied, and on the other the distinctions relevance theorists draw between sentence meaning, explicature and implicature. I argue that what legal scholars consider to be what a statute is taken to express together with what it properly implies will generally tend to map onto what relevance theorists consider explicature, especially in the case of onerous provisions.

I go on to contrast the legal case with the literary case, arguing that, just as there are certain standing implicated premises in legal interpretation that tend to *restrict* the recovery of implicatures, so there are standing implicated premises in literary interpretation which instead *licence* the recovery of a very wide array of strong and weak implicatures.

Chapter 7

In this chapter I consider the processes by which a hearer recovers the explicature of an utterance and argue that these processes generally take place when a judge interprets a statute. I focus here on lexical modulation and take the example of the word "use" in a variety of contexts to show that the meaning judges typically attribute to statutes tends to be their assertive content. I conclude by examining how that content is recovered by judges depending on the linguistic context, legislative context and/or moral context of the interpretation.

Part III: Conclusions

Chapter 8

In my final chapter, I set out my conclusions on what relevance theory can bring to the interpretation of statutes and what statutory interpretation can bring to relevance theory. I conclude that a key part of the process of statutory interpretation is the recovery of the assertive content of the text, that is to say its explicature (which in the case of onerous provisions will tend to coincide with what Bennion calls "what is expressed" plus "what is properly implied"). As such, case law provides a rich source of evidence that language users "in the wild" are able to draw meaningful and important distinctions between what is asserted and what is merely implied, and that such a distinction may be a key factor in the way a case is decided.

Further, the fact that the assertive content of the text tends to be not merely its sentence meaning (or Gricean “what is said”) but rather, the content recovered by the judge taking into account all relevant context (including moral and social context), suggests that even legal positivist approaches to law inevitably incorporate moral and social considerations, suggesting perhaps that there is less difference between positivist and natural law positions than is sometimes asserted.

I go on to argue that greater awareness of the cognitive processes involved in the recovery of explicatures would greatly assist lawyers in drafting clear legislation, and judges in interpreting that legislation in a way which is consistent, reliable and justifiable.

Annex

This annex contains some of the poems to which I refer in Chapter 6.

Part I Law, statutory interpretation and linguistic communication

Chapter 1: Relevance theory and theories of law

1.1 Relevance theory

Relevance theory is an account of human communication which includes as a major component a theory of the principles and processes employed in utterance interpretation. It was developed out of the work of the philosopher H.P. Grice and builds upon his insights into the inferential nature of the communicative process. In this section, I shall briefly set out the main tenets of the theory, but first it may be helpful to explain some other approaches, in order to highlight what is distinctive about relevance theory.

1.1.1 The code model

Inferential accounts of communication should be distinguished from what is sometimes referred to as the "code model". This is a semiotic characterisation of communication as essentially a process wherein a source conveys a message to a receiver through the transmission of a signal. A speaker who wishes to convey a particular proposition encodes that proposition linguistically and transmits it (by means of an acoustic signal through the air in the form of speech). The hearer of that acoustic signal then decodes the signal to recover the proposition, and provided the proposition recovered matches that which the speaker encoded, successful communication has occurred.

While such a description may sound superficially plausible, there are many ways in which the code model fails to account for how human linguistic communication actually occurs. For one thing, the code model provides no plausible account of irony or metaphor (especially in relation to novel metaphors). It does not explain how a hearer can understand a phrase like “John’s book” in different contexts to refer to the book that John is holding, or the one he has written, or the one he is arguing should win the Crime Writer’s Association Dagger Award for best debut, and so on. It provides no account of the fact that Peter’s response in the following exchange could be understood as meaning either that Peter would or would not like a cup of coffee, depending on the situation:

Mary: Would you like a cup of coffee?

Peter: Coffee would keep me awake.

(Adapted from Sperber & Wilson, 1986/95, p. 16.)

Nor does the code model explain what, for example, is communicated by the word “flat” in examples like:

Holland is flat.

[Of a poorly-laid wooden floor] This floor is not flat!

This is not to say that encoding and decoding play no part in linguistic communication, far from it (and see below), but rather that the code model provides a very incomplete account.

1.1.2 Gricean pragmatics

While Grice did not use the term “inferential communication”, his key insight was that linguistic communication is an inferential process, in that the hearer does not simply decode the speaker’s utterance, but rather uses that utterance as a basis from which to infer the proposition that the speaker intended to communicate. In his paper *Logic and Conversation* (1967/1989), he posited an account of how a hearer might do this, based on expectations which a hearer might have about how speakers conduct themselves. He set this account out in the form a cooperative principle and a number of conversational maxims.

> **Grice’s cooperative principle**
>
> Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.
>
> **Conversational maxims**
>
> Quantity:
>
> 1 Make your contribution as informative as is required (for the current purposes of the exchange).
>
> 2. Do not make your contribution more informative than is required.

Quality:

Supermaxim: Try to make your contribution one that is true.

1. Do not say what you believe to be false.
2. Do not say that for which you lack adequate evidence.

Relation:

Be relevant.

Manner:

Supermaxim: Be perspicuous

1. Avoid obscurity of expression.
2. Avoid ambiguity.
3. Be brief (avoid unnecessary prolixity)
4. Be orderly.

Grice's proposal was that, in interpreting an utterance, a hearer will work on the basis that the cooperative principle and maxims have been followed and will therefore seek an interpretation which satisfies this assumption. In doing so, they will often have to assume that the speaker is trying to communicate something other than merely the encoded meaning of the words used (plus reference assignment and disambiguation - together constituting “what is said”). Grice termed this additional content “conversational implicature” (an implicature being a communicatively intended implication) and gave the following example:

B comes upon A standing by his immobilised car:

A: I am out of petrol.

B: There is a garage round the corner [implicating that to the best of her knowledge the garage is open].

[Grice, 1967/1989, p. 32]

Here, Grice argues, the implicature (that the garage is open) can be inferred by A through use of the maxim of relevance: B's utterance will be relevant for A if it provides him with useful information, and the existence of the garage is not useful information if B knows it to be closed.

Grice also gives examples of speakers who flout the conversational maxims, for example, in cases of irony or metaphor in which the hearer assumes that the speaker is obeying the cooperative principle and yet saying something which is very clearly untrue (for example, describing X as "a fine friend" or saying "you are the cream in my coffee" (p. 34) when it is clear to all that this is not literally true). The hearer will readily grasp that the speaker is not trying to communicate the literal meaning, in cases of this type, and so infer the phrase as being used ironically or as a metaphor.

A number of criticisms have been made of Grice's account, such as the symmetry problem set out below.

The symmetry problem

Imagine that a child tells his mother that he has eaten some of the sweets that were in a bowl. Invoking the maxim of quantity ("Make your contribution as informative as is required") the mother will infer the implicature that the child has not eaten all of the sweets that were in the bowl (as if it were true that he had eaten all the sweets then, following the maxim of quantity, he would have said so). To explain this more fully:

- The child has said that he has eaten some of the sweets. This could be true whether or not he has eaten all the sweets, as long as he has eaten some of them.

- It is clear that if the child had thought that he had eaten all the sweets, he would not have been observing the maxim of quantity.

- It must be that it is not true that the child thinks that he has eaten all the sweets.

- But now, it seems clear that the child would know whether he has eaten all the sweets.

- So it must be the case that he thinks he has not eaten all the sweets.

- The child could see (and see that the mother could see that he could see) that the mother would infer that he thinks he has not eaten all the sweets, and so on.

The child, therefore, conversationally implicates that he has not eaten all of the sweets.

However, it has been observed that any purpose for which knowing whether the child ate all the sweets is relevant, is such that knowing that he did not eat all the sweets is relevant. So one might equally analyse the utterance as follows:

- The child has said that he has eaten some of the sweets. This could be true whether or not he has eaten all the sweets, as long as he has eaten some of them.

- It is clear that if the child had thought that he had not eaten all the sweets, he would not have been observing the maxim of quantity.

- It must be that it is not true that the child thinks that he has not eaten all the sweets.

- But now, it seems clear that the child would know whether he has eaten all the sweets.

- So it must be the case that he thinks he has eaten all the sweets.

- The child could see (and see that the mother could see that he could see) that the mother would infer that he thinks he has eaten all the sweets, and so on.

The child has, therefore, implicated that he has eaten all of the sweets.

Other criticisms have been made of the cooperative principle and maxims, for example that they are not well-defined, and that there may be cases where the application of different maxims (to one utterance) yields different implicatures, with no way for the hearer to know which maxim yields the implicature the speaker intended.

1.1.3 A brief introduction to relevance theory

Relevance theory was developed out of Grice's work on the inferential nature of linguistic communication. Its key tenet is a more general claim about human cognition: that it is oriented towards what is relevant:

> **Cognitive principle of relevance**:
>
> Human cognition tends to be geared to the maximisation of relevance.
>
> (Wilson & Sperber 2004, p. 610)

'Relevance', within relevance theory, is a technical term for a quality which emerges from two components, effect and effort.

1.1.3.1 Effect

Any input (linguistic or otherwise) will be more relevant if it has a greater effect. This will be the case where its processing provides useful information. This may be by contributing new information to the cognitive system, correcting false existing assumptions or confirming true existing assumptions. In each case, the input gives rise to a positive cognitive effect. Such effects are not limited to what is derived from the stimulus alone but also and importantly include so-called contextual (or cognitive) implications, derived by processing a stimulus together with information about the context in which it arises. To give a simple and non-linguistic example, seeing a tiger gives rise to the positive cognitive effect of knowing that a tiger is present. Processing that stimulus along with relevant contextual information (such as the fact that tigers are dangerous) gives rise to an even more positive cognitive effect that it might be a good idea to run. The greater the cognitive effects to which a stimulus gives rise, the more relevant it will be.

1.1.3.2 Effort

The second component of relevance is the amount of effort required to process the input. This will depend on context: different people in different situations will require more or less processing effort to derive positive effects from a given stimulus.

Relevance increases as the effort required decreases, thus overall relevance is a trade-off between effect and effort:

Relevance of an input to an individual

a. Other things being equal, the greater the positive cognitive effects achieved by processing an input, the greater the relevance of the input to the individual at that time.
b. Other things being equal, the greater the processing effort expended, the lower the relevance of the input to the individual at that time.

(Wilson & Sperber, 2004, p. 609)

It is against this background that the relevance-theoretic account of linguistic communication was developed.

1.1.3.3 The recognition of intentions

An utterance is a human action which is a potentially relevant stimulus (one which can give rise to positive cognitive effects and which requires some degree of processing effort). Note that, according to relevance theory, not all (intentional) human actions count as communication. I can leave my daughter's gym kit by the door with the intention of reminding her to take it to school, but for this to be considered communication, I must have not only an intention to remind her but also an intention to inform her of my intention to remind her (for example, by pointing at the kit). As such, relevance theory accords with the key Gricean tenet that communication is based on the recognition of intentions to inform:

> First, there is the information which has been, so to speak, pointed out; second, there is the information that the first layer of information has been pointed out.
>
> (Sperber & Wilson, 1986/1995, p. 50)

Communication thus requires the recognition of a nested pair of intentions: one to impart information to the hearer and another that this informative aim should be recognised as having been intended. This is summarised thus:

Ostensive-inferential communication

a. The informative intention: the intention to make manifest or more manifest to the audience a certain set of assumptions.
b. The communicative intention: the intention to make mutually manifest to audience and communicator the communicator's informative intention.

(Sperber & Wilson, 1987, p. 700)

Manifestness is defined within relevance theory as the degree to which an individual is capable of mentally representing an assumption and holding it as true or probably true at a given moment (Sperber & Wilson, 1987, p. 699; Carston, 2002, p. 378). The same assumption can be manifest in the cognitive environment of more than one person. Further, it can be manifest in the shared cognitive environment of those people that the assumption in question is manifest in that shared cognitive environment. Sperber & Wilson give an example:

> …every Freemason has access to a number of secret assumptions, which include the assumption that all Freemasons have access to these same secret assumptions. In other words, all Freemasons share a cognitive environment that contains the assumption that all Freemasons share this environment.
>
> (1987, p. 699)

Such a shared cognitive environment – one in which the same assumption is manifest to more than one person and it is manifest to them all that that assumption is manifest to them all – is termed a *mutual cognitive environment* by Sperber & Wilson. Within a mutual cognitive environment, every manifest assumption can be called mutually manifest; that is to say, that it is manifest to everyone who shares that environment that every manifest assumption is manifest to those people.

1.1.3.4 Ostensive stimuli

An utterance is, within relevance theory, an ostensive stimulus: that is to say, it is a stimulus which is an overt act "designed to attract an audience's attention and focus it on the communicator's meaning" (Wilson & Sperber, 2004, p. 611). Every ostensive stimulus gives rise to a "presumption of relevance": it is presumed to be optimally relevant in virtue of having been made deliberately in order to attract attention.

Communicative principle of relevance

Every ostensive stimulus conveys a presumption of its own optimal relevance.

(Wilson & Sperber, 2004, p.612)

Optimal relevance here does not mean that a stimulus will be maximally relevant, as the speaker may not be willing or able to provide a more relevant stimulus: an utterance will be optimally relevant if it is relevant enough to be worth processing and the most relevant one consistent with the speaker's abilities and preferences:

Presumption of optimal relevance

a. The ostensive stimulus is relevant enough to be worth the audience's processing effort.
b. It is the most relevant one compatible with the communicator's abilities and preferences.

(p. 612)

1.1.3.5 Interpretation

From the hearer's perspective, relevance theory posits a process of utterance interpretation based on the recognition of the speaker's intentions. The hearer will recover the encoded meaning of the utterance and enrich that meaning (for example,

by assigning references, disambiguation, modulation of the concepts encoded by the words used, inferring implicatures, and so on) in pursuit of the goal of recovering the content of the speaker's informative intention.

Due to the communicative principle of relevance, the hearer can assume that the utterance is relevant enough to be worth processing and, given the trade-off of effect and effort that contributes to an utterance's relevance, the hearer is justified in taking the easiest (most accessible) path to recovering an interpretation that gives rise to adequate effects. This process is encapsulated thus:

> **Relevance-theoretic comprehension procedure**
>
> - Follow a path of least effort in computing cognitive effects: Test interpretive hypotheses (disambiguations, reference resolutions, implicatures, etc.) in order of accessibility.
> - Stop when your expectations of relevance are satisfied (or abandoned).
>
> (p. 613)

1.1.3.6 Explicature and implicature

Within Gricean pragmatics, utterance meaning is generally considered to have a two-way division between "what is said" (the encoded meaning plus reference assignment and disambiguation) and what is implicated. Relevance theory, in contrast, posits a three-way division between:

1. sentence meaning (sometimes not all of which is part of the communicated content);
2. a pragmatically enriched meaning which is the truth-conditional content of the utterance and is what the speaker asserts in saying it (the explicature); and
3. further propositions which are merely implied and not asserted (the implicature).

The explicature of an utterance (what is explicitly asserted) is considered further in Chapter 6.[11] It comprises the explicitly asserted truth-conditional content of the utterance, and its recovery may require not only linguistically-mandated processes such as disambiguation and reference assignment but also so-called "free" (i.e. pragmatically-mandated but not linguistically-mandated) processes such as lexical modulation and the inclusion of unarticulated constituents (discussed further in Chapter 6). To give a well-known example from Carston (2009, p.36):

A: How was the party?

B: There was not enough drink and everyone left early.

The encoded content of B's utterance is the meaning given for the lexical entries for the words used plus the syntax of the sentence. The explicature (i.e. the truth-conditional asserted content of the utterance) is something like:

[11] I do not consider so-called "higher level" explicatures ("a particular kind of explicature which involves embedding the propositional form of the utterance or one of its constituent propositional forms under a higher-level description such as a speech-act description, a propositional attitude description or some other comment on the embedded proposition" (Carston, 2002, p. 377)).

> There was not enough *alcoholic* drink *to satisfy the people at [the party]$_i$* and *so* everyone *who came to [the party]$_i$* left *[the party]$_i$ early*.

From this, hearers derive the implicature that the party was no good.

1.1.3.7 Implicated premises and implicated conclusions

Relevance theory posits that utterance comprehension involves three subtasks:

> - constructing an appropriate hypothesis about the explicit content of the speaker's utterance through decoding of linguistic meaning, along with reference resolution, disambiguation and 'free' (i.e. not linguistically mandated) pragmatic enrichment processes;
> - constructing an appropriate hypothesis about the intended contextual assumptions (implicated premises in the inferential reasoning process); and
> - constructing an appropriate hypothesis about the intended contextual implications of the utterance (implicated conclusions).
>
> (Wilson & Sperber, 2004, p.615)

Note that these subtasks are not carried out sequentially. Rather:

> the hearer does not FIRST decode the logical form, THEN construct an explicature and select an appropriate context, and THEN derive a range

> of implicated conclusions. Comprehension is an on-line process, and hypotheses about explicatures, implicated premises, and implicated conclusions are developed in parallel against a background of expectations which may be revised or elaborated as the utterance unfolds
>
> (p. 615)

The second of the tasks listed requires the hearer to construct an appropriate hypothesis about intended contextual assumptions: that is to say, about the premises which the speaker intends the hearer to make use of in deriving the communicated content of the utterance. Note that the relevance-theoretic definition of implicature is as follows:

> …any assumption communicated, but not explicitly so, is implicitly communicated: it is an implicature.
>
> (Sperber & Wilson, 1986/1995, p. 182)

As such, implicatures include not only the implicated conclusions which a hearer derives from the utterance but the implicated premises which the speaker communicates, in the relevance-theoretic sense of producing evidence of an intention to make more manifest by producing an utterance the interpretation of which requires them .To take an example from Carston (2002, p 140):

> Sue: Are you inviting Jessica to your party?
>
> Kim: No. I'm only inviting close friends.

Implicated premise: Jessica is not a close friend of Kim's.

Implicated conclusion: Kim is not inviting Jessica to her party because Jessica is not a close friend of hers.

A person's total cognitive environment consists of the set of assumptions that are manifest to her at a given time. As set out above, the mutual cognitive environment of two people is the cognitive environment which they share and in which it is manifest to those individuals that they share it with each other. It is this mutual cognitive environment which speakers and hearers make use of in communication, which includes their encyclopaedic entries for concepts (mentally-represented information about their extension and denotation- "[f]or example, the encyclopaedic entry for *Napoleon* would contain a set of assumptions about Napoleon" (Sperber & Wilson 1986/1995, p. 87)) as well as all the information which they (both) are capable of inferring from those assumptions (Sperber & Wilson give the example of the assumption that Noam Chomsky never had breakfast with Julius Caesar, a fact which is unlikely to have crossed anyone's mind before reading it but which is readily inferable from accurate encyclopaedic entries for *Noam Chomsky* and *Julius Caesar)*.

Precisely what falls within the mutual cognitive environment of a given speaker and hearer will never be entirely known to them and so the communicative process relies on each making assumptions about the cognitive environment of the other. Sperber & Wilson give the example of a woman commenting on a landscape:

> It’s the sort of scene that would have made Marianne Dashwood swoon.
>
> This is an allusion to Jane Austen’s *Sense and Sensibility*, a book [the speaker] knows [the hearer] has read. She does not stop to think whether he knows she has read it too and knows that she knows he has read it, and so on. Nor is she unaware of the fact that they may well have reacted to the book in different ways and remember it differently. Her remark is based on assumptions that she does not mention and that he need never have made himself before she spoke. What she expects, rightly, is that her utterance will act as a prompt, making him recall parts of the book that he had previously forgotten, and construct the assumptions needed to understand the allusion.
>
> (Sperber & Wilson 1986/1995, p. 44)

Speaker and hearer will attempt to take account of what they believe about each other’s cognitive environments. For example, my friend and I may have very different views about the former Prime Minister, Boris Johnson, (and we know about the other’s views and know that we know). If I describe a mutual acquaintance to her as a “bit of a Boris Johnson”, she will have to determine what I meant to communicate by reference not only to her encyclopaedic entry for *Boris Johnson* but what she believes about my encyclopaedic entry for *Boris Johnson*, and what she believes that I believe about her encyclopaedic entry for *Boris Johnson*, and so on. Only then will she be able to form an appropriate hypothesis as to the contextual assumptions

which I intend her to make use of in deriving the contextual implications of my utterance.

1.1.4 Relevance theory and statutory interpretation

In this thesis, I will apply the tenets of relevance theory outlined here to the practice of statutory interpretation, considering in particular:

- How far statutes can be considered the utterances of legislatures.
- The differing roles of intentions in ordinary communication and in the passing and interpretation of legislation.
- The particular implicated premises involved in the process of legal interpretation.
- How those premises give rise to the explicature of the legal text and limit the availability of implicated conclusions (as defined within relevance theory).

I shall also be looking at some of these issues in relation to literature and considering whether relevance theory can account for the difference in experience of reading literature compared to reading legislation.

1.2 Theories of Law

Before looking in depth at the practice of statutory interpretation, I will very briefly summarise some of the key points of two competing approaches to the philosophy of law: legal positivism and natural law. Given that this thesis is largely devoted to the

application of pragmatic theory (and specifically, relevance theory) to statutes, it is worth briefly considering how legal theorists view the relationship between statutes, on the one hand, and the nature and content of the law, on the other. Further, I shall go on to argue (in Chapter 7) that relevance theory supplies a plausible way in which a judge may incorporate moral considerations in determining[12] the meaning of a provision.[13] This is essentially an inclusive legal positivist position (inclusive legal positivism being a theory of law that takes law to be socially constructed but accepts moral principles can form part of the content of the law, provided that they are made so (either explicitly or implicitly) by the sources of the law). Before making these arguments, I first set out the two broad schools of thought regarding the nature of law and relationship between law and morality.

1.2.1 Legal positivism

Legal positivism takes law to be socially constructed and based on positive norms (such as legislation and case law). Austin (1832/1995, p. 157) summarises the position as follows:

> The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.

[12] In both senses, see footnote 16.
[13] Essentially, I shall argue that moral precepts can act as implicated premises in the interpretative process.

Positivism takes law to be a matter of social facts, founded in conventions and separable from questions of morality. That is to say, that it treats the question of the systemic validity of law (a systemically valid law being one identified as part of the legal system in virtue of the system's social sources (see Harris, 1979, p. 107-111)) as separate from the question of moral justification of the law (whether there is a sound moral justification for respecting the law as a norm).

> Even if the law is essentially moral—the cautious positivist would argue—it is clear that establishing the moral merit of a law is a different process relying on different considerations, from establishing its existence as a social fact. To the positivist the identification of the law and of the duties and rights it gives rise to is a matter of social fact. The question of its value is a further and separate question. Since one may know what the law is without knowing if it is justified, there must be a possibility of making legal statements not involving commitment to its justification.
>
> (Raz, 1979, p. 158)

Note that legal positivists do not consider that such moral questions are in any way unimportant or secondary. Rather, they simply see them as separate questions from those of systemic validity. Legal positivists therefore typically allow that there may be situations in which disobeying the law is morally justified. Hart (1955, p. 185-186) posits a *prima facie* duty to obey the law but one which is subject to questions of fairness (meaning that there is no moral duty to obey an unfair law) while Raz considers there to be no moral duty to obey the law at all (see Raz, 1979. p. 233-

249); the question of whether it is morally right to obey the law is entirely separate from that of what the law is.

1.2.2 Natural Law

Legal positivism may be contrasted with the philosophy of natural law, which posits that there is (at least) some kind of non-conventional relationship between morality and law (the Overlap Thesis), a view sometimes summarised as *lex iniusta non est lex* (an unjust law is no law at all).

Traditional natural law

Traditional natural law theory (of the kind set out by Thomas Aquinas) recognises the existence of a higher law or laws. Aquinas considered that there are four different kinds of law: eternal law, natural law, divine law, and human (positive) law. Where positive law can be considered genuine and just, it is derived from natural law, and this derivation can work in different ways: natural law requires that positive law should incorporate a prohibition of murder (for example) and determines what the content of that prohibition should be. In contrast, traffic laws (for example) allow greater scope for human choice: it may be a matter of natural law that there is some system governing road traffic, but the precise details of whether people should drive under 30mph or 20mph in built-up areas, drive on the right or the left, give way to traffic on the minor road or major road etc. can be left to human choosing.

According to Aquinas, where positive laws are just they "have the power of binding in conscience". This will be the case where a law is "ordered to the common good" the lawmaker is acting within its authority, and the burden of the law is imposed on citizens fairly (Aquinas, 1994, Question 96, p. 324-326).

Modern theories of natural law

In modern times, the traditional approach to natural law has been continued by theorists such as John Finnis, while other positions have developed in response to legal positivism, such as those held by Lon Fuller and Ronald Dworkin.

Lon Fuller

Lon Fuller (1958, 1969) rejected what he saw as positivism's "one way projection of authority". His conception of law was as "the enterprise of subjecting human conduct to the governance of rules " (Fuller, 1969, p. 96) and it required reciprocity and cooperation between citizens and officials. Law, therefore, is a tool for guiding behaviour and, as such, its nature cannot be separated from its function: if the rules of a legal system are so poorly constructed that they cannot guide behaviour in a way which is sufficiently effective, then that legal system cannot truly be called a system of law at all.

Fuller analysed law based on a notion of its "internal morality". Just as traditional natural law theorists had done, he considered there was a standard to be met before something could be thought of as law in its fullest sense. For Fuller, however, this

standard was not a test of moral content but one of procedure and function (where procedure and function also have moral implications). He summarised the requirements as follows:

1. Laws should be general;
2. They should be promulgated, that citizens might know the standards to which they are being held;
3. Retroactive rulemaking and application should be minimized;
4. Laws should be understandable;
5. They should not be contradictory;
6. Laws should not require conduct beyond the abilities of those affected;
7. They should remain relatively constant through time; and
8. There should be a congruence between the laws as announced and their actual administration.

(Fuller, 1969, p. 33)

Note that Fuller did not just consider these to be the requirements of a good legal system or a fair one. Rather, his position was that these were the requirements by which one might judge the extent to which a system was actually a system of law at all.

Ronald Dworkin

A key feature of Dworkin's theory of law is that it is *interpretive* (1998, 2006): the law is what follows from a constructive interpretation of the institutional history of the

legal system. He developed a conception of law based on the recognition of legal principles. To determine these principles, judges interpret legal data (legislation, cases, etc.) in order to put forward an interpretation that best explains and justifies past legal practice. This conception of law necessarily involves morality, as every decision about what the law is will require moral judgements. Accordingly, Dworkin rejected the separation of law and morality that underlies legal positivism.

1.2.3 Relevance theory and theories of law

The extremely brief summary above sets out some of the key points which distinguish legal positivism from natural law. In this thesis, I take what is *prima facie* a positivist approach to law: I am primarily concerned with the communicated meaning and interpretation of statutes. However, I shall argue (see Chapter 7) that the communicated content of a statute will very often be stipulatively determined (at least in part) by moral considerations which form part of the context of interpretation (in relevance-theoretic terms, a moral precept may be an implicated premise in the interpretation of a statutory provision). This argument sits alongside other so-called "inclusive positivist" positions and is set out further in my conclusion to this thesis.[14]

[14] Inclusive positivists (such as Waluchow and Kramer) argue that moral principles can form part of the content of the law, provided that they are made so (either explicitly or implicitly) by the sources of the law. This view allows that legal validity can depend upon morality provided that the sources of the law allow morality as something which customarily determines validity.

Chapter 2: Legislation as communication

In this chapter, I consider three key questions:

- How does the meaning of a statute contribute to the total content of the law?
- Is the enacting of a statute an act of communication?
- If so, what is the relevant communicative content of a statute in relation to its contribution to the law?

These questions are fundamental to the arguments that I wish to make in this thesis regarding the application of relevance theory to statutory interpretation. Relevance theory is an account of human communication which includes a theory of the principles and processes employed in utterance interpretation; thus, before applying a relevance-theoretic approach to statutory interpretation, I must first consider whether the enacting of a statute is correctly considered a communicative act at all and how the interpreted meaning of that statute affects the set of facts about the world that make up the legal system in the jurisdiction in question. I will show that a statute *is* an act of communication but that its relevant communicative content is far narrower than has often been taken to be the case.

2.1 The communication theory of law

Greenberg (2011) summarises the communication theory of law as follows:

> Legal texts are linguistic texts, so the meaning or content of a legal text is an instance of linguistic meaning generally. It therefore stands to reason that, in order to understand the meaning of an authoritative legal text or utterance, such as a statute or regulation, we should look to our best theories of language and communication. Those theories tell us that a text or utterance has linguistic content - call it *communicative content* - that may well go beyond the semantic content of the text. Communicative content depends on certain communicative intentions of the speaker. Communication is successful to the extent that the hearer succeeds in recognizing what the speaker intends to communicate. From this understanding of language and communication, the communication theorists conclude that a statute's contribution to the content of the law is its communicative content.
>
> (p. 217-218)

Greenberg goes on to raise a number of objections to the communication theory of law. In this chapter, I shall consider some of the questions raised by Greenberg and to what extent his criticisms of the communication theory hold water. I hope, from this, to provide a clearer picture of the relationship between legislation and communication.

Two initial questions arise. First, how does the meaning of a statute contribute to the total content of the law? Second, how do we determine that meaning?[15] I shall consider these questions in turn.

[15] The word "determine" is itself capable of meaning more than one thing (see footnote 16).

2.2 The meaning of a statute and its contribution to the law

Greenberg objects strongly to the assumption that a statute's meaning constitutes its contribution to the law:

> the communication theory moves from an understanding of what the legislature communicated to a thesis about a statute's contribution to the content of the law. The content of the law consists of the legal obligations (powers, privileges, and the like) that obtain in a legal system at a given time. So a thesis about a statute's contribution to the law is a thesis about legal obligations. A move from a text's meaning to the existence of certain legal obligations requires argument. It is uncontroversial that, on any plausible view, the meaning of a statute's text is highly relevant to the statute's contribution to the content of the law. But it is highly controversial what role the meaning of the text plays in explaining a statute's contribution to the content of the law.
>
> (p. 219)

He goes on to give two different theories as to a statute's contribution to the law, in order to demonstrate this point. The first of these is Dworkin's (1998) theory, that the content of the law is the set of principles that best justify past legal and political decisions or practices. The effect of enacting a statute is to change the law by altering the set of legal and political decisions and practices, and so potentially

altering the set of principles that would best justify those past decisions and practices.

Greenberg also puts forward his own theory of how a statute contributes to the content of the law, which he terms the Dependence View. On this view:

> a statute's contribution to the law, other things being equal, is the general and enduring effect on our moral obligations that the enactment of the statute brings about in certain characteristic ways…the contribution of statutes to our legal obligations is, with important qualifications, determined by moral considerations, such as considerations of democracy and fairness. The meaning or content of a statutory text is merely one factor that may be relevant to the statute's contribution, and what relevance, if any, a particular factor has depends on what relevance moral considerations give it.
>
> (p. 228)

Greenberg's theory is thus founded in the notion of moral obligations. Interestingly, he believes that the communication theory of law discards moral considerations all together:

> An important part of this appeal is the way in which philosophy of language seems to show that the content of the law does not depend on moral facts, thus making it unnecessary to engage in moral reasoning to ascertain the law.
>
> (p. 225-226)

He believes that this is part of the appeal of the communication theory: that excluding moral reasoning from the ascertainment of the law avoids controversy and reduces the risk of judges basing decisions on their own moral views rather than on the actions of the legislature.

I think that Greenberg is incorrect in suggesting that communication theories of law do not allow a role for moral concerns. As I will argue further in Part II, judges very frequently base their interpretation of a statute on the context-dependent meaning of that statute. The context in which that meaning is determined is potentially unlimited and may certainly include moral factors. Thus, the meaning of the text, as determined by a judge, may well be influenced by moral considerations.

That said, Greenberg is surely right in challenging the assumption that a statute's contribution to the law is its meaning, and in asserting that there are numerous theories of law in which a statute's contribution to the law is something other than its meaning. However, there is to my knowledge no plausible theory of law which considers the meaning of a statute irrelevant or unimportant in determining its contribution to the law. (Greenberg acknowledges this - "It is uncontroversial that, on any plausible view, the meaning of a statute's text is highly relevant to the statute's contribution to the content of the law" (p. 227).) I therefore do not propose to explain here precisely how a statute's meaning relates to its contribution to the law: it is enough to say that, on any plausible theory, the meaning of a statute is highly relevant to its contribution.

2.3 What determines the meaning of a statute?[16]

Greenberg argues that there are many candidate theories for determining the meaning of a statute. Even within communication theory, there are multiple candidates for notions of meaning. He summarises a broadly neo-Gricean approach to communicative content thus:

> Roughly speaking, for a speaker's utterance of a sentence to have the communicative content that P is for the speaker to utter the sentence intending his or her hearers to come to recognize that the speaker is communicating P, in part by their recognition of this intention…The point I want to highlight is that, on the neo-Gricean notion, communicative content is constituted by the content of the speaker's communicative intentions.
>
> (p. 230-231)

He contrasts this with what he calls an objective notion of communicative content: "what a member of the audience would reasonably take a speaker who had uttered

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[16] Neale (2022, p. 25) notes that the determination of meaning in the case of judicial interpretation works rather differently from ordinary communication:

> Judges on a court may disagree about the content of a given provision, but if a majority agrees on one reading the court may rule in its favor, *stipulatively* determining its content in what amounts to a causal fashion and thereby effectively answering a question about the constitutive determination of the provision's content unless or until the ruling is overturned.

For statutory interpretation then, we are less concerned with what the legislature (speaker) meant and more with what the judge (hearer) determined (in the sense of "worked out" or ascertained via interpretive processes) the utterance to mean. This interpretation is stipulative, in that the provision means what the judge says it means irrespective of any actual intention of the legislature or individual legislators (I discuss this further below).

the relevant sentence under specified conditions to have intended to communicate" (p. 231). He considers this to be an objective notion because "what is communicated does not depend constitutively on the speaker's – or anyone's – actual mental state" (p. 231).

Greenberg here draws a distinction between a Gricean notion of speaker meaning and the content which is "what a member of the audience would reasonably take a speaker who had uttered the relevant sentence under specified conditions to have intended to communicate" (which he terms objective, on the basis that it is not reliant on mental states). It is worth noting (and Greenberg would not disagree) that statutory interpretation is done by actual judges, rather than notional audience members acting reasonably: while the communicated content of a statute (i.e. the content that the judge recovers) does not rely on the speaker's mental state, it will certainly be affected by the interpreting judge's mental state. As such, Greenberg's use of the term "objective" here is arguably misleading.

This is not to say that the distinction Greenberg draws is entirely unhelpful. He is right that, for neo-Griceans and many other language theorists, the notion of meaning is largely based on speaker's meaning. Grice's initial analysis of this notion was:

> 'A meant something by *x*' is (roughly) equivalent to 'A intended the utterance of *x* to produce some effect in an audience by means of the recognition of this intention'.

(Grice, 1957/1989) p. 220)

The notion has been considered and its definition revised many times (for example Sperber & Wilson, 2015), but throughout a key point has been that speaker's meaning is constitutively determined by a certain kind of complex intention (an m-intention), even where those intentions may not be fully determinate. Even where a speaker misspeaks, we can still think of her utterance in terms of speaker's meaning. A speaker's utterance is an input used by the hearer to try to recover that meaning. If the error she makes is sufficiently serious, it may be impossible for the hearer to do so, in which case communication will fail.

Helen: I was so impressed to see James Corden rowing in the Boat Race this year, after everything he's been through. *[Here the speaker's intention is to comment on the rower James Cracknell]*

Fred: Isn't he a comedian?

In the example above, Helen can correct herself and explain that she meant to refer to James Cracknell and not James Corden, thereby making clear what it was that she meant (i.e. the meaning which she had intended that Fred would recover based on her utterance). Most linguistic theorists have primarily focused on this meaning - speaker's meaning - in their analysis of linguistic communication. We might, however, put forward a different notion of meaning ("hearer's meaning") which comprises the proposition which the specific hearer in question recovers based on

the utterance (in other words, what a specific hearer considers that a speaker intended to communicate). This is a subjective notion, in that it is based on the mental state of a specific hearer. In this case, the hearer's meaning is very different from the speaker's meaning: Fred fails to work out what it was that Helen meant to say and instead recovers a proposition about the comedian James Corden, not the rower James Cracknell. This hearer's meaning makes no sense to Fred, and so he questions it, allowing Helen to correct herself. (Of course, sometimes a hearer will recover a substantially different proposition to the one which the speaker intended to communicate without either party being aware of this, in which case communication will have failed: for successful communication to occur, the proposition recovered need not be identical to the one the speaker intended to communicate, but it needs to be close enough.).

Returning to legislation, obviously judges use the text of a statute as input to determine the meaning of that statute and hence (on some basis) its contribution to the content of the law. It is the meaning *which the judge recovers* which is determinative of the contribution made: in other words, a meaning equivalent to "hearer's meaning" in the example above. From here, I shall use the term "audience's meaning" in order to refer to the proposition which is actually recovered by a specific reader or hearer. Note that this remains a subjective notion of meaning, based on the mental state of that particular reader or hearer. In the case of the judge, her particular audience's meaning will affect how she interprets the statute, and thus the contribution of that statute to the law.

There are many reasons why this notion of audience's meaning is better in the context of the analysis of legal interpretation than the notion of speaker's meaning on which linguistic theorists generally focus. As I discuss in Chapter 3, it is far from clear that legislatures, which are usually composed of large numbers of legislators, form joint communicative intentions to communicate the detailed array of propositions in a bill.

Audience's meaning also fits more closely with the standard view of a statute's meaning taken by the majority of judges and practitioners. As described in Bennion:

> The legal meaning of an enactment is the meaning that conveys the legislative intention. The legislative intention is *the meaning attributed to the legislator* in respect of the words used.
>
> (emphasis added) (10.9)[17]

Here, Bennion states that the meaning of the act is that which comprises the intention *attributed* to the legislator (or more accurately, legislature) not that actually *held* by the legislature. The locus of meaning is the person doing the attributing, not the legislature.[18] Bennion does not specifically address whether this should be taken to be the meaning that reflects the intention that a notional audience would attribute to the legislature or the meaning that reflects the intention a given judge attributes to the legislature: the wording "attributed to the legislator" suggests the latter but the

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[17] Judicially approved in *Mohamed v London Borough of Barnet [2019] EWHC 1012* at [36].

[18] See discussion of the distinction between constitutive and epistemic determination of meaning on footnote 16.

point is not made explicitly. There is a subtle difference here between Bennion's notion of "legislative intention" and Greenberg's notion of "objective content". Bennion appears (at least implicitly) to take "legislative intention" as the outcome of a process that has actually happened: a judge has attributed an intention to the legislator in respect of the words used, and that is the legislative intention. Greenberg's "objective content" in contrast seems less concrete- "what a member of the audience *would* reasonably take a speaker who had uttered the relevant sentence under specified conditions to have intended to communicate" [emphasis added].

Further, while judges will often consider themselves to be involved in recovering the *objective* meaning of a text, in fact this process is necessarily a *subjective* one, in which the audience's meaning of the text is recovered based on context (which context will include the judge's own encyclopaedic general knowledge and mentally-represented assumptions).[19]

Thus far, I have argued that the meaning of a statute is highly relevant to its contribution to the content of the law, and that the appropriate approach to meaning in analysing how statutes contribute to the law is via audience's meaning, that is to say, what a particular judge would consider the legislature had intended to convey. This latter point departs significantly from some conceptions of legislation as communication (which focus on speaker's meaning). This characterisation, of course, allows that a judge might interpret a legislative provision in a way which is

[19] See further discussion of context in Chapter 5.

different from how another judge might have done it, and that there will sometimes be interpretations which are widely considered to be incorrect, and interpretations from a lower court which are then corrected by a higher court.

Ordinarily, we are able to work out whether communication has successfully occurred: communication is successful to the extent that the hearer succeeds in recognising what the speaker intended to communicate. In the case of statutory interpretation, however, if we accept that the meaning of a statute is audience's meaning (which we must do if, as in most modern legal systems, it is judges who determine (stipulatively) what statutes mean) it is far harder to say whether communication has successfully occurred. As I argue in Chapter 3, there is probably no single coherent joint intention of the legislature regarding the meaning of the statute as a whole. It therefore seems impossible to say whether an interpretation of the text of a statute has successfully inferred such an intention.

2.4 Performatives

A useful approach may be to look in more detail at how a statute actually works. In English law, each statute contains enacting words such as:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:
>
> …

This is followed by the main text of the statute, (which I shall refer to as *T*), which will contain a number of provisions. The enacting words are declarations, a type of performative utterance, and give the provisions set out in the text of a bill a particular status in law. The effect of these words is to bring about the enactment of *T*, such that *T* acquires the status of a statute and hence *T*'s meaning contributes in a particular way to the content of the law. Without that enactment, the text *T* would not have the status of a statute and its meaning would not contribute to the law in that way.[20]

Performative utterances make something the case by stating that it is so (Austin, 1975). Searle (1989) argues that performatives are truth-evaluable, and if successfully performed they will necessarily be true (so that, for example, a speaker saying, 'I order you to leave the room,' is thereby ordering someone to leave the room). Searle called this the 'self-guaranteeing' character of performatives (p. 538) and argued that this character derived from the fact that

> "… not only are these utterances self-referential, but they are self-referential to a verb which contains the notion of intention as part of its meaning, and the acts in question can be performed by manifesting the intention to perform them."
>
> (pp. 555-556)

[20] It is possible of course that *T* might informally contribute to the content of the law in some other way: for example, if a legislature narrowly votes against the enactment of *T* it is possible that a judge may still be aware of *T* and that the meaning of *T* plays some sort of (perhaps unconscious) role in that judge's decision-making, perhaps because the judge thinks that legislation in a similar form to *T* will be enacted in the near future.

Searle introduced the term 'declaration' to describe such utterances: an utterance is a declaration where 'the successful performance of the speech act is sufficient to bring about the fit between words and world, to make the propositional content true' (p. 547). Thus, if successfully performed, the declaration is true: saying makes it so. We can consider legislation as perhaps an axiomatic example of a declaration (in Searle's sense).

Returning to the statute we are considering, it is unlikely that a group legislature can form a sufficiently detailed joint understanding as to the meaning of *T*, such that their enactment of *T* expresses a communicative intention in respect of that understanding. In contrast, it is highly likely that a group legislature is able to form a joint intention to enact *T*, that is, to confer on *T* the status of legislation. Even those legislators who vote against the enactment of *T* will understand that they are taking part in a process by which the legislature *as a whole* acts in accordance with the votes of the majority. It therefore seems safe ground to say that the enacting words constitute an act of genuine communication: the legislature intends to communicate that *T* is hereby enacted and, in communicating this, effects that enactment.

To make this distinction between the enacting words and the rest of the statute clearer, we can imagine a situation in which *T* is written in a language which none of the legislators in a Parliament understand. Theoretically, there is no reason why those legislators could not vote for the legislature to enact *T*, despite the fact that they do not understand *T*. If this were to happen, clearly none of the legislators

would know what meaning a speaker of the language in question would recover on reading *T*. It would therefore be difficult to argue that the legislature communicated that meaning of *T*. We could still happily say, however, that the legislature communicated its enactment of *T* and in doing so effected that enactment.

So far, I have argued that the meaning of a statute will contribute in some way to the total content of the law and that (for a novel question of interpretation, not previously judicially considered) the relevant meaning for this purpose is that which is actually recovered by a particular judge, based on a hypothetical intention attributed by that judge to the legislature in respect of the words used. (Where the meaning of a provision has previously been judicially considered, a judge may be bound to follow the earlier interpretation, subject to the relevant rules of precedent. I set out the English rules of precedent briefly in footnote 43). I have also argued that legislating is an act of communication by which the legislature communicates a joint intention to enact a particular text (*T*) but probably does not have any actual joint intention to communicate a particular array of mutually understood propositions evidenced by *T*. This is a far narrower conception of communication theory than that set out by Greenberg.

2.5 The communication theory of law and the legal impact of utterances

Greenberg notes that there are various utterances which can effect a change of legal status, such as swearing to uphold the US Constitution, announcing “we, the jury, find the defendant guilty on all counts” and uttering marriage vows. While these utterances have communicative content, their primary purpose is to effect a change

in legal status and, Greenberg argues, “the legal impact of [the utterance] does not include its total communicative content, and may even be inconsistent with its communicative content”.

As an example of this, Greenberg describes a couple exchanging marriage vows and saying the words “for as long as we both shall live”. Greenberg argues that, while the couple may intend to communicate that they will be married until one of them dies, the legal impact in most jurisdictions is actually that they will be married until annulment, divorce or death. Thus the communicative content of the words and their legal effect are not consistent.[21]

A problem with Greenberg’s argument here is that he ignores the question of the couple’s intentions in this sort of performative utterance. What do they intend to communicate, and what does the audience understand them to communicate, when they recite the standard marriage vows? They may intend to communicate the whole content of the vows (“for richer, for poorer, in sickness and in health, until death do us part” and so on) along with a desire to be legally married, but they will not be understood as making a *legally-binding* commitment to stay married for as long as they both shall live, so the legal commitment to remain married until death does not form part of the communicated content of their utterance. At most, its communicated content will be that they wish to be legally married and that they make a *moral*

[21] In many jurisdictions, such as the UK, it is not the uttering of marriage vows which brings about the legal impact of marriage but the signing of the register: it is quite possible to change your mind in between exchanging vows and signing the register and in such a case one would not be legally married. However, for the purposes of this discussion I shall proceed on the basis that a legal marriage can be effected through the exchange of vows.

commitment to remain so until death. Alternatively, they may intend to communicate only a desire to be legally married and consider the vows to be merely the form of words they must use in order to do so (and be understood as such by their audience). I shall consider these possibilities below, but first I shall demonstrate that the intention with which such words are said is a vital component of their legal impact.

Even if we allow that one can effect a change in legal status by exchanging marriage vows (rather than signing a register), the words spoken are not a sort of incantation which change legal status regardless of the parties' intentions. Thus, the couple and the vicar could have a practice run of the entire marriage ceremony without unwittingly effecting a marriage. Likewise, a policeman may use a particular form of words in order to place somebody under arrest, but it is not simply saying the words that effects that legal change (so, the policeman could say the words to someone in jest and not effect an arrest within the meaning of the law). Clearly, intentions do play some sort of role in effecting legal changes through utterances. I consider below the nature of this role.

Let us consider again the couple exchanging marriage vows. Greenberg is correct that the actual legal effect of the exchange of vows will be that they are married until annulment, divorce or death. What Greenberg fails to note, however, is that the communicative content of an utterance is not limited to a single proposition. As I argue above, the couple exchanging vows *may or may not* intend to communicate a (moral) lifelong commitment, but in order to be married they *must* intend to

communicate an intention to effect the actual legal change in order for that legal change to be effected. If they simply say the words without holding that latter intention (perhaps while rehearsing their vows, or in a situation in which one party lacks the mental capacity to understand the nature of the commitment) then there is no legal change and they remain unmarried. The communicative content of the utterance would then consist of the following propositions:

1. The couple commit to stay together until death (a moral commitment).
2. The couple wish to be married according to the law of that jurisdiction as a result of their utterances (a legal commitment).

And possibly other propositions as well, but it is (2) that is the proposition which they *must* intend to communicate in order to be legally married. Alternatively, a couple may only intend to communicate (2) and may be understood as doing so by their audience, with the wording of the ceremony being merely the form of words required to communicate (2).

Let us return to legislation. As I argue above, there are good reasons to take a far narrower view of the communicative content of a statute than that which Greenberg ascribes to the majority of communication theorists. All we can safely say about the communicative intentions of the legislature that enacted a statute is that it intended to communicate the fact of that enactment ("Be it enacted by The Queen's most Excellent Majesty…" etc.). In terms of speaker's meaning, the *relevant* communicative content (for the purposes of the statute's contribution to the law) is

therefore the fact of the enactment and nothing more (the precise legal effect of the provisions of *T* being determined by audience's meaning, where the audience in question is the judge interpreting the text, who stipulatively determines the statute's meaning and thus its legal effect), just as the *relevant* communicative content of marriage vows (for the purposes of effecting a marriage) is the couple's intention to be legally married.

One consequence of taking this narrow view of the communicative content of legislation is that it follows that philosophy of language will not, after all, solve all disputes about legal interpretation as philosophers such as Neale (2009) have hoped.[22] However, it is not the case that the narrow view deprives philosophy of language (and, in particular, linguistic pragmatics) of any role in legal interpretation. As I shall argue in Chapter 3, judges read legislation *as if* its communicative content were far broader.

[22] "A great deal of time and ink have been wasted in legal theory . . . on debates that are, at bottom, either fruitless or incoherent. The good news is that the confusions and conflations that have given rise to spurious debates or produced the illusion of intelligible arguments are readily dispelled by doing some patient philosophy of language." ((2009) at pp 3–4). Soames (2009) makes similar claims.

Chapter 3: The Role of Intentions

In the last chapter, I argued that the passing of legislation should indeed be viewed as an act of communication, albeit of a limited kind: legislating is a communicative act by which a legislature communicates a joint intention to enact a given text *T*. The meaning of *T* is not governed by speaker's meaning but by audience's meaning, the meaning that is actually recovered by a particular judge. In this chapter I shall provide further justification for this approach.

Relevance theory posits that ordinary linguistic communication is founded on the recognition of speaker intentions. I suggested in the preceding chapter that a legislature may hold an intention to enact a given text but generally does not hold intentions as to the meaning of that text. How then does relevance theory apply?

3.1 Relevance theory and speaker intentions

According to relevance theory, a speaker who wishes to communicate has a related pair of intentions. First, she intends to affect the hearer's state of mind by making something manifest to the hearer: in other words, she wishes the hearer to form a mental representation (of an aspect of the world) and accept it as true or probably true. This first intention is known as the speaker's *informative intention*. Second, she intends to inform the hearer of this informative intention: this is the speaker's *communicative intention*. Carston (2021) gives the canonical definition of these terms thus:

> *Informative intention*: to make manifest or more manifest to the audience an array of propositions *I*.
>
> *Communicative intention*: to make it mutually manifest to audience and communicator that the communicator has this informative intention.
>
> (p. 519)

Communication will have occurred successfully if the communicative intention is fulfilled, i.e. if the speaker succeeds in making the hearer aware of her informative intention. Successful communication does not require that the speaker succeeds in fulfilling her informative intention. (To give an example, if I wish to communicate to you that today is Monday, I succeed if I make you aware that I wish to communicate to you that today is Monday, even if I fail to convince you of the truth of my assertion because today is in fact Wednesday.)

Any relevance-theoretic account of legislation as communication must therefore consider the role of intentions and in particular whether a legislature is capable of forming an informative intention, of which the legislation it enacts is evidence.

The courts have long discussed the role of intention in the making and interpretation of laws. In doing so, they typically refer to the notion of "legislative intention" and in general approach statutory interpretation as being an exercise in determining legislative intention. As noted earlier, this is expressed in Bennion as follows:

> The legal meaning of an enactment is the meaning that conveys the legislative intention. The legislative intention is the meaning attributed to the legislator in respect of the words used.
>
> (10.9)

In this chapter, I shall consider the role of informative intentions in the making of laws. I shall look at the ways in which the concept of informative intention differs from that of legislative intention and what this means for our understanding of legislation as communication.

Relevance theory (along with most other theories of communication post-Grice) is founded in the notion of intentions:

> Relevance theory may be seen as an attempt to work out in detail one of Grice's central claims: that an essential feature of most human communication, both verbal and non-verbal, is the expression and recognition of intentions.
>
> (Wilson & Sperber, 2004, p. 607)

Thus, any relevance-theoretic analysis of legislation as an act of communication must consider whether and how these central concepts of communication - informative intention and communicative intention - fit into the legislative process. In

particular, can we see informative/communicative intentions as equivalent to legislative intention (as this notion is understood by legal scholars)? These questions give rise to a number of issues.

Many people are involved in the drafting of legislation, from government lawyers and civil servants to lobbyists and consultants. What's more, some individual legislators will play a substantial role in drafting the precise wording of the law (e.g. through membership of the public bill committee with responsibility for the legislation in question), while other legislators will play no role and may not even read the bill before voting. All who have substantial involvement in the drafting are likely to form views as to what the provisions of the law are intended to mean, although they may not agree with one another on these. What relation is there between these states of mind and the states of mind of legislators when they vote on the bill?

In ordinary communication, we typically communicate one-to-one (as in a conversation between friends) or one-to-many (as in a teacher addressing her class). Legislation is a special case: here the decision to legislate is made by a group, the legislature, who make this decision by means of a voting procedure. Can a group of this kind hold a collective informative/communicative intention?

Informative and communicative intentions are subjective: they are part of the state of mind of the speaker. What is more, they can exist even when unfulfilled: I can hold an informative and communicative intention in relation to a particular array of propositions and yet not actually communicate those propositions at all (for example,

because I am interrupted or change my mind). In this regard, informative/communicative intention would seem to differ greatly from the notion of legislative intent as it is expounded by many legal theorists. What differences exist and what is their significance for a relevance-theoretic account of legislation as communication?

I shall consider the roles of the different participants in the legislative process below in section 3.2. In section 3.3, I shall address the question of group informative/communicative intentions. In section 3.4 I shall consider the differences between informative intentions and the notion of legislative intention propounded by legal theorists such as Ekins & Goldsworthy (2014) (see also Ekins (2012)). In section 3.5, I go on to consider the role of intentions in the creation of literary works, in order to demonstrate the very meaningful differences between intentions in literature and law, and hence what is perhaps particular to law. As I discuss in the Introduction, legal and literary texts have many things in common as well as significant differences. The purpose of the comparison is to highlight what is perhaps particular to the legal case rather than common to all texts.

3.2 Participants in the legislative process

In ordinary speech, we generally speak for ourselves: we form our own informative intentions, determining for ourselves the array of propositions that we wish to make manifest (or more manifest). Communication will be successful if we manage to inform our audience of this intention (thereby fulfilling our communicative intention). If the audience realises what it is that we intend them to come to think, we have

successfully communicated. (Whether the audience actually comes to think what we would wish them to is another matter.)

In some circumstances, however, things are more complex. A politician may employ a speechwriter to draft speeches which the politician will herself deliver.[23] A rough outline of the process may be as follows. First, the politician (or her staff) will direct the speechwriter as to the content of the speech. Then the speechwriter will write the speech, forming his own informative intentions in respect of the array of propositions he wishes to make manifest to the audience in each part of the text. Assuming that there is time, the politician will then read the speech and, in doing so, recover the pragmatically enriched content to which the logical form (i.e. decoded linguistic meaning) of the sentences making up the text along with her background knowledge and assumptions give rise. She may suggest some changes, if this enriched content does not capture the message she wishes to put across. Finally, the politician will deliver the speech, with the enriched content she recovered when reading the speech forming the basis for her own informative intention. Note that it is probable that the informative intention of the speechwriter in writing the speech and the informative intention of the politician in delivering the speech will not match exactly, but if the process is working well they will match closely enough.

[23] Goffman (1981) accounts for this sort of discourse by expanding the traditional speaker-hearer model to include different kinds of participants. He sets out three different roles for speakers:

- Principal (the person who is responsible for the message)
- Author (the person who originates the form and content)
- Animator (the person who actually produces the utterance).

A speaker may fulfil one, two or three of these roles. The politician in the example above would be considered the principal and animator of the message, while the speechwriter (possibly with assistance from the politician and others) will be the author.

An interesting comparison would be a politician giving a speech written for her but in a language she did not understand and without having been provided with a translation. In such a case, the politician would not have been able to recover speaker's meaning and so would not have any basis on which to form an informative intention of her own to fulfil in delivering the speech. However, she may have other sorts of intention e.g. an intention to communicate that she speaks the language in question or that she wishes to pay a compliment to speakers of that language by addressing them in it, or to communicate the content of the speech (whatever it is) provided she has sufficient trust in the speechwriter.

A similar process takes place when a translator translates the work of another writer. The original writer will have held an informative intention in respect of propositions which he hopes to make manifest to his readers through the text. The translator, reading the text, will recover an enriched version based on its logical form and her own background knowledge and assumptions (which may include assumptions about the original writer's desires and attitudes). This enriched version will form the basis of the translator's informative intention, as she seeks in another language to communicate propositions encompassing not only the explicature of the original text but also any implicatures.

Can such an analysis be applied to legislating, given that the initial authors of a statute are not the people whose votes will determine whether its text becomes law?

Let us first consider the case of a single sovereign legislator: I shall borrow Hart's (1994) notion of a dynasty of kings, Rex I, II, III, IV etc. [24]

For the purposes of this example, let us imagine that, in the kingdom in question, the rule of recognition broadly states that a rule has the status of law where it is contained in a written text signed by the monarch. There is no requirement that the monarch reads or understands what he is signing. Laws are applied and interpreted by judges who have recourse to the text alone and who seek to give effect to the king's intentions.

Rex I habitually delegates the task of devising and drafting legislation to an advisor. Rex I is a bad king, uninterested in the effects on his people of the legislation that his advisor drafts. He does not read the text of the draft legislation at all: he simply signs it in order to get the job done as quickly as possible. In such a case, we can see that the advisors will have informative intentions when drafting the legislation. However, it is hard to argue that Rex I himself (who was the sole legislator) has any such intentions in passing it, as he is unaware of the content of the legislation he signed. Note that, although Rex I cannot be said to have had an informative intention of the sort we are concerned with, of which the text of the legislation is evidence, he may still intend to communicate in passing laws. For example, he may wish to communicate that he is powerful.

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[24] Hart (1994) imagines a simple dynasty of sovereign kings. In this legal system, each king is an autocratic monarch. Legislative authority is conferred on each king by a rule of recognition (i.e. the rule by which all other rules are identified and understood as law). This rule of recognition confers this power on the firstborn son of the previous king.

Conversely, imagine Rex II, a good king who cares about the effects on his people of the legislation that his advisors draft. Rex II is likely to read the text of draft legislation carefully before agreeing to sign. In such a case, Rex II would recover an interpretation of speaker's meaning in reading the draft legislation, and will hold his own informative intention (in respect of an array of propositions based on this recovered meaning) of which the legislation he finally signs will be evidence. Note that Rex II's informative intention may not be identical to that of his advisor, as it is based on an interpretation of speaker's meaning which may not reflect his advisor's intention exactly.

As such, we can say that an individual legislator *can* hold informative intentions based on a text drafted by someone else, provided that that legislator engages with the text sufficiently to recover an interpretation of speaker's meaning which in turn forms the basis of his or her own intention.

What happens then when judges seek to interpret the legislation passed by Rex I and Rex II? In the case of Rex II, we can view the text as evidence of an informative intention: Rex II has read the legislation he signs and has recovered the enriched content of that legislation, based on the text and his own assumptions. Passing the legislation can be seen as an act of communication, akin to ordinary speech or writing. A judge reading legislation passed by Rex II could fairly be said to be in the process of inferring Rex II's communicative intention and could recover enriched content on this basis.[25]

[25] i.e. his intention to inform the reader of his informative intention

How about Rex I? We know that Rex I never reads the legislation he signs and therefore does not recover any content, as a consequence of which he cannot have formed an informative intention or communicative intention of which the text is evidence. And yet a judge interpreting that legislation, given that judges in this kingdom have recourse only to the legal text, will have no more difficulty in doing so than the judge in the case of Rex II. This judge will also be in the process of inferring communicative intentions. However, unbeknownst to the judge, the intentions in question will be those of the advisor who drafted the legislation, *not* the intentions of the king. The judge effectively infers the intentions of the advisor but treats these intentions *as if* they were the intentions of the king.

What then can we say about the actual intentions of Rex I in passing laws, given that he does not form any informative or communicative intention? Certainly, he intends the text of the legislation he passes to have the status of law. Not only this but also, given that he knows that judges apply and interpret laws, it is reasonable to suppose that he intends the meaning of such texts to be that which would be understood by a reasonable and conscientious judge.

3.3 Informative intentions and group legislatures

3.3.1 The legislative process and the role of informative intention

I set out here a very brief summary of the legislative process in the UK. First, a person (such as a government minister) or persons will intend to effect a change in

the law in order to achieve some aim (for example, the banning of smoking in pubs in order to improve public health).[26] A bill will be drafted by Parliamentary Counsel, with the input of various interested parties (civil servants, Members of Parliament, lobbyists and others). The lawyers who draft the bill will hold informative intentions: they will have identified propositions which they wish the text of the bill to make manifest. These intentions may be held individually (in the case of a single lawyer drafting a provision on her own) or jointly (where lawyers work together on a provision, having discussed in detail the propositions which the text of that provision is intended to convey).[27]

The draft bill will then be considered and debated by legislators. A legislator who reads the bill will recover an enriched version of the linguistic meaning, based on the logical form of the text and her own background knowledge and assumptions.[28] Note that different legislators may recover different explicatures and implicatures, as each will have her own particular set of accessible assumptions. The bill will be subject to a number of readings and amendments.

Finally, legislators will vote in favour of or against the bill being enacted. In voting, each individual legislator will express whether she wishes the text of the bill, in its

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[26] This person (and indeed anyone involved in the process) may also have personal intentions, e.g. to raise their profile and secure advancement.

[27] In the case of joint intentions, it may be that there are minor differences in what lawyers consider the text is to convey, but assuming that they are working closely together these differences should be insignificant.

[28] Just as in the case of Rex II above.

final form, to have the status of legislation. I discuss below what precisely is communicated in the casting of votes. While voting is an individual act,[29] note that the passing of legislation is an act of the legislature as a whole, not of legislators acting individually.

Here we run into multiple difficulties. Individual legislators may vote in favour of a bill becoming law, with their understanding of the legal effect of the enactment being based on the enriched content that they personally recovered. Not all legislators will have recovered the same explicatures and implicatures, and some (who have not read the bill) will not have recovered any enriched content at all.[30] What is more, the content of the bill is unlikely to represent the precise wishes of any individual legislator, never mind a majority: the legislative process involves negotiation and compromise. Legislators are likely to have acted strategically in debating the wording of the law (for example, by deliberately leaving provisions under-specified in the hope that they will be interpreted in a particular way).

A worked example makes this clearer. A government may wish to criminalise the buying and selling of particular drugs in order to reduce the availability of the drugs and protect public health. It may also wish to penalise particularly severely anyone who uses a firearm as a weapon (i.e. to shoot or expressly or impliedly threaten to

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[29] Although of course legislators will often vote according to the wishes of their political party, rather than according to their own individual judgement.

[30] They may have an understanding of the overall purpose of the bill but not the kind of detailed understanding that would be required in order for them to form an informative intention of their own of which the text is evidence.

shoot) during the course of a drugs transaction.[31] Accordingly, it brings forward a draft bill which contains the following provision:

> Whoever, during and in relation to any drug trafficking crime, uses a firearm, shall, in addition to the punishment provided for such drug trafficking crime, be sentenced to imprisonment for five years. [This text is adapted from *Smith*.]

Let us imagine that the legislators who will be voting on the bill fall into three categories. The first category of legislators is made up of those who read the bill carefully and who understand the provision above to apply to people who use a firearm *as a weapon,* during and in relation to a drug trafficking crime. They believe that the purpose of this provision is to reduce the incidence of shootings during such crimes. The second category of legislators is made up of those who read the bill carefully and understand the provision above to apply to people who use a firearm *in any way whatsoever* during and in relation to a drug trafficking crime. They believe that the purpose of this provision is to reduce the overall proliferation of firearms. Members of both the first and second groups consider that their particular understanding of the text is uncontroversial and accordingly do not ask for any clarification or amendment to be made. The final group of legislators is made up of those who do not read the text of the bill in detail (or at all) and are unaware of what the provision says.

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[31] This example is based on a simplified version of the legislation 18 U.S.C. § 924(c)(1)(A) considered in *Smith v. United States*, 508 U.S. 223 (1993), discussed in detail in Chapter 7.

Legislators from each group vote in favour of the legislation and it becomes law. However, the legal effect of the legislation is ambiguous: there are at least two plausible enrichments: USE* *(as* a firearm) or USE** (for any purpose whatsoever), each of which can be justified under the broader aims of the legislature to increase the public good. The differences in understanding on the part of different legislators can be ascribed to their use of different assumptions in deriving the explicature of the text (e.g. that it is desirable to reduce the incidence of shootings during drugs offences or that it is desirable to reduce the proliferation of firearms), which formed the basis of their own decisions to vote. The third category of legislators (those who have not read the bill) will have no notion at all of enriched content which they believe the provision to express: they will merely be aware that the text of the bill exists and perhaps its broad subject matter.

Anecdotal evidence from former MPs supports this characterisation and suggests that this third group is generally the largest.[32] For example, this exchange, between former Labour Director of Communications Alistair Campbell and former Conservative MP Rory Stewart, addresses the point:

> RS:… the sad thing about that, which we almost never talk about, but is of course the guilty secret of Parliament, is that as a result the vast majority of

[32] This view is supported by Greenberg (2011): "It is uncontroversial that most legislators do not read most of the text of the statutes on which they vote. The vast volume of legislation ensures this. Just to give a sense of the problem, in 2005–6, the most recent year for which statistics are available, Congress passed more than 7,000 pages of statutes." (p. 239)

MPs barely bother to find out what they're voting on, unless it's something that's been really brought to their attention by a constituent or a lobby group. People are filing in and out of the lobbies, could be voting seven times in a day, and if you say to them, "What are we voting on?" – I've noticed this as a young MP – they'd have to glance up at the screen and go, "Uh….um….Academies Bill, Second Reading". And if you said, "OK, what is the Academies Bill, Second Reading?" they'd whop you round the head for being a cheeky bugger.

AC: And they wouldn't have read the whips' notes on it either.

(Campbell & Stewart, 2022, 51:13)

Likewise, former Conservative MP Heidi Allen commented as follows on the experience of leaving the Conservative Party (where she was whipped to vote in line with the government) to join the short-lived Independent Group for Change (also known as Change UK) and then to sit as an independent:

The five of us that came out [of Change UK] still were very tight. We met last week, in fact. And that's lovely, cos it is kind of a bit of a lonely existence being…there was a vote the other week. We're like, "Oh my God! What is this?" Because of course you get, when you don't have whips, you don't know…Texting each other going, "What the hell is this about? What is it? Quick, does somebody know?" So we kind of hang out as a fivesome...

(Taylor, Dunt & Andreou, 2019, 54:38)

Thus, there will be no single, identical array of propositions which all legislators consider the bill to express and which could potentially form the basis of an informative intention in the manner explained above for Rex II. Even more importantly, the actual passing of the legislation is done not by individual legislators but by the legislature acting as a whole (i.e. including both those legislators who voted to enact the bill and those who voted against) according to decisions taken by majority vote. It is therefore surely the informative intention of the legislature as a body which is relevant for any analysis of legislation as communication. However, can a body such as a legislature hold an intention of this kind? If not, then the situation appears analogous with that of Rex I. If it can, how is such an intention constituted?

I consider these questions below, looking first at what a legislator communicates when she votes and then at how this relates to any intention held by the legislature as a whole.

3.3.2 Legislators' intentions in voting[33]

As set out above, a legislator who reads a draft bill will form an understanding of speaker's meaning based on the linguistically encoded logical forms of the sentences making up the text of the bill and her own background knowledge and

[33] This section draws on some of my own (unpublished) work submitted in the course of my Master's degree in linguistics.

assumptions. This enriched version of the text will be what she considers herself to be voting on. However, what does her vote actually communicate? Does it communicate her desire to change the law in accordance with the enriched version of the text, or something else? This question is considered below.

Greenberg (2011) notes that people can mean different things when they vote. For example, although some voters in the 2000 US presidential election voted for Ralph Nader, few wanted to communicate that they wished Nader to become president; rather, they intended to convey some other concern, such as their unhappiness with traditional politics. Given this difference in intentions, how can we account for voting as a communicative act?

Marmor (2014) responds to Greenberg. While voters may have various underlying reasons for how they vote, these do not affect the notion of voting as a communicative act.

> In presidential elections, the question is not: “Who would you really want to become president?” The question is: “How would you like the system to count your vote—in favor of X, Y, or Z?” By voting for X, you convey the message that, in the tally of the votes, your vote counts for X.
>
> (p. 16)

Likewise, legislators may have different reasons for voting for the enactment of a bill, yet we can safely say that each legislator who votes in favour is communicating that

she wishes her vote to be counted in favour of the enactment of a law in the given form. Thus:

> … voting procedures in a democratic institution are not meant to aggregate the subjective states of mind of the members of the institution. Voting procedures are meant to generate an institutional decision.
>
> (p. 18)

Thus far, I agree with Marmor's analysis. However, he then argues that this institutional decision is in itself the speech act which communicates the content of the bill as the binding decision of the legislature:

> Greenberg's doubts about the legislative procedure as a form of collective speech act stem from a confusion between the question of what kind of communicative action legislation is and the very different question of whether voting, or legislation more generally, necessarily reflects the subjective intentions of the legislators. The fact that the answer to the second question is often *no* does not cast any doubt on the assumption that voting in a democratic legislature to approve a certain bill is a form of collective speech act intending to communicate the content of the bill as the official, institutional decision of the legislature. (p. 22)

Here I disagree with Marmor. Voting to approve a bill is not a collective speech act intended to communicate the content of that bill as the decision of the legislature.

Rather, voting is the method by which that institutional decision is *reached*, not the method by which it is communicated (notwithstanding that the casting of a vote may be an individual speech act by an individual legislator). This collective decision sets in motion the process by which the bill becomes binding law, which in the UK is through Royal Assent and publication (and hence communication of the text of the legislation as a legal declaration). In other words, the effect of voting is to reach an institutional decision that the particular text should be deemed a particular type of collective, performative speech act by Parliament, such that it changes the world into a world in which the provisions contained in the text have legal effect.

3.3.3 Group intention and the actions of legislatures

It is hard to dispute that people sometimes act together. If a football team work together to score a goal, they are exercising agency in concert. Likewise, if two people go for a walk together, then we think of this as a shared activity: there is a difference between, on the one hand, John and Mary going for a walk, and on the other, John going for a walk and Mary going for a walk. This is uncontroversial. Similarly, many modern legislatures enact legislation together, making decisions as to whether to enact a particular bill by means of a vote. Although not every legislator may have voted in favour of a particular law, they act as a group in enacting that law. How do we characterise this kind of collective action?

Searle (1990) gives an example which makes clear the difference between individual and joint action. A number of people are in a park when it suddenly starts to rain. Each person therefore runs to a shelter located in the middle of the park. While the

people may coordinate their behaviour (in that they are aware of one another and take care not to collide with one another), we cannot speak of their running to the shelter as something which they do as a group. In contrast, imagine the same people doing the same movements as part of a dance troop performing a dance. Here, although the physical actions performed may be identical, we can speak of them as an example of collective action.

Searle argues that the distinguishing factor is not the actions of the people but rather a matter of intention. In the former case, each individual may have the intention to run to the shelter ("I am running to the shelter"), but in the latter case each individual's intention relates to the others', as might be expressed by "we are running to the shelter". Likewise, in the case of John and Mary's walk, something different would be expressed by John and Mary each saying, "I am going for a walk," compared to their saying, "we are going for a walk". This kind of intention, which we can think of as a "we-intention" as opposed to an "I-intention", is what makes the difference, for Searle, between group action and multiple individual acts.

Searle does not specify precisely the conditions under which he considers that the holding of we-intentions results in group action. In particular, he does not address how the we-intentions of different participants must relate to one another: for example, must the we-intentions be common knowledge among all participants, and must they all be identical?

Bratman (1999) provides a more detailed account of group intentions, which he summarises thus:

> To understand shared intention, then, we should not appeal to an attitude in the mind of some superagent; nor should we assume that shared intentions are always grounded in prior promises. My conjecture is that we should, instead, understand shared intention, in the basic case, as a state of affairs consisting primarily of appropriate attitudes of each individual participant and their interrelations. (p. 111)

The state of affairs in question is as follows:

> We intend to J if and only if
>
> 1. (a) I intend that we J and (b) you intend that we J.
>
> 2. I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b.
>
> 3. 1 and 2 are common knowledge between us.
>
> (p. 121)

Bratman's account is based on the premise that group intentions are more than simply coincident. They arise from the interlocking intentions of the participants: each participant intends to act with the others, meaning that their individual decisions are made by reference to group action towards a shared goal. One strength of this

notion of group action and intention is that "it allows for shared intention even when the agents have different reasons for participating. We can intend to sing the duet together even though my reason is the love of the music and yours is, instead, the chance to impress the audience" (Bratman 1999 p. 122): this is a circumstance which is clearly relevant to the actions and intentions of legislators.

Ekins & Goldsworthy (2014, p.64) consider this notion of group action and intention in relation to legislatures. They consider a speech given by Chief Justice Robert French in 2013, in which he commented as follows:

> Are the real intentions of the legislators who voted for a statute to be inquired into and somehow assembled by the court into a collective mental state, which may then inform the interpretation of the statute? In my opinion, the answer to that question is no.

Ekins & Goldsworthy agree that it is not possible to aggregate legislators' intentions in this way in order to arrive at a conception of legislative intent. Rather, a legislature should be seen as a complex purposive group that can form and act upon intentions, which arise from but are not reducible to the intentions of individual legislators (p. 64). They explain these intentions thus:

> Intentions are plans that persons adopt as means to ends they seek. The intention of a group is the plan of action that its members adopt, and hold in common, to structure how they are to act in order to achieve some end that

> they want to reach together. When members play their part in the plan, and carry it to completion, the group has acted on its intention.
>
> (p. 64)

They continue:

> The group has...two types of intention: secondary (standing) intentions, which are plans to form and adopt other plans, and primary (particular) intentions, which are plans that directly concern how the group is to act on this or that occasion.
>
> (p. 65)

Applying Bratman's tests to this conception of the group intentions of legislators, it follows that a legislature can form a joint intention provided that:

> 1. Each legislator intends the same thing ("1. (a) I intend that we J and (b) you intend that we J");
> 2. Each legislator's intention to do that thing is in accordance with and because of the others' intentions to do so (and meshing subplans) ("2. I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b.")
> 3. 1 and 2 are common knowledge between the legislators.

We can apply this quite easily to Ekins and Goldsworthy's notion of the secondary intention of a legislature, which is to pass laws in accordance with votes cast by a majority. So:

> 1. Each legislator intends to pass laws in accordance with votes of the majority of legislators;
> 2. Each legislator's intention to pass laws in accordance with votes of the majority is in accordance with and because of the others' intentions to do so.
> 3. 1 and 2 are common knowledge between the legislators.

Thus we can certainly speak of a group intention of the legislature to pass laws in accordance with majority votes. However, things become more complicated when we ask whether a legislature can form a group *informative intention*.

3.3.4 Can a legislature hold an informative intention?

As shown, statutes are passed by legislatures acting together, not by the actions of individual legislators (albeit that their votes determine how the legislature then acts). Any relevance-theoretic account of legislation as communication should therefore analyse the passing of laws as an act of communication by the legislature, and not by individual legislators. Accordingly, we need to consider whether we can give a coherent account of legislating based on legislatures holding informative and communicative intentions, which are then evidenced by the laws they pass.

An informative intention in legislating must be in respect of a fairly precise and specific array of propositions. As set out above, when passing laws some legislators may have been motivated to vote for or against the enactment of the bill based on the content that they personally recovered from their reading of the text, while others may have voted according to party or for other reasons. How, then, can we discern whether the legislature, acting as a whole, holds an informative intention (i.e. an intention to make manifest or more manifest to the audience an array of propositions), when different legislators are likely to have different notions of the propositions which the text of the statute evidences?

Here, we appear to fail the first limb of Bratman's test (i.e. "(a) I intend that we J and (b) you intend that we J"). In order for this limb of the text to be met, each participant must have the same intention. This will not be the case in respect of informative intentions if different legislators have different notions of what the statute communicates (e.g. whether the penalty for using a firearm will apply just in the case of firearms used as weapons or in any case of firearm involvement at all - USE* or USE**). If legislators do not share an intention to make manifest an array of propositions which is substantially the same, it cannot be said that they hold a joint informative intention in respect of the law which would evidence that intention. Note that there is nothing here which would prevent a group, in other circumstances, from holding a joint informative intention, nor that would prevent a legislature from holding group intentions of other sorts, such as intention to pass legislation based on majority votes, provided that each limb of Bratman's test is met (which necessitates a common understanding of what it is that the legislature is doing).

Bratman's test of intention has been considered by many philosophers, notably Gilbert (2009). Gilbert argues that it is possible for two people to hold a shared intention to J, even if neither of them has a personal intention to J. She gives the following example:

> The parties are Ned and Olive, and Olive is speaking: "Our plan was to hike to the top of the hill. We arrived at the hill and started up. As he told me later, Ned realized early on that it would be too much for him to go all the way to the top, and decided that he would only go half way. Though he no longer had any intention of hiking to the top of the hill, he had as yet said nothing about this to me, thinking it best to wait until we were at least half way up before doing so. Before then we encountered Pam, who asked me how far we intended to go. I said that our intention was to hike to the top of the hill, as indeed it was.
>
> (pp.171-172)

Gilbert argues that, in this situation, Ned and Olive hold a shared intention to J, notwithstanding that Ned had privately decided that he himself would not J. She goes on to say that they would still hold a shared intention to J even if Olive had also privately decided not to J.

I agree entirely with Gilbert's argument here. However, it does not follow that a similar analysis can be applied in the case of legislating. In Gilbert's example, both Ned and Olive are well aware of what it is they have a shared intention to do (J): they

have a shared intention to hike to the top of the hill, notwithstanding that Ned privately does not intend to do so. In the case of legislating, it is not that there is a shared intention to J (where J is to make manifest to a reader a specific proposition) notwithstanding that some legislators do not personally hold that intention. Rather, *there is no agreed J*: there is no meeting of minds among legislators as to the specific proposition which the text of the bill evidences.

The situation here would seem to be analogous to that of Rex I, except that here laws are passed by the whole of the legislature (who decide whether to pass a law based on majority voting). The legislature (as distinct from individual legislators) does not hold a shared informative intention of which the text of the bill becoming law is evidence. As in the case of Rex I, a judge interpreting that legislation (if basing her interpretation on the text alone) will have no more difficulty in doing so than would be the case if the legislature *did* hold a shared informative intention. The judge effectively infers the intentions of the lawyers who drafted the legislation but treats these intentions *as if* they were the intentions of the legislature.

Again, what then can we say about the actual intentions of the legislature in passing laws, given that it does not hold any shared informative or communicative intention? Certainly, we can say that the legislature intends the text of the laws it passes to have the status of law. Further, given that it is common knowledge among all legislators that judges apply and interpret laws, it is reasonable to suppose that the legislature has a shared intention that the meaning of such texts should be that which would be understood by a reasonable and conscientious judge applying

ordinary interpretive methodologies. This notion of intention seems very close to the notion of objective legislative intention (and see further below).

3.4 Informative intention and legislative intention

To recap, while it is possible that a group could hold an informative intention, to do so it requires a common understanding of the array of propositions which it intends to make manifest. Such a common understanding is possible where the constitution and processes of the group allow it: for example, where a small group of people cooperate to reach a genuine and detailed agreement about what they wish to communicate, such that they each have substantially the same notion of the propositions which they wish to make manifest to their audience.

However, the constitution and processes of modern legislatures almost certainly prevent such genuine, detailed agreement from being reached: different legislators will have different notions of the propositions which the passing of a statute will make manifest, such that there is no realistic prospect of a modern legislature holding the kind of subjective informative intention upon which relevance theory relies. Is this a problem for statutory interpretation?

Earlier in this chapter, I quoted Bennion:

> The legal meaning of an enactment is the meaning that conveys the legislative intention. The legislative intention is the meaning attributed to the legislator in respect of the words used.

(10.9)

The key word here is "attributed". Unlike informative intentions, which are subjective and independent (in that they can exist even if the utterance is never made, e.g. because the speaker changes her mind), legislative intentions are something *attributed* to legislatures by others in respect of the words actually used. At first sight, therefore, it would appear that they are neither subjective nor independent: they are attributed by others and, because they only exist "in respect of the words used" they presumably cannot be separated from those words. Thus far, the view expressed in Bennion seems compatible with my conclusions on shared intentions: that a modern legislature, for practical rather than theoretical reasons, cannot hold a shared informative intention in respect of which a statute is evidence, but that such a legislature holds a shared intention to pass a law the meaning of which is that which would be understood by a reasonable and conscientious judge.

Whether this initial analysis holds good is something I shall consider below, looking in detail at the work of Ekins & Goldsworthy (2014).

3.4.1 Legislation and the notion of objective intention

Ekins & Goldsworthy consider the nature of legislative intention in detail. Their overall position, as I shall set out below, is that legislative intention exists as something real and independent. They look at legislative intention in two ways: as both objective and subjective. Objective intention is defined in relation to subjective intention: objective intention is what a reasonable audience would conclude was the

author's subjective intention, given all the publicly available evidence of it. It is notable that Ekins & Goldsworthy claim not only that objective legislative intention genuinely exists but also that there is a genuine subjective intention which underlies it. It is on this latter point that their view differs most substantially from mine. I consider the strength of their claims below.

Ekins & Goldsworthy note that various judges and legal theorists have queried whether legislative intention genuinely exists as something real and independent. Some theorists consider it to be something constructed or produced as a result of interpretation long after the law is passed, rather than being a genuine intention of the legislature which the interpretive process uncovers: judges have referred to this conception of legislative intention as a "fiction" and a "metaphor". This characterisation of legislative intention gives rise to a number of issues, which Ekins & Goldsworthy consider in some detail.

First, they argue that attempting to interpret statutes without a belief in an "independently existing intention is likely to become an artificial, pointless and debilitating exercise, like perpetuating religious rituals after abandoning belief in God" (p. 43). However, this in itself is not an argument against the view that legislatures do not hold shared intentions regarding the specific meaning of legislation, any more than it is an argument for the existence of God that people go to church on Sundays.

Second, they note that there is disagreement between interpreters about the weight that should be placed on the text of a statute as against contextual evidence of the statute's purpose (broadly, the respective positions of textualists and purposivists). Legislative intention, they argue, provides a criterion for resolving such disagreements: "is the textualist or the purposivist methodology more likely accurately to discern the legislature's intention?" Without genuine legislative intention, Ekins & Goldsworthy argue, much of the debate between textualists and purposivists ceases to make sense: what is the use of arguing about the best way to determine legislative intention if that intention does not exist? Again, this does not appear to be an argument against the view that legislatures do not hold shared intentions regarding the specific meaning of legislation: in fact, an approach to the nature of legislative intent which makes the ongoing debate between textualists and purposivists redundant would surely be desirable?

Third, Ekins & Goldsworthy ask whether judges who are sceptical about the existence of legislative intention can apply the standard principles of statutory interpretation without changing them: "if legislative intention is a product of applying the principles of statutory interpretation, but those principles direct the courts to infer the legislature's intention, the dog is chasing its own tail. To break the cycle, something would have to be changed." Finally, Ekins & Goldsworthy argue that, even without a requirement to break the cycle, courts may be tempted to change the principles of statutory interpretation if such principles are no longer tied to a notion of independently existing intention. Here it seems to me that it is the characterisation of the role of the principles of construction that is at fault: the principles of statutory

construction do not simply direct the courts to infer the legislature's intention but give them methods to do so, aiding consistency of interpretation.

Many of the issues raised by Ekins & Goldsworthy show why it may be desirable to be able to demonstrate that legislatures do hold independently existing intentions, which are not "just a label for whatever emerges from [the interpretive process]" (p. 43). However, none of these issues provides any evidence that such independent intentions *do* exist (to be clear, Ekins & Goldsworthy do not claim otherwise: their intention in expounding these issues is simply to demonstrate why the nature of legislative intention matters).

Ekins & Goldsworthy then go on to distinguish between subjective intentions of actual legislators and so-called objective intentions, noting that those who are sceptical about the existence of independent legislative intentions are "happy to impute so-called 'objective' intentions to legislatures or statutes, while dismissing the 'subjective' intentions of actual legislators as irrelevant." They offer the following definition of objective intention:

> An 'objective' intention amounts to this: what a reasonable audience would conclude was the author's 'subjective' intention, given all the publicly available evidence of it.
>
> (p. 46)

This, for Ekins & Goldsworthy, is what courts are seeking to uncover in interpreting legislation. They note that the courts often speak of legislative intention in such terms, quoting among others Lord Diplock (here in relation to the interpretation of trusts):

> [T]he relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind, or even acted with some different intention which he did not communicate to the other party.
>
> (pp. 46-47)

Likewise, in relation to statutory interpretation, they quote Lord Radcliffe:

> the paramount rule remains that every statute is to be expounded according to its *manifest or expressed* intention
>
> (emphasis added) (p. 47)

Thus, for Ekins & Goldsworthy, the relevant intention for the interpretation of legal texts is what a reasonable audience would consider the author to have expressed as its subjective intention. This is an *objective* notion of intention and very far removed from the relevance-theoretic notion of informative intention. Informative intention is *subjective* and can exist even in the event that it is not communicated (e.g. where the speaker changes her mind before she speaks). In fact, the content of what legal

theorists refer to as objective intention is rather like what a relevance theorist might call explicature: the content of an utterance which the hearer/reader recovers from the decoded logical form of the utterance plus context, assumptions and so on, and considers to be the proposition which the speaker/writer asserted.[34] Given that human communication is not flawless, this may not be the same as the exact proposition which the speaker intended to make manifest.

So far, so good: it is not illogical that the courts should try to interpret legislation based on what a reasonable audience would conclude was the author's subjective intention, if it had one. However, Ekins & Goldsworthy's claim is that the objective intention of the legislature is an "independently existing intention" and not merely "a label for what emerges from [the interpretive process]". This argument is not yet made.

Ekins & Goldsworthy go on to consider whether the notion of subjective intention[35] is relevant to statutory interpretation. They state that:

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[34] In my opinion, it would be preferable to refer to the interpretation placed on a legal text by some term other than "objective intention". Given that what legal theorists refer to as "objective intention" is not actually an intention at all, but rather an *interpretation*, the use of this term seems misleading. (This point is made by Ekins & Goldsworthy themselves at p. 49.)

[35] Where Ekins & Goldsworthy refer to subjective intention, I understand the notion as being a precise intention relating to the detail of the meaning and legal effect of a legal text. If it is not this kind of precise intention, and is instead something looser (such as "an intention to ban smoking in pubs") it is hard to see how it can play any real role in statutory interpretation. As I note above, my objection to the idea that a legislature can hold an informative intention is a *practical* one: given the nature of modern legislatures and legislative processes, it is unrealistic that a legislature could form a group intention to make manifest one single array of propositions. I do not doubt that a legislature could hold a much looser group intention, e.g. to ban smoking in pubs.

> … an 'objective' interpretation is whatever a reasonable audience would infer, from the publicly available evidence, was the author's subjective intention. The existence of a subjective intention is a crucial presupposition of our attribution of an objective intention to the author of a text. If we knew that the creators of a text had no relevant subjective intention (for example, they were monkeys pounding randomly on keyboards), we would have no rational basis for attributing any objective intention either.
>
> (p. 48)

The point to note here is that Ekins & Goldsworthy understand subjective legislative intention as something which really exists, rather than merely as something an audience might construct.

Ekins & Goldsworthy then consider and reject two bases on which sceptics might reject the characterisation of their position as equivalent to viewing legislatures as "monkeys pounding randomly on keyboards".

First, they note that a sceptic as to the existence of legislative intent might argue that a statute reflects the subjective intentions of those involved in drafting it, such as Parliamentary Counsel and individual legislators. Ekins & Goldsworthy's view is that this is quite wrong: it is not the intentions of the drafters that should matter but those of the legislature. This view highlights one of the difficulties of approaching legal theory from the perspective of linguistic theory: while linguists seek to describe and explain how linguistic communication actually works, legal theory often takes a

normative approach, looking, for example, not simply at what a judge does in interpreting a law but at what she should do. While I agree with Ekins & Goldsworthy that democracy requires that it is the intentions of the legislature which matter, from the perspective of linguistics it is hard to claim that the intentions of the drafters play no role when it comes to judicial interpretation. Here I refer back to the example of Rex I, given above.

Second, Ekins & Goldsworthy consider and reject the characterisation of objective intention as "whatever a 'reasonable legislature' or 'ideal legislature' would have intended had it enacted the statute" (p. 49) (rather than as what a reasonable audience would infer as the author's subjective intention). Their objections to this characterisation are somewhat weaker: they argue that this notion of objective intent would be a fiction, something which sceptics should be reluctant to invoke. But this seems to miss the point. Sceptics consider the notion of objective intention to be a fiction because they do not consider that it exists except as a product of the interpretive process, something which is constructed and not discovered. As such, there is no reason why a sceptic would be unhappy with the characterisation of objective intention as something fictional. Ekins & Goldsworthy also argue that such a conception of objective intention is problematic because it invites judges to interpret legislation by reference to what they think the legislature *should* have enacted, thereby undermining the separation of powers. In this they may be right, although this kind of normative objection to a characterisation of objective intention does not mean that the characterisation is not correct.

As I have argued above, there is no realistic prospect that a modern legislature, given its constitution and procedures, could form a subjective intention regarding the meaning of the legislation it passes, as it does not have one single coherent set of propositions which it intended to make manifest. For Ekins & Goldsworthy, this view gives rise to a number of problems. They set some of these problems out in the next section of their paper, and I consider these in detail below. As a general statement, I consider that their arguments largely address why it would be desirable for a legislature to hold a shared subjective intention as to the meaning of legislation it passes. Such arguments run the risk of falling foul of affirming the consequent, if they are taken on their own as proof of the existence of such a subjective intention. Such an argument might take the following form:

1. If the legislature forms genuine subjective intentions then the courts' approach to statutory interpretation is coherent.
2. The courts' approach to statutory interpretation is coherent.
3. Therefore, the legislature must form genuine intentions.

While I do not suggest that Ekins & Goldsworthy have made this error, it is important to note that the coherence of the courts' approach to statutory interpretation may be due to matters other than the existence of subjective legislative intention. Ekins & Goldsworthy themselves address what it would mean for their notion of objective intention, if there were no underlying subjective intention:

> If...what is being referred to is the output of a process of dealing with statutes, understood just as sets of unintended sentences, that is unconcerned with any intention - then the word "intention" should be replaced with a less misleading label. 'Thingamajig' seems to us as good a label as any other. Of course this sounds bizarre: what could possibly be the rationale for constructing this non-existent 'thingamajig'? But that is our point. There is an obvious and straightforward rationale for interpreting statutes in the light of contextual evidence of legislative intention.
>
> (p. 49)

As I hope to show below, relevance theory provides a coherent and adequate explanation for the courts' approach to statutory interpretation. I shall argue below that, rather than being based on a genuine subjective intention of the legislature, judges read statutes *as if* they were evidence of such a subjective intention, notwithstanding that there is no realistic prospect of the legislature holding such an intention. As I have argued above, in the absence of a shared informative intention held by the legislature, I believe that the courts effectively treat the text as being evidence of the informative and communicative intentions of the legislature when in fact the text is evidence of the underlying informative and communicative intentions of the lawyers who drafted the laws. The judge will use this text, along with the context and her own assumptions, in order to derive the meaning, *as if* the text were

actually evidence of the subjective informative intention of the legislature.[36] [37] I shall refer to this "as-if" intention as a "quasi-intention" of the legislature but I should like to make very clear that, by giving this notion a name, I do not mean to imply that it has any independent existence. Rather, it is simply part of the process by which judges seek to interpret legislation.[38]

For the avoidance of doubt, note that I am not suggesting that no genuine informative/communicative intentions are involved in the drafting and enactment of statutes: far from it. My argument is that these intentions are held by the person or people who did that detailed drafting, that is to say parliamentary counsel and perhaps others who had detailed input into the process. They are not held by the legislature, but rather imputed to the legislature by the judge who interprets the text in question.

Further I shall show that the rationale for such a quasi-intention is more convincing than Ekins & Goldsworthy's normative rationale for the existence of subjective

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[36] It is perhaps worth noting here that, even in ordinary speaking/hearing, a hearer cannot know for sure that she is actually inferring the intentions of the speaker.

[37] It is worth contrasting texts created where there is genuinely no informative/communicative intention, such as a text which is generated at random. In certain contexts (for example, if the text is presented to a reader as a poem) the reader is likely to read the text as if it expressed an intention, even if she knows that no intention was involved in its creation other than the intention to create a randomly-generated text and present it in this way.

[38] Boudreau et al. (2005) take a similar approach:

> …we argue that judges should adopt an intentional stance. The intentional stance, unlike the search for actual intent, does not require knowledge of what legislators were actually thinking when they wrote a statute. Rather, it involves the *imputation of intentionality* to the legislature in order to figure out what its statutes mean.
>
> (p. 2137-2138) [emphasis added]

legislative intention: it is driven not by normative considerations regarding the separation of powers but by a coherent theory of communication and human cognition.

3.4.2 Arguments for the existence of legislative intention as to meaning

Ekins & Goldsworthy give eight arguments for the existence of legislative intention, which I set out below. In almost every case, I consider that the notion of quasi-intention (i.e. the idea that judges interpret law *as if* it were evidence of an underlying intention of the legislature) addresses the issues raised just as well as a real subjective intention would do. Therefore, given my arguments above that no such subjective intention can exist, quasi-intention would appear to provide a better solution.

Note that my intention throughout this section is merely to show that we do not need to assume the existence of actual legislative intentions in order to explain the interpretative process. It is not to show that quasi-intentions provide a better account of the interpretative process than actual intentions would, if they existed (although of course one would still face the question of how to access those intentions other than through the text of the statute). I have argued above that, for practical reasons, there is no real possibility that detailed legislative intentions as to meaning exist. Here I simply offer support for that position by addressing Ekins & Goldsworthy's arguments that actual legislative intentions *must* exist for the eight reasons given.

3.4.2.1 Common sense perceptions of legislative intention

Ekins & Goldsworthy claim (p. 51) that we often "*perceive* what was intended when we read provisions in statutes whose language does not communicate that intention with absolute accuracy and comprehensiveness", giving a number of examples of occasions when courts have interpreted the language of a statute in a non-literal way. We do this "on the basis of simple common sense and shared cultural understandings". Therefore "[a]ny assertion that legislatures never have ascertainable intentions (other than to enact a text with a literal meaning) is implausible, partly because it entails that common sense cannot play this role" (p. 53).

Ekins & Goldsworthy are correct to identify that courts often interpret legislation in a non-literal way. A relevance-theoretic account of this process would refer to accessible assumptions about the world and a guiding principle of optimal relevance (rather than Ekins & Goldsworthy's "common sense and shared cultural understandings"). While these two descriptions of this process seem compatible, the relevance-theoretic account is to be preferred: not only does it unpack Ekins & Goldsworthy's notion of "common sense" but it also explains why different readers can form different interpretations of the same text. The important point here, however, is that there is nothing in Ekins & Goldsworthy's account of this process which supports the existence of genuine legislative intention rather than quasi-intention: quasi-intention (i.e., the idea that judges interpret texts *as if* they evidenced an underlying intention of the legislature) provides just as convincing an account of the process. Proponents of legislative intention may wish to respond that relying on

quasi-intention, rather than a notion of genuine legislative intention, is problematic from the perspective of legislative supremacy and the separation of powers. Certainly it is problematic, but the solution to the problem is not unfounded belief in legislative intention.

3.4.2.2 Resolution of ambiguities

Ekins & Goldsworthy argue (p. 53) that evidence of legislative intention is used to resolve ambiguities in the literal meaning of the law. Without genuine legislative intention, how could this be justified?

My response to this echoes my response to Ekins & Goldsworthy's first argument: quasi-intention provides just as convincing an account as genuine legislative intention. Again, this may give rise to problems concerning legislative supremacy and the separation of powers. Again, the solution is not an unfounded belief in legislative intention.

3.4.2.3 Statutory references to legislative intention

Ekins & Goldsworthy note (p. 53) that statutes occasionally contain mention of intentions (e.g. the Road Safety Remuneration Act 2012, s.10, states that "[t]his Act is not intended to exclude or limit the operation of any other law of the Commonwealth...")

Ekins & Goldsworthy argue that sceptics about legislative intention cannot make sense of provisions of this kind. This seems to me to be somewhat weak: the wording of the section operates as a guide to the interpretation of the Act (i.e. that it should not be interpreted as excluding or limiting the operation of other laws). The fact that it has been phrased in this way by Parliamentary Counsel is not evidence of genuine legislative intention.

3.4.2.4 Drafting errors

Ekins & Goldsworthy state (p. 53) that drafting errors can result in the literal meaning of a provision "being quite different from its obviously intended meaning, sometimes absurdly different. Where the provision's context and purpose make it obvious that this has happened, and also obvious what the legislature intended to provide, the courts may be prepared to correct the error and give effect to the intention".

Again, quasi-intention gives just as coherent an explanation here as genuine intention would do.

3.4.2.5 Application of interpretive maxims

Ekins & Goldsworthy argue (p. 54) that the application of interpretive maxims makes sense only on "the assumption that they sometimes help us to understand the intention that guided the framing of the provision". My response is that the application of interpretive maxims makes just as much sense in relation to quasi-intentions as it would in the case of genuine intentions. The role of interpretive

maxims is to give judges a consistent basis on which to make decisions about interpretation. Whether or not the legislature has a genuine underlying subjective intention is irrelevant.

3.4.2.6 Inexplicit content

Here, Ekins & Goldsworthy set out (pp. 54-55) an account of legal interpretation based on the existence of ellipses, presuppositions, other tacit assumptions and implicatures. How can these be understood, they ask, unless by reference to intention? I would respond as I did to their first argument regarding non-literal language: quasi-intention provides just as good an explanation as actual intention.

3.4.2.7 Purpose

Here, Ekins & Goldsworthy argue (p. 57) that "it is self-contradictory to dismiss legislative intentions as fictions but to keep talking about statutory purposes": what are purposes, if not a kind of intention? If we can allow that a legislature may have a purpose in bringing forward legislation, why do we dispute that it can have an intention in doing so?

Here, I refer back to my understanding of Ekins & Goldsworthy's notion of legislative intention. If a legislature can hold an intention that plays a role in statutory interpretation, that intention must be to communicate something sufficiently detailed and precise that it is a genuine aid: in other words, something akin to an informative intention. My objection to the notion of legislative intention is a practical one: I do not

argue that it is theoretically impossible for a group to hold an informative intention, but rather that the nature of modern legislatures and the legislative process mean that, in practice, there is no realistic possibility that a legislature will do so.

I therefore am not overly concerned with the idea that a legislature could hold a particular purpose in passing legislation, provided that Bratman's tests are met. For example, a legislature could pass legislation banning smoking in pubs, with the purpose of improving public health: it is far more realistic that a group could hold a collective purpose of this type than that they could hold a collective, detailed, informative intention. This sort of collective purpose is very different from the kind of detailed meaning intention which Ekins & Goldsworthy appear to argue for.

3.4.2.8 Context

Ekins & Goldsworthy note that the courts often refer to "context" when interpreting legal texts. They quote Lord Steyn, who observed that "a statement is only intelligible if one knows under what conditions it was made" (p. 58). This seems true. Ekins & Goldsworthy go on to argue that the reason that it is true is that "the circumstances in which a statement was made illuminate the intentions or purposes of the speaker or writer". They quote Lord Blackburn to this effect:

> In all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object,

> appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they are used.
>
> (p. 58)

However, the logic here is circular and presupposes that the role of the court is to identify some kind of genuine legislative intention. If we discard that premise and assume that the courts instead seek to interpret legislation *as if* it were evidence of an underlying intention, context plays much the same role (and indeed is still relevant in interpretation, as the context in which a law is passed may affect the accessibility of assumptions to its readers). Further, while there are certainly many occasions on which the courts refer to context, there is significant disagreement about what makes up the relevant context for legislative interpretation. Is it the textual context or some wider background?

3.4.3 Complex groups

Finally, I would like to address the arguments made by Ekins & Goldsworthy in the last section of their paper. Here they explain the notion of complex groups:

> Complex groups are different [from simple groups in which all plans are known and held fully by all members]: instead of having a single, specific objective, they may be devoted to the ongoing pursuit of some general purpose by adopting and implementing an indefinite number of particular plans. Consider how an army or trading corporation pursues general purposes

> by adopting or changing particular plans as and when needed. Such a group may adopt procedures to settle how plans for group action are to be formed, and the plans so formed may not be known in full by all members. The group has, one might say, two types of intention: secondary (standing) intentions, which are plans to form and adopt other plans, and primary (particular) intentions, which are plans that directly concern how the group is to act on this or that occasion. Their action is still based on unanimity, because all members of the group have the same secondary intention, which is that the group use agreed procedures to develop and adopt primary plans, to be implemented by individual members insofar as the plans require them to act.
>
> (p. 65)

Legislatures, Ekins & Goldsworthy argue, are a kind of complex group. They have secondary intentions (for example, "to stand ready to change the law when there is good reason to do so, acting on particular occasions in accordance with established procedures" (p. 65). Ekins & Goldsworthy characterise bills as proposals for legislative action: legislators vote for or against a bill becoming law and the legislature as a whole acts accordingly. As part of this process:

> The detail of the proposal [i.e. the bill] is the focal point for argument and action. It is the proposal that legislators deliberate about and which, if they assent, they will act to introduce. That is, the proposal is what legislators hold in common.
>
> (p. 66)

Here, much turns on what one understands by "the detail of the proposal". If one takes this simply to be the text of the bill, then I agree with Ekins & Goldsworthy's analysis: the text of the bill is what legislators hold in common and one can certainly identify a shared intention to give that text the status of law. However, it does not follow that there is any shared intention regarding the meaning of that text (or, to put it another way, any shared informative intention of which that text is evidence). If legislators do not have a common *conception* of the meaning of the text, it is surely impossible to argue that they have a shared *intention* regarding the meaning of the text.

3.4.4 Pragmatics and the existence of legislative intentions as to meaning

Finally, Ekins & Goldsworthy address the role of pragmatics in legal interpretation:

> When interpreters read that statutory text, in the rich context of enactment, it makes good sense for them to strive to infer, from the publicly available evidence, the plan that the legislature has chosen to enact. It would make little sense for interpreters to refuse to stray from the bare literal meaning of the text; that would frequently defeat the plan that the text was designed to communicate. Recent work in the philosophy of language, particular its sub-branch known as 'pragmatics', shows that the meaning of any communication is considerably more substantial than the bare literal meaning of its text, which provides only part (even if the largest part) of the evidence from which that intended meaning is inferred. Communication through the medium of a natural

> language generally and necessarily relies on the ability of its intended audience to infer the speaker's intended meaning from contextual as well as textual clues. It would be impractical for a legislature to resist this truth, and attempt to communicate everything explicitly through the literal meaning of the statutory text, partly because this would be impossible, and partly because it would generate inefficient prolixity, complexity and confusion. That is why ... every statute includes 'inexplicit content', including ellipses and tacit assumptions, which is revealed by attention to context and purpose. Hence, when reasonable legislators vote for or against a Bill, they understand what is before them not to be a text with a sparse literal meaning, but a complex and reasoned plan to pursue particular means to achieve certain ends. Even if they have not given much thought to its detailed provisions or even bothered to read them, when they vote for or against it, they vote for or against not only the text, but the plan that the text has been designed by their colleagues to communicate.
>
> (p. 66-67)

Here, I am largely in agreement with Ekins & Goldsworthy: the communicated meaning of a legal text, like the communicated meaning of any other utterance, is inevitably richer than the bare encoded meaning of the text. However, there are some differences between how we interpret everyday speech expressed face to face and how we interpret statutes. If I am correct that legislatures do not hold shared informative intentions, then what is it that a judge reading a statute seeks to infer? Again, I would argue that it is a quasi-intention: the judge interprets the statute *as if*

she is inferring the legislature's intended meaning. Further, while I agree with Ekins & Goldsworthy that legislators do not intend merely that the text (i.e. the linguistically encoded meaning of the sentences) of a bill becomes law, it is hard to see how the group can be said to fully understand the "complex and reasoned plan" which the legislation represents, if members of that group have different conceptions of what that plan is: they understand (and therefore can be said to intend) that that text will be interpreted by a judge and that this interpretation is likely to go beyond the bare, encoded meaning of the text.[39] However, it does not follow that they have any specific shared subjective intention as to what the text means.

3.5 Intentions in literature and law

So far in this chapter, I have argued that legislatures do not hold communicative/informative intentions regarding an array of propositions of which the text of the statute is evidence. I would now like to look at authorial intentions in literature. The purpose of this is to contrast the role of intentions in the two sorts of text, with the aim of throwing into relief what is perhaps particular to the legal case. I therefore look here at what is in some ways perhaps the most contrastive position regarding authorial intentions in literature – extreme intentionalism.

3.5.1 Extreme intentionalism

[39] Ekins & Goldsworthy do note that some legislators may not have read the text or given it much consideration, but do not really address the problem of legislators reading the text and deriving different interpretations from one another.

In *Only Imagine* (2017), Kathleen Stock sets out the 'extreme intentionalist' position in relation to fictional content.[40] That is to say, she presents the view that the fictional content of a text is determined by what the author reflexively intended her readership to F-imagine:

> An author *Au*'s utterance *x* (or set of utterances *S*) has fictional content that *p*, if and only if: *Au* utters *x* (or *S*) intending that i) x (or *S*) should cause F-imagining that *p* in her intended readership *R*; ii) *R* should recognise this intention; and iii) *R*'s recognition of this intention should function as part of *R*'s reason to F-imagine that *p*.
>
> (p.15)

Stock's definition of fictional content in terms of a reflexive m-intention derives from Grice (1957)[41]: for Grice, a speaker's meaning is characterised as an overt intention to cause a certain cognitive effect in an audience through their recognition of the speaker's intention to cause this effect. Her definition of F-imagining is "whatever kind of imagining is appropriate, at a minimum, as a response to fictional content" (p. 20). It is a "variety of propositional imagining" (as distinct from imagistic imagining): fictions communicate propositions (whether done explicitly or impliedly).

[40] This is a view which has historically been, according to Stock, "very unpopular" (p. 1). The essence of the approach is that an author's intentions are the primary determinants of what counts as true within the fiction, rather than the stand-alone text, readers' impressions of that text, or any standard of aesthetic value.

[41] "[A]n m-intention is a speaker's intention to produce an effect in the listener by means of the hearer's recognition of that intention." (Sperber & Wilson, 1987, p. 718)

Why is extreme intentionalism in fiction of interest in considering the legal content of statutes? I describe extreme intentionalism above as “the most contrastive position” with the legal case: I argue that legislatures do not hold informative/communicative intentions as to the meaning of the text of a statute, while the extreme intentionalist position is that an author not only holds intentions as to what is true within a fiction but those intentions are the primary determinant of what is true. However, it is worth noting that there is a parallel between E&G’s account of legislative intentions (with which I disagree) and extreme intentionalism. In a democracy, legislators are chosen by public vote and the legitimacy of laws derives from this. Although it is the role of judges to interpret legislation, the requirements of democracy are that they do so in order to determine the intention of Parliament as expressed in the text. Arguably this is analogous to the extreme intentionalist approach to literature, which holds that a reader successfully recovers the fictional content of the text if she F-imagines what the author reflexively intended her readership to F-imagine.

However, there are also many obvious ways in which the extreme intentionalist approach is a poor fit for statutory interpretation. The extreme intentionalist approach states that one condition for an author *Au*’s utterance *x* (or set of utterances *S*) having fictional content that *p* is that *Au* utters *x* (or *S*) intending that i) x (or *S*) should cause F-imagining that *p* in her intended readership *R.*[42] This is not the case for the legal content of statutes, where it is judges who determine (constitutively) the

[42] Of course, the term “F-imagining” is inappropriate in the legal context: a better term might be “knowing”.

legal content by reference to the intentions of Parliament *as expressed in the text,* which may well not be what the actual legislature intended, if it can be said to have had intentions of the sort in question at all. That is to say, while according to extreme intentionalism it is the producer of the literary text (Au) who constitutively determines the content of the text, in the legal case it is one particular interpreter, the judge, who has the authority to constitutively determine legal content.[43] To put this in Stock's terms, a judge interprets *x as if* the legislature uttered *x* intending that i) *x* should cause knowing in the judge that *p*; ii) the judge should recognise this intention; and iii) the judge's recognition of this intention should function as part of her reason to know that *p*.[44]

3.5.2 Challenges to extreme intentionalism

Stock considers what it means for the fictional content of an utterance to be determined by the speaker's intentions. For example, does it mean that a speaker can cause "a hearer to believe that *grass is green* arbitrarily by an utterance of 'it's ten past two'"(p. 39)? If so, does it not follow that miswriting and misspeaking are impossible: if speakers can "arbitrarily change or elude the conventionally given, rule-bound meanings of sentences" then an utterance presumably means whatever

[43] Note that the law of precedent in England and Wales will apply to cases in this jurisdiction. This means that (with some exceptions) courts are bound by the past decisions of courts at the same level or higher in the hierarchy, but not bound by the decisions of lower courts (for example, the Court of Appeal is bound to follow earlier decisions of the Court of Appeal or Supreme Court but not bound to follow decisions of the High Court on the same point).

[44] Note that this formulation focuses on the judge's interpretation.

the speaker intends it to mean, and there can be no such thing as an "unsuccessful intention" that a text mean something.[45]

Stock addresses this challenge by way of reference to "the constraint on having an intention…where a person K intends someone else to do something, K must at least not believe that the other person cannot or could not do what she intends them to do." (p. 39): "to intend to *A* entails (at least) that one does not believe that one cannot or could not *A*" (p. 17).

Neale (1992) expresses this as:

> What *U* meant by uttering *X* is determined solely by *U*'s communicative intentions; but of course the formation of genuine communicative intentions by *U* is constrained by *U*'s expectations: *U* cannot be said to utter *X M*-intending *A* to Ø if *U* thinks that there is very little or no hope that *U*'s production of *X* will result in *A* Ø-ing.
>
> (p.552–3)

Thus, unless speaker and hearer have somehow agreed a particular code between them,[46] a speaker who says "it's ten past two" cannot intend the hearer to

[45] This point applies not only to law and literature but to linguistic communication generally.

[46] Arguably there are principles of statutory interpretation and rules of construction which might be characterised as a particular code agreed between speaker and hearer. For example, under the Interpretation Act 1978, references to the masculine include the feminine unless the context requires otherwise, so every "he" or "she" should be read as "he or she".

understand *grass is green*, as there is no likelihood of that outcome being achieved. (This alleged challenge is well known in the philosophical literature as "Humpty Dumpty's theory of meaning", and was effectively rebutted some time ago by Keith Donnellan. See Donnellan (1968).)

Although Stock does not say this explicitly, it is clear that the proposition(s) that the author intends the reader to F-imagine are not simply recovered from the encoded meaning of the words used but rather are the explicature and implicatures of the utterance ("Equally, meanwhile, an author can coherently intend a content for a sentence or word in a way that deviates even more strongly from conventional use. Irony occurs in fiction just as in ordinary conversation, if not more often…" (p. 41)). Context is significant, and not limited to the context of the text but also what the author believes about the reader's existing state of mind.

Take for example the first line of *Pride and Prejudice* (1813/2006, p. 3):

> It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.

Austen's intention here is not to make her reader F-imagine that the statement is true. Rather, by stating so unequivocally ("a truth universally acknowledged") something so obviously doubtful[47] (given what she believes the reader to know about the world), her intention is to convey via her ironical dissociation that the proposition

[47] In Grice's terms, flouting the maxim of quality.

as stated is *not* true and imply that, in fact, it is other people (perhaps the ones acknowledging this "truth") who are keen on rich, single men getting married. As in ordinary speech, while it is not open to a speaker to intend to communicate that *grass is green* arbitrarily by an utterance of "it's ten past two", it is certainly open to her to intend to communicate propositions which differ markedly from the encoded meaning of the words used (for example, in the case of metaphor).

One criticism made of Stock's extreme intentionalist position is that it potentially 'decentralises' the fictional text as a source of its own content, by potentially making other accompanying pieces of evidence more important in interpretation than the text is.[48] Again, for Stock, this criticism is founded on a mischaracterisation of intentions, in that m-intentions, like all intentions are constrained by the bounds of the possible.

A text might arguably be "decentralised" where the author has misused a word or failed to abide by some communicative norm fundamentally, so that the reader is not able to recover the intended meaning, and where the author has inadvertently conveyed her intention inexpertly, so that it is not clear to the reader what the proposition is that they are intended to F-imagine.

I will consider the well-known example of misuse of a word by Robert Browning in his poem, *Pippa Passes* (1841/2016):

[48] Levinson (1992, p. 223) for example notes the concern that the text could be "jettisonable in principle if we could get more directly at what the author had in mind to tell us".

> Then owls and bats,
>
> Cowls and twats,
>
> Monks and nuns in a cloister's moods…
>
> Adjourn to the oak-stump pantry

Browning used the word "twats" here under the impression that it referred to part of a nun's habit.[49] In fact the word was, in 1841 as now, vulgar slang for female genitals. A possible root of the mistake is an anonymous seventeenth century satirical poem, *Vanity of Vanities*, which Browning may have misunderstood:

> They talk'd of his having a Cardinall's Hat;
>
> They'd send him as soon an Old Nun's Twat.
>
> (Anon, 1660)

How does extreme intentionalism account for this kind of error? Stock's argument is that, even where a text contains an error of this sort, it is still evidence of the author's intentions:

> Now, the worry about extreme intentionalism seems to be that in such cases the original authorial intention that *B* should be achieved gets radically hidden (for after all, *B* was not achieved). But in fact this is not true for most or perhaps even any cases: *for there will usually be evidence potentially*

[49] "…the word struck me as a distinctive part of a nun's attire that might fitly pair off with the cowl appropriated to a monk" (Peterson, 1979, p.135)

available of the person's trying to do B by A-ing, even if they have not succeeded in doing B. I may try to make a beautiful wedding cake, which turns out via my incompetence to be an ugly mess, but nonetheless the choice and placing of certain decorations, the texture of the icing, and so on, will allow a viewer to reconstruct my original intentions, even though they were unsuccessful. Attempted assassinations may fail but they usually leave ample evidence of their perpetrator's intentions. So too when an author tries to communicate some fictional content, but fails, the nature of her actions usually still provides evidence of what her goal was originally.

(pp.88-89)

To apply this to Browning, there is certainly evidence that he tried to "do B by A-ing" (here, to communicate a proposition about nuns' attire by use of the word "twats"), and the fact that a reader is able to understand that a mistake has occurred is in itself evidence that the intended fictional content is derived from the evidence that the text provides.

In relation to statutes, where there is a clear error in drafting (of a sort analogous to Browning's mistake described above), there is a presumption in interpretation that the court will rectify the error. To do so, the court must be abundantly clear of:

1. the intended purpose of the provision in question;

2. that the drafter and the legislature inadvertently failed to give effect to that purpose in that provision; and

3. the substance of the provision the legislature would have made (though not necessarily the precise words it would have used) had the error in the Bill been noticed. [50]

The power to rectify error in this way is 'confined to plain cases of drafting mistakes' (Bennion, 15.1) and should not be used simply where a statute could have been drafted in a better way.

3.5.3 Pepper v Hart

In relation to ambiguity in statutes, the role of accompanying pieces of evidence (such as the record of debate in the House of Commons) is controversial. It was most famously considered in *Pepper v Hart*,[51] in which the House of Lords held that, in certain circumstances where a statute was ambiguous, a court could consider statements made in Parliament to aid interpretation of its meaning.

The case concerned the wording of s. 63 of the Finance Act 1976:

[50] *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586.

[51] *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3

> The cash equivalent of any benefit chargeable to tax ... is an amount equal to the cost equivalent of the benefit, less so much (if any) of it as is made good by the employee to those providing the benefit ... the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and (here and in those subsections) includes a proper proportion of any expense.

John Hart was a teacher at Malvern College, an independent, fee-charging school. Under his employment contract as a teacher, he was able to educate his children at the College at a substantial reduction, paying only 20% of the usual fees. This was a benefit of employment and thus taxable. The question for the court was how to determine the cash equivalent of this benefit, so as to compute the amount of tax due, and the relevant legislative provision was s. 63 Finance Act 1976, which referred to the “cost equivalent of the benefit”. However, as any accountant knows, there are many ways in which one might calculate cost.

The Inland Revenue’s position was that the “cost” for the purposes of s. 63 should be taken as the average of the total cost of providing the benefit (in this case, broadly, if a school cost a total of £100,000 to run and had 100 pupils, the cost should be £1000). Thus the cash equivalent of the benefit of an 80% reduction in fees would be very high. Hart argued, however, that the correct approach was to take the marginal cost to the school of educating one additional pupil (roughly, if a school is already established, costs £100,000 to run and educates 100 pupils, what is the additional cost of adding one more pupil?) By this measure, the cost is very low: adding one more pupil would not necessitate more teachers, more buildings or more

management, but only a few small expenses, such as a few more exercise books and school lunches.

This case was originally decided in favour of Hart, with the Special Commissioners interpreting “cost” to mean MARGINAL COST. It was appealed by the Inland Revenue to the High Court where it was held that “cost” should mean AVERAGE TOTAL COST. The Court of Appeal concurred. The case was then appealed to the House of Lords.[52]

The Lords initially agreed with the Court of Appeal by a majority of 4-1. However, the judges were then informed of a remark made by the Financial Secretary to the Treasury during the Finance Act's Committee Stage (recorded in Hansard) regarding teachers at fee-paying schools:

> The removal of clause 54(4) will affect the position of a child of one of the teachers at the child's school because now the benefit will be assessed on the cost to the employer, which would be very small indeed in this case.[53]

This was taken as implying that the cost to be considered should be the marginal cost to the school, rather than the average total cost. The House of Lords then reconvened as a seven judge panel and found in favour of the taxpayer, Hart.

[52] Note that such appeals may be allowed in tax cases which concern fairly small sums of money if it is considered that there is an important point of law at stake. Such cases are generally funded by HMRC (previously the Inland Revenue) rather than the taxpayer.

[53] HC Official Report Standing Committee E (Finance Bill), 22 June 1976, col 1098.

Regarding the use of Hansard as an aid in interpretation, Lord Browne-Wilkinson commented:

> In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria. (p. 616)

It should be noted that this was a significant departure from existing law. Previously, debate in Hansard could not be considered by the courts: this would have been considered breach of parliamentary privilege. The decision attracted widespread criticism on a number of grounds:

- That to allow the remarks of one politician (even a Minister) to influence interpretation was to substitute the intentions of that politician for those of Parliament. Even where a remark is not challenged in debate, it is far from safe to assume that other MPs concur.

- That to allow the remarks of a Minister to influence interpretation was to violate the notion of the separation of powers (that it is the legislature that passes laws, not the government (executive)).
- That to allow remarks made in debate to influence interpretation was harmful to the notion of legal certainty and might increase the costs of litigation by requiring lawyers to interpret legislation in the light of the surrounding parliamentary debate when advising their clients.

Since the decision in *Pepper v Hart*, the question of reliance on Hansard has arisen in a number of further cases and generally the approach taken by the courts has been to try to limit its effects by distinguishing cases in which its principle should not apply. For example, in *Massey v Boulden* it was held that *Pepper v Hart* did not apply to criminal cases,[54] as criminal statutes are to be strictly construed in favour of the defendant and so no reference to parliamentary debate should be required. In *Spath Holme* it was held that *Pepper v Hart* could only apply to help the court ascertain the meaning of a word or phrase,[55] rather than in more general cases of legislation being ambiguous or unclear. The effect of such cases has been to reduce the practical application of *Pepper v Hart* substantially.

How far do the criticisms of *Pepper v Hart* outlined above apply, by analogy, to the extreme intentionalist position on literary content and specifically the worry about the decentralisation of the text. As I outline above, Stock's response to the criticism of

[54] [2003] 2 All ER 87

[55] [2001] 2 WLR 15

her position as decentralising the fictional text is that it is based on a misunderstanding of extreme intentionalism. She is not arguing that the fictional content of a text is whatever the writer happened to have in her head, irrespective of what she actually put on the paper; rather, her argument is that an author utters *x* intending that *x* should cause F-imagining that *p* in her intended readership, and "where a person K intends someone else to do something, K must at least not believe that the other person cannot or could not do what she intends them to do"(p.39).

To adapt Stock's formulation for literary imagining to the legal case, a judge interprets *x as if* the legislature uttered *x* intending that i) *x* should cause knowing in the judge that *p*; ii) the judge should recognise this intention; and iii) the judge's recognition of this intention should function as part of her reason to know that *p*.[56] This is an approach which centralises the text in interpretation rather than other evidence as to Parliament's intentions, and the approach taken in *Pepper v Hart* is strictly limited to cases where the meaning of a word or phrase is ambiguous or obscure. In fiction, where the meaning of a word is ambiguous or obscure, it is open to the reader to let it remain so, and generally this is unlikely to affect the success or failure of the author's intentions for the work overall; it may even be deliberate. In legislation, however, the meaning of a single word or phrase can sometimes be determinative of guilt or innocence (as in *Smith*) or determine whether a taxpayer owes a large sum or a small one (as in *Pepper v Hart*) - the outcome of the case turns on the meaning of the word or phrase and thus it is not open to the judge

[56] Note that this formulation focuses on the judge's interpretation.

simply to leave that meaning unclear. A decision must be made. Thus, while the general principle that interpretation should be based on the text is sound, in extremis the use of evidence outside the text may be justified.

3.6 Conclusions

My aim in this section was to consider the role of informative intentions in the legislative process. I have argued the following:

1. That Parliamentary Counsel, individual legislators and others involved in the legislative process may hold informative intentions, but that these do not therefore comprise the intentions of the legislature;
2. That the legislature could theoretically be capable of holding a collective informative intention, but that in practice there is no realistic possibility that it does so;
3. That arguments for the existence of objective legislative intention as "what a reasonable audience would conclude was the author's 'subjective' intention" rather than as simply an output of the interpretive process, are not convincing;
4. That arguments for the existence of a subjective legislative intention underlying a legislature's so-called objective intention are unconvincing: the fact that a genuine subjective intention would support the courts' approach to interpretation is not evidence for the existence of that subjective intention;
5. That, in fact, the notion of quasi-intention does the job just as well. This is the notion that judges interpret legislation as if it were evidence of an underlying

informative intention, notwithstanding that there is no realistic prospect that such an intention could exist.

I have contrasted the role of intentions in literature with their role in legislation, with the aim of drawing out what it is that is perhaps particular to the legal case. Importantly, while the extreme intentionalist view makes the author's intentions prime determinants of what counts as true within a fiction, what counts as true within a legal system is determined by the interpreting judge; this contrast perhaps highlights quite how unusual the legal case can be considered. In Chapter 4 below I shall consider what it means for the content of a statute to count as true within a legal system, looking at the work of David Lewis and Andrei Marmor.

One final point: arguments that legislatures do not hold detailed and specific shared intentions as to the meaning of legislation can certainly be problematic from the perspective of legislative supremacy and the separation of powers. The notion that the meaning of legislation (and thus its legal effect) is based on the intentions of the legislature is certainly desirable. The separation of powers requires that, at least as far as possible, judges limit their role to interpreting legislation which is made by the legislature. If judges are in fact interpreting the law based on quasi-intentions, not actual intentions, they play a far greater role in the process.

None of this is unimportant, but the solution to these problems is not to assume that independent legislative intention exists. To do so merely obscures the issues, rather than resolving them.

Chapter 4: Legislation as speech act

4.1 Locutionary, illocutionary and perlocutionary acts[57]

Speech act theory, derived from the work of Austin (1975) and Searle (1969), looks to account for the various actions that language can be used to perform. Speech acts can be considered on three levels:

1. the locutionary act - the performance of the utterance
2. the illocutionary act(s) - what the speaker does in producing the utterance. An illocutionary act may be direct (e.g. "Please pass the salt"- a request) or indirect.[58] In the case of indirect speech acts, "a single utterance is the performance of one illocutionary act by way of performing another" (Bach, 2006 p. 156) (e.g. "Can you pass the salt?"- a request performed by the performance of a question).
3. the perlocutionary act(s)- this is "what we bring about or achieve by saying something" (Austin (1975 p. 109). Kissine (2008) posits that perlocutionary acts should be understood "as causal relations between two events, the cause being the production of an utterance by the speaker" (p. 1191). He goes on to note that "the speaker does not necessarily intend to produce

[57] This section incorporates some of my own (unpublished) work submitted in the course of my Master's degree in linguistics.

[58] Searle describes indirect speech acts thus: "the speaker communicates to the hearer more than he actually says by way of relying on their mutually shared background information, both linguistic and non-linguistic, together with the general powers of rationality and inference on the part of the hearer" (Searle, 1979 p. 31-32): the overlap with the notion of implicature discussed in Chapter 6 is clear.

every perlocutionary effect her utterance turns out to have," although notes that, in many cases, these effects will have been intended by the speaker.

Thus, using an example from Bach (2006, p. 150), if a barman says, "The bar will be closed in five minutes," he is performing a number of acts, locutionary, illocutionary and perlocutionary. The locutionary act is the act of saying the bar (that he is tending) will be closed in five minutes (from the time of the utterance).[59] He performs the direct illocutionary act of *informing* the customers that the bar will soon close and perhaps the indirect illocutionary act of *urging* them to buy a final drink. He performs the perlocutionary acts of causing the customers to understand that the bar will soon close and perhaps causing them to buy a drink.

Sperber & Wilson note (1986/1995, pp. 244-245) that some sorts of speech act can only be performed if they are identified as that sort of speech act in their performance: this may be done explicitly through the use of an explicit performative verb (e.g. “I promise to pay you five pounds”) or (in some cases) implicitly. These are institutional acts which rely on the existence of the relevant social institution to be understood and must be recognised as so doing in performance. Sperber & Wilson give the example of bidding at bridge, where the speaker must ostensively communicate that the utterance is a bid, either directly (e.g. by uttering, "I bid two No Trumps,") or by inference (by uttering, "Two No Trumps"). In contrast an act such as predicting does not require the identification of an utterance as a prediction: whether

[59] Bach notes that the content of the locutionary act is not fully determined by the words used, which here do not specify which bar is meant or the time from which the five minutes run.

or not a speaker ostensively communicates the fact that she is predicting, her utterance will be a prediction provided that she ostensively communicates an assumption about a future event which is at least in part outside her control (Sperber & Wilson, p. 245).

Clearly, enacting legislation falls within Sperber & Wilson's first category: the meaning of legislation relies on the existence of the social institutions which underlie it (such as the rule of law) and its meaning is only understood where this reliance is also understood. For Sperber & Wilson "generally speaking, the study of institutional speech acts such as bidding, or declaring war, belongs to the study of institutions" (p. 245). I hope to demonstrate in this thesis that a proper understanding of institutional speech acts (such as legislating) is impossible without also understanding their linguistic content and the communicative and inferential processes involved in their interpretation.

The relationship between relevance theory and speech act theory is has not been given a great deal of consideration by relevance theorists, especially as regards so-called institutional speech acts. However, as I will go on to show, any convincing relevance-theoretic account of the meaning of legislation must take account of the kind(s) of speech act which enacting legislation comprises. There is a meaningful and significant difference between the enacting of a legislative provision which states “It is an offence to hunt a wild animal with a dog” (a declaration, which brings about the fit between world and words so as to make the provision true), and my saying “It is an offence to hunt a wild animal with a dog” (which merely attempts to describe

what is the case and may or may not be true). I argue in this thesis that the interpretation of statutes by judges is a more constrained process than ordinary utterance interpretation, with judges seeking to recover what they consider the truth-conditional meaning of statutory provisions. This is a process which cannot be considered without considered the truth-*guaranteeing* nature of declarations. For one thing, the fact that a successfully-enacted provision brings about the fit between world and words so as to make the provision true (rather than merely looking to describe what the world is like) is part of the context in which that provision is interpreted, a part which arguably justifies the constraints I describe below.

4.2 Illocutionary and/or perlocutionary acts of Parliament

In looking at how judges consider the intentions of Parliament, it is important to differentiate between the intention behind the illocutionary speech act of Parliament (what Parliament intends to do *in* passing a law) and the intention behind the perlocutionary speech act of Parliament (what Parliament intends to do *by* passing a law). I argue in this thesis that the process of understanding any utterance (including legal texts) is a process akin to attempting to recover speaker meaning (what the speaker intended to convey in making the utterance).[60] The question arises, then, as to how these notions interrelate in the context of legal interpretation: in short, in interpreting laws, should judges address the illocutionary act that Parliament has performed in passing the law, by attempting to determine what Parliament did *in* passing the Act; or should they address the perlocutionary act that Parliament has

[60] But not the same as, for the reasons given above.

performed, by attempting to determine what Parliament did *by* passing the Act, or should they address both?

4.2.1 Example 1- Vagueness

This is a question considered by Soames (2011, p. 36) with reference to an imagined example of a vague legal text. Soames describes a situation in which a town council wishes to legislate in the light of a recent outbreak of sexual assaults against girls who had accepted lifts offered by boys from out of town. The council therefore enacts a law stating that:

> It shall be a misdemeanour...for children on their way to or from school to accept rides in automobiles from strangers.

If a schoolgirl, Susan, accepts a ride from an old lady to whom she has never spoken, but whom she has seen around town and nodded to several times, has she broken the law? "Stranger" is a vague term (in the sense that its extension lacks clarity, so that there are borderline cases where it is uncertain whether the term applies), and here it is unclear whether the old lady is within its extension with regard to Susan. Soames argues that, in such a case, the court should have regard to both the illocutionary and perlocutionary intentions of the council, and thus will find Susan not guilty of the misdemeanour.

> [The council] intend to reduce the risk of sexual assault against the town's schoolchildren by enacting a law discouraging them from accepting rides from

> strangers. They enact the law by adopting a text with the illocutionary intention that their linguistic performance be recognised as asserting or stipulating that, henceforth, accepting such rides shall be a misdemeanour.
>
> (p. 43)

Soames notes that the court should recognise the illocutionary intentions of the council. He then argues further that:

> ... any doctrine that aspires to be a theory of legal interpretation also cannot afford to dismiss the larger, perlocutionary intentions of law-makers when the application of a vague statute to a borderline case is at issue ... Since the content of the statute, together with the facts of the case, failed to determine [Susan's] guilt or innocence, the court based its decision on the public policy the town council intended its legislation to advance [the reduction of the risk of sexual assault].
>
> (p.43)

(Note that Soames is not saying here that the council's *only* perlocutionary intention is the reduction of the risk of sexual assault: the council will have multiple related perlocutionary intentions (such as the intention to bring about a reduction in the number of people accepting lifts) but only some of these will be useful to the court in its decision-making.)

It is notable that Soames' argument applies to cases where the linguistic content of a statute, together with the facts of the case, fail to determine the defendant's guilt or innocence. He does not argue that the court should consider the perlocutionary intentions of a legislature when the application of a statute is clear from its linguistic content plus facts. As such, his argument is in line with the relationship between the so-called "literal rule" of statutory interpretation (also known as the "plain meaning rule") applied by many courts,[61] and other rules of construction. The literal rule says that, except in the case of technical or legally defined terms, the meaning of a statute should be understood as the ordinary meaning of its language, unless this gives rise to an absurd result. However, in many legal systems (such as in England), where the meaning of the statute is not clear, the courts may use other approaches, by applying the so-called "mischief rule" (which allows the court to interpret legislation in the light of the "mischief" the legislation was intended to address) or taking a purposive approach in order to give effect to the purpose of the legislation (in other words, by considering the perlocutionary act in question). The notion of purpose here seems closely related to that of perlocutionary act, taking Austin's definition of perlocutionary act as "what we bring about or achieve by saying something" (Austin (1975 p. 109).

4.2.2 Example 2- Intention and the window tax

In 1696, a property tax known as the window tax was brought into force in England and Wales. This stated, on enactment, that:

[61] Despite this rule being referred to as the "literal rule", it is far from accepted that the ordinary meaning of a statute should be equated with its literal, linguistically-encoded meaning.

> Every such Dwelling House inhabited now erected or which hereafter shall bee erected ...the yearely Summe of Two Shillings
> And for every such Dwelling House inhabited having Ten Windows or more and under the Number of Twenty the Summe of Foure Shilling yearely over and above the said yearely Summe of Two Shillings
> And for every such Dwelling House inhabited having Twenty Windows or more the yearely Summe of Eight Shillings over and above the said yearely Summe of Two Shillings...
> (An Act for granting to His Majesty severall Rates or Duties upon Houses for making good the Deficiency of the clipped Money. William III, 1695-6)

Parliament imposed this tax on windows because it wished to tax people according to their wealth. At the time, the notion of an income tax (as we currently have it) was considered an unwarranted intrusion by the government into the private financial dealings of individuals and was thus politically unpopular. Parliament therefore sought to use the number of windows in the property an individual occupied as a proxy for his wealth: the richer the person, the bigger his house; the bigger the house, the more windows.

We can therefore identify two separate intentions behind this piece of legislation: a) an intention to tax people according to their wealth and; b) an intention to do so by means of a tax on windows.

One way to analyse these two different intentions is by reference to speech act theory. What can we say about the speech act Parliament performed in passing the law which imposed the window tax? Its illocutionary act was to enact legislation making various rates of tax payable depending on the number of windows in a property. Its intended perlocutionary act (what it intended to do by passing the law), in contrast, was to tax people at a rate according to their wealth.

The consequences of the window tax are well-known. In response to the law, many people who occupied large properties deliberately blocked some of their windows, in order to bring their houses below the relevant threshold, especially after 1797 when the rates of tax trebled. As a result, they were taxed at the lower rate, in keeping with the illocutionary act of Parliament (enacting legislation to tax people according to the number of windows in their property) but contra the intended perlocutionary act of Parliament to cause people to be taxed according to their wealth.

Thus, if we are to allow any role for the intention of Parliament in determining the meaning of laws, we must first understand what sort of intention we mean: illocutionary or perlocutionary? To illustrate the difference, let us imagine a fictitious case in which a fictitious tax inspector takes a taxpayer to court for non-payment of the window tax. This taxpayer, he says, had a house with twenty windows. As such, he would have been due to pay the window tax at the highest rate. However, on the imposition of the tax, the taxpayer bricked up a number of his windows and now asserts that he is only liable to pay window tax at the lowest rate. But, the tax

inspector argues, this subverts Parliament's intention, that people should be taxed according to their wealth. How should the law be interpreted?

Assuming that the judge allows any role for legislative intention, the answer to this question would appear to depend on the type of intention in question.

The illocutionary intention of Parliament was to enact legislation taxing people according to the number of windows in their house. If this is the only intention, there seems no reason to interpret the word "window" as having anything other than its ordinary meaning. The first definition of "window" given in the OED is "[a]n opening in the wall or roof of a building, for admitting light or air and allowing people to see out". On this basis, a bricked-up window is no longer a window: it is not an opening, it does not admit light or air and it does not allow people to see out. Accordingly, the number of windows in the taxpayer's house does not include those windows which he bricked up - judgment for the taxpayer.

Conversely, let us imagine that the judge takes the view that the perlocutionary intention of Parliament is what counts here: what Parliament actually intended to cause to happen by passing the law. The perlocutionary intention was to tax people according to their wealth, and the number of windows in a house was merely a proxy for this. Accordingly, there is some justification for seeing the meaning of the word "window" as ambiguous: we are not interested, in interpreting this law, in whether windows can admit air or be seen out of, but rather in what the number of windows in a house tells us about the size of the house and the wealth of its owner. By this

token, a bricked-up window is still a window and the taxpayer's rate of tax should be calculated based on the total number of windows, including those he has bricked up - judgment for the tax inspector.

Carston (2012) considers the different senses of the word window:[62]

> a. The bay windows are a beautiful feature of the house. [glass pane and frame]
>
> b. The cricket ball smashed my study window. [glass pane]
>
> c. She crawled through the upstairs window and fell onto the floor. [open space in wall]….
>
> (p. 615)

Is a blocked window a type of window or is it instead not a window at all? Certainly if we agree with Soames (2011, p. 43) that "…any doctrine that aspires to be a theory of legal interpretation also cannot afford to dismiss the larger, perlocutionary intentions of law-makers …" it is arguable that a judge should look to the larger perlocutionary intention of Parliament in this case to tax people according to their wealth.

4.3 Illocutionary force

[62] Note that these are established senses – a case of semantic polysemy – whereas the example of a bricked up window would be an "ad hoc" sense (see Chapter 7).

Whether or not judges do or should take account of the apparent perlocutionary intentions of Parliament, they certainly take account of their apparent illocutionary intentions. The nature of the illocutionary force of statutes has been the subject of some debate. I argue below that a statute is best considered as two speech acts: one which takes place in an instant (the act of enacting the statute), the other of which takes place over time and lasts for as long as the statute is in force.

The Hunting Act 2004 contains the text:

> Be it enacted by The Queen's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by the authority of the same, as follows: ...
>
> Section 1. A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt...

Here the introductory text contains the explicit performative "Be it enacted..." while the main wording of the statute sets out the "fit between world and words": the world has changed into a world in which the words "A person commits an offence if he hunts a wild mammal with a dog…" have a particular status - that of legislation - and thus make a contribution to the content of the law. What is more, the enacting wording ("Be it enacted…") is both truth-evaluable and, by definition, true: provided the declaration is successfully performed (which here will depend on such things as

the correct following of Parliamentary procedure), as soon as the legislation comes into force, it is true that the provisions which follow are enacted, i.e. that they have the status of legislation.

In fact, it is arguable that the act of legislating is a kind of double declaration. In each Act of Parliament we find enacting words ("Be it enacted…") and legislative provisions (e.g. "It is an offence to hunt a wild animal with a dog…"). The enacting words constitute a declaration, as outlined above: they change the world into one in which the legislative provisions have been enacted, which is to say, into a world in which they take on a particular legal force.[63] As a result of this, the legislative provisions also become declarations - they change the world from one in which (in the relevant jurisdiction) it is not true that, e.g., it is an offence to hunt a wild animal with a dog, into one in which it is true that it is an offence to hunt a wild animal with a dog. Without the performance of the enacting words, the provisions which follow would not in turn be declarations: they would have no effect.

This view is close to that expressed by Kurzon (1986), who recognises that the act of enacting may be separate from the other acts performed:

> … a statute will be analysed as a speech act with the illocutionary force of enacting … Moreover, many sentences within the text are speech acts with their own illocutionary force - of permitting, ordering or prohibiting.

---

[63] As such, legislation works rather differently from simple cases of a single declaration, such as "I name this ship the Mary Rose".

(p.5)

That is to say, that provisions permitting, ordering or prohibiting constitute illocutionary acts separate from but resulting from the illocutionary act of enacting. Separating the analysis of a statute in this way into two (or more) speech acts has the benefit of allowing an appreciation of the different temporal natures of the acts involved. Enactment happens in an instant. The active provisions of statutes, however, are best seen not as something that has been said but as something which has the nature of being 'continuously said'. A useful analogy might be the striking of a tuning fork: the moment of striking takes an instant but has the effect of producing a long, sonorous sound. The notion of the provisions of a statute being continuously said accords with the famous characterisation of legislation expressed by Lord Thring, "An Act of Parliament should be deemed to be always speaking", a notion which was considered further by Lord Steyn:

> Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking'. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may

> sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety.
>
> (*R v Ireland; R v Burstow* [1998] A.C. 147, 158.)

As I state above, the effect of the declaration of the enacting words is to give legal force to the provisions, and hence to make those provisions also into declarations. The question arises whether this is the only act performed in the enacting of the provisions.

Searle (1979) considered that that there might be two types of illocutionary force involved:

> Promulgating a law has both a declarational status (the propositional content becomes law) and a directive status (the law is directive in intent).
>
> (p. 28)

Marmor (2014) also posits that the provisions of a statute are (indirectly) directive:

> Legal instructions are typically exhortatives [i.e. directives]…The enactment of a legal requirement, or the official expression of a legal ruling…are the kind of speech acts that purport to motivate conduct on the part of the addressees by way of recognizing the speech act as providing them with reasons for action. (p. 64)

This characterisation could be expounded as follows: it is not simply that the enactment of a statute gives effect to its provisions so that, for example, the propositional content of the statement "A person commits an offence if he hunts a wild mammal with a dog…" becomes true, so that it is the case that a person commits an offence if he hunts a wild animal with a dog. Rather, in addition to the above, the enactment of a statute has the effect of exhorting or directing people not to hunt wild animals with dogs (an indirect speech act).

In contrast, Allott & Shaer (2018) argue that "crime-enacting statutory provisions do not have directive illocutionary force" (unlike Marmor and Searle, who consider that they have both effective and indirect directive force). In this remainder of this section, I shall consider the arguments made by Allott & Shaer.

Searle defines a directive as a speech act whose "illocutionary point…consists in the fact that they are attempts…by the speaker to get the hearer to do something" (Searle, 1976, p.11, quoted in Allott & Shaer). Allott and Shaer's argument that crime-enacting statutory provisions are not directives runs as follows:

1. They show that statutory provisions of this kind are not direct directives; and
2. They show that they are not indirect directives.

On the basis that each illocutionary force possessed by a directive is either direct or indirect, in light of 1 and 2, it follows that statutory provisions of this kind are not directives.

Direct directives may be imperatives (“Give me your wallet!). Modern statutory provisions do not take this form (although of course various non-statutory rules may do - “Do not run in the corridors” on a school noticeboard, for example). Direct directives may also be performed through explicit performatives (“I command you to give me your wallet”, “I beg you not to run in the corridors”).

Allott & Shaer quickly discount the possibility that modern crime-enacting provisions are direct directives: they are neither imperatives nor explicit performatives. They note that modals can be used in direct directives (“No girl *shall* run in the corridors”, “Mobile phones *must* be turned off during the performance”) but also that modals are not used in modern crime-enacting provisions.[64]

Are crime-enacting provisions indirect directives then, as Marmor contends? Again Allott & Schaer answer no.

> For Marmor, directive force is, in at least some cases, part of implicit content; it should follow, then, that in those cases this force should be straightforwardly cancellable. Our claim, however, is that the ‘directive force’ of each enacted

[64] Although they may appear in statutes, for example in giving directions to administrators, defining terms and occasionally in non-criminal provisions.

> provision is part of neither direct nor indirect content, but simply embodies the normative force of law by virtue of being enacted law.
>
> (p. 363)

In support of this, they attempt to apply various tests for implicit content (such as the cancellability test and reinforcement test) to the kind of indirect content Marmor suggests statutory provisions contain. Applying a cancellability test to the proposed indirect content does not produce felicitous results (as one would expect if it were implicit content) nor such infelicitous results as one would expect if it were explicit content.[65]

> It is hereby enacted that everyone who challenges another person to fight a duel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> a. ?? But that does not imply that one should not challenge another person to a duel.
>
> b. ?? But the law doesn't tell you not to challenge another person to fight a duel.
>
> c. ?? But Parliament isn't telling you duelling is bad.

---

[65] Compare

> a. I broke a finger yesterday. Not one of my own, though.
> b. I broke a finger yesterday. ??But I didn't break anything.
>
> (p. 362)

Likewise applying a test of reinforcement (the obverse of the cancellability test) produces a similarly mixed result (in the other direction): not as felicitous as reinforcing implicit content nor as infelicitous as reinforcing explicit content.[66]

> It is hereby enacted that everyone who challenges another person to a duel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> ?And one should not engage in duels.

In each case, the additional wording actually just feels like additional information rather than anything cancelling or reinforcing the content of the foregoing statutory provision.

A possible criticism of Allott & Shaer here is that the cancellability test and reinforcement test are not perfect measures of whether content is implicit or explicit. It is possible to think of examples of cancellations of (clear) implicit content that still feel infelicitous. For example, a sign saying “Children can use the pool between 4pm and 6pm”.[67] In ordinary communication, someone reading this sign may well recover the implicature that children may not use the pool outside these hours.[68] However,

---

[66] Compare

a. I broke a finger yesterday. One of my own, I mean.
b. I broke a finger yesterday. ?? It was a finger, I mean. (p. 364)

[67] I am grateful to Tim Pritchard for this example.

[68] See Chapter 6 for discussion of whether implicatures of this kind arise in statutory interpretation.

cancellation of that implicature (e.g. “But the sign is not implying that children cannot use the pool at other times”) is arguably infelicitous. Infelicity in cancellation alone is not an infallible test of the implicit/explicit distinction.

Nevertheless, I agree with Allott & Schaer that “the directive force of each enacted provision…simply embodies the normative force of the law by virtue of being enacted law” (p. 363). This is not to say (and Allott & Schaer agree) that statutes are not enacted in order to reduce certain unwanted behaviours: they are. Rather, that aspect of enacting statutes is better thought of as part of its perlocutionary force. By comparison, I might wish to reduce the risk of my house being burgled and therefore fit a very visible burglar alarm. In choosing a very visible alarm, I may be hoping to communicate to any would-be burglar that I have an alarm. I may be successful in reducing the risk, if would-be burglars see the alarm and so decide not to attempt to burgle the house. However, it does not follow that, in fitting a visible alarm, I am therefore exhorting burglars not to burgle my house. I merely make them aware that a consequence of their trying to do so could be the setting off of the alarm. Likewise, Parliament does not exhort us not to hunt wild animals with dogs. Rather, in passing the Hunting Act 2004, it created a world in which so doing is an offence and subject to a penalty, which in turn had the effect of reducing the incidence of people hunting wild animals with dogs (either because they take it as a social fact that they (morally) should obey the law and/or because they wish to avoid the penalty or any other negative consequences of breaking it).

4.4 Legal and literary texts as declarations

In section 3.5.1 above, I referred to questions regarding the content of a statute and what counts as true within a legal system. I contrast this with the notion of truth in fiction. In this section of my thesis, I shall continue with this comparison, looking at the work of Andrei Marmor, David Lewis and Kathleen Stock. As throughout, my aim in so doing is to use comparison with the literary case to draw out what is maybe particular about the legal case.

As stated above, declarations are truth-guaranteeing: saying makes it so. Marmor (2018) looks at legislation and literature as declarations (in that things are made true in a legal system or a fictional world because they are said to be the case). But, he considers, what is it that is being made true?

4.4.1 Law and fiction as closed prefixed contexts

Marmor (2018, p.483) draws a comparison between the performative nature of legislation and that of fiction. In each case, saying makes it so: just as it is true that an Act of Parliament is made by virtue of its being said, so it is (fictionally) true that Sherlock Holmes lived at 221B Baker Street because Conan Doyle said that he did.

Marmor notes that law has a spatio-temporal aspect, in that any statements about legal contents are "necessarily prefixed by an implicit formula 'According to law in legal system S at time t'" (p. 473). This is clearly correct in respect of positive law.[69]

[69] As opposed to natural law, for which some theorists argue: the idea that there is a natural law that is universal and derives from intrinsic human values. However, Marmor notes that even "[n]atural Lawyers concede that positive law is jurisdiction-dependent" (p. 474)

For example, the Theft Act 1968 apples to England and Wales and it came into force on 1 January 1969. Section 1, states:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it…

We may therefore state that:

> According to the law of England and Wales, from 1 January 1969 until the present day (assuming the Act has not been repealed), a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

If we assume,[70] along with Marmor, that the enactment of the Theft Act gives rise to a legal norm,[71] we may further state that:

> According to the law of England and Wales, from 1 January 1969 until the present day (assuming the Act has not been repealed), a person legally *ought not* to dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it.

---

[70] I consider this assumption in section 4.3 in relation to statutory provisions as exhortatives.

[71] Marmor considers how legal content of this sort arises: "When I say, for example, that you have a legal obligation to ϕ in context C, what I mean is that from the point of view of the relevant legal order, you ought to ϕ in context C. You may not have this obligation from a different normative vantage point, such as morality or religion, and you may not have this obligation in a different jurisdiction or according to a different legal system".

Or equally:

> According to the law of England and Wales, on 25 January 2021, a person legally ought not to dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it.

Marmor argues that this sort of expressed or implied prefix is necessary in order to make true statements about legal content, just as it is necessary to make such statements about fictional content. While, for legal content, the express or implied prefix is "According to law in legal system S at time T…", its equivalent for fictional content is "According to fiction *F*…"[72,73]. He demonstrates the importance of this prefix by reference to David Lewis's famous example (Lewis 1978). In the Conan Doyle books, Sherlock Holmes was a detective who lived at 221B Baker Street in London. We may therefore wish to say:

1. Sherlock Holmes lived at 221B Baker Street, London.

---

[72] The implied prefix for fictional content does not include any reference to time or space in the real world, as the fictional world represented exists outside the real world. Of course, time and space in the fictional world may be represented ("According to fiction *F*, Sherlock Holmes lived at 221B Baker Street in the late nineteenth and early twentieth century").

[73] Note that "According to Fiction *F*…" here means that a particular proposition is true within Fiction *F*. Contrast the phrase "According to…" in the context e.g. "According to John, England will win the game on Saturday", where it indicates that John believes or claims to believe that a proposition is true in the actual world.

However, it turns out that at the time in question 221B Baker Street was actually a bank. So we may wish to say:

2. At the relevant time, 221B Baker Street was a bank.

The inference from (1) and (2) would therefore seem to be

3. Sherlock Holmes lived in a bank.

This last statement is clearly false. Lewis argues that the mistake we have made is to move from a prefixed to an unprefixed context. That is to say, (1) is true only if preceded by the prefix "In the fiction *F*…" whereas (2) is true if taken to be unprefixed (that is to say, in the real world).[74] It is not true that, in the fiction *F* at the relevant time, 221B Baker Street was a bank. We therefore cannot conclude that (3) Sherlock Holmes lived in a bank.

Marmor goes on to offer a refinement to this basic argument. He notes that the problem does not, at first sight, arise in the following inference:

4. Sherlock Holmes lived in London.
5. London is a city in the United Kingdom.
6. Sherlock Holmes lived in the United Kingdom.

[74] It may of course also be true or undetermined in other fictional worlds.

It may appear that, although here (4) should clearly be prefixed by "In the fiction *F*…", (5) need not be so prefixed in order for (6) to be a correct inference. However, this is not correct. While (5) may seem not to require a prefix, in fact it does. (5) is incorporated into the fiction by implication: Marmor posits that "fictions typically incorporate by implication an indefinite, though limited, number of facts (or factual assumptions) about the world, at least those that are salient and well known to potential readers" (p. 476). That London is a city in the United Kingdom is one such fact, and so even if Conan Doyle does not mention the location of London explicitly, it is incorporated into the fiction. Thus correctly:

1. In the fiction *F*, Sherlock Holmes lived in London.
2. In the fiction *F*, London was a city in the United Kingdom.
3. In the fiction *F*, Sherlock Holmes lived in the United Kingdom.

Of course, it is open to the creator of the fiction to prevent the incorporation of facts about the real world into their fictional world, even facts which are very well known to readers. For example, in the *Hitchhikers Guide to the Galaxy* series of books by Douglas Adams, Arthur Dent is a human. One might naturally assume that:

1. Arthur Dent is a human.
2. Humans cannot fly unaided.
3. Arthur Dent cannot fly unaided.

In fact, we learn in the third book of the series (*Life, The Universe and Everything,* Adams, 1982/2020) that humans can, in fact, fly if they acquire the knack ("The knack lies in learning how to throw yourself at the ground and miss" (p. 10)) and that Arthur himself can fly. Such a statement within a fiction overrides or blocks importation of any real world fact it contradicts.

Further, it is open to a writer to make statements which apply to both the fictional and actual world within a fictional world such as a novel, or to make statements which apply only to the actual world. For example, the first, ironic, line of *Pride and Prejudice* ("It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife"(Austen, 1813/2006, p.3)) appears to the reader to be a general statement which applies both to the real world and to the fictional world of the story. In *Bleak House* (1853/2020), Dickens moves directly from relating events in the fictional world of the novel to making a statement about the actual world, when he narrates the death of Jo the crossing-sweeper, a destitute orphan:

> Dead, your Majesty. Dead, my lords and gentlemen. Dead, right reverends and wrong reverends of every order. Dead, men and women, born with heavenly compassion in your hearts. And dying thus around us every day.
>
> (p.677)

While the first four sentences appear to apply to the death of Jo within the fictional world of the novel, the last ("And dying thus around us every day.") is a statement

about the real world, in which “us” refers to Dickens himself and his readers (and maybe the population as a whole), while the present tense of “dying” refers to action happening at the time of writing, not at the time at which the novel is set.

Various accounts have been given of how implied fictional truths are incorporated into a fictional world. For example, in *Truth in Fiction* (1978), Lewis posits that fictional stories are related against a background of (known) facts and beliefs, meaning that there is more to truth in fiction than what is explicitly stated in the story. He gives two possible accounts of this. The first takes the following form:

> A sentence of the form “In fiction F, ϕ” is non-vacuously true if and only if some world where F is told as known fact and ϕ is true differs less from our actual world, on balance, than does any world where F is told as known fact and ϕ is not true. (p.42)

To apply this to an example, let us take the first lines of Orwell’s *Keep the Aspidistra Flying* (1936/2000):

> The clock struck half past two. In the little office at the back of Mr McKechnie’s bookshop, Gordon- Gordon Comstock, last member of the Comstock family, aged twenty-nine and rather moth-eaten already- lounged across the table, pushing a four-penny packet of Player’s Weights open and shut with his thumb. (p. 1)

In the real world, clocks of the relevant sort measure time by running from 12 midnight to 12 noon and then from 12 noon until 12 midnight and there are 24 hours in a day. Gordon is a name almost exclusively used for males. Twenty-nine-year-olds are adults. Player's Weights is a brand of cigarettes, and so on. None of these statements is made explicitly in the text. However, following Lewis's analysis, it is non-vacuously true in the fiction that there are 24 hours in a day iff some world where the fiction is told as known fact and it is true that there are 24 hours in a day differs less from our actual world on balance, than does any world where the fiction is told as known fact and it is not true that there are 24 hours in a day.

The effect is that the reader "is licensed to 'import' into the fictional scenario, as fictional truths, any necessary or contingent truths from the actual world consistent with explicit content" (Stock, p.51). That the reader can only import truths which are consistent with explicit content can be seen from a comparison with the first lines of Orwell's *1984* (1949/2000):

> It was a bright cold day in April, and the clocks were striking thirteen. Winston Smith, his chin nuzzled into his breast in an effort to escape the vile wind, slipped quickly through the glass doors of Victory Mansions, though not quickly enough to prevent a swirl of gritty dust from entering along with him.
>
> (p. 3)

In the actual world, Winston is a name traditionally given to males, April is a month in spring, one's chin is located at the bottom of one's face, and so on. However, in the

actual world, clocks of the type the reader could be expected to imagine do not strike thirteen: they run from 12 midnight to 12 noon and 12 noon to 12 midnight. This is not consistent with the explicit content "the clocks were striking thirteen" and so the reader is therefore not licensed to import this truth from the real world into the fictional world, with the effect that the reader is put on notice that this fictional world may have some fundamental differences from the actual world.

Lewis notes that there is a problem with his analysis, as it suggests that the truths imported into the fictional world include truths of which neither the writer nor the intended reader could have been aware (Stock gives the example of $E=mc^2$ being imported into Chaucer's *Canterbury Tales*). Lewis therefore moves to a second analysis:

> A sentence of the form "In fiction *f*, ϕ" is non-vacuously true iff, whenever *w* is one of the collective belief worlds of the community of origin of *f*, then some world where *f* is told as known fact and ϕ is true differs less from the world *w*, on balance, than does any world where *f* is told as known fact and ϕ is not true. (1978, p. 45)

Here, "collective belief worlds" are the sets of beliefs endorsed by most of the community of origin of *f* and believed by most to be believed by most, and the community of origin of *f* is the community of the text's actual or potential readers at the time of writing or publication (Stock, p. 51). Thus, given that none of the actual or potential readers of *The Canterbury Tales* at the time of writing or publication

believed that $E=mc^2$, that truth from the actual world is not imported into the fictional world. It follows from Lewis's analysis here that the sets of beliefs of Chaucer's actual or intended readers at the time of writing can be imported into the relevant fictional world, even if they are beliefs which may not be held by a modern reader (such as religious beliefs or beliefs about the social roles of men and women).

A possible criticism of Lewis's analyses is that they do not provide any account of fictional truths that result from symbolism. The use of symbols in a work of fiction can generate implied fictional truths (Stock, 2017, p. 53; Lamarque, 1990, p. 336). Stock gives the example of the red room in which Jane Eyre is locked as a child, and which critics have argued symbolises (among other things) a womb, and the psychological effect on Jane of losing her mother as a child. Stock notes that, on Lewis's analysis:

> The significance of the red room in generating fictional truths about Jane cannot be accounted for, as in a world in which *Jane Eyre* was 'told as known fact', no (collectively believed) facts about Jane's motherless state and its strong psychological effect on her would follow from the fact of Jane's being locked in such a room as the red room, no matter how womblike it seemed. (p. 53)

Hence for Stock, Lewis's account under-generates, in that it does not offer an account of all the fictional truths a text may contain. It could also be said to over-generate fictional truths of a sort which would not strike a competent reader: Stock

gives the example of the *Chief Inspector Barnaby* series, in which the fictional county of Midsomer is the scene for a large number of murder cases, which Barnaby must solve. On Lewis's account, a reader should be struck by the fictional truth that the murder rate in Midsomer is unusually high and yet a competent reader is not troubled by this, recognising that the genre of crime fiction necessitates plentiful murders.

Stock also comments that Lewis's analyses have the effect of importing a large number of irrelevant fictional truths into works of fiction which have no need of them:

> Whether it is a gothic short story by Angela Carter, a Jeeves and Wooster comedy, a piece of erotica by EL James…it is a consequence of the application of Lewis's view that in these stories, no matter what their differences in form and content, it is fictionally true that the USA has fifty states, that Queen Victoria was married to Prince Albert, that mercury is a shiny slippery metal… (p. 55)

Stock's position is that these fictional truths offer no additional benefit to the reader: they reveal nothing about plot, character and so on. She argues that an account of fictional truths which does not offer any way to determine which fictional truths are relevant and meaningful in the context of the work in question will be inadequate because it does not reflect the actual experience of readers reading a fictional text and certainly doesn't reveal those truths which a competent reader will recover. This criticism of Lewis seems misplaced to me: his definition relates only to the fictional

truths which a reader *is licensed* to import, not to the truths that a reader actually will import (those which are relevant). He is not attempting to define or describe the actual experience of reading a fictional text, but rather to provide an account of why, if in the fiction there is a sentence or passage which presupposes ϕ, but ϕ has never been mentioned in the story, it can be accommodated so long as it is a fact in the real world that ϕ.

One question which arises in relation to fictional truths, particularly in works of fiction with a first person narrator, is whether the encoded meanings and extensions of words constitute facts about the actual world which a reader imports into the fictional world: that is to say, how safely can the reader assume that the words used in a work of fiction mean the same in the fictional world as they do in the actual world? Often, no question as to meaning arises. However, there are cases where the reader may need to consider how she approaches word meaning and extension, such as in fictional worlds in which characters use language in ways which are different from those of the writer or actual or potential readers. The novel *A Clockwork Orange* (1962/2013) by Anthony Burgess opens:

> There was me, that is Alex, and my three droogs, that is Pete, Georgie, and Dim, Dim being really dim, and we sat in the Korova Milkbar making up our rassoodocks what to do with the evening, a flip dark chill winter bastard though dry. (p. 3)

How should the reader understand “flip” in the context of “dark chill winter bastard though dry”? In the fictional world, it clearly encodes something different from its encoded meaning in the actual world. Further, in some cases Burgess uses entirely new forms, which do not exist in the actual world at the time of writing: what is meant by “droogs” and “rassoodocks”? It is fictionally true in *A Clockwork Orange* that “droog” encodes something like the concept FRIEND and it should be understood as such by the reader, despite this not being (at the time the novel was published) a word in wider use: the reader cannot simply import her knowledge of language from the actual world but must interpret the work in the light of the implied fictional truth that “droog” encodes the concept FRIEND.

I now return to Marmor and the comparison of law and fiction. Marmor compares prefixes such as “According to law in legal system S at time t…” and “In fiction *F*…” (which he refers to as closed prefixes), with open prefixes such as “According to science…” or “According to the laws of thermodynamics…”. Marmor defines open prefixes as prefixes which “range over unprefixed statements to form valid conclusions” (p.477): in other words, the prefix need neither be expressly stated nor implied for the statement which follows to be correct. In contrast, closed prefixes are intended to form part of the truth conditions of the statement which follows:

> In other words, it is probably part of what it means to prefix a statement by “according to science” that the statement following the prefix is meant to apply unconditionally. Whereas it is part of the meaning of a prefix such as “according to fiction F…” that it ties the truth-value of the statement to be

> contained within a world demarcated by the prefix, that is, the world of fiction *F*. (p.477-478)

Note that an open prefix is *meant* to apply unconditionally, not necessarily that it does apply unconditionally: it is simply that the truth or falsity of the statement is not dependent on the prefix. (Consider someone in the sixteenth century stating, “According to science, the sun revolves around the earth”.) In Marmor’s words “some prefixes [closed prefixes] are such that they designate a constitutive relation to the truth-values of the statements prefixed by them. A statement is true in fiction, if it is, because the fiction states it” (p. 478). Marmor’s words “if it is” are interesting here, because his position is broadly that a statement is true in fiction in virtue of being said. Perhaps an example of a statement in fiction which is in some sense untrue would be a statement involving authorial irony (see my discussion of the opening of *Pride and Prejudice* below): I argue that in such a case the author is not inviting the reader to consider the statement as true. Alternatively, Marmor may be thinking of unreliable narrators (such as Nick Carraway in *The Great Gatsby* and Barbara Covett in *Notes on a Scandal [refs]*) who make statements which the reader comes to realise may be untrue or misleading: again, I would argue here that the author is not inviting the reader to consider such statements as true but rather, over the course of the book, to question the extent to which they are true and consider what a true representation of the imagined events might be. After all, the device of an unreliable narrator is only effective where the author has signalled to the reader that the narrator cannot entirely be trusted.

Marmor argues that the law is a closed prefix context because the truth value of any statement about the content of a legal premise depends on its jurisdictional prefix ("According to legal system S at time t…"), just as the truth value of any statement about fictional truth depends on its fictional prefix ("According to fiction *F*…"). What happens if you apply something like one of David Lewis's false syllogisms about fictional statements to legal statements?

1. According to the law in S at t, anyone who is an X ought to ϕ in circumstances C.
2. John is an X (in S at t)
3. Therefore, John ought, legally to ϕ in circumstances C.

Clearly the first statement here is a closed prefixed statement. It would appear that the second statement is not: it appears to be a fact about the world whose truth is not contingent on a prefix. However, Marmor correctly sees that this is an illusion: while (2) may simply be a fact about the world, in order for inference (3) to arise, it must also be a fact according to the law in S at t.

I agree with Marmor's analysis here. An example makes the point more clearly. In many legal systems, there is a concept of "legal fiction": something which is deemed to be true for the purposes of the law which may or may not be true in the real world. For example, in English law, under the Law of Property Act 1925, in a case where two people die roughly simultaneously and there is no evidence as to who lived

longer, the deaths will be assumed to have occurred in order of age, oldest first.[75] Thus, although it may be the case in the real world that the younger person died first (although this fact is not known to anyone), for legal purposes it will be deemed to be the case that the older person died first. Of course, it is far more common that what is true in the real world is also legally true: if so, the example is akin to the syllogism below:

1. In fiction F, Sherlock Holmes lived in London.
2. (In fiction *F*) London was in the United Kingdom.
3. Therefore (in fiction *F*) Sherlock Holmes lived in the United Kingdom.

If unprefixed, (2) is a fact about the actual world: it is imported into the fictional world giving rise to an implied prefix "In fiction *F*", just as in the legal example mentioned above ("anyone who is an X ought to ϕ in circumstances C"), for premise 2 ("John is an X (in S at t)"), there must be an implied prefix "According to the law in S at time t…". To give an example of how this might work in the case of a legal fiction regarding the order of deaths, imagine two people, Jim and Mary, who each leave each other everything in their wills. Mary is older than Jim. They both die, and there is no evidence as to who lived longer.

1. According to the law in S at t, if Jim lives longer than Mary he will inherit her estate.

[75] The purpose of this legal fiction is to allow a court to determine who should inherit property under the wills of the deceased.

2. According to the law in S at t, Jim lived longer than Mary (by virtue of the legal fiction that the older person died first).
3. Therefore, according to the law in S at t, Jim inherits Mary's estate.

I have considered above the types of facts which can be incorporated into the fictional world (for example, whether the facts that should be incorporated are those known to a given reader or those known to actual and potential readers at the time of publication). Marmor argues that there is no limit to the facts that can be incorporated into the legal context: any fact may be relevant, as may propositions which are not facts in the real world (my example of a legal fiction above is such a fact). Marmor gives the example of *Nix v Hedden,*[76] a case in which a court held that a tomato was legally a vegetable in spite of it being botanically (in the real world) a fruit (an alternative argument here might be that the court acknowledged that the word "vegetable" has multiple senses, one of which encompasses certain fruits such as tomatoes).

4.4.2 Expressive artefacts

Marmor then links the notion that both law and fiction act as declarations - true in virtue of being said - with the notion of expressive artifact. An artifact is something which is created by humans; an expressive artifact is something created by humans through expressive means of symbolism or communication. Expressive artifacts are

[76] 149 U.S. 304 (1893).

distinct from other sorts of artifacts: Marmor notes that while you cannot create a chair by saying “I hereby make a chair” you can create a story simply by telling it.[77]

Further, both statutes and works of fiction are compound artifacts, which Marmor defines as “artifacts within artifacts”. He gives the example of an artwork within an art museum as an artifact within an artifact. Here, he means not simply in the spatial sense of one thing being inside another, but rather that the meaning and function of the artwork are altered by its display in a museum. The extent of this alteration depends on the case: to place a pile of sand in a gallery (rather than on a building site) makes a profound difference to its meaning and function.

Marmor then takes this concept of a compound artifact and applies it to law and fiction. He posits that conventions are another type of artifact: we have sets of conventions about genre and symbolism in literature, for example, which shape the way in which works of literature are created and read. Like an abstract painting in a gallery, a novel (for example) is created and understood within a set of conventions which affect its meaning and function.

This seems correct, and this relationship between a work of literature as expressive artifact and the set of conventions it sits within is one which writers make use of as a means of implicit communication. To give an example, here are the first two verses of Sassoon’s poem *Suicide in the Trenches* (1918/1984):

[77] Although of course one cannot tell a story simply by saying “I hereby tell a story”.

I knew a simple soldier boy

Who grinned at life in empty joy,

Slept soundly through the lonesome dark,

And whistled early with the lark.

In winter trenches, cowed and glum,

With crumps and lice and lack of rum,

He put a bullet through his brain.

No one spoke of him again

In a number of ways, the form of this poem directs the reader towards placing it within a particular set of conventions: rhyme scheme, simplicity of vocabulary, simplicity of meter (iambic tetrameter) are highly reminiscent of a particular genre of poetry, the comic cautionary tale, made famous by writers such as Hilaire Belloc,[78] which in turn parodied the more earnest cautionary tales of the nineteenth century. For comparison, here are some verses of one of these:

The Chief Defect of Henry King

Was chewing little bits of String.

At last he swallowed some which tied

Itself in ugly Knots inside.

---

[78] *Cautionary Tales for Children: Designed for the Admonition of Children between the ages of eight and fourteen years* (Belloc, 1907/2008)

Physicians of the Utmost Fame

Were called at once; but when they came

They answered, as they took their Fees,

"There is no Cure for this Disease.

"Henry will very soon be dead."

His Parents stood about his Bed

Lamenting his Untimely Death,

When Henry, with his Latest Breath,

Cried, "Oh, my Friends, be warned by me,

That Breakfast, Dinner, Lunch, and Tea

Are all the Human Frame requires..."

With that, the Wretched Child expires.

Henry King: Who chewed bits of string, and was early cut off in Dreadful agonies (Belloc, 1907/2008)

These poems are characterised by identical rhyme and meter to the Sassoon poem above, and the same simple vocabulary. Each deals lightly with a gruesome death or other ignominious end. This particular set of conventions (those of the cautionary tale for children) is exploited by Sassoon, in his far more serious poem, to misdirect the reader, ironically placing the realistic death by suicide of a young man in the trenches within the conventions of a comic cautionary tale and thus throwing it into

stark relief. (Not every reader of Sassoon's poem will be aware of the pastiche, although arguably the simple vocabulary, meter and rhyme scheme will have a similar effect even in this case.)

Just as the meaning of a pile of bricks is created/changed by its existing within a set of conventions attached to works of art displayed in galleries,[79] so the meaning of an utterance within a literary work can be changed by its existing within the conventions which attach to literature, broadly, and a particular literary genre specifically. I give for example the following epigraph to a work of young adult dystopian fiction, *The End Games* by T. Michael Martin (2014):

> Everything not saved will be lost.
>
> (–Nintendo "Quit Screen" message)

Likewise, legal texts exist within a framework of conventions, as artifacts within artifacts whose meaning and function are altered by the set of conventions within which they sit, from overarching conventions about the normative character of the law to conventions about construction and interpretation. For example, as I discuss in Chapter 5, a judge's knowledge of the legal norm of the presumption of doubtful penalisation will mean that she is more likely to recover an explicature which limits a

[79] Such as Equivalent VIII by Carl Andre, 1966 https://www.tate.org.uk/art/artworks/andre-equivalent-viii-t01534

prohibition or provides a defence than an explicature which extends a prohibition or limits a defence.[80]

Marmor then goes on to relate this notion of law and fiction as expressive, performative compound artifacts to his earlier characterisation of law and fiction as closed prefix contexts: neither statutes nor works of fiction simply describe how things are. Rather "Like fiction, the law…creates a world in itself by stipulating that the legal world is so and so" (p. 491).

4.5 Conclusions

Marmor's conception of law and fiction both as closed prefixed contexts throws light on what it means for something to be true in law as the result of the enactment of a statute (a declaration): that it is true 'according to law in legal system *S* at time *t*', just as statements about fictional content are necessarily prefixed by an implicit formula, 'In Fiction *F*…'. This insight relies on an understanding of the kind of speech act legislating is.

In fact, as I have argued above, statutes are even better seen as two related speech acts (or sets of acts), in each case declarations: one (the enacting words) with the illocutionary force of enacting, the other(s) (the enacted provisions) with the illocutionary force of prohibiting, imposing a penalty and so on (although without any

[80] "It is a principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account." (Bennion, 26.4)

indirect exhortative force). This is preferable to thinking of the passing of a statute as a single act of enacting, as it takes account of the very different temporal effects involved: enacting happens in a moment, with the result that the enacted text has (and continues to have) a particular legal status until express or implied repeal. This reflects Lord Thring's description of a statute as "always speaking" and perhaps the text of the individual provisions as always being spoken. In the next section of this thesis, I shall look in detail at how judges approach the interpretation of these enacted provisions, taking a relevance-theoretic approach.

Part II Relevance theory, context and the role of explicature and implicature

In the introduction to this thesis, I set out part of my plan as follows:

> …first things first: some pages back, I used the phrase "if judges interpreting statutes undertake a process which is anything like the process of ordinary utterance interpretation". This is what might be described as a "Big If". Accordingly, in the first part of this thesis I consider the extent to which Parliaments passing statutes and judges interpreting them act like speakers and hearers in ordinary conversation, looking at whether the passing of a statute should be considered an act of communication at all, what can be said about the intentions of a Parliament in passing that statute and what sort of speech act the passing of a statute may be.

While my aim in writing this thesis is to consider the application of relevance theory to statutory interpretation, doing so required me to first consider some broader questions regarding legislation as communication: after all, if legislating is not an act of communication, what benefit would there be in applying a theory of communication to it?

Having considered these broader questions in the first chapters of my thesis, I now move on to apply relevance theory to statutory interpretation.

In the English courts (and many others) the starting point in interpretation is to consider the "ordinary meaning" of the text. Per Leggett LJ:[81]

> The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation.

What constitutes the ordinary meaning of a word or phrase, however, is not always readily identifiable. Certainly, we can see from the case law that what judges take to be ordinary meaning is not identical to the dictionary definition of a term (although judges do on occasion make use of dictionaries), and the courts readily recognise that words can have different meanings (or be used in different senses) in different contexts. Can relevance theory provide any assistance in understanding how this can be the case?

The significance of relevance theory for the interpretation of legislation is that it provides a psychologically coherent account of the process by which the content that a speaker communicates can differ from the encoded meaning of what they say. Thus, if we allow that the creation and interpretation of statutes works like (or rather like) ordinary linguistic communication, we must surely allow the possibility that the communicated meaning of a statute may differ from the encoded meaning of its text,[82] and indeed that this might correctly be thought of as its ordinary meaning (the

[81] *R (The Good Law Project) v Electoral Commission [2017] EWHC 2414* at [33]
[82] This is arguably problematic from the perspective of the rule of law. If the meaning communicated by a statute differs from the literal meaning of its text and, in particular, if that communicated meaning derives in part from the assumptions and background knowledge of the judge interpreting the legal

meaning one recovers through the application of ordinary communicative processes).

Further, relevance theorists posit their theory as an explanation of normal linguistic communication. If this is right, any argument that judges should not interpret laws in a way that is consistent with normal linguistic communication but instead adopt an artificial method of interpretation which prioritises some sort of literal meaning of a text (insofar as it is possible to determine the literal meaning of a text) over what it would ordinarily be understood to mean is highly problematic from the perspective of the rule of law (which requires that laws should be comprehensible, as far as possible, to ordinary native speakers). It is hard to argue that the most comprehensible interpretation of a law is one based on an artificial and effortful linguistic process which deliberately ignores the ordinary enrichments of meaning which naturally arise in communication.

It follows that it is a question of great import whether judges do (and/or should) interpret legislation in this way. A good example of this import is the well-known case of *Smith v US*.[83] The defendant, Smith, had attempted to exchange a MAC-10 automatic gun for two ounces of cocaine. Smith pleaded guilty to the charge of drug trafficking but not guilty to the charge of having "used a firearm" in the commission of a drug trafficking offence: if he was guilty of the latter, he faced a longer sentence.

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text, how can the statute fulfil the requirements of clarity and consistency which the rule of law requires?

[83] *Smith v. United States*, 508 U.S. 223 (1993)

The question for the court was whether trying to swap a gun for drugs constituted "using a firearm" in the commission of a drug trafficking offence. If the word "use" is understood in its broad, dictionary sense ("employ" or "make use of") it seems Smith did use a firearm: he employed it as an item of barter. Conversely, if "use" is understood in context, he arguably did not: to "use a firearm" is generally understood to mean use one *as a weapon*.[84] The doctrine of "ordinary meaning" on its own does not seem to provide any assistance here.

In *Ordinary Meaning* (2015), Slocum remarks on the wide acceptance of the ordinary meaning standard as the basis for judicial interpretation:

> The judicial unanimity regarding the salience of the ordinary meaning doctrine should not be surprising as no other competing standard is coherent or persuasive. Primarily, the ordinary meaning doctrine is uncontroversial because it is intuitively the correct standard for determining textual meaning. The doctrine can be viewed in another light, though. Perhaps it is uncontroversial amongst the judiciary because it has not been well developed and thus can be easily manipulated by courts to justify a desired interpretation.
>
> (p. 278)

[84] The court eventually, and controversially, held that Smith *had* used a firearm in the commission of a drug trafficking offence and he was sentenced accordingly. In a later case on similar facts the defendant was found not guilty of using a firearm (Watson v. United States, 552 U.S. 74 (2007)).

Slocum is concerned that there is a tension between the notion of ordinary meaning (which by its nature should be "generalizable and not a specific meaning for a specific context") and what he terms "the textualist belief in the pervasiveness of contextual influences on meaning" (p. 112). For Slocum, on the one hand, to have a doctrine of ordinary meaning at all implies that courts are (or may be) doing something different from simply recovering the communicative meaning of the text: if the ordinary meaning of a provision is simply its communicative content, why do we need a doctrine of ordinary meaning at all? On the other, Slocum notes that words are naturally polysemous and so to consider a word in isolation without regard to context does not aid interpretation either.

He concludes that any useful conceptualisation of ordinary meaning requires context to be accounted for but that "contextual consideration does not require that meaning be characterized as being primarily pragmatically derived". Rather, he suggests an approach to meaning which is based mainly on semantic meaning ("or at least systematic accounts of meaning that blur the line between semantics and pragmatics" (p. 279)). He also draws a distinct between wide and narrow context, arguing that it is narrow context that should be taken into account in determining the meaning of a provision. Nevertheless:

> This way of framing ordinary meaning does not, however, eliminate interpretive discretion. When context is considered, the assignment of meaning invariably has an ineliminable element of interpreter discretion.

(p. 279)

I agree with Slocum about the tension between the requirement for generalisability of meaning across contexts on the one hand, and the importance of the particular context in interpretation on the other. It is of course highly desirable that statutes should be as comprehensible as possible and that judicial interpretations of statutory provisions should, as far as possible, be based on word meanings which are predictable and generalisable across contexts. It would be harmful to the principle of legal certainty if judges could simply pull an interpretation "out of the air" and deem that to be a provision's ordinary meaning. On the other hand, in ordinary language use we regularly adjust lexical meaning depending on context, so an interpretive methodology which required fixed and invariable word meanings irrespective of context would hardly reflect the "ordinary meaning" of those words.

Slocum does not really attempt to square this circle: he concludes by proposing a notion of ordinary meaning "*primarily* based on semantic meaning" (emphasis mine) in which narrow context plays a role, and in which even then there will remain an "ineliminable element of interpreter discretion".

This is an area in which relevance theory has a particularly valuable contribution to make to the debate around legal interpretation. Relevance theory posits that hearers make use of implicated premises in deriving the communicated meaning of an utterance. I shall argue below (in Chapter 5) that the particular implicated premises involved in legal interpretation provide a mechanism for the kinds of interpretation

that Slocum argues for (broadly, interpretations "primarily based on semantic meaning" but with a role for contextual adjustments where justified and necessary). That is to say, that the kinds of presumptions that judges make use of (such as the presumption against doubtful penalisation and requirement that onerous provisions should be clearly expressed) are effectively implicated premises in the interpretive process, which constrain the range of meanings available to the interpreting judge. The effect of such implicated premises is that a judge cannot simply pluck a meaning from the air, but rather must seek to interpret a provision in a way which minimises doubt and promotes clarity and certainty. This will tend to constrain the available interpretations to those which tend to stick fairly closely to semantic meaning, but still allows adjustments to meaning where they are necessary and justified in context (such as the differing adjustments made to the meaning of the word "use" in *Elliott v Grey* [1960] 1 Q.B. 367 (1959) and *Hewer v Cutler* [1974] R.T.R. 155 (1973) which were justified by reference to the purposes of the provisions in question). I shall argue below that this meaning is equivalent to the explicature of the relevant provision, being what Parliament has asserted.

Given this, I do not agree with Slocum that there is necessarily any gap between the communicative meaning of a provision to the interpreting judge and its ordinary meaning, given that its communicative meaning will be recovered in the light of ordinary legal interpretive practice, which includes reference to the sorts of legal presumptions I mention above and which I argue in this part act as implicated premises in a relevance-theoretic process of utterance interpretation.

Also in this part of my thesis, I shall continue to contrast legal interpretation with literary interpretation, with the aim of making my arguments clearer by throwing them into relief. I shall argue that, just as there are certain standing implicated premises in legal interpretation which tend to *constrain* the range of interpretations available to a judge, so there are certain standing implicated premises in literary interpretation which tend to *licence* the recovery of a very wide range of interpretations. I discuss this further below in Chapter 6.

In the next section of my thesis, I shall look at the application of relevance theory to statutory interpretation, taking account of the following questions:

- Do judges tend to determine the communicated content of legislation in a way which accords with modern pragmatic theory and, in particular, with relevance theory, through a process of utterance interpretation?
- Assuming a relevance-theoretic approach, are there any additional constraints on the recovery of communicated meaning, compared to ordinary conversation? In particular, do judges tend to recover a communicated meaning which accords with the *assertive content* of the text alone?
- Is it plausible that the context in which judges read statutes includes some sort of rebuttable presumption that what is intended to have been communicated is what is asserted? Are there different presumptions for provisions which impose legal obligations or prohibitions, as opposed to those which limit the scope of obligations or prohibitions or those which grant rights?

Chapter 5: Context

In this chapter, I look at the relevance-theoretic notion of contextual assumptions and their role in utterance interpretation, and consider the part that contextual assumptions play in statutory interpretation.

In Chapter 1, I set out a brief summary of the main tenets of relevance theory and the relevance-theoretic account of utterance interpretation. In this chapter I shall consider how the outcome of the process of utterance interpretation (as outlined in relevance theory) is affected by the context in which that process takes place. An utterance is an ostensive stimulus and, as such, conveys a presumption of its own optimal relevance. In interpreting the utterance, this presumption of optimal relevance licenses the hearer to employ the following comprehension procedure:

- Follow a path of least effort in computing cognitive effects: Test interpretive hypotheses (disambiguations, reference resolutions, implicatures, etc.) in order of accessibility.
- Stop when your expectations of relevance are satisfied (or abandoned).

(Wilson & Sperber, 2004, p. 613)

Further, relevance theory posits that utterance comprehension involves three subtasks:

- constructing an appropriate hypothesis about the explicit content of the speaker's utterance through decoding of linguistic meaning, along with reference resolution, disambiguation and 'free' (i.e. not linguistically mandated) pragmatic enrichment processes;

- constructing an appropriate hypothesis about the intended contextual assumptions (implicated premises in the inferential reasoning process); and
- constructing an appropriate hypothesis about the intended contextual implications of the utterance (implicated conclusions).

(Wilson & Sperber, 2004, p.615)

Note that these tasks are not carried out sequentially but in parallel. The second subtask require that the hearer form an appropriate hypothesis about intended contextual assumptions (in other words, implicated premises in the interpretive process). In constructing this hypothesis, the hearer will make use of the mutual cognitive environment- the set of assumptions or propositions which are mutually manifest between speaker and hearer and which include not only known facts but inferable ones. An utterance acts as a prompt to access the appropriate assumptions from which to form a hypothesis about intended contextual assumptions.

In this chapter, I shall mainly consider the second subtask. The inferential process of utterance interpretation requires the hearer to construct an appropriate hypothesis about implicated premises – that is, the intended contextual assumptions that are used to determine the communicated content of the utterance. I shall consider the implicated premises used in the interpretation of legislation, and whether these are meaningfully different from implicated premises in ordinary utterance interpretation. If so, can relevance theory provide an account of this difference?

5.1 What is context?

According to relevance theory:

> The set of premises used in interpreting an utterance … constitutes what is generally known as the *context*. A context is a psychological construct, a subset of the hearer's assumptions about the world.
>
> (Sperber & Wilson, 1986/1995, p.15)

In other words, it is not the world itself that affects utterance interpretation but the hearer's assumptions about it. What can constitute an assumption making up part of the context of utterance interpretation is extremely broad, including not only information about the time and place of utterance but also "expectations about the future, scientific hypotheses or religious beliefs, anecdotal memories, general cultural assumptions, beliefs about the mental state of the speaker" (p. 16) and so on.[85] As such, the context in which utterances may be interpreted will change over a speaker/hearer's life, as their life experience affects the set of premises available to them. Similarly, while different speakers in a linguistic community may share a language (or rather, "converge on the same language" (Sperber & Wilson, 1986/1995, p. 16)) and it is plausible that they share the same pragmatic abilities to infer meaning, they may have assumptions about the world which are very different.

[85] As such, the different aspects of context identified by Fetzer (2017) (social, sociocultural, linguistic etc.) are subsumed by the cognitive notion of context within relevance theory, noting that the relevance-theoretic concept of context includes only those assumptions actually used in the interpretation process.

One immediate concern then, from the perspective of someone considering the role of context in the interpretation of legislation, is the fact that the context in which a written text is created/uttered[86] is inevitably different from that in which it is interpreted: in particular, a judge may interpret a statute decades or even centuries after its utterance,[87] when the type of assumptions a typical reader holds about the world may have changed dramatically from the time of utterance; for example, from Sperber & Wilson's list above, it is easy to see how expectations about the future, scientific hypotheses or religious beliefs, anecdotal memories and general cultural assumptions are likely to change over decades.

What is more, while in ordinary face to face conversation, participants in a conversation can often correct any failure by the hearer to infer the speaker's intentions, this is far less likely to be possible in the case of a written text where writer and reader will be separated by both time and space. In certain cases of texts, a writer can anticipate the different context in which a reader will read a text and so write accordingly in order to express the meaning intended. As discussed above, Carston (2008, p. 326) gives the example of a departmental secretary writing a note saying "I'll miss my office hour today" and attaching it to an absent professor's office door one evening. Here the correct referents of "I" and "my" are the professor and not the secretary, and the correct referent of "today" is not the day on which it was written but the following day. In order to understand the note, the reader must go

[86] Legislation is a special sort of written communication, which goes through a number of steps in its creation, from drafting by Parliamentary Counsel, debate, amendment, and so on. I take as the point of "utterance" the point at which the statute has legal effect (which may be a different point in time from that at which particular provisions take effect).

[87] I consider later in this chapter how courts approach these difficulties.

beyond (or not even consider) what is known as narrow or semantic context.[88] This requires the writer to know the context in which a text will be read: the secretary's note will, of course, no longer communicate the intended proposition if it is left on the door for a further day as the wrong contextual parameters will be used. Similarly, an answerphone message saying "I am not here now so please leave a message" communicates to the hearer that the utterer is not available to speak at the time that the hearer hears the message, rather than at the time the speaker recorded it (Predelli 2005).

In the case of legal texts, where context of utterance and context of interpretation may diverge in unpredictable ways, it is far harder for the utterer to anticipate the context of interpretation. Occasionally, an effort will be made to accommodate this, providing a power to a third party to interpret a text in the light of that later context, rather than the context of utterance. See, for example, Ellis v Hurley (c/w B300806 (Cal. Ct. App. Nov. 20, 2020)), in which the settlor of a trust for his grandchildren explicitly empowered the trustee to interpret the wording of the trust in any reasonable way in administering it. At the time that the trust was settled, in 1980, the settlor had two children and no grandchildren; at the time that the trustee came to interpret the trust nearly 40 years later, the settlor's son Stephen had had two children out of wedlock, neither of whom he lived with, and his relationship with his father had substantially broken down. This arguably contributed to the trustee's

[88] Defined by Bach (1997, p. 39) as "[i]nformation that plays the limited role of combining with linguistic information to determine content (in the sense of ascertaining it) is restricted to a short list of variables, such as the identity of the speaker and the hearer and the time and place of an utterance."

decision to interpret "grandchild" in a way which excluded children born out of wedlock who did not live with the relevant parent.

Further, in the case of legislation specifically, although the role of a judge is to interpret legislation so as to determine (in the sense of 'ascertain') the intention of Parliament as expressed in the text, it is the judge's interpretation which determines (in the constitutive sense[89]) meaning and hence legal effect, not the intention of any particular legislator or even the joint (subjective) intention of all relevant legislators. The fact that the context of utterance and that of interpretation may differ substantially is therefore of great importance (see further discussion at 5.2).

Sperber & Wilson (1986/1995 p. 16) give an example of an everyday mismatch between a context envisaged by a speaker and the context actually used by the hearer:

> Suppose, for example, that the speaker of (7) wants to stay awake, and therefore wants to accept his host's offer of coffee, whereas the host assumes that the speaker does not want to stay awake, and thus interprets (7) as a refusal:
>
> (7) Coffee would keep me awake.

[89] See my discussion of the verb "determine" in footnote 16.

Sperber & Wilson argue that misunderstandings like this show that the mechanisms of verbal communication we use cannot guarantee successful communication, only make it probable. After all, the inferential processes used by the hearer depend on the specific contextual assumptions about the world which she uses to enrich the encoded meaning of an utterance. While we are likely to share many assumptions about the world with the people to whom we speak, we are highly unlikely to have an identical range of assumptions to choose from nor always to make the same choices. Participants in a conversation must therefore make further (second order) assumptions about the assumptions they share with one another, third order assumptions about those second order assumptions, and so on.

Rejecting the notion that mutual knowledge is required for communication, Sperber & Wilson instead posit that an individual has a cognitive environment, a set of facts, assumptions and so on that are manifest to him. An assumption is manifest if it is either perceptible or inferable, whether or not it is true (a mistaken assumption can form part of someone's cognitive environment just as an accurate one can). Manifest assumptions are more likely to be entertained by an individual the more manifest they are. Further, as discussed above, the notion of what is manifest includes those assumptions which a person has not actually made but which he is capable of making (Sperber & Wilson give the example of the assumption that Noam Chomsky never had breakfast with Julius Caesar; this assumption is manifest to anyone who knows who those two people are despite the fact that the assumption will be unlikely to have crossed their mind). Something may be manifest only by being perceptible,

even if not assumed or known about (such as a car passing outside in the street to which one has paid no attention).

Sperber & Wilson note that there are contexts, such as legal proceedings, in which participants take trouble to try to establish mutual knowledge among the parties:

> …all laws and precedents are made public, all legitimate evidence is recorded, and only legitimate evidence can be considered, so that there is indeed a restricted domain of mutual knowledge on which all parties may call, and within which they must remain…
>
> (ibid: 19)

While it is correct that all legislation and precedents are public, all legitimate evidence is recorded, and so on, it is worth noting that this does not create an absolute domain of mutual knowledge. While all parties have access to the relevant legislation, the ways in which the prosecution, the defence and the judge interpret that legislation may well differ. Likewise, while all the evidence on which any party seeks to rely will be recorded, it is not only the existence of evidence that is of import but the significance and meaning of that evidence, which again is something which different parties may see differently. An absolute domain of mutual knowledge would include knowledge not only of the existence of statutes and evidence but also of how each party understands those statutes and that evidence, the assumptions on which they have based their understanding, and so on. That said, it is certainly true that procedural rules which require parties to make clear to one another the legislation,

precedents, evidence and so on, on which they seek to rely do place some constraints on the knowledge on which they can legitimately draw.

5.2 Updating constructions and social change

Judges attempt to interpret legislation in the appropriate context, and that context is taken as including "legal, social and historical context" (Bennion, 11.2). The editors of Bennion note that:

> Previous editions of this book suggested that the requirement to consider the context was based on an inference that the legislature intended the legislative text to be given a fully informed interpretation. In *Secretary of State for Work and Pensions v Goulding,*[90] David Richards LJ said:
>
> > …legislation should be read in its legal, social and historical context. The legislature intends the language of a statute, or statutory instrument, to be given an informed, rather than a literal meaning.
>
> The current editors think that the requirement to consider the context is justified primarily by the fact that one cannot construe a legal text (or indeed any other text) without regard to its context.

90 [2019] EWCA Civ 839 at [23].

This notion of context is an external one, concerning facts about the world rather than the "psychological construct" (Sperber & Wilson, 1986/1995, p. 15) of assumptions mentally represented by the interpreting judge. Nevertheless, there will of course be a connection between context (as an external set of facts about the world) and context (as a set of assumptions used by a judge in interpretation), given that the assumptions accessible to the judge will vary depending on facts about the world.

In terms of the social context in which legal interpretation occurs, judges will usually apply an "updating construction", interpreting legislation in a way which reflects social, technological, and similar changes in the context of interpretation.[91] Bennion (14.1) sets out the issue thus:

> Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. Although the language originally used endures as law, its current subjects may find that law more and more ill-fitting. Viewed like this, an Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.

[91] There are some categories of Act which are not subject to updating constructions, such as an Indemnity Act (that is, an Act relieving certain persons from liability in respect of particular breaches of the law), but these are the exception.

This reflects Lord Steyn's description of an Act as "always speaking": provisions are interpreted in the light of the context at the time of interpretation, rather than at the time of enactment. As expressed by Lord Woolf MR (of the National Assistance Act 1948) in *R v Hammersmith and Fulham London Borough Council ex p M:*[92]

> We emphasise the significance of the Act because it is a prime example of an Act which is "always speaking", and so should be construed "on a construction that continuously updates its wording to allow for changes since the Act was initially framed".

Updating constructions cannot, however, change the concepts underlying the enactment in a way which is contrary to the intention of Parliament as expressed in the text. Per Sir James Munby in *Owens v Owens:*[93]

> "In one respect, however, the law permits, indeed requires us, to look at matters from the perspective of 2017. Section 1 of the 1973 Act is an "always speaking" statute: see *R v Ireland* [1998] AC 147, 158. Although one cannot construe a statute as meaning something "conceptually different" from what Parliament must have intended (see *Birmingham City Council v Oakley* [2001] 1 AC 617, 631, per Lord Hoffmann), where, as here, the statute is "always speaking" it is to be construed taking into account changes in our understanding of the natural world, technological changes, changes in

[92] (1998) 30 HLR 10 at 16

[93] [2017] EWCA Civ 182

social standards and, of particular importance here, changes in social attitudes."

To give a few examples of updating constructions in practice:

In *Fitzpatrick v Sterling Housing Association,*[94] the House of Lords held that a same-sex partner could be considered a member of a “family” within the meaning of the Rent Act 1977 (an Act which consolidated a number of Acts, the relevant one here being from 1920). Per Lord Slynn:

> It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been “No”. That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word “family”. An alternative question is whether the word “family” in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920.

[94] [2001] 1 AC 27 at 35.

In *Yemshaw v Hounslow London Borough Council,*[95] the court considered the word "violence". The question was whether a duty imposed by the Housing Act 1996 on authorities to help people who had left their homes to escape domestic violence arose when the person had suffered psychological abuse, not physical abuse. Per Baroness Hale at [27]-[28]:

> "Violence" is a word very similar to the word "family". It is not a term of art. It is capable of bearing several meanings and applying to many different types of behaviour. These can change and develop over time… The essential question, as it was in the *Fitzpatrick* case, is whether an updated meaning is consistent with the statutory purpose – in that case providing a secure home for those who share their lives together. In this case the purpose is to ensure that a person is not obliged to remain living in a home where she, her children or other members of her household are at risk of harm. A further purpose is that the victim of domestic violence has a real choice between remaining in her home and seeking protection from the criminal or civil law and leaving to begin a new life elsewhere.
>
> That being the case, it seems clear to me that, whatever may have been the position in 1977, the general understanding of the harm which intimate partners or other family members may do to one another has moved on. The purpose of the legislation would be achieved if the term "domestic violence"

[95] [2011] UKSC 3

were interpreted [to mean] … physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm."

While Baroness Hale talks specifically of a "word…capable of bearing several meanings and applying to many different types of behaviour…[which] can change and develop over time", what underlies this change are the sort of "changes in social standards and, of particular importance here, changes in social attitudes"[96] that mean that a term that might previously have been understood to refer only to physical abuse could now be understood to include psychological abuse.

Interestingly, Bennion draws a distinction between cases where there is "change in the meaning of an expression over time" (which can be a basis for an updating construction, as in *Yemshaw v Hounslow Borough Council* above), and cases where the "grammatical meaning" of a word has changed, where the meaning at the time of enactment should be used. Bennion gives the example of *R v Cockburn,*[97] where the defendant had been charged with an offence under the Offences Against the Person Act 1861, s. 31 which makes it an offence to set or place 'any spring gun, mantrap, or other engine' calculated to endanger life. At the time of enactment, the meaning of "engine" was much wider than it is today (or at the time of *R v Cockburn,* in 2008); the word could be used for any product of human ingenuity. The background to this case was described as follows:

[96] *Owens v Owens,* [2017] EWCA Civ 182
[97] [2008] EWCA Crim 316

In the course of a lawful investigation of the defendant's property, an army officer pushed open the door of a shed on his land. A spiked metal object made from two pieces of heavy steel plate into which 20 4-inch long nails, protruding at different angles, were welded, was connected by a metal rod or wire to the roof frame of the shed. Another wire connected it to the shed door. When the shed door was opened the object was activated and the force of gravity caused it to swing downwards and catch the person entering through the door. The spiked object struck the officer's forearm, two nails entered into his clothing, and a third punctured his forearm.

The court held that the arrangement did fall within s.31: the legislation did not only apply to instruments which acted through stored energy but to any “engine” calculated to kill or inflict grievous bodily harm. The court noted that the word “engine” had a broad meaning at the time of enactment and that this was the relevant one for the purpose of the case, noting at [12] that :

Something of the breadth of its meaning at the time when the 1827 Act came into force is identified in the dictionary itself where, among other references, we find a pair of scissors described as a 'little engine' in the *Rape of the Lock* (1712–1714) and a description of 'engines of restraint and pain' at the victim's feet in *Death Slavery* (1866).[98]

[98] The Spring-Gun Act 1827 was the precursor to s. 31 of the Offences Against the Person Act 1861.

Bennion's distinction between "the meaning of an expression over time" where a change can justify an updating construction and "the grammatical meaning of a word" where a change does not justify an updating construction seems somewhat opaque. One possibility is that judges will allow a change to the application of a word where they consider such a change both reflects the intention of Parliament and reflects a change in social context, as in *Yemshaw* above, where Baroness Hale considered that the intention of Parliament was to "to ensure that a person is not obliged to remain living in a home where she, her children or other members of her household are at risk of harm", and accepting that people now take a broader view of what constitutes harm than they may have done in 1996. In contrast the intention of Parliament as expressed in the Offences Against the Person Act 1861 was to make it an offence to set or place any sort of mechanical contrivance calculated to kill or cause grievous bodily harm. To adopt the modern, narrow meaning of 'engine" would not give effect to that intention, nor has there been any underlying change in social attitudes that would justify an updating construction so as to prevent the application of "engine" to the sort of contrivance the defendant in *R v Cockburn* had constructed ("[a] spiked metal object made from two pieces of heavy steel plate into which 20 4-inch long nails, protruding at different angles" intended to swing into somebody). Such a contrivance is clearly considered harmful now just as it would have been at the time of enactment in 1861.

Alternatively, one might argue that what Bennion refers to as a change in "the meaning of an expression over time" might more accurately be thought of as a

change in the extension of that expression. The courts have explicitly recognised that there may be cases where the extension of a word has changed, even if the meaning of the word has not. Per Lord Bingham in *R (on the application of Quintavalle) v Secretary of State for Health*[99] at [9]:

> There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of "cruel and unusual punishments" has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.

It is interesting to note that Lord Bingham here seems clearly to be referring to a change what linguists would call a term's *extension (*such that more punishments would now be considered to fall within that term's extension than in 1689), while in *Yemshaw* Baroness Hale refers to a change in the *meaning* of the word 'violence" (such that it includes psychological as well as physical violence). Arguably what Baroness Hale refers to as meaning might be more accurately considered extension,

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[99] [2003] UKHL 13, [2003] 2 AC 687, [2003] 2 All ER 113

just as the change in *Fitzpatrick* (regarding the word “family”) might be considered a change to the extension of that word.

Clearly changes in the social context (including changes to e.g. technology) are taken into account by judges in interpreting statutes (in relevance-theoretic terms, altering the set of assumptions available to them, or the relative accessibility of assumptions, for use in the interpretive process). The position regarding changes to word meaning (without an underlying social change) is slightly less clear; where a concept has broadened or narrowed due to social changes, the courts are free to accept those changes to the extent they do not go against the intention of Parliament as expressed in the text. However, it may not always be clear whether such a broadening or narrowing is the result of social changes or simply language change.

Information about the other provisions which make up an act can play a substantial role in the interpretation of a given provision. A statute is to be read as a whole,[100] rather than as an assemblage of individual provisions, which gives rise to a number of effects. For example, where an Act contains different words, it is assumed that they are intended to convey different meanings. By way of example, in the Accessories and Abettors Act 1861, s. 8, the words “aid, abet, counsel or

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[100] Per Lord Reid said in *IRC v Hinchy ([1960] AC 748 at 766)*:

> "… one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of the other clauses, and attributes to Parliament a comprehension of the whole Act."

procure" have been held each to have a different meaning;[101] otherwise, their use would be redundant.[102] Likewise, where the same words are used within the same Act, they are assumed to convey the same meaning.[103] (See also "*Presumptions about meaning*" below.)

R v Millward[104] concerned the interpretation of the Perjury Act 1911. The appellant, a police officer, had been convicted of perjury and appealed his conviction on the basis of s. 1 (1) of the Act:

> If any person lawfully sworn as a witness … in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury …

The appellant argued that the word "wilfully" in this section required proof that the defendant knew or believed that the question and answer were material, and that the offence was therefore not committed by someone knowingly making a false statement, even if material in law, if he has an honest belief that the statement was immaterial.

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[101] *A-G's Reference (No 1 of 1975) [1975] QB 773* at 778

[102] Compare Grice's maxim of brevity; if we assume that Parliament is not being unnecessarily prolix, each word must be there for a reason.

[103] *MC v Secretary of State for Work and Pensions (UC) [2018] UKUT 44.*

[104] *[1985] QB 519*

The Court of Appeal rejected this argument, upholding the conviction, by reference to a different provision of the Act, s. 1(6), which states that “the question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial”. Per Lord Lane CJ at p. 524:

> It is clear that the question to which section 1(6) refers can only arise out of section 1(1). If that subsection means that a statement is only material when a person making it believes it to be so, then section 1(6) is meaningless. It would be surprising, to say the least, if Parliament intended to say that it was for the judge to decide…

Thus, the meaning of “wilfully” in one provision was determined in part by the wording of a later provision. This is of course another difference between legal interpretation and utterance interpretation in real-time face to face conversation, where we can only make use of the linguistic context of preceding utterances.

Further, the principle that an Act should be read as a whole[105] can also be applied to groups of Acts which are considered *in pari materia*[106] (on the same subject).

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[105] That is to say, in its intertextual context (Meibauer (2012)).

[106] Bennion (21.5):

> Two or more Acts may be described as in *pari materia* (i.e. on the same subject matters) if:
> a) they have been given a collective title;
> b) they are required to be construed as one;
> c) they have identical short titles (apart from the year); or
> d) they otherwise deal with the same subject matter on similar lines;

5.3 Legislative context and purposive interpretations

Part of the linguistic context in which a statute exists is the stated purpose of its enactment, which may be stated or alluded to in its title, preamble, headings, or in its explanatory notes.[107] As I set out above and in Chapter 7, judges will often look at the purpose for which a statute was enacted as part of the context in which to interpret its provisions.

Clearly, a term like "legislative context" cannot be applied to ordinary communication, but the notion that a hearer takes account of what she perceives the speaker's purpose in communicating to be is fundamental to the relevance theory account of communication. Take the following example (from Wilson & Sperber (2004, p.615-616)).

a. Peter: Did John pay back the money he owed you?

b. Mary: No. He forgot to go to the bank.

And the schematic outline that the hearer, Peter, might use to construct hypotheses about Mary's utterance:

(a) Mary has said to Peter, 'He$_x$ forgot to go to the BANK$_1$ / BANK $_2$.' [He$_x$ = uninterpreted pronoun]	*Embedding of the decoded (incomplete) logical form of Mary's utterance into a*

[107] In very limited circumstances, a judge may look outside the text for guidance on what Parliament intended. See the discussion in Chapter 3.

[$BANK_1$ = financial institution] [$BANK_2$ = river bank]	*description of Mary's ostensive behaviour.*
(b) Mary's utterance will be optimally relevant to Peter.	*Expectation raised by recognition of Mary's ostensive behaviour and acceptance of the presumption of relevance it conveys.*
(c) Mary's utterance will achieve relevance by explaining why John has not repaid the money he owed her.	*Expectation raised by (b), together with the fact that such an explanation would be most relevant to Peter at this point.*
(d) Forgetting to go to the $BANK_1$ may make one unable to repay the money one owes.	*First assumption to occur to Peter which, together with other appropriate premises, might satisfy expectation (c). Accepted as an implicit premise of Mary's utterance.*
(e) John forgot to go to the $BANK_1$.	*First enrichment of the logical form of Mary's utterance to occur to Peter which might combine with (d) to lead to the satisfaction of (c). Accepted as an explicature of Mary's utterance.*
(f) John was unable to repay Mary the money he owes because he forgot to go to the $BANK_1$.	*Inferred from (d) and (e), satisfying (c) and accepted as an implicit conclusion of Mary's utterance.*

(g) John may repay Mary the money he owes when he next goes to the BANK$_1$.	*From (f) plus background knowledge. One of several possible weak implicatures of Mary's utterance which, together with (f), satisfy expectation (b).*

Looking at (c) from this schema ("Mary's utterance will achieve relevance by explaining why John has not repaid the money he owed her."), an interpretation of an utterance made in response to a question is likely to satisfy the hearer's expectations of relevance if it answers that question.[108] [109] Similarly, the interpretation of a legislative provision introduced for a stated purpose is likely to satisfy the reader's expectations of relevance if it meets that purpose (see the discussion of this principle later in this chapter).

To give an example of a purposive construction, in *R v Elsayed*, the court considered the wording of provisions of the Proceeds of Crime Act 2002, which concerned the meaning of the word "value".[110] In this case, drugs had been confiscated from the defendant and the question for the court was whether the value of those drugs was the value in the form in which they had been seized (wholesale value) or the value

[108] Here the explicit question "Did John pay back the money he owed you?" is answered by the explicit reply "No". "He forgot to go to the bank" answers the implicit question "Why?"

[109] Although of course there may be other utterances the speaker could make that would have greater cognitive effects, e.g. "Look out for that car!"

[110] [2014] EWCA Crim 333.

for which they could be sold, which was much higher. The court held that the higher "street value" was the appropriate measure:

> We consider that this conclusion, on the facts as found by the judge, flows from a "fair and purposive" construction of the relevant provisions of section 79 and section 80 of the 2002 Act. It also reflects the legislative purpose of the 2002 Act: to deprive a defendant of the benefit from his criminal conduct.
>
> [22]

The purpose of the provision was to deprive the defendant of the benefit he would have received as a result of his crime. This would have been the street value of the drugs- what he could have sold them for- and not their value in the form in which they were seized. This justified the court taking the word "value" to refer to the street value.

5.4 Context and legal presumptions

As I argue in Chapter 3, a modern group legislature such as the UK Parliament is highly unlikely to hold and communicate a specific intention to inform the reader of a sufficiently precise and determinate proposition such that a court can make use of it in determining the meaning of a provision. Rather, the legislature communicates that a given text *T* should have a particular status and legal effect and that its meaning should be determined according to the ordinary rules used to determine meaning[111]

[111] Compare *Ellis v Hurley*, in which the settlor likewise executed a legal document in a way which made its meaning whatever (reasonable) meaning the trustee choose to give it.

(in both the constitutive and “working out” sense of ‘determine’). Those ordinary rules include both rebuttable presumptions about the nature of the legislature which are known to Parliamentary Counsel (who draft the legislation) as well as to the judges who interpret it. These presumptions are quite different from some of the sorts of contextual assumptions which we make use of in ordinary conversation, which depend on the precise context in which the conversation occurs: although the presumptions can be rebutted (where outweighed by other interpretive factors) and the weight placed in them will vary, as statements they are fixed and invariant. I consider in the next part of this chapter those presumptions as part of the context used in the inferential process of comprehension of legislative texts. I shall argue that, while some of the implicated premises used in statutory interpretation are of a different nature from those used in ordinary communication, the process of interpretation guided by the search for relevance is the same.

5.4.1 Presumption against doubtful penalisation

As stated in Bennion (26.4):

> It is a principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account… The rationale is that the legislature is presumed to intend that a person on whom a hardship is inflicted should be given a fair warning.

This principle has been judicially approved in a number of cases.[112] As set out by Brett J:

> Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.[113]

I shall argue in Chapter 6 that judges interpreting legislative provisions which outlaw actions, impose penalties, limit the scope of a defence, impose taxes etc. (together "onerous provisions") generally do, and should, base their interpretations on explicit content alone, not implicit content. Likewise, where there are multiple potential explicatures which might appear equally relevant (for example, in cases of ambiguity or indeterminacy), the explicature which expresses the less harsh proposition is to be preferred. The principle against doubtful penalisation should generally apply, such that a judge's interpretation of that provision is limited to its explicit content, and (where there is more than one possible explicature) to the explicature which expresses the less harsh proposition. Conversely, where a provision limits the scope of an onerous provision or provides a defence to it, sufficiently clear implicit content may potentially be included in the communicated content of the provision, by virtue of the same principle, and where there are multiple potential explicatures, the

[112] Such as *Ricketts v Ad Valorem Factors Ltd* [2003] EWCA 1706, [2004] 1 BCLC 1 at [30]; *HKSAR v Tang Hoi On* [2003] 3 HKC 123 at [32].

[113] *Dickenson v Fletcher (1873) LR 9 CP 1 at 7.*

explicature which expresses the most generous proposition should be preferred. Note that the presumption against doubtful penalisation is rebuttable. As stated in Bennion [26.4]:

> The weight to be given to the presumption will necessarily depend upon the circumstances of the particular case. One factor that is likely to influence the weight given to the presumption is the severity of the detriment. If the detriment is minor, the presumption may be expected to carry little weight. If the detriment is severe, the principle will be correspondingly powerful.

The question in *Dickenson v Fletcher* concerned the circumstances in which a mine owner could be held criminally liable for breach of certain safety regulations. The defendant was the owner of a mine who had employed a competent lamp-man to examine and lock the safety lamps. However, on the day in question, and unknown to the owner, the lamp-man had given out lamps which were unlocked (no harm had occurred as a result). The question for the court was whether the owner had complied with the law by appointing a lamp-man and instructing him to lock the lamps, or whether the owner had breached the law because, on the day in question, the lamp-man had not done so.

All parties agreed that there was no legal obligation on the owner to check the lamps personally. The owner was found not guilty in the Magistrate's Court and the case was then appealed to the Court of Common Pleas, where the appellant (for the prosecution) argued that "[t]he statute expressly casts the duty on the owner and

agent" and therefore the owner should be held criminally liable. The respondent (for the defence) argued that, given that it was agreed that the owner was not required personally to check the lamps, the obligation imposed by the statute was simply to appoint an appropriate and competent person to do so. This the owner had done, and so there was no breach of the law, notwithstanding that the lamp-man had failed to lock the lamps on the day in question.

The court considered two possible interpretations of s.22 of the Mines Regulation Act 1860 (the section of the statute which imposed a penalty). This section stated:

> If any coal mine, colliery, or ironstone mine be worked, and through the default of the owner or agent thereof special rules have not been established for the same according to the provisions of this Act, or the general rules or the special rules for such coal mine, colliery, or ironstone mine, by this Act required to be established, have not been hung up or affixed, or have not, after obliteration or destruction, been renewed or restored as required by this Act, or any of such general rules or special rules provisions of which ought to be observed by the owner and principal agent or viewer of such coal mine, colliery, or ironstone mine, be neglected or wilfully violated by any such owner, agent, or viewer, such person shall be liable to a penalty of not exceeding 20*l.*

The key questions were:

- whether the words “through the default of the owner or agent thereof” applied to the whole of the provision or only to the words which immediately followed regarding special rules, and
- whether the words “default” and “neglected” should be interpreted as requiring an actual instance of personal default/neglect by the owner, or whether such default/neglect could be said to occur simply in virtue of a rule having been broken.

The court decided both of these questions in favour of the defendant: the words “through the default of the owner” governed the entire provision and “default” and “neglected” were interpreted as referring to an actual instance of personal default/neglect by the owner. As the owner had taken all reasonable steps to comply with the rules by appointing a lamp-man, there was no such neglect or default and so no fine could be imposed. As stated by Brett J at p.7:

> Those who contend that the penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty. Assuming that s. 10 says that the rule is to be observed, and that the owners and agent are the persons to observe it, we have then to consider what the 22nd section says. It does not say, if the rule is not observed the owner and agent shall be subject to a penalty. It says, "If through the default of the owner or agent thereof," the rule has been neglected, then the penalty shall be incurred.

Essentially, in linguistic terms the two questions consisted of resolving the syntactic ambiguity regarding the scope of “through the default of the owner” and determining the meaning of the words “default” and “neglect”. Were the concepts communicated by these words DEFAULT* and NEGLECT* (instances of a personal failure to act) or DEFAULT** and NEGLECT** (a state of being in default of the rules/having neglected the rules simply by virtue of a rule having been broken due to the actions of an employee). In order to determine the explicit content of s. 22, some lexical adjustment was required, with the presumption against doubtful penalisation making up part of the context in which that adjustment occurred.

To give a rough schema of the role of the presumption against doubtful penalisation in relation to the communicated concept $DEFAULT_1$:

(a) Parliament has said that the offence is committed where a rule has not been followed “through the $DEFAULT_1$/ $DEFAULT_2$ of the owner”. [$DEFAULT_1$ = personal failure to act] [$DEFAULT_2$ = an instance of a rule not having been followed]	*Embedding of the decoded (incomplete) logical form of the provision.*
(b) Parliament’s utterance will be optimally relevant to the judge.	*Expectation raised by recognition of Parliament’s ostensive behaviour*

	(passing the Act) and acceptance of the presumption of relevance it conveys.
(c) The provision will achieve relevance by setting out the circumstances in which an owner should be held liable for a breach of the rules	*Expectation raised by (b), together with the fact that such an explanation would be most relevant to the judge at this point.*
(d) In the absence of other contextual cues, either sense of DEFAULT could be appropriate.	*From (a).*
(e) It is a principle of legal policy that a person should not be penalised except under clear law.	*A legal presumption, accepted as an implicit premise of Parliament's utterance in passing the Act.*
(f) As it is unclear whether the concept that Parliament intended to communicate was $DEFAULT_1$ or $DEFAULT_2$, the court should interpret the provision as communicating the concept which is less likely to penalise the owner.	*From (d) and (e).*
(g) Parliament has said that the offence is committed where a rule has not been	*An enrichment of the logical form of the provision which might combine with (e)*

followed "through the DEFAULT$_1$ of the owner".	*to lead to the satisfaction of (c). Accepted as the explicature of the provision.*

Of course, in ordinary conversation, although no such formal presumption as the presumption against doubtful penalisation exists, our presumptions about speakers do form part of the context in which we interpret their utterances. For example, when speaking to a good friend we might tend to presume that her utterances are meant kindly and, where two possible interpretations are available, reject one which expressed an unpleasant or unkind proposition (for example, by interpreting her utterance as ironic), whereas the same words uttered by somebody else might be interpreted as expressing an unkind or unpleasant proposition. Although there are clear differences between some of the implicated premises used in statutory interpretation and those used in ordinary communication, the inferential interpretive process guided by the search for relevance remains the same.

5.4.2 Presumption of an ideal, rational legislature

As expressed in Bennion (11.3):

> The legislature is taken to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner.[114]

[114] Judicially approved in *R (on the application of Ahmed) v Secretary of State for the Home Department* *[2019] EWCA Civ 1070* at [15](7).

And

> There is a presumption that legislation has been competently drafted.[115]

Leggatt J[116] considered the effect of these presumptions:

> When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. That assumption shows appropriate respect for Parliament, enables Parliament most effectively to achieve its purposes and promotes the integrity of the law. In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort.

The existence of this presumption in legal interpretation provides one reason why legal interpretation can seem very different from ordinary utterance interpretation. In ordinary conversation we do not generally assume that the person speaking is an

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[115] *Richards v McBride (1881) 8 QBD 119* at 122.

[116] *R (on the application of N) v Walsall Metropolitan Borough Council, [2014] EWHC 1918* at [65].

ideal communicator, incapable of error. Therefore, when somebody misspeaks ("I've been feeding the penguins in Trafalgar Square" (Wilson, 2012, p. 240)) it is open to the hearer to interpret their utterance with this in mind and assume that she has misspoken, ask for clarification and so on. Judges, in contrast, are required to strive for an interpretation based on the presumption that Parliament has not misspoken: a statute banning people "feeding the penguins in Trafalgar Square" would be interpreted as doing just that.[117]

In section 5.4.1 I argue that the presumption against doubtful penalisation is a legal presumption accepted as an implicit premise of Parliament's utterance in passing an Act. Here, likewise, the presumption of an ideal, rational legislature would be accepted as an implicit premise of Parliament's utterance, justifying an interpretation of the provision as referring to penguins and not pigeons, even if that seemed surprising (subject to the limited exception set out in footnote 117). The difference in outcome here between legal interpretation and ordinary utterance interpretation is well accounted for by the principle that an ostensive stimulus is optimally relevant to an audience iff:

- It is relevant enough to be worth the audience's processing effort;

[117] Bennion notes that "If pushed too far, the concept of the 'ideal' legislature can produce unfortunate results" where it prevents the court from recognising a genuine drafting error. Courts can construe an Act so as to rectify a drafting error where they are "abundantly sure" (Bennion 15.1) of a) the intended purpose of the provision in question; b) that the drafter and the legislature inadvertently failed to give effect to that purpose in that provision; and c) the substance of the provision the legislature would have made (though not necessarily the precise words it would have used) had the error in the Bill been noticed.

- It is the most relevant one compatible with communicator's abilities and preferences.

(Wilson & Sperber, 2004, p. 612)

In ordinary conversation, we accept that our interlocutors are capable of error. Saying "penguins" and meaning "pigeons" may well be compatible with the abilities of a fallible speaker, but may be incompatible with the abilities of an "ideal" legislator. We recover different content (pigeons in the case of ordinary conversation, penguins in the case of legislation) due to the difference in premises, but the inferential process of interpretation guided by the search for relevance remains the same.

5.4.3 Presumptions about meaning

There is a presumption that where the same words are used more than once in one act they have the same meaning, and that where different words are used, they have different meanings.

To some extent, we sometimes apply a similar presumption in ordinary utterances: if a speaker says "My house has three bedrooms. My cottage is poorly insulated," we assume that she is talking about two different properties, despite the fact that a cottage is a kind of house. However, this presumption only goes so far: people vary the terms they use for reasons of style and because, in conversation, both speaker and hearer may forget which term was used previously.

5.5 Legal presumptions as implicated premises

The kinds of legal presumptions outlined above are interpretive norms in the courts of England and Wales, and as such are arguably best thought of as part of the social context which comprises part of the mutual cognitive environment of the legislature and judiciary. I do not mean here that individual legislators are aware of the intricacies of interpretive presumptions (although some may be and Parliamentary Counsel certainly are). Rather, as I argue in Chapter 2, the legislature's joint intention is that a given text *T* should have a particular status and legal effect and that its meaning should be determined (in both the constitutive and "working out" sense) according to the ordinary rules used to determine meaning. Such ordinary rules of course include the application of interpretive presumptions.

5.6 Canons of construction

The canons of construction are certain interpretive heuristics used in statutory interpretation, such as "*expressio unius est exclusio alterius*" ("expression of the one is exclusion of the other"), "*noscitur a sociis*" ("the meaning of a statutory term can be gathered from its associated words") and so on. I consider these, looking at "*expressio unius*" in particular, in Chapter 6.

The role of canons of construction is described by Bennion (20.1):

> Linguistic canons of construction are not confined to statutes, or even to the field of law. They are based on the rules of logic, grammar, syntax and

> punctuation; and the use of language as a medium of communication generally. They are not rules to be rigidly applied but provide a useful tool for analysing and describing the intention of the legislature based on ordinary English usage.

As such, the canons of construction may be distinguished from the types of presumption I have described above, which are presumptions specific to the nature of the legislature and legislation, not about language use generally (and I give some examples above of why they could not be applied to general usage).

The value of the canons was considered by Lord Neuberger in *Cusack v Harrow London Borough Council:*[118]

> … canons of construction have a valuable part to play in interpretation, provided that they are treated as guidelines rather than railway lines, as servants rather than masters. If invoked properly, they represent a very good example of the value of precedent … With few, if any, exceptions, the canons embody logic or common sense, but that is scarcely a reason for discarding them: on the contrary. Of course there will be many cases, where different canons will point to different answers, but that does not call their value into question. Provided that it is remembered that the canons exist to illuminate and help, but not to constrain or inhibit, they remain of real value.

118 [2013] UKSC 40, [2013] 4 All ER 97 at [58], [60].

As Bennion makes clear, the existence of legal canons of construction is effectively an attempt to codify the kinds of heuristics of interpretation which we make use of in ordinary language use (see also Carston, 2013): part of our interpretive process itself rather than an input to that process (as context is). However, I shall briefly raise the possibility here that in being codified in this way, such heuristics become both part of the interpretive process and – as part of the context of interpretation (Meibauer's (2012) extratextual context ("the relation of a text to aspects of the situation in which the text has been produced or interpreted")) – a contextual input to that process.

5.7 Conclusions

Context plays as great a part in the interpretation of legislation as it does in ordinary utterance interpretation. The key difference is how the relevant context for interpretation is selected. In ordinary conversation, this will vary freely depending on the situation. In the interpretation of legislation, while some implicated premises may vary freely, other implicated premises (such as the presumption against doubtful penalisation) are fixed: a judge can decide whether the presumption applies in a given case and how much weight should be placed on it, but the legal principle contained within it does not vary. I will go on (in Chapter 7) to consider some of the kinds of implicated premises that vary more freely, such as premises founded on (the judge's view of) the purpose of the legislation, premises founded on moral precepts, and so on.

As I demonstrate in the schema above (regarding *Dickenson v Fletcher)* relevance theory has no problem accounting for this. While the nature of some of the implicated premises used in statutory interpretation differs from the type of implicated premises used in ordinary conversation, the inferential process of interpretation guided by the search for relevance remains the same.

Chapter 6: Implicature, explicature and the interpretation of legal texts

6.1 Implicature and explicature

In this chapter, I shall consider the role of explicature and implicature in legal interpretation. I shall look at arguments (Borg, 2016) that the relevance-theoretic notion of explicature is ill-defined: I hope to show that it is not. I shall then consider how the courts have looked at the role of implications in legal texts,[119] taking account of the law of statutory interpretation as set out in Bennion and a number of leading cases. I shall argue that the courts' approach to implication in legal texts - that implications form part of the expressed meaning of a text where they are "necessary or proper" - fits more closely with the relevance-theoretic notion of explicature than with implicature. Finally, I shall argue that maxims such as *expressio unius est exclusio alterius*, sometimes considered evidence that courts *do* consider implicated conclusions to form part of the communicated meaning of onerous provisions in legal texts, in fact show no such thing.

Relevance theory posits a three-way split in the communicated content of an utterance. This split is between:

1. sentence meaning (sometimes not all of which is part of the communicated content);

[119] As opposed to implicatures.

2. a pragmatically enriched meaning which is the truth-conditional content of the utterance and is what the speaker asserts in saying it (the explicature)
3. further propositions which are merely implied and not asserted (implicatures).

In this way, relevance theory differs from some other approaches to semantics and pragmatics. According to semantic minimalism, for example:

> … every well-formed declarative sentence expresses a complete content, with a fixed set of truth conditions; and this content is determined by formal, standing meaning, given an assignment of values to recognised variables. A sentence's 'minimal' semantic content thus lines up nicely with the linguistic aspect of Grice's notion of what is 'said'. Grice also thought of "what is said" as being part of what a speaker intends to communicate. Whereas some minimalists (including Cappelen and Lepore) maintain that minimal contents play a similar role, others (including Borg) deny that they need always be intended by speakers (or arrived at by hearers); in many cases, they will not be. Instead, it is proposed that speakers often communicate only wider pragmatic contents.
>
> (Borg & Fisher, 2021, P.180-181)

To illustrate this distinction by way of example, I will use the sentence:

> I've had breakfast.

This sentence has a certain context-independent meaning. It also has a context-dependent meaning (and truth conditions) which will vary depending on its utterance: the truth conditions for an utterance of “I’ve had breakfast” by me are clearly different from the truth conditions of an utterance of the same words by someone else.

Thus far, relevance theorists and semantic minimalists (and other theorists of pragmatics) would agree. The distinction between the theories becomes clear when we consider what a speaker actually communicates in producing an utterance of “I’ve had breakfast.”

A typical relevance-theoretic analysis might place the utterance in a particular context: for example, it’s eight in the morning and John has just asked his wife Mary whether she would like some toast. She replies, “I’ve had breakfast.” John's interpretation of Mary’s response may proceed as follows:

1. Mary has said to John, "I've had breakfast."
2. Premise: Mary’s utterance will be optimally relevant to John. This expectation is raised by recognition of Mary’s ostensive behaviour and acceptance of the presumption of relevance it conveys.
3. Mary’s utterance will achieve relevance if it provides an answer to John's question, "Would you like some toast?" This expectation is raised by (2), together with the fact that such a response/answer would be most relevant to John at this point.

4. Assumption: If someone has eaten *recently*, they will not be hungry and so will not want to eat again. This is the first assumption to occur to John which, together with other appropriate premises, might satisfy expectation (3).
5. Based on the premises and assumption above, the first enrichment of the logical form of Mary's utterance that is likely to occur to John is that Mary has had breakfast *recently*.[120] This will be accepted by John as the explicature of her utterance, that is to say, as what she explicitly asserts.

Mary's utterance also gives rise to the implicated conclusion that she does not want any toast, based on the explicature given at (5) plus John's background knowledge.

In contrast, a semantic minimalist approach would allow only the saturation of the indexical "I" in determining the truth conditional content of the sentence. Mary's utterance of "I've had breakfast" will be true provided that, at some point in her life, Mary has had breakfast. The whole of the rest of the communicated content (that (1) Mary has had breakfast that morning and (2) therefore does not want a slice of toast) has the status of implicature: that is to say, something that is merely implied. (An alternative analysis might be that there is some sort of temporal variable (supplied by the encoded linguistic tense) that has to be contextually saturated.)

[120] A logical form is a "non-propositional conceptual representation, generated entirely from the context-free meaning of lexical items and the syntax of the sentence uttered" (Carston & Hall, 2012, p.55)

The minimalist approach has certain attractions, which will be discussed below. It also has at least one serious drawback, at least from the perspective of somebody looking to analyse the meaning of legal texts, in that it arguably treats all communicated content that is not contained within the standing meaning of the sentence in the same way: it allows for no distinction of the type which relevance theory allows for between the explicature of an utterance (Mary has had breakfast this morning) which is explicitly asserted despite not being encoded, and any implicatures (that she does not want a slice of toast) which are merely implied. Minimalists (such as Cappelen & Lepore, 2005) have responded to this criticism, rejecting it as a mischaracterisation of their position (in Cappelen & Lepore's case, semantic minimalism is combined with what they call Speech Act Pluralism, the notion that an utterance token can carry out more than one speech act):

> speakers use sentences to make claims, assertions, suggestions, requests, claims, statements, or raise hypotheses, inquiries, etc., *the contents of which can be (and typically are) radically different from the semantic contents of (the propositions semantically expressed by) these utterances*. The speech act content (i.e., what was said, asserted, claimed, asked, etc.) depends on a potentially indefinite range of facts about the speaker, his audience, their shared context, the reporter (i.e., the person recounting what was said), the reporter's audience, and their shared context.
>
> (p. 176)(emphasis added)

However, it is not clear to me that this truly provides an adequate account of the distinction between content which is explicitly asserted despite not being encoded

and content which is merely implied. As I will argue below, the courts very regularly interpret legislation in ways which require a pragmatically enriched version of the text. However, they very rarely interpret legislation in ways which rely on implicatures alone.[121]

An important caveat to any analysis of linguistic meaning in legal texts is that judicial decisions can be inconsistent. Judges take different approaches to the extent to which context should determine the meaning of a text. They also sometimes make mistakes. Thus an analysis of linguistic meaning in legal texts can sometimes come down to what judges tend to do, or what they do frequently as opposed to what they do rarely. Thus no legal or linguistic theory based purely on a handful of cases selected to support it will be very robust. Likewise, no legal or linguistic theory can be effectively disproved by pointing to a case or handful of cases which went the other way.

6.2 A semantic minimalist criticism of the notion of explicature[122]

As stated above, relevance theory posits three kinds of meaning within an utterance: what the sentence means, what the speaker explicitly asserts (the explicature) and what she implies (the implicature). In 'Exploding Explicatures' (2016), Borg concludes that this approach fails to put forward a coherent definition of explicature: explicature is defined variously as a development of the logical form, as what the

[121] In this chapter, unless the context requires otherwise, the word "implicature" is used in the sense generally meant by relevance theorists and is distinct from explicature.

[122] This section incorporates some of my own (unpublished) work submitted in the course of my Master's degree in linguistics.

speaker/hearer has in mind when communicating, and in relation to a public notion of assertion. She posits that these definitions pull apart from one another "and thus that the notion of an explicature explodes" (p. 353)[123].

If Borg is correct that the notion of explicature turns out to be ill-defined, an analysis of legal interpretation which argues for explicature as the level of meaning at which courts should (and do) interpret legal texts will necessarily be flawed. In this section, I shall argue that, while Borg raises interesting points regarding pragmatic effects, she ultimately fails to dispatch explicatures. Not only does she not succeed in undermining the definition of explicature,[124] she also largely fails to show that alternative functional definitions are incompatible with either the canonical definition or with one another.

Borg sets out the three-way division used in relevance theory:[125]

1. linguistically encoded content
2. explicature
3. implicature

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123 Although note that this criticism does not necessarily imply that the three-way division of meaning is incorrect, only that the relevance theory notion of explicature is not the right kind of notion to employ in that division.

124 Borg describes explicature as "the propositional content recovered on the basis of [the standing meaning of the sentence] via a range of pragmatic processes (e.g. disambiguation, reference determination and what we will below term 'free pragmatic effects') which yields what the speaker explicitly asserts" (p. 337)

125 This three-way division contrasts with the Gricean binary division between 'what is said' and implicature, and with the Minimalist division between what the sentence means and what the speaker means.

The linguistically encoded content of a sentence involves no pragmatic processes: any sentence containing, e.g., an indexical will be sub-propositional at this level.

Explicatures, however, are propositional. Not only do they undergo saturation (the filling-in of semantic slots through processes such as reference assignment), but they may also be enhanced by free pragmatic effects. Unlike saturation, free pragmatic effects are optional processes. Borg's example, "I've eaten," demonstrates the difference between mandatory and optional processes: saturation requires the mandatory assignment of a referent to "I" and (with temporal resolution) gives a truth-evaluable statement (equivalent to Gricean 'what is said'). The relevance-theoretic model, in contrast, allows free pragmatic effects (i.e. pragmatic effects which are not linguistically mandated) to alter the content of the statement: someone saying, "I've eaten," may mean they have eaten recently. This meaning forms part of the explicature, and thus what the speaker asserts.

The third element of meaning is implicature, which comprises content conveyed indirectly and inferred from the explicature. Borg uses Carston's example (2009, p. 36) to demonstrate this division:

A: How was the party?

B: There was not enough drink and everyone left early.

The encoded content of B's utterance is the meaning given for the lexical entries for the words used plus the syntax of the sentence. The explicature, however, is something like:

> There was not enough *alcoholic* drink *to satisfy the people at [the party]*$_i$ and *so* everyone *who came to [the party]*$_i$ left *[the party]*$_i$ *early*.

From this, hearers derive the implicated conclusion that the party was no good.

The canonical definition is that explicature is a communicated proposition which is a pragmatically inferred (which is to say, pragmatically mandated) development of the logical form.[126] Borg considers the free pragmatic effects relevance theorists posit contribute to this development: unarticulated constituents (UCs) and meaning modulation.

Within relevance theory, UCs are constituents which contribute to the content of explicatures but are not mandated by the linguistic form (for example, where the speaker looks out of the window and remarks, "It's raining" (*It's raining <u>in the speaker's current location</u>*). Modulation is the process whereby elements extant in the logical form are modified in meaning. Thus, while the utterance "I want a red pen" could refer to either a pen with red casing or with red ink, the explicature expresses a

[126] Sperber & Wilson, 1986/1995, p. 182: 'An assumption communicated by an utterance U is explicit (and hence is an explicature) if and only if it is a development of a logical form encoded by U'.

modulated concept *RED** or RED**. Both UCs and modulation are optional processes: utterances can be propositional without them.

Borg asks why relevance theorists do not treat free pragmatic effects as resulting from a single process of modulation rather than two processes. She notes that weather predicates have traditionally been considered to require UCs. If I look outside and say, "It's raining," I mean *It's raining [in my current location].* This additional locational content is considered a UC by relevance theorists: something asserted but not represented linguistically.

Borg posits that relevance theorists have no requirement for UCs here: modulation can do the whole job, accounting for the enhancement of "It's raining" to include location. Modulation of the predicate "is raining" to mean *is raining-at-l* (where *l* has a contextually determined value) removes the need for UCs.

Thus Borg argues that modulation alone could account for free pragmatic effects within relevance theory. A number of linguists have considered whether cases traditionally analysed as UCs may better be considered as modulation: the utterance "You need money to buy a house in London" may be an example of modulation of the concept MONEY, rather than a UC ("You need [A LOT OF] money") (Carston & Hall, 2012, p. 60). However, weather predicates are generally considered axiomatic examples of UCs.

The benefits of being able to ascribe all free pragmatic effects to modulation are clear: a notion of pragmatic enhancement that operates only on extant elements of the logical form is more constrained than one which allows additional constituents. It might go some way to answer critics who see the notion of UCs as unduly liberal (e.g., Stanley (2002)). However, as Borg herself notes "it is currently not clear exactly what the constraints are on broadening and narrowing of senses" (2016, p. 342): to replace the notion of UCs with unconstrained modulation would leave modulation open to the same criticisms UCs have attracted. Thus, while Borg sets out an analysis of weather predicates with recourse to modulation alone, she can arguably do so only by taking a notion of modulation so broad that it would attract accusations of lack of constraint and over-generation: after all, it is hardly less constrained to modulate "is raining" *to raining-at-l* than to rely on a UC [*at l*]. Each requires the inclusion of contextual information not derived from the logical form of the utterance. One could even argue that Borg's approach does not truly obviate the need for UCs but merely imports the UC into the modulated meaning of the extant constituent.

Borg then considers whether there are clear rules under which pragmatic enrichments contribute either to explicature or implicature. She does this by reference to two tests: the Scope test and the Locality constraint.

6.2.1 The Scope Test

According to Carston (2002) and Recanati (1989/91), the Scope test can show whether pragmatically inferred constituents comprise part of the explicature or are in

fact merely implicated. The test proceeds by embedding the utterance within the scope of a logical operator and considering its truth conditions. Borg gives the example:

> If Jill [drank five beers and drove home]/[drove home and drank five beers], she can be arrested for drunk driving.

Intuitions here converge on the position that the two antecedents make different contributions to the truth conditions of the conditional such that while one of them seems to be true, the other seems to be false.

However, as Carston & Hall (2012) state (and Borg agrees), the Scope test may not demonstrate the distinction between implicit and explicit content for particular utterances. Free pragmatic enrichments are optional: their operation depends on the context. Carston & Hall (2012, p.68) state that "the line between explicature and implicature can vary from occasion to occasion of utterance of the same sentence type", but surely this would be better put as, "the line between explicature and implicature can vary from occasion to occasion of utterance of the same sentence"? It is the utterance token (in the context of utterance) rather than the utterance type which determines the explicit/implicit distinction. Take, for example, the temporal ordering and causation communicated in an utterance "Mary fell down a manhole and broke her leg". This is likely to form part of the explicature if the speaker is seeking to explain the cause of Mary's injury, but could potentially form an implicature if the utterance is made in response to the request, "Tell me two things

that happened to Mary recently?" While the Scope Test may assist with distinguishing between explicit and implicit content, it is not definitive.

6.2.2 The Locality Constraint

Borg next considers the Locality constraint. Carston & Hall (2012) assert that effects which operate locally (that is, to sub-propositional constituents) contribute to explicature while those operating globally (that is, giving rise to propositions) contribute to implicature. The utterance, "this steak is raw", applied to an insufficiently-cooked steak, relies on modulation of RAW to the inferred concept RAW* (insufficiently cooked). This effect applies at a sub-propositional level and thus forms part of the explicature. However, any resulting implicature (*The customer wants a replacement meal*) arises as a proposition.

Borg dismisses this distinction, arguing that, often, numerous potential explicatures are available. The answer below could be modulated in various ways:

A: Do you want to have dinner?

B: I'm going to the cinema.

Borg notes one might narrow the concept GOING-TO-THE-CINEMA to GOING-TO-THE-CINEMA-TONIGHT: this local modulation allows the hearer to derive the global implicature that B is unable to accept the invitation. However, one might narrow the concept to GOING-TO-THE-CINEMA-AT-A-TIME-THAT-MAKES-HAVING-DINNER-

IMPOSSIBLE. Borg asserts that here there is no need for implicature: the fact that B cannot come to dinner is directly asserted.

While I agree that both modulations are possible, it does not follow that no implicature arises from the second modulation. Even if the concept is modulated to GOING-TO-THE-CINEMA-AT-A-TIME-THAT-MAKES-HAVING-DINNER-IMPOSSIBLE, a further step must be taken to the implied proposition that B is declining the dinner invitation. The fact that this implicature is easily accessible does not obviate the need for it to meet A's expectations of relevance. Further, relevance theory does not suggest that the modulation process is entirely unconstrained: while free pragmatic effects are not linguistically mandated, they are pragmatically mandated by contextually-specific expectations of relevance.

Borg considers further characterisations of explicature, which she classifies as psychological (relating to "the contents entertained by speakers or hearers during on-line processing of communicative acts" (2016, p. 335)) or communication-based (as they look to a "more publicly-oriented understanding of the communicative process" (2016, p. 346)).

6.2.3 Explicatures as what the speaker intends directly to communicate

Borg's criticism of this psychological definition rests on her assertion that "in many cases, the speaker may not have any very definite content in mind to communicate". She refers to Wilson's example (2011) of the teacher who asks for a red pencil. Wilson notes:

> "the concept RED PENCIL applies to any pencil that stands in some relation to the colour red, e.g. pencils which are painted red, pencils that write in red … and so on". (p. 181)

Wilson contends that the teacher will necessarily have internally determined a specific sub-type of red pencil (she is asking "not simply for a RED PENCIL, but for a RED PENCIL*" (p. 181)) (e.g. one that writes in red).

Borg rejects this analysis, arguing that the teacher may not have decided what kind of red pen (sic) she requires. She compares this with someone stating, "I want to travel to London": on hearing there is a bus, the traveller replies she does not want to take the bus. The initial claim is sharpened: the traveller wants to go to London but not by bus. This, Borg claims, is equivalent to the teacher and her pen: she may initially ask for a red pen but only modulate the meaning of RED to RED* later.

This comparison is unconvincing. It is plausible that someone might state they wish to travel to London and only later consider the means by which to travel. It is far less plausible that someone would request a red pen without having internally determined the meaning of RED: the teacher must have had an aim in mind (a RED PEN* with red ink to mark some homework or a RED PEN** with red casing to match her red pencil case, etc.). Borg's comparison would seem more applicable to a teacher saying, "I want a pen", then rejecting one offered saying, "I meant a red one". Here,

the teacher would simply be refining her request (just as the traveller refined her wish to travel to London).

As apparent support for her position, Borg notes that Sperber & Wilson (2015) state that communicated meaning may be indeterminate. However, the examples in their paper do not seem relevant here: first, they refer to metaphors such as “Juliet is the sun”, the full meaning of which cannot be paraphrased; and secondly they consider non-verbal cases, such as ostensively sniffing the air to communicate something indeterminate. Neither example seems relevant to the modulation of concepts like RED PEN, where the modulated meaning is easily paraphrased (a pen with red casing, a pen with red ink, etc.).

6.2.4 Explicatures as the first proposition the hearer entertains via relevance processing

Borg argues that explicature is otiose in understanding how people grasp meaning. Regarding the example above (“Do you want to have dinner?”), she argues:

> it’s perfectly possible that I can grasp the proposition that you can’t or won’t have dinner with me, just given Grice’s notion of ‘what is said by the sentence’ and an understanding of the context in which the sentence is produced.
>
> (p. 348)

Thus there is no need for an “intermediate proposition which slightly pragmatically enhances this literal meaning [what is said by the sentence]”.

Borg is correct that it is implausible to posit a laborious process whereby A first recovers the explicature and only then begins to comprehend that B is declining the invitation. However, this is not how relevance-theoretic pragmaticists believe the communicative process works:

> …a hearer does not first decode the entire utterance, then saturate, disambiguate, enrich, and modulate the decoded meaning in order to arrive at explicature…and only then use the explicature, together with contextual assumptions, to form hypotheses about implicatures. Instead, the explicatures, implicatures, and contextual assumptions are mutually adjusted in parallel until they form an inferentially sound relation, with premises (explicature, contextual assumptions) warranting conclusions (implicatures). It follows that a hypothesis about an implicature can both precede and shape a hypothesis about an explicature.
>
> (Carston & Hall, 2012, p. 68-69)

Note here that Carston & Hall argue that a *hypothesis* about an implicature can precede and shape a *hypothesis* about an explicature: the explicature must still be derived to the hearer's satisfaction in order to support the hypothesis about the implicature. Hearers do not derive explicatures and implicatures by a linear process but through a complex process of mutual adjustment.

6.2.5 Explicatures as the propositions which warrant the recovery of implicatures

Similar points apply to the notion that explicatures warrant the recovery of implicatures. Borg argues that, when a mother says to her child, “You are not going to die” (from a grazed knee), hearers understand she is telling him to calm down, without first forming the explicature *you are not going to die from that injury*. However, Borg is largely attacking a straw man here: relevance theorists do not claim that hearers first derive the explicature and only then derive implicatures (see Carston & Hall above). Rather, explicatures warrant implicatures where the relation between explicature and implicature is inferentially sound, that is, ultimately, the interpretation consists of a set of propositions forming an inference in which the explicature is a key premise for any implicated conclusions.

Borg then considers communication-based definitions of explicature.

6.2.6 Explicatures as the propositions by which a speaker’s utterance is judged true or false

Borg considers this definition in relation to Carston’s example (2009, p. 36). She asks, under what circumstances is this explicature true?

> There was not enough *alcoholic* drink *to satisfy the people at [the party]*$_i$ and *so* everyone *who came to [the party]*$_i$ left *[the party]*$_i$ *early*.

Borg suggests various situations which might affect the truth of the utterance: “is it true if there was enough alcoholic drink at the party but it was held in a locked cupboard?” “is what B said true in a situation where there was plenty of crème de

menthe available at the party…" etc. She posits that each question requires the original content of the utterance to be sharpened, but that "these moves reflect decisions about how to sharpen content not an uncovering of material which is already present" (p. 351). Her concern is that, effectively, soliciting judgements of truth and falsity for the content of an utterance can influence what that content is deemed to be.

However, it is not clear to me that this objection undermines the notion of explicature as the proposition by which the speaker's utterance is judged true or false. Take, for example, the situation in which the hearer subsequently learns that there was plenty of crème de menthe at the party. The hearer may consider that the speaker's statement had therefore been untrue: she understood the speaker to be expressing the proposition that there was no alcoholic drink at all and that was not the case. Alternatively, she may consider that, in retrospect, the speaker had been expressing the proposition that there was no alcoholic drink at the party *that anybody wanted to drink*, and that proposition was true. The fact that, in this latter case, the hearer considers that the proposition actually expressed was a slightly different one from the one which she first recovered does not mean that she does not take the explicature of the utterance as the proposition by which she may judge it true or false; we often adjust what we believe people to have expressed in the light of later information – "ah, I thought she meant X but really she must have meant Y!" – and this does not undermine the notion of explicature as the proposition by which we may judge an utterance true or false. It is just an example of imperfect communication.

6.2.7 Explicatures as asserted content

Borg looks next at the notion of explicature as asserted content, stating that “one can cancel or withdraw from attributed implicatures in a way which one cannot from asserted content” (although note that many theorists would disagree with this characterisation; see for example Carston, 2002). Borg raises two issues regarding the characterisation of explicature as asserted content.

First she argues that, if the notion of explicature is intended to explain our intuitions about asserted content, we cannot define explicature simply through appeal to our intuitions about such content. This is correct. Borg then posits that our intuitions about asserted content might not tally with the canonically defined distinction between explicature and implicature, and that we sometimes allow assertion to cover fairly minimal content (close to compositional linguistic meaning), while at other times holding speakers responsible for more pragmatically enhanced content. This is correct. However, nothing here seems to undermine the notion that the explicature of a sentence is the content the speaker asserts: as noted above, free pragmatic effects are optional processes and thus the content of an explicature (what the speaker is considered to have asserted) will depend on the specific context.

Borg notes that we sometimes hold people responsible for more pragmatically enriched content than explicature. She notes that UK libel law can apply to any false defamatory statement, whether the defamatory content was explicit or implicit. This

is true, but in no way undermines the notion of explicature. A statement is defamatory if it tends to injure the reputation of another person: this is not a question of whether the content of the statement has been *asserted* but simply of whether it has been published.[127] Any communicated content could be defamatory, whether asserted or implied, provided that the meaning is sufficiently clear that a reasonable person would understand it (indeed, the law can even apply where the statement was made accidentally): the cause of action arises from the harm done to the subject's reputation in the mind of the hearer, irrespective of the speaker's intentions. The fact that the law holds people responsible for what they communicate, deliberately or otherwise, rather than what they assert, does not undermine the notion that explicature comprises asserted content.

Borg concludes that explicatures are defined in three different ways, and that these definitions "pull apart", giving rise to the eponymous explosion. I disagree, and in this section of my thesis I have tried to show that there is nothing (or little) inconsistent in the various definitions applied to the concept of explicature. Borg raises many interesting points: her criticisms of the definition of explicature as "the first proposition the hearer entertains" are accurate, as is her argument that unarticulated constituents may be unnecessary, although such points are not new. However, ultimately she fails to show that explicature (which I would characterise as the enriched, explicit and truth-conditional content of an utterance) plays no role in online

[127] "Published" in this context means "the communication of the defamatory matter to a third person" (*Pullman v Walter Hills & Co Ltd* [1891] 1 QB 524 at 529). Indeed, defamation can occur even where there is no intention at all to refer to the claimant, provided that people to whom the matter was published would reasonably understand it to refer to the claimant (*Morgan v Odhams Press Limited* [1971] 2 All ER 1156).

processing. This level of meaning remains prerequisite to our understanding of communication: it is the meaning which speakers use both in evaluating propositional truth and in determining the robustness of implicatures.

6.2.7 Minimal semantics and statutory interpretation

Borg considers legal language further in *Explanatory roles for minimal content* (2019), in which she considers the standard objection to so-called 'minimal semantics' (Borg 2004, 2012, Cappelen and Lepore 2005) that minimal contents are explanatorily redundant as they play no role in an adequate account of linguistic communication, a position taken by Levinson (2000), Carston (2002) and Recanati (2004).

Borg defines minimal semantics as follows:

> there are propositional, truth-evaluable contents which attach to all well-formed declarative sentences (relativized to a context of utterance), in virtue of the standard lexico-syntactic constituents of those sentences alone.
>
> (p.513)

She looks in the paper at a number of legal cases in the hope of showing that the courts take account of minimal semantic contents in determining the meaning of legislation. However, her analysis of the principles which courts apply, and of the cases themselves, is flawed.

Borg begins by stating that:

> …two of the three rules of statutory interpretation standardly applied in the UK – the 'Plain Meaning Rule' and the 'Golden Rule' – rest on minimal semantic content
>
> (p. 526)

She states that the Plain Meaning Rule "requires the interpretation assigned to legal statements to coincide with the literal meaning of the sentences used to express those judgements", and that the Golden Rule "allows departure from literal meaning, where the results of literal interpretation lead to absurd results". Borg does not explain here what she means by "literal meaning", whether she sees it as equivalent to encoded meaning nor she takes encoded meaning to be. But more fundamentally, her description is a complete mischaracterisation of the Plain Meaning Rule, which in fact states that, where the meaning of a provision is plain, that is the meaning that should be followed. This was set out clearly by Lord Reid:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.[128]

[128] *Pinner v Everett* [1969] 1 WLR 1266 at 1273

The effect of the Plain Meaning Rule is to ensure that, where the meaning is plain, the courts do not apply some other rule in order to reach a different interpretation. This was discussed by Lord Bingham in *R v Bentham* [2005] UKHL 18:

> Rules of statutory construction have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain. Purposive construction cannot be relied on to create an offence which Parliament has not created.

In other words, if the meaning is plain the courts cannot use another rule of statutory construction (for example, by looking to the purpose of the statute) in order to interpret the provision in a different way. What Parliament has plainly said should be accepted as what it has said.

There is nothing here about “literal meaning” at all, and certainly nothing which “requires the interpretation assigned to legal statements to coincide with the literal meaning of the sentences used to express those judgements” (Borg 2019, p. 526). Borg appears to equate literal meaning with plain meaning (or in the words of Lord Reid, natural or ordinary meaning) but makes no arguments for this. There is of course a large debate about what the plain, ordinary or natural meaning of a legislative provision is and to what extent it should be taken to include pragmatic enrichments, but this is a debate which Borg has simply sidestepped or missed. She then goes on to consider a number of cases, starting with *Smith*. She quotes the judgment as follows:

> the Court of Appeals held that § 924(c)(1)'s plain language imposes no requirement that a firearm be "used" as a weapon, but applies to any use of a gun that facilitates in any manner the commission of a drug offense...Had Congress intended § 924(c)(1) to require proof that the defendant not only used his firearm but used it in a specific manner -- as a weapon -- it could have so indicated in the statute.

Borg argues that "we cannot even make sense of the Supreme Court judgement *unless* we admit a propositional content for the statute independent of rich pragmatic adjustment". It is not entirely clear what claim she is making here, but the fact that the court in this case did not interpret the word "use" as USE-AS-A-FIREARM does not demonstrate that the court was only interested in minimal semantic content, only that (in the context in question) the court was not convinced that the narrowed meaning was the appropriate one. In fact, the judgment arguably makes clear that the decision not to narrow USE in this way was context-dependent:

> Had Congress intended § 924(c)(1) to require proof that the defendant not only used his firearm but used it in a specific manner -- as a weapon -- it could have so indicated in the statute. However, Congress did not.

In other words, in the context in which it was open to Congress to specify a narrower sense of USE, the fact that Congress chose not to do so was a reason to assume that it did not intend the word to be interpreted in that narrower sense. This statement of the court makes clear that not narrowing USE was a choice influenced

by the context in which the word appears, rather than suggesting that the court simply looked to minimal semantic content with no regard to context. After all, a pragmatically-motivated decision not to narrow is still a pragmatically-motivated decision.

Borg does not look at any of the other cases which considered 18 U.S.C. § 924(c)(1) (such as *Watson*), where the Supreme Court *did* narrow USE to USE-AS-A-FIREARM. The next two cases which Borg uses to illustrate her point are surprising, as both are examples of judicial decisions explicitly based on meanings which are a long way from the literal meaning of the words used.

The first case she considers is *R v Harris* (1836), 7 C&P 446. This case concerned a woman who had bitten off someone's nose. She was convicted under a statute making it an offence 'to stab, cut or wound' (9 Geo. 4, c.31, s. 12) and this conviction was overturned on appeal. Borg describes the case as follows:

> a defendant…had his [sic] conviction quashed on appeal where the court found that the literal understanding of 'stabbing, cutting or wounding' required an instrument to be used.
>
> (p. 527)

First, it is far from obvious that the literal meaning of "wound" requires an instrument to be used. Further, the judgment makes no reference to literal meaning at all. Rather, the case referred to an earlier precedent, that of *R v Stevens*,[129] in which a

[129] No case reference is given in the report.

defendant indicted under the same section for biting off part of a policeman's finger was found not guilty on the following grounds:

> It was evidently the intention of the legislature, according to the words of the statute, that the wounding should be inflicted with some instrument and not by the hands or teeth…[footnote] The first part of the section speaks of shooting at and drawing a trigger upon a person, and attempting to discharge loaded arms at a person, and then proceeds to say "or shall unlawfully and maliciously stab, cut or wound any person"…

In other words, the court narrowed WOUND to WOUND-WITH-A-WEAPON due to the earlier part of the section in question referring to the use of weapons. That is to say, it looked at the context in which the word was used in order to narrow it in a way which reflected the intention of the legislature according to the words of the statute. [130] [131] The claim Borg makes regarding *R v Harris* is not a strong one ("making sense of what the courts were doing (whether we agree with the judgements or not) requires appeal to minimal content") and it is hard to see any basis on which the case supports the claim.

The next case which Borg considers is an even clearer example of the courts departing from the "literal" meaning of a word. In *Fisher v Bell* (1961), 1 QB 394, the defendant's conviction for offering a flick knife for sale was overturned on the

[130] The cannon of construction in question is known as *noscitur a sociis*- "it is known from its associates*".*

[131] The report of this case is extremely short and there is no discussion of the meaning of "wound" given beyond what I have set out here.

grounds that displaying a flick knife in a shop window, with a price tag attached, did not constitute an "offer" in the technical sense but was rather "an invitation to treat". The distinction the court made here was based on the law of contract. Any legally-binding contract must have four elements: an offer, acceptance of that offer (together these make an agreement between two parties), consideration (broadly, a promise or performance given in exchange for another, such as the promise to pay £500 for a car), and an intention to create legal relations. The meaning of each of these elements has been judicially considered, and it has long been held that, in relation to the formation of contracts, simply displaying an item on a shelf in a shop with a price tag does not constitute an offer to sell.[132] Rather, it is an "invitation to treat" (i.e. an invitation for the would-be purchaser to make an offer to buy). The importance of the distinction can be seen, for example, where an item on a shelf has been incorrectly priced: if placing the item on the shelf with the price were an offer to sell, the buyer could simply accept the offer by agreeing to buy at that price and so form a binding contract. Deeming placing of the item on the shelf to be an invitation to treat avoids the risk: when the would-be purchaser takes the item to the counter to pay for it, they are merely offering to buy it, and the shopkeeper has the opportunity to decline to sell.

In *Fisher v Bell*, the defendant had been convicted of offering a flick knife for sale, and the conviction was quashed on appeal on the basis that (under the law of contract) merely putting an item on display with a price was not an offer for sale. The

[132] See, for example, *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401, [1953] 1 All ER 482, CA

court imported that technical definition from the law of contract into a criminal case, noting that this led to an interpretation contrary to its meaning in "ordinary language". Per Lord Parker CJ:

> The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I think that most lay people would be inclined to the view (as, indeed, I was myself when I first read these papers), that if a knife were displayed in a window like that with a price attached to it, it was nonsense to say that that was not offering it for sale. The knife is there inviting people to buy it, and in ordinary language it is for sale; but any statute must be looked at in the light of the general law of the country, for Parliament must be taken to know the general law. It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat….In those circumstances I, for my part, though I confess reluctantly, am driven to the conclusion that no offence was here committed.

Lord Parker goes on to describe the outcome as appearing "absurd" and yet states that it is the correct one in law.

Again, the claim Borg makes for this case is only that "making sense of what the courts were doing (whether we agree with the judgements or not) requires appeal to minimal content" and yet the case does not appear to provide any support for that position. The court's reasoning was not based on the literal meaning of "offer for

sale" but on a narrow, technical meaning derived from the law of contract. Even in describing the position it goes on to reject ("most lay people would be inclined to the view…that if a knife were displayed in a window like that with a price attached to it, it was nonsense to say that that was not offering it for sale"), the court does not refer to literal meaning but something more like common usage or perhaps ordinary meaning – something which is not synonymous with literal meaning or minimal semantic content, as I argue above. If Borg's position is that, even to have discussions of this kind, a court would require some notion of minimal content, this case would seem a poor example: the court does not refer at all to anything like literal meaning but to what "most lay people" would understand by the expression "offer for sale".

Having considered Borg's criticisms of the notion of explicature and her arguments regarding minimal semantic content in legal interpretation, I will now look in more details at cases where the courts considered implicit/explicit content. Do courts tend to distinguish between the sort of non-encoded content that relevance theorists would characterise as explicature and that which they would characterise as implicature? If so, this would seem to support the notion that there is a distinction between these two types of non-encoded content.

6.3 Bennion on implying

Bennion is a useful starting point for considering the extent to which what a legal text communicates is its encoded meaning, its explicature, or its explicature and implicatures. At first sight, Bennion would appear to tend towards the last of these. Section 11.5 contains a full discussion of what it calls the "implications" of legal texts:

> The interpreter of legislation needs to accept that it is a fact of language that a statement consists not only of what is expressed but also of what is implied. Implications may arise from the language used, from the context, or from the application of some external rule or principle. They are of equal force, whatever their derivation.

Further:

> In ordinary speech or writing it is a recognised method to say expressly no more than is required to make the meaning clear, the obvious implications remaining unexpressed. The drafter of legislation, striving to be concise, may need to adopt the same method.

It quotes approvingly from Reed Dickerson, *Materials on Legal Drafting* (1981) p 133.

> It is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication.

We must consider what the writers of Bennion mean here by the word "implication": they use this term in a non-technical sense and it is extremely unsafe to assume that in doing so they meant something equivalent to an implicated conclusion. In fact,

reading on, it becomes clear that what Bennion means by "implication" is not implicated conclusion at all, but something far closer to the pragmatically derived aspects of explicature.

Bennion gives a number of examples of what it would call "implication". The first is from *Law in the Making* (1946/1966) p. 411, where it quotes Sir Carleton Allen.

> …the statute refers to a contract "not to be performed within one year from the making thereof". To be performed by whom? By one party or by both? When the case arises in which the contract cannot be wholly performed by one party within the year, but *may* be so performed by the other party, the Court cannot simply refuse to "read something into the statute": it is bound to decide how the general policy of the Act applies to this case, and in order to do so, it has to look for what is called "the implied will of the legislator".

Here the language of the statute is not sufficiently explicit to determine its truth conditions for the purposes of making a decision as to the outcome of a case: any practically meaningful interpretation would require a court to read the statute as if it contained additional words. As Bennion puts it, "The court cannot avoid filling the gaps when an instance requiring this arises" (11.5).

Thus, what Bennion considers implication here is something required to make the legal text sufficiently specific to be usable in practice. There would appear to be different options for how this might best be considered. One might argue that the fact

that the fictitious provision under discussion simply expressed a vague concept (performance of the contract), or that it was underspecified, and that we should not assume that "filling the gaps" necessarily contributes to the explicature of the provision in question. However, as I argue above, if we take the presumption of an ideal, rational legislature as a contextual assumption, we should surely (as far as reasonably possible) work on the basis that Parliament intended to communicate something sufficiently specific to be of practical use, and therefore to treat the additional information required to make the provision of practical use as part of what Parliament asserted (and see further the discussion below of *Chorlton v Lings).*[133]

To take another example from Bennion, the case of *Re Chapman, ex p Johnson*[134] related to the meaning of s.8 of the Bills of Sale Act 1878. This stated that a bill of sale to which the Act applied "shall set forth the consideration for which such bill of sale was given". Per Bowen LJ at 217:

> The *Bills of Sale Act* of 1878 requires that a bill of sale shall set forth the consideration for it. That has been held, and it seems to me with unquestionable good sense, to mean that it must truly set forth the consideration, because a person does not set forth the consideration who instead of it sets out something which is not the consideration. Therefore the Act itself means - though it does not say so in words, it says so impliedly - that the consideration must be truly set forth.

[133] (1868) LR 4 CP 374
[134] (1884) 50 LT 214 at 217

Again, what Bennion treats as implication - the fact that a reference to the consideration for a bill of sale must be *truly* stated in order to comply with section 8 - would certainly not count as implicature in the sense used by theorists of language. To compare with ordinary language, when we say ask someone to tell us the price of an item, we do not need to specify that we mean the true price rather than something false: arguably this is part of the encoded meaning and certainly it is part of the explicature.

6.4 Expressum facit cessare tacitum

Where an implication goes against the express words of a legal text, that implication is by definition not proper, under the maxim *expressum facit cessare tacitum* (the statement ends the implication). Thus it is not permissible for a court to interpret the law in a way which relies on interpretations which contradict the sentence meaning of the text. This is one very obvious way in which the interpretation of legal texts differs from ordinary utterance interpretation: in ordinary communication we regularly find that the communicated content of an utterance directly contradicts its sentence meaning, for example when we use irony or metaphor.

Further examples from Bennion likewise point away from implicature and towards explicature, with courts holding that only what was "necessarily and properly implied" could form part of what a statute expresses. In *Chorlton v Lings,*[135] Willes J

[135] (1868) LR 4 CP 374

considered the wording of Lord Brougham’s Act (the first Interpretation Act). Section 4 of this Act uses the words, “unless the contrary be expressly provided and declared”, and the question for the court in *Chorlton v Lings* was effectively whether this restrictive language had the effect of preventing anything other than the sentence meaning of legislation being considered.

The case turned on the interaction of two statutes:

1. The Representation of the People Act 1867, which provided that every "man" should, in and after the year 1868, be entitled to be registered as a voter to vote in general elections, provided that he was of age and was not subject to any legal incapacity.
2. The Interpretation Act 1850 (Lord Brougham’s Act) s. 4, which provided that, in all Acts, words importing the masculine gender should be taken to include females, “unless the contrary is expressly provided”.

A woman named Mary Abbott sought to be registered as a voter, arguing that the effect of Lord Brougham’s Act was that the word “man” in the Representation of the People Act 1867 should be read as including women. Her application to be admitted to the register of voters was denied, on the basis that she was a woman and that under the existing law, she was disqualified from registration on account of her sex. Mary Abbott appealed, along with over 5,000 other women, and this case considered all of these appeals, looking, inter alia, at whether the proper interpretation of the

Representation of the People Act, read alongside Lord Brougham's Act, was that the word "man" should be taken to include women.

Per Willes J:

> The application of [Lord Brougham's Act] contended for by the appellant is a strained one*. It is not easy to conceive that the framer of that Act, when he used the word "expressly," meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies is expressed thereby.*
>
> (emphasis added) (374)

In other words, the effect of Lord Brougham's Act is that "man" should include "woman", unless the contrary is expressly provided, and the contrary will be expressly provided even where it is merely implied (rather than expressly stated), provided that it is "necessarily and properly implied".

These words are highly instructive for any analysis of linguistic meaning and legal content.[136] Willes J does not argue that the meaning of a law should be confined to its sentence meaning, nor that any implications at all which might arise should be considered to contribute to the meaning. Rather, he distinguishes a particular

[136] Notwithstanding that one might suspect that the judges in this case decided on their conclusions first and then shaped their reasons to fit.

category of implication: “what is necessarily or properly implied” and argues this implication *forms part of what the language used actually expresses*. Accordingly, Lord Brougham’s Act did not have the effect of extending the meaning of the word “man” to women, because the contrary was expressly provided by what was necessarily and properly implied (i.e. that Parliament had not intended to extend the franchise to women).

Bennion’s conclusion is that Willes J accurately stated the principle that courts should apply: the legal meaning of a statute includes “what is necessarily or properly implied” and that whatever is necessarily and properly implied is actually expressed by the language of the text. I have argued above that what the courts consider “necessarily or properly implied” is equivalent to the explicature of the legal text. I now consider arguments for and against the inclusion of implicated conclusions in the meaning of legislation.

6.5 Implicature and legal texts

Thus far, this chapter has considered the role of explicature in communication and, specifically, in legislation. The explicature of an utterance is its assertive, truth-conditional content. This is distinct from any implicature which the utterance may contain, which is merely implied and which does not contribute to truth conditions.

We may perhaps begin by considering implicature in non-statutory and less formal normative texts. Take for example a sign posted on the door of a hotel swimming pool:

The pool is open for hotel guests over 18 between 8am and 8pm.

Children may use the pool between 4pm and 6pm.

What does such a sign communicate? A domain restriction on "children" is likely to be part of the explicature ("children [staying at the hotel]"). Further, the text includes at least two implicated conclusions: that the pool is closed for hotel guests over 18 outside the hours of 8am to 8pm, and that children staying at the hotel may use the pool *only* between the hours of 4pm and 6pm. Neither of these propositions is contained in the explicit content of the utterance and each is cancellable (without creating a semantic contradiction), a possible test of implicature (Grice 1975):[137]

The pool is open for hotel guests between 8am and 8pm. In fact, it's open 24 hours a day.

Children may use the pool between 4pm and 6pm. In fact, they can use it any time.

These implicatures form part of the content communicated by the sign and would be readily understood by ordinary readers.

[137] It could be argued that these are part of the explicit content of the utterance; some work on scalar implicatures suggests that there are so-called exhaustivity operators in various positions in the sentence (something like adding the word 'only'), which account for these relevant interpretive specifications, and thus these restrictions would contribute to explicit content. In this section, I treat scalar implicatures as implicit rather than explicit content, although note that my later arguments about the effects of *expressio unius* would apply in either case.

So, if we allow that implicatures form part of the communicated meaning of non-statutory and less formal normative texts, should we also allow them to form part of the communicated meaning of statutory texts? After all, they are part of ordinary language use and are readily understood by ordinary speakers. The answer to this question is, in my view, no, and the rest of this chapter considers the reasons behind this answer, as well as a number of relevant UK cases. Notwithstanding the arguments put forward in this chapter, it should be noted that Parliamentary Counsel take great pains to avoid unwanted implicatures in the drafting of legal texts. Even if one considers that pure implicatures form little or no part of the legal meaning of a text, they certainly make that text more difficult for ordinary readers to interpret.

6.5.1 Expressio unius est exclusio alterius

To begin, it should be noted that the exclusion of implicated conclusions from the correct interpretation of a statutory text is by no means uncontroversial. Take, for example, the canon of construction known as *Expressio unius est exclusio alterius* - expression of the one is exclusion of the other. Scalia, in *A Matter of Interpretation* (1997/2018) appears to equate the operation of this canon with what a linguist might consider to be implicature.[138] Scalia puts it thus:

> What it means is this: if you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other.

[138] Or else as akin to the exhaustivity operators mentioned in footnote 137.

(p. 25)

It could be argued (Neale, 2008)[139] that this enrichment (conditional perfection) gives rise to an implicature which imposes an obligation to pay on anybody over 12. In this section, I shall argue that any attempt to use this kind of example to justify the inclusion of implicatures in the communicated content of onerous legal provisions is confused.

First, it is interesting that Scalia's example here is an informal and non-statutory normative text, rather than a statute. It is not contentious at all to suggest that, in informal, non-statutory language use, people readily make use of and understand implicatures. Certainly, we are able to understand that a sign saying that children under twelve may enter free would tend to communicate that children over twelve must pay - this is no more controversial than the swimming pool examples above - but it does not follow that the same interpretation would be placed on a statute drafted in these terms.

Further, Scalia's reference to a non-statutory implicature as an example of a canon of statutory construction is highly misleading. The effect of *expressio unius*, were this language used in a statutory context, would not be to incorporate any implicatures

[139] It is easy to see why some commentators have accepted that a principle of this kind works in a similar way to implicature. After all, to take an example from ordinary language use, if I tell my husband that we have six people coming to dinner, he is very likely to understand that I mean exactly six, and not seven or eight, despite the fact that there is nothing in the encoded content of what I have said to tell him that. At first sight, quantity implicatures of this kind would seem to work much like the *expressio unius* principle. I argue here that they do not.

into the meaning of the legal text but rather to ensure that it is the explicature of a legal text that generally counts - what has actually been asserted - and not any implied content. Applying *expressio unius* to the phrase “children under twelve may enter free” gives rise to an interpretation that accords entirely with explicature: that children under twelve may enter free. It does not have the effect of mandating that a child of thirteen should pay, only that a child of thirteen is not covered by the provision in question. Thus her position will be whatever the law otherwise provides (which might be that she should pay, or that she should not, or it might be silent on the matter).

Carston (2013) appears to accept that this kind of implicature could arise in the case of a legal binding public notice:

> ‘Children under ten get in free’
>
> Inference: Children ten or over do not get in free
>
> What is explicitly expressed here is the age ‘under ten’ rather than any higher age (‘under eleven,’ ‘under twelve,’ etc.), so we are entitled to infer that (children at) the higher ages are excluded (from getting in free). As Gary Ostertag has pointed out, the inference involved looks like an instantiation of the Q-heuristic (‘What isn’t said is not the case’), the speaker having followed the Q-principle (‘Say as much as you relevantly and truthfully can’). However, according to Stephen Neale, this particular example is an instance of conditional perfection, a case of which was discussed as (11a) in the previous

> section. It is, after all, equivalent to an utterance of 'If a child is under ten, then he/she gets in free' and so should fall under the I-principle and accompanying heuristic ('Say no more than you must,' 'Enrich to the stereotypical/normal case'). Interestingly, in this case the two maxims converge on the same interpretation and the canon of *Expressio unius* could be seen as a subclause of both of them. This looks like further evidence that the two pragmatic maxims (and the '*Expressio unius*' canon) are surface manifestations of some deeper underlying principle, as mooted in the previous section. However, my main point in this section is that the interpretive canons/heuristics called upon by official interpreters of legal texts (including legally binding public notices) are very closely related to the principles/heuristics formulated by theorists of pragmatics for communication and interpretation quite generally.
>
> (p. 17-18)

However, the argument that she appears to make here relies on an initial assumption that we are entitled to infer that children at the higher ages will have to pay. This is a misunderstanding, albeit a subtle one, of the effect of *expressio unius* on the meaning of a legal text. Its effect is absolutely not to create the legal meaning that older children have to pay. In fact, there is nothing here that mandates that those over ten would have to pay to enter the swimming pool (or how much they would have to pay, or any of the other details that would be required in order to impose a positive obligation to pay). The effect of *expressio unius* is simply that *the provision applies only to children under ten and not to anybody else.* The position of somebody over ten is whatever the law otherwise provides. If the law otherwise

provides that people must pay (whether through legislation or any other legal rule) then children over ten will be caught. But it is *what the law otherwise provides* that would impose the obligation and not any implicature derived from the statement that children under ten get in free. The effect of *expressio unius* is to ensure that the provision in question applies only to those specified within it. It does not have the effect of mandating that the legal position of those to whom the provision does not apply cannot be the same as those to whom the provision does apply (which appears to be what Scalia suggests[140]), only that their legal position is not mandated by the provision. This is not the effect of the operation of any implicature but simple operation of law, an instance where the outcome of the legal interpretative process diverges markedly from what the outcome of ordinary utterance interpretation would have been.

6.5.2 Expressio unius in case law

Salisbury Independent Living Ltd v Wirral Metropolitan Borough Council

In *Salisbury Independent Living Ltd v Wirral Metropolitan Borough Council,*[141] the Court of Appeal expressed the principle thus:

[140] I suspect that Scalia was simply taking as read that the background legal position was that there was an obligation to pay. It might be tempting to think of this kind of background legal position as an implicated premise available for use in inference, giving rise to an implicated conclusion that people over ten must pay. However, given we are concerned with the legal effect of the provision, the fit between words and world that it brings about, this gives rise to a circularity: if the fact that children over ten must pay is an implicated premise, how can it give rise to an implicated conclusion with the effect of making it the case that children over ten must pay?

[141] [2012] EWCA Civ 84

The principle of construction can be given the Latin tag *expressio unius exclusio alterius*, equally simply explained by the ordinary proposition that when a legislative provision sets out who or what is within the meaning of an expression, it ordinarily means that no-one else or nothing else is.

R v Caledonian Rly Co[142]

The facts of this case were as follows. An Act of Parliament was passed which allowed the Caledonian Railway Company to build roads and bridges over railway lines. This Act specified that the bridges should be of the "heights and spans" shown on a plan which had been deposited with the clerk of the peace. The Caledonian Railway Company carried out the building and ensured that its bridges did indeed conform to the heights and spans on the plan. However, it did not ensure that its bridges conformed to the inclinations which were also set out in the plan, and about which the Act was silent. The question for the court was whether, in carrying out the building in this way, the Railway Company was in breach of the Act.

It was held that no breach had occurred. The Act had the effect of mandating the heights and spans of the bridges but said nothing about the inclinations, and therefore the Company was not obliged to conform to the inclinations on the plan. Per Lord Campbell CJ:

[142] *(1850) 16 QB 19*

> there is no obligation beyond the heights and spans of the bridges as delineated on the plans. These are mentioned in the enactment; and nothing is said as to the rates of inclination of the road. *Expressio unius est exclusio alterius.*
>
> *(30)*

Is there anything here which suggests the operation of any kind of implicature? Absolutely not. The effect of the expressio unius principle is simply to ensure that the legal effect of the provision in question is its explicature: it asserts that the Railway Company must conform to the heights and spans on the plan, and so they must. It says nothing about the inclinations on the plan and so the Railway Company is free not to conform to these (or to conform to them, if it chose to do so).

R (on the application of Jackson) v A-G[143]

This was a case concerning the validity of the Hunting Act 2004. Jackson and two other appellants were members of the Countryside Alliance who opposed the ban on foxhunting which the Hunting Act 2004 effected. They therefore sought to challenge the validity of the Hunting Act 2004. This Act had been passed using a special procedure under the Parliament Acts 1911 and 1949. Under the Parliament Act 1911, bills could be presented for Royal Assent without the assent of the House of Lords, provided that they had been passed by the House of Commons in three successive Parliamentary sessions and there had been a delay of two years.

[143] [2005] UKHL 56, [2005] 4 All ER 1253

The Parliament Act 1949, which was itself passed using the Parliament Act procedure, then amended the 1911 Act, with the effect that bills could then be presented for Royal Assent after two successive sessions and a period of one year.

Section 2(1) of the Parliament Act 1911 allows two exceptions to these general rules: Money Bills and "Bill[s] containing any provision to extend the maximum duration of Parliament beyond five years". Section 5 also excludes bills confirming a provisional order from the use of the procedure.

The appellants argued that the Hunting Act 2004 could not be passed using the Parliament Acts procedure because:

> The legislation made under the 1911 Act was delegated or subordinate, not primary, in that it depended for its validity upon a prior enactment; and that the legislative power conferred by s 2(1) of the 1911 Act was not unlimited in scope and had to be read according to the principle that powers conferred on a body by an enabling Act could not be enlarged or modified by that body without express words so that s 2(1) of the 1911 Act did not authorise the House of Commons to modify any of the conditions on which its law-making power was granted.
>
> (1253)

The House of Lords held that the Hunting Act had indeed been validly passed and dismissed all parts of the appellants' claim. In relation to the wording of s. 2(1) of the Parliament Act 1911, Lord Rodger spoke as follows:

> One is left with the opening words of s 2(1): 'If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons…'. Section 5, which was added by amendment at a late stage in the passage of the Parliament Bill, really introduces another exception by defining 'Public Bill' as not including any bill for confirming a Provisional Order. The effect of ss 2(1) and 5 is therefore to exclude expressly from the scope of the term 'Public Bill' any money bill, or any bill containing a provision to extend the maximum duration of Parliament beyond five years or any bill for confirming a provisional order. *Expressio unius exclusio alterius* or *exclusio unius inclusio alterius*. Since Parliament has expressly excluded these three types of bill from the scope of s 2(1), in the absence of any indication to the contrary, I would read that provision as applying to a public bill to amend s 2(1) itself. The Bill which led to the Parliament Act 1949 was such a bill. In my view, it was within the scope of s 2(1), was passed in accordance with the provisions of s 2 and is accordingly 'an Act of Parliament'.
>
> [138]

Did the court rely to any extent on implicature in reaching this conclusion? No: once again, what is being applied here is the explicature of the legal text and not

implicature of any kind. The provision applies to “any public bill” excluding the types specified. To reach the conclusion that a bill not being one of the three types specifically excluded would fall within the term “any public bill” requires no implicature whatsoever. Rather, it is an application of the explicature of the legal text.

Of course, demonstrating that the courts’ uses of the *expressio unius* principle in a handful of cases are not examples of implicature does not prove that judges do not or cannot recover implicatures in interpretating statutes, nor is it meant to. What I am doing in this part of my thesis is simply demonstrating that *expressio unius* is not synonymous with conditional perfection (as some commentators have taken it to be)– that a statutory provision which states “Children under ten get in free” is not equivalent to “*Only* children under ten get in free (and therefore others must pay)” but rather to “Only children under ten get in free *under this provision* (and therefore others must do as the law otherwise provides)”.

Knight v Goulandris[144]

The final case I shall consider here regarding implicature in legal texts is the recent case of *Knight v Goulandris*, which does not relate to *expressio unius*. I intend to show just how far the legal reasoning employed in this decision diverges from the principles formulated by theorists of pragmatics with regard to implicatures.

[144] [2018] EWCA Civ 237

The facts of this case were as follows. Mr Knight and Mr Goulandris were neighbours. In 2013, Mr Knight began some works on his house. These works included the extension of a party wall between his house and that of Mr Goulandris. The works gave rise to some damage to Mr Goulandris's property and, once they were completed, each party appointed his own surveyor to assess the extent of the damage. The figures that the two surveyors provided were very different so, as a result, Knight and Goulandris were unable to agree on the sum that Mr Goulandris was due. The surveyors therefore appointed a third surveyor (as provided for in s.10(1)(b) of the Party Wall etc. Act 1996).

On the morning of 2 September 2015 this third surveyor issued his assessment of the compensation payable to Mr Goulandris. He did this by emailing his award to both parties' surveyors. Mr Goulandris's surveyor forwarded the assessment of compensation to Mr Goulandris at 23.19pm on 2 September. Mr Goulandris opened the email and read the assessment early on 3 September. The sum awarded was far lower than the sum that Goulandris's own surveyor had calculated and, on 17 September, Mr Goulandris appealed against the award under s.10(14)-(17) of the Act.

Mr Knight argued that Mr Goulandris's appeal had been issued out of time: s.10(17) of the Act allowed a period of 14 days for appeal, beginning on the day on which the award was served. Mr Knight's position was that the award had been served on either 2 September (when the initial email was sent) or on 3 September (when Mr

Goulandris opened it) and that therefore the latest date for appeal was either 15 or 16 September.

The issue for the court was whether the receipt by Mr Goulandris of the email attaching the award constituted service for the purposes of s.10(17). S 15 of the Act contained the following provisions on service:

> A notice or other document required or authorised to be served under this Act may be served on a person—
>
> (a) by delivering it to him in person;
>
> (b) by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom; or
>
> (c) in the case of a body corporate, by delivering it to the secretary or clerk of the body corporate at its registered or principal office or sending it by post to the secretary or clerk of that body corporate at that office.

One question which the Court of Appeal was required to consider was whether the wording of this section constituted an exhaustive list of the ways in which a notice could be served (meaning that the word “may” bore the meaning “may only”), or whether “may” was simply permissive and did not exclude other methods of service from being effective.

Before considering the conclusions of the court, I shall first set out how implicatures might arise from this sort of language in a non-statutory context, taking a Gricean approach[145]. Take for example the utterance:

> Children may enter the swimming pool:
>
> - by the entrance located on Dean Street; or
> - by the entrance located on Old Compton Street.

The explicit content of this utterance is simply that children may do X or Y, and there is nothing in this explicit content to the effect that they may or may not do Z. However, such an utterance will often allow the hearer to infer that children may only do X or Y.

Assuming the speaker is obeying the maxim of quantity (where one tries to be as informative as one possibly can, and gives as much information as is needed, and no more), one may apply Grice's approach:

> [the speaker] has said that p; there is no reason to suppose that he is not observing the maxims or at least the Co-operative 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

[145] And, in a different context, a relevance-theoretic approach might reach the same conclusion.

> 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 p.31)

Here the speaker has said that children may enter the pool by Entrance X or Entrance Y. There is no reason to suppose that he is not observing the maxim of quantity (make your contribution as informative as is required), he could not be doing this unless he thought that children could only enter the pool by Entrance X or Entrance Y; he knows (and knows that I know that he knows) that I can see that the supposition that he thinks that children can only enter by Entrance X or Entrance Y; he has done nothing to stop me thinking that children can only enter by Entrance X or Entrance Y; he intends me to think that children can only enter by one of these two entrances and so he has implicated that children can only enter by Entrance X or Entrance Y.

Of course, applying this analysis also gives rise to the symmetry problem in Gricean implicatures: any purpose for which knowing that children may only use Entrance X or Entrance Y is relevant, is such that knowing that children may not only use Entrance X or Entrance Y is relevant, allowing us to derive the implicature that children may <u>not</u> only enter by Entrance X or Entrance Y.

Returning to the case itself, an attempt to apply quantity reasoning to the text of the statute might be expected to give rise to an interpretation along the lines set out above: either that only these two methods of service were available or not only these

two methods of service. However, it is notable that none of the Court's reasoning followed a path anything like quantity reasoning. The implicature which we recover from the ordinary language example is entirely absent. Patten LJ quotes approvingly an analysis of a similar point in Ener-G Holdings by Lord Neuberger MR:[146]

> The argument that it would have been pointless to spell out two methods of service in cl.13.2, unless they were intended to be exclusive, has some initial attraction. However, in my view, on closer analysis, the argument has no force. The purpose of a provision such as cl 13.2, if it is not exclusive, is to shift any risk from the server to the intended recipient…thus, if a document is served in accordance with cl. 13.2, it is treated as served, or delivered, even if it does not come to the attention of, or even if it is not received by, the intended recipient…But if a document is served or delivered in any other way (e.g. by ordinary post or by being left at the intended recipient's premises rather than being handed personally to him) there is no such presumption. In my view, clear words would normally be required before one could ascribe to the parties an intention that a recipient who actually receives a notice in time should nonetheless be treated as not having received the notice at all.
>
> [29]-[32]

This is a process of legal reasoning which is entirely unlike that quantity reasoning set out above. The upshot was that the receipt by Mr Goulandris of the email

146 *Ener-G Holdings plc v Hormell* [2012] EWCA Civ 1059, [2013] 1 All ER (Comm) 1162, 144 ConLR 43

attaching the award did constitute service within the meaning of the Act. In other words, where the provisions stated that a document could be served by method A, method B, or method C, this did not have the effect of making it (legally) the case that a document that had (actually and indisputably) been served by method D had not been served at all. Setting out three methods of service (A, B and C) shifts the risk away from the server and onto the recipient: provided you do A, B or C you have (legally) served the document, whether or not the recipient actually receives it. This does not make service by other means ineffective. Again, there is no conditional perfection here- “a document may be served by method A, method B, or method C” does not mean that a document may only be served by one of these methods.

Is it the case, then, that relevance theory does not provide an account of statutory interpretation, on the basis that there are substantial differences between the content recovered in ordinary conversation and the content recovered in interpreting statutory provisions? Not at all. These differences are adequately explained by the different contexts (and in particular, by the different implicated premises) of interpretation. I discussed this more fully in Chapter 5.

6.6 Implicature and literary texts

I have argued above (in Chapter 5) that there are certain legal presumptions which act as implicated premises in the interpretive process, tending to limit the communicative content recovered, particularly by tending to limit the availability of implicatures. In the next section of my thesis, I shall consider implicatures in literary texts, arguing that (as in the legal case) there are certain “standing” implicated

premises which play a role in the interpretive process but (in contrast to the legal case) these have the effect of *licensing* the recovery of a very array of implicatures.

As noted previously, relevance theory posits that utterance comprehension involves three subtasks:

1. constructing an appropriate hypothesis about the explicit content of the speaker's utterance through decoding of linguistic meaning, along with reference resolution, disambiguation and 'free' (i.e. not linguistically mandated) pragmatic enrichment processes;
2. constructing an appropriate hypothesis about the intended contextual assumptions (implicated premises in the inferential reasoning process); and
3. constructing an appropriate hypothesis about the intended contextual implications of the utterance (implicated conclusions).

(Wilson & Sperber, 2004, p.615)

In statutory interpretation, the intended contextual assumptions (implicated premises) with which a judge constructs an appropriate hypothesis as to meaning will include assumptions which are part of the standard custom and practice of legal interpretation (and for which there will often be legal precedent) such as the presumption against doubtful penalisation. In Chapter 5 I set out a schema for how such an implicated premise might have operated in the case of *Dickenson v Fletcher* (the case of the mine owner whose workers had been given unlocked lamps).

So, in the legal case, a standing implicated premise can operate to constrain the range of interpretations available. Yet the experience of reading a literary text is markedly different from that of reading a statute. Hilary Mantel (2012) encapsulated some of the difference in this quotation from *Bring Up the Bodies*, on the poet Sir Thomas Wyatt:

> When Wyatt writes, his lines fledge feathers, and unfolding this plumage they dive below their meaning and skim above it…A statute is written to entrap meaning, a poem to escape it.
>
> (p. 414)

I shall consider here whether and how relevance theory can account for this difference.

6.6.1 The licensing of weak implicatures

As I argue above, the availability of implicated conclusions in statutory interpretation tends to be restricted by virtue of the implicated premises involved in the interpretive process. I shall argue here that the opposite is true for literary texts (and especially for particular sorts of literary text, such as poems): that is to say, that the difference between reading a poem and a statute, say, is at least in part accounted for by the different implicated premises involved in each activity. I have already set out (in Chapter 5) some of the sorts of implicated premises which can *restrict* the recovery of implicated conclusions in statutory interpretation. Here I shall consider some of the

possible implicated premises which *licence* the recovery of implicated conclusions when reading a poem.

6.6.2 Implicated premises and processing effort

First, as Cave (2018) notes, the time scale involved in reading a literary work is expanded (in contrast with ordinary communication). The act of reading (and in particular the type of reading we do with literary texts) slows the reader down and therefore allows for more reflection. What Cave describes as “real-world urgency” (p. 167) is suspended; the reader is generally not in a hurry to recover the meaning of the text as they might be in other sorts of situation.

I agree with Cave about this “time-expanded” experience of reading, and suggest that it gives rise to an implicated premise. In relevance theory, the first branch of the communicative principle of relevance states that every utterance conveys the information that it is relevant enough for it to be worth the addressee's effort to process it. The principle further implies that the greater the processing effort required, the greater the positive effects that the reader is entitled to expect to recover. The experience of reading can be effortful, demanding and time-consuming: the effort required to process a literary text can be substantial. Thus it follows from the communicative principle of relevance that the creation of a literary utterance in itself conveys the information that the utterance will yield substantial positive effects, enough to justify the kind of close reading and the particular sort of attention one pays when reading a literary work.

This perhaps accounts for the different experiences of reading different sorts of literary text. Commercial novels of the sort often described as “page-turners” or “beach reads” require less processing effort (relative to the time spent reading) than some sorts of modern poetry, where it can sometimes take substantial processing effort to form any sort of hypothesis about meaning. As a result, the reader of the commercial novel (low processing effort) may find their expectation of relevance satisfied by the surface story of the novel, while the reader of the modern poem will hope (having been led to expect) that the process of interpretation will yield a meaning which is particularly profound or resonant. (Of course, readers sometimes find that they are unable to recover an interpretation with sufficient positive benefits to justify their processing effort, at which point the book may be put to one side.)

In both cases (the reader enjoying the surface story of the commercial novel or the reader looking for a deeper meaning in a modern poem), the communicated content of the text will comprise explicatures and implicatures, and those implicatures may be either strong or weak. As Sperber & Wilson (1986/1995) put it:

> …there is a continuum of cases, from implicatures which the hearer was specifically intended to recover to implicatures which were merely intended to be made manifest, and to further modifications of the mutual cognitive environment of speaker and hearer that the speaker only intended in the sense that she intended her utterance to be relevant, and hence to have rich, and not entirely foreseeable, cognitive effects. (p. 201)

Relevance theory terms those implicatures the reader was specifically intended to recover *strong*. Those “that the speaker only intended in the sense that she intended her utterance to be relevant, and hence to have rich, and not entirely foreseeable, cognitive effects” are termed weak. The less strongly manifest the speaker’s intention, the weaker the communication will be, meaning that the addressee has to take greater responsibility for treating a particular proposition as part of the intended import (Wilson & Carston, 2019). In the case of the modern poem, the cognitive efforts of processing may well give rise to an implicated premise which licences the recovery of a very wide range of weak implicatures, which may in turn give rise to further weak implicatures,[147] until the reader’s expectation of relevance is satisfied. My position here might suggest that the presumption of optimal relevance should be considered a sort of implicated premise for all utterances. This seems to me a reasonable characterisation of the presumption of optimal relevance and it is one which is arguably supported by Sperber & Wilson (2008, p. 99) when they state:

> Thus, if a stranger comes up to you in the street and asks what time it is, you can feel confident that it would be relevant to tell him the time, even if you neither know nor care exactly how it would be relevant and are implicating

[147] Note that such implicatures could be mutually contradictory. As Auden (1941) put it, “poetry might be defined as the clear expression of mixed feelings”.

> nothing more the presumption of relevance that any utterance conveys about itself.

As Sperber & Wilson comment (2008, p. 100):

> Optimal relevance may be achieved by an utterance with a few strong implications, many weak implications, or any combination of weak and strong implications. A speaker aiming at relevance may implicate (that is, anticipate and intend) a few strong implicatures or a wide range of weak implicatures (which may themselves be strong or weak implications).

In particular, in the case of poetry, relevance may be achieved "through a wide array of weak implications which are themselves weakly implicated" (p. 100). In other words, the poet may consider that a sufficiently wide array of potential implications, each having similar import, are true or probably true, although the poet need not know which these are individually and cannot anticipate which of them will be accessed and accepted by the reader. This sort of wide array of weakly implicated weak implications is termed a "poetic effect" in relevance theory (Sperber & Wilson, 1986/1995, chapter 4 section 6). Take, for example, the following poem of Emily Dickenson (1861/2016).

"Hope" is the thing with feathers -

That perches in the soul -

And sings the tune without the words -

And never stops - at all -

And sweetest - in the Gale - is heard -

And sore must be the storm -

That could abash the little Bird

That kept so many warm -

I've heard it in the chillest land -

And on the strangest Sea -

Yet - never - in Extremity,

It asked a crumb - of me.

The extended metaphor used in this poem (HOPE IS A BIRD) evokes an ever-widening array of implications and powerful effects, including mental imagery and impressions, which will vary between readers and between readings. For example, part of the explicit content of the poem is the fact that hope PERCHES-IN-THE-SOUL*, a complex ad hoc concept which is difficult to define but which (inter alia) captures something of the properties of the perching bird that might also apply (at some level of abstraction) to the feeling of hope (perhaps catching sight of it unexpectedly, a sense of energy and lightness, something surprising and uplifting). To construct such an ad hoc concept we must take Dickenson to be attributing to hope (or the experience of feeling hope) that property which contextually implies the ideas suggested by the words "perches in the soul", achieving relevance through the creation of poetic effects.

6.6.3 Implicated premises and literary form

I have argued above that the nature of the experience of reading and the processing effort required (which depends on the type of text) can licence the recovery of a very wide range of weak implicatures. I shall argue here that further implicated premises are made manifest to a reader by a writer's choice of literary form, assuming that writer and reader share sufficient cultural assumptions and background knowledge about literary forms. As a result, a writer's choice of form can give rise to further arrays of strong and weak implicatures.

Of course, the poet's choice of literary form (as is communicated to the reader in reading the poem) is only one small aspect of a poem. All its aspects (from rhyme and rhythm to metaphor and simile) contribute to the ever-widening array of weak implicatures which a reader may recover. I focus here on the poet's communicated choice of literary form because I wish to consider how implicatures may arise from reading a poem in the context of the reader's knowledge and understanding of standard literary conventions; this seems analogous to the kinds of fixed, invariant implicated premises (such as the presumption against doubtful penalisation) used in legal interpretation.

I take for example the sonnet form (a form of poetry many consider to have been introduced to Britain by Sir Thomas Wyatt).[148] Traditionally a sonnet has a specific form: fourteen lines long, with a range of possible rhyme schemes (broadly, Petrarchan- ABBAABBA CDCDCD or ABBAABBA CDECDE; Italian- ABBAABBA CDDCEE; Shakespearean ABABCDCD EFEFGG). Over time, many variations on this form have developed and in modern poetry there may be no identifiable rhyme scheme at all. The convention of fourteen lines can also be followed or breached, up to a point. The sonnet form has a rich cultural history and weight in English poetry and is traditionally associated with (among other things[149]) love. The choice, therefore, of the sonnet form by a writer may make manifest to a reader (assuming sufficiently similar cultural assumptions and background knowledge) a range of implicated premises about the poem (for example, that the poet intends the poem to be understood as a love poem and part of a particular literary canon, requiring a certain sort of attention from the reader). I offer here an example of a sonnet in which these implicated premises licence the recovery of various strong and weak implicatures that may not otherwise be available.

Sonnet

> The late Gracie Allen was a very lucid comedienne,
>
> Especially in the way that lucid means shining and bright.
>
> What her husband George Burns called her illogical logic

[148] The same poet whose “lines fledge feathers” in the Mantel (2012) quotation above.
[149] Such as religious devotion.

Made a halo around our syntax and ourselves as we laughed.

George Burns most often was her artful inconspicuous straight man.
He could move people about stage, construct skits and scenes, write
And gather jokes. They were married as long as ordinary magic
Would allow, thirty-eight years, until Gracie Allen's death.

In her fifties Gracie Allen developed a heart condition.
She would call George Burns when her heart felt funny and fluttered
He'd give her a pill and they'd hold each other till the palpitation
Stopped—just a few minutes, many times and pills. As magic fills
Then fulfilled must leave a space, one day Gracie Allen's heart fluttered
And hurt and stopped. George Burns said unbelievingly to the doctor,
"But I still have some of the pills."

Notley (2006)

In this poem the sonnet form is used more loosely than in more traditional examples: there is no obvious rhyme scheme nor any apparent constraints on line length. It is not written in what might be considered a traditional register for a love poem but feels chatty and conversational. However, the writer's choice of the sonnet form, taken together with the reader's cultural assumptions about that form, give rise to implicated premises (for example, that the poet intends the poem to be a love poem, that it is to be taken seriously, that it is intended to stand in a particular relation to a

particular literary canon and to be read as such), which license the reader to recover a wide range of implicatures. To briefly sketch this process for *Sonnet*, we might analyse as follows:

- The poet has created a literary utterance, the poem.
- This utterance will be optimally relevant for the reader.
- This utterance will achieve relevance if it provides positive cognitive effects commensurate with the processing effort of interpretation.
- Now, recovery of the surface meaning of the poem (explicature and strong implicatures) does not require excessive processing effort: the poem is largely written in a fairly conversational style (in fact, the more serious the story becomes, the more simple the vocabulary- “her heart felt funny”) and tells the story of the relationship between Gracie Allen and George Burns and her death. Perhaps the reader’s expectation of relevance should be satisfied by this?
- No. The poet’s ostensive act in writing a poem in sonnet form (and titling the poem *Sonnet* for good measure) make manifest (to a careful reader with relevant background knowledge) an array of implicated premises (perhaps, that this is a serious work, that it is a love poem, that it is intended to stand in a particular relation to a particular literary canon).
- The reader’s expectations of relevance will be satisfied if her hypothesis about the intended contextual implications of the poem takes account of these implicated premises. The reader will therefore reject an interpretation of the poem that is limited to its surface meaning and instead recovery a wide range

of weak implicatures (for example, about the nature of love and mortality). (As the range of potential weak implicatures is so wide, attempts to present the communicated meaning of a poem in terms of a set of propositions are necessarily reductive and probably best avoided.)

6.6.4 Implicated premises and other texts

I argue above that a poet's choice of literary form can make manifest to her reader a range of implicated premises which licence a wide range of implicated conclusions. In this section of the chapter, I shall consider another way in which poets make implicated premises manifest to their readers: through the implicit or explicit reference to other specific literary works.

Again, this is best illustrated with an example. It is a fairly common poetic device for a poet to refer (implicitly or explicitly) to another poem. One poem very frequently referenced is Rilke's (1908/2014) *Archaic Torso of Apollo*:

Archaic Torso of Apollo

We cannot know his legendary head
with eyes like ripening fruit. And yet his torso
is still suffused with brilliance from inside,
like a lamp, in which his gaze, now turned to low,

gleams in all its power. Otherwise
the curved breast could not dazzle you so, nor could

a smile run through the placid hips and thighs

to that dark center where procreation flared.

Otherwise this stone would seem defaced

beneath the translucent cascade of the shoulders

and would not glisten like a wild beast's fur:

would not, from all the borders of itself,

burst like a star: for here there is no place

that does not see you. You must change your life.

(Rilke, 1908/2014 (translated by Stephen Mitchell). The original German text is included in an annex to this thesis.)

The poet describes an encounter with an ancient and damaged sculpture of Apollo, which has the quality of an encounter with a god and ends in a moment of disruptive epiphany ("You must change your life."). This poem has been widely referenced;[150] I include just one example below.

Departure Gate Aria

She was standing near a departure gate,

[150] Other examples include *Invitation* (Oliver, 2013), *Lying in a Hammock at William Duffy's Farm in Pine Island, Minnesota* (Wright, 1992), *A Moment* (Stone, 2020), *American Sonnet for my Past and Future Assassin* (Hayes, 2018). The text of these poems is included in an annex to this thesis.

sandal-footed, her wiggly hair

and the latticework of her mercury footwear

the same satiny gold, and there was something

wistful about her, under the burnish

of her makeup she looked extremely young,

and a little afraid. I wanted to speak

to her, as if I were a guardian spirit

working the airport — God knows

I was crazed with my fresh solitariness —

so I did a little double take,

when I passed her, and said, Could I ask, where did you

get your sandals — my husband, I lied,

wants me to get some, and she said a name, as if

relieved to speak. Thanks, I said,

they look great with your hair — actually

(my head bowed down on its own), you look

like a goddess. Her face came out from behind

its cloud. You don't know how I needed that!

she cried out, I'm going to meet my boyfriend's

parents. You'll do just fine, I said, you look

beautiful and good. She looked joyful. I bustled off —

so this is what I'll do, now,

instead of kissing and being kissed, I'll

go through airports praising people, like an

Antichrist saying, You do not need

to change your life.

Olds (2019)

Here, the narrator of the poem has an encounter with a nervous young woman in an airport, which has the quality of an encounter with a goddess ("her mercury footwear", "You look like a goddess"). The final epiphany ("You do not need/To change your life."- a message of comfort rather than disruption) is not experienced by the narrator but is instead something she intends to deliver to others. However, the narrator herself also experiences change:

> "…so this is what I'll do, now,
>
> instead of kissing and being kissed, I'll
>
> go through airports praising people…"

The references to *Archaic Torso of Apollo* are implicit but very clear to someone who knows both poems,[151] and for the careful reader, the reference to the earlier poem will licence the recovery of a particular array of weak implicatures.[152] We might briefly analyse as follows:

- The poet has created a literary utterance, the poem.
- This utterance will be optimally relevant for the reader.

[151] Contrast Oliver (2013) and Hayes (2018) who explicitly refer to Rilke.

[152] Of course, a reader can read and appreciate *Departure Gate Aria* without having read *Archaic Torso of Apollo*, but the range of implicatures recovered will differ.

- This utterance will achieve relevance if it provides positive cognitive effects commensurate with the processing effort of interpretation.
- The poet has implicitly referenced *Archaic Torso of Apollo*, in particular, through the echo of its famous last line, but also in subtler ways, such as the comparison of the young woman with a goddess, the detail that "Her face came out from behind its cloud." ("We cannot know his legendary head…" and so on.
- In doing so, she has made manifest (to a careful reader with knowledge of both poems) a possible set of implicated premises (at the very least, that there is some sort of connection between the two poems and that it would be worth the processing effort of considering what this connection might be).
- The reader's expectations of relevance will be satisfied if her hypothesis about the intended contextual implications of the poem takes account of these implicated premises. The recovery of a range of weak implicatures is therefore licensed, (for example, that a moment of connection in an airport can be the cause of a just as profound moment of change and epiphany as Rilke's encounter with the sculpture, that we should be alive to the possibility of such epiphanies arising from apparently insignificant events, and so on). Of course, readers unfamiliar with the Rilke poem will also recover a wide array of weak implicatures on reading the Olds poem.

Just as a poem may be read and interpreted in the light of another poem, so it is common in legal interpretation for a statute to be read in the light of another statute or other legal text and interpreted accordingly. This principle is well-established.

In *Garland v British Rail Engineering Ltd*[153] where the question for the court was whether domestic legislation was incompatible with European Community legislation, Lord Diplock noted:

> [I]t is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of an international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it. (771)

Lord Diplock's remarks were made in respect of international treaties generally. To give another example, judges interpreting UK legislation are required (under s. 3(1) of the Human Rights Act 1998) to read and give effect to domestic legislation in a way which is compatible with the rights and freedoms guaranteed under the European Convention on Human Rights (ECHR), or else to make a declaration of incompatibility. In essence, the effect of s. 3 is to create a strong presumption in favour of an interpretation which is compatible with the ECHR; from a relevance-theoretic perspective, such a presumption would form an implicated premise in the interpretation of the legislative provision in question.

[153] [1983] 2 AC 751.

In *R* v *A*,[154] the defendant had been charged with rape. Section 41 of the Youth Justice and Criminal Evidence Act restricted questions regarding the sexual history of a complainant except in certain strictly limited circumstances. In this case the proposed questions regarding the complainant's sexual history fell outside these exceptions, and the House of Lords agreed that, if ordinary principles of statutory interpretation were used, then they would not be allowed. However, under the special rule of construction contained in s. 3 of the Human Rights Act 1998, the court held that it was possible to read the section subject to an implied provision (effectively an implicated premise in the interpretation of s. 41) that evidence or questioning which is required to ensure a fair trial under Article 6 of the ECHR could be admitted by the trial judge.

> The test of admissibility is whether the evidence is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Art 6. [46]

Per Lord Steyn:

> The will of Parliament as reflected in s. 3 will sometimes [make it necessary] to adopt an interpretation which linguistically may be strained. The technique to be used will not only involve the reading down of express language in a statute but also the implication of provisions. [44]

[154] [2001] UKHL 25

6.6.5 Conclusions on implicatures in literary texts

In summary, as I have argued above (see Chapter 5), judges make use of interpretive norms (such as the presumption against doubtful penalisation) which form part of the context of interpretation, acting as implicated premises which restrict the recovery of implicated conclusions and affect the asserted content recovered (for example, through lexical modulation).

The experience of reading a literary text is very different from that of reading a statute. This is despite the fact that the two types of utterance share some similarities, such as the fact that they are written texts which can be used to communicate across time. I have argued elsewhere in this thesis that the recovery of implicated conclusions when a judge interprets a statute is *strictly limited*, by virtue of the sorts of implicated premises which derive from standard interpretive practice. I hope that I have shown in this chapter that, in the case of literary texts, certain standing implicated premises (related to the status of the text as a literary text, the kind of literary text it is etc.) can instead *license* the recovery of a wide range of both strong and weak implicatures. "A statute is written to entrap meaning, a poem to escape it." (Mantel, 2012, p. 414).

6.7 Conclusions

I hope that, in this section of my thesis, I have made a good case for the distinction between implicatures and explicatures, and against the inclusion of implicated conclusions in what courts should (and generally do) consider to be the

communicated content of onerous provisions, contrasting the legal case with the literary case. In the next section, I shall turn my attention more fully to explicatures and shall seek to demonstrate their ubiquity in legal interpretation, looking in particular at lexical meaning modulation.

Chapter 7: Lexical Modulation and Legislation

7.1 Lexical Modulation

As I argue above, it is generally the explicature of a statutory text which a judge looks to recover, especially in the case of onerous provisions. In this chapter, I shall consider the role of lexical modulation in determining the explicature of legislative utterances. I shall do this by reference to a number of cases considering the word "use", some well-known to linguists and others largely unknown.

The notion of lexical modulation is that words have encoded meanings which are independent of context and which are modulated in utterances, depending on the communicative intentions of the utterer. This modulation may result in a specific broadening or specific narrowing of the denotation of that encoded meaning, or a combination of both, so that the contribution of the word to the proposition expressed is different from its lexically encoded sense. By way of example, the meaning of the word "flat" is broadened when the word is used loosely ("Holland is flat" (Sperber & Wilson, 2008, p.91)), while the meaning of the word "drink" is narrowed when the word is used to mean ALCOHOLIC DRINK ("I'm on a health kick and haven't had a drink all month.") Word meaning is also modulated where a word is used metaphorically (for example "Sally is a chameleon" used to convey that Sally is able to change her appearance to fit in with her surroundings (example due to Wilson & Carston (2007) p. 235)).

Wilson & Carston (2007) set out an inferential account of lexical modulation. On their account, the interpretation of a word typically involves the construction of an ad hoc concept: this is a sense of the word which is pragmatically derived in context from the encoded meaning, inferentially formed from the interaction between the encoded meaning of the word, the context of its use and the hearer's expectation of relevance. Such an ad hoc concept (the concept communicated) may be more specific (narrower) than the encoded concept or more general (broader) and, Wilson & Carston argue, this lexical narrowing and broadening is the result of a single interpretive process.

As Wilson & Carston note:

> Most current approaches to lexical pragmatics…share the view that narrowing and/or broadening contribute to the truth-conditional content of utterances (what is asserted or explicated) as well as what is implicated. That is, the ad hoc concepts created by the pragmatic interpretation of individual words and phrases are seen as constituents of the proposition the speaker is taken to have expressed, rather than merely contributing to implicatures, as in the standard Gricean account. (p. 231)

I argued in Chapter 6 that the approach generally and correctly taken by judges to the interpretation of statutory provisions (and in particular the interpretation of statutory provisions which impose obligations or penalties) is, in practice, a process of recovering the explicature of the provision in question. If this is correct, then we

would expect judicial interpretation to allow for lexical modulation and ad hoc concepts. In this chapter, I hope to demonstrate that this is the case.

Wilson & Carston argue that the same interpretive process is used in a wide variety of cases, including literal use, approximation, hyperbole and metaphor. In the language of statutes, certain cases will not apply: statutes are generally drafted without the use of metaphors, say, or hyperbole, and legislative drafters largely attempt to use words in ways which involve only limited modulation of word meaning, in order to reduce the risk of unintended interpretations. This chapter, therefore, focuses on those modulations which might be considered “fine tuning” of word meaning, rather than the more marked modulations involved in metaphor etc. I shall also consider whether there are some categories of word for which lexical modulation is not an optional process but obligatory.

Where word meaning is narrowed, the sense of the word conveyed is more specific than its encoded meaning and has a more restricted denotation. To take the example given above:

> I’m on a health kick and haven’t had a drink all month.

The speaker of this utterance would generally be understood to have communicated that she has not had an alcoholic drink all month rather than that she has not drunk any liquid at all, based on the hearer’s pragmatic expectations of relevance and background knowledge that refraining from drinking alcohol can contribute to good

health whereas refraining from drinking any liquid for a long period would be extremely unhealthy.

Wilson & Carston consider examples of narrowing within different linguistic contexts:

- cut the lawn/someone's hair/a cake/one's finger/a pack of cards…
- open curtains/one's mouth/a book/a bottle/a road/the mountain/…
- leave the house/home/food on a plate/one's spouse/a note/…

In each case, there is no one standard method for cutting, opening or leaving. The concepts CUT, OPEN and LEAVE are narrowed by reference to their linguistic context (cutting hair, opening curtains etc.).

Where word meaning is broadened, the word is used to convey a more general sense than that which is linguistically encoded. For example, "That bottle is empty", if "empty" is interpreted strictly will have a different meaning from its meaning if "empty" is interpreted to mean EMPTY* for the practical purpose in hand (albeit that it may contain a drop of liquid, some air etc.).

The relevance-theoretic view of lexical modulation involves "a process of ad hoc concept construction, based on information readily accessible from the encyclopaedic entries of the encoded concepts and constrained by expectations of relevance" (Wilson & Carston, 2007, p. 239) via mutual parallel adjustment of implicit and explicit content. The relevance-theoretic account differs importantly from the

Gricean account in that the modulation contributes to truth-conditional content, that is to say it forms part of the explicature of the utterance.

Wilson & Carston discuss a number of arguments for the truth-conditional view. First, they consider neologisms such as the verbs "to porch" ("The boy porched the newspaper") and "wristed" ("She wristed the ball over the net"). These words have no encoded meanings and yet the propositions expressed in the examples are easily understood (via information made available by the related nouns that do have encoded meanings). If the ad hoc concepts expressed by the verbal innovations PORCH*, WRIST* and so on did not contribute to the proposition expressed, it is not clear that anything would be expressed at all.

Further, they consider cases involving sentence operators such as negation. The utterance

> No teenager is a saint.

if understood by reference to the encoded meaning of SAINT is a trivial (and incorrect) claim that no teenager has been canonised. In fact, this utterance is readily understood by reference to a modulated meaning SAINT* (person of outstanding virtue), the modulation occurring within the scope of the sentence operator (negation), meaning that it must contribute to the truth-conditional content of the utterance rather than being merely implicated. This is an application of the scope test discussed in Chapter 6.

A third argument for lexical modulation contributing to truth-conditional content is that such modulation can lead to semantic change, for example when a metaphorical use such as SAINT* or ANGEL* becomes an example of polysemy, and its interpretation one of disambiguation rather than the construction of ad hoc concepts.

To these arguments, I would add the following. Relevance theory posits that modulation contributes to the explicature of an utterance; that is to say, to its truth-conditional content. As discussed in section 2.4, properly performed legislative provisions are examples of declarations: propositions which are true in virtue of being said.[155] I shall argue below, by reference to a number of cases, that courts do indeed interpret legislation by reference to modulated concepts, and that they are correct to do so. If this is right, it is further evidence that the truth-conditional content of an utterance (which in the legal case is a declaration) includes any pragmatically required modulation, as it is the truth-conditional content of legislative provisions (a fact about the world) that courts seek to determine. It is hard to see how one could agree that a statutory provision is true in virtue of being said and yet also take its communicated meaning as something other than its truth-conditional content; an

[155] In fact, I argue there that the enactment of legislation is best seen as two speech acts: one speech act of enactment which takes place at one moment in time, and which, properly performed, is true in virtue of being said:

> "Be it enacted that…"

And another which is the enacted text, which is "deemed to be always speaking" until express or implied repeal and which likewise, properly performed, is true in virtue of being said:

> "A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt."

enacted provision brings about a fit between words and world so that the provision is true in virtue of its enactment. To understand what that fit between words and world comprises, which we might term the provision's legal effect, we must understand the conditions under which the provision is true.

7.2 The lexical modulation of "Use"

In this chapter, I shall consider a number of cases from a relevance-theoretic perspective, considering in particular the role of free pragmatic enrichment in the derivation of the explicature of an utterance.[156] The first cases I will look at concern a single word: "use".

1. *Smith v United States* 508 U.S. 223 (1993)

This US case concerns the potential violation of 18 U.S.C. 924(c)(1), which sets a minimum sentence for a defendant who "during and in relation to any….drug trafficking crime…uses a firearm".[157]

2. *Elliott v Grey* [1960] 1 Q.B. 367 (1959)

   Hewer v Cutler [1974] R.T.R. 155 (1973)

[156] Enrichments of explicature which are pragmatically but not linguistically mandated, including modulations.

Each of these English cases concerns the potential violation of road traffic laws which provide that it is an offence to “use a vehicle” without, respectively, third party insurance or an MOT certificate.

I shall begin by setting out the facts of each set of cases and then look (from a relevance-theoretic perspective) at the legal reasoning involved in each case.

7.2.1 Using a firearm- narrowing by reference to linguistic context[158]

Smith v United States

This well-known case concerned the potential violation of 18 U.S.C. 924(c)(1), which sets a minimum sentence for a defendant who “during and in relation to any….drug trafficking crime…uses or carries a firearm”. John Angus Smith was the petitioner in the case. He and a companion had travelled from Tennessee to Florida in order to buy some cocaine, which they were planning to resell for profit. In Florida, they met up with an acquaintance of Smith’s companion, Deborah Hoag. Hoag bought some cocaine for Smith and accompanied him and his companion to a motel room. There they were joined by a drug dealer. There, Smith discussed selling his MAC-10 firearm and silencer to the dealer. The gun had been modified to act as an automatic and was capable of firing 1,000 rounds a minute.

[158] This section incorporates some of my own (unpublished) work submitted in the course of my Master’s degree in linguistics.

Unknown to Smith, Hoag was actually a police informant. She informed the local Sheriff's Office of Smith's activities and, as a result, an undercover officer was sent to the motel room. The undercover officer told Smith that he was a pawnshop dealer. On hearing this, Smith made a proposition: he offered the officer his modified MAC-10 and silencer in exchange for two ounces of cocaine. The officer replied that he was a pawnshop dealer, not a drug dealer, but said that he would try to get hold of the drugs to exchange for Smith's gun.

The officer then returned to the Sheriff's Officer to arrange for Smith's arrest. Meanwhile, Smith decided to leave the motel. He was seen departing by officers who had been stationed to watch the building, who gave chase. Smith was eventually caught following a high-speed chase.

A grand jury returned an indictment charging Smith with a number of offences, including conspiracy to possess cocaine with intent to distribute and attempt to possess cocaine with intent to distribute. Further, the indictment alleged that Smith had knowingly *used* his MAC-10 firearm during and in relation to a drug trafficking crime. Under 18 U.S.C. 924(c)(1), a defendant who so uses a firearm must be sentenced to a five-year prison term. Where, as here, the firearm is a "machine gun" or is fitted with a silencer, the sentence is increased to 30 years.

Smith was convicted on all counts. He appealed, arguing that the penalty for using a firearm during and in relation to a drug-trafficking offence relates to the use of a firearm as a weapon, and not otherwise. In Smith's case, the Court of Appeals for

the Eleventh Circuit disagreed, holding that there was no requirement in the statute that the firearm be used as a weapon. However, at the same time similar cases were being considered by other courts, with the Court of Appeals for the Ninth Circuit reaching a different conclusion. The Supreme Court therefore agreed to resolve the conflict and held that a criminal who trades his firearm for drugs "uses" it "during and in relation to ... [a] drug trafficking crime" within the meaning of 18 U.S.C. 924(c)(1).[159] The majority view, as expressed by Justice Sandra Day O'Connor, was that exchange of a gun for drugs did fall within the meaning of "use a firearm".

> When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning...

She went on to consider a number of dictionary definitions of "use", as meaning "to convert to one's service", "to employ", "To carry out a purpose or action by means of", etc. She continued:

> Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it. Recognizing this, petitioner and the dissent argue that the word "uses" has a somewhat reduced scope in § 924(c)(1) because it appears alongside the word "firearm."... There is a significant flaw to this argument. It is one thing to say

[159] This case is widely considered to have been wrongly decided. Notably, the Supreme Court has taken a contrary approach in other cases considering this legislation, such as *Watson v United States* 552 U.S. 74 (2007) and *Bailey v United States* 516 U.S. 137 (1995).

> that the ordinary meaning of "uses a firearm" *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of "use" that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use

The dissenting opinion was Scalia, who argued rather that the ordinary meaning of the word “use” is to use something for its intended purpose. He gave the example, "Do you use a cane?" A questioner asking this clearly means to ask whether you walk with a cane, not "whether you have your grandfather's silver handled walking stick on display in the hall". He argued that "[t]he Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used." Thus, the phrase "use a firearm" should be considered as a whole, with the direct object "a firearm" narrowing the meaning of the verb "use".

Analysis

As set out above, concepts lexically encoded in a linguistic expression uttered may be modulated (by being narrowed or broadened) by pragmatic processes in order to derive the explicature of an utterance, its asserted content. A relevance-theoretic account of the possible narrowing in this case of USE (for any purpose) to USE* (as a weapon) would involve an ad hoc concept construction based on “information readily accessible for encyclopaedic entries of the encoded concepts and constrained by expectations of relevance” (Wilson & Carston, 2007, p. 239) via mutual parallel adjustment of implicit and explicit content. The encyclopaedic entry for “firearm” makes an interpretation hypothesis narrowing USE to USE* readily

accessible. (Note that US statutory interpretation involves a “rule of lenity” similar to the UK presumption against doubtful penalisation; *United States v Gradwell*, 243 U.S. 476, 485 (1917).) With this in mind, it is interesting to compare Scalia's view of the meaning of "use" here with the discussion of the word "open" in Searle (1983, p.145) (see also Carston (2002)). Searle gives a number of examples of the use of the word "open", all of which are truth-conditional and all of which mean something distinct:

> Tom opened the door.
>
> Sally opened her eyes.
>
> Sam opened his book to page 37.

Here, each use of "open" refers to a very different action: the lexical meaning of the verb "open" "acts as a pointer to indefinitely many notions or concepts ...": OPEN, OPEN*, OPEN** etc. As Carston notes (2002, p.3 61), it is difficult to think of a concept OPEN which is not narrowed in some way.

Searle (1983) and Carston (2002) also discuss examples such as "Chris opened the fork" and "Jane opened a hair". It is hard to understand what these sentences mean, although the lexical meaning of each word is clear, as is the syntax. Carston suggests that this may be because

> …the verb ‘open’ points us to a particular region in encyclopaedic memory at which all manner of information about kinds of opening is stored, or at least

> made accessible, but it does not include what would be needed for us to construct the kind of full-fledged concept that could feature in a thought involving a relation between … Chris and the fork, etc., a thought which could then be evaluated against some situation or event in the world involving … Chris and the fork, etc., and judged true or false.
>
> (2002, p. 361)

Just as for "open", so for "use": when I use a metaphor, I say it; when I use a hammer, I hit things with it; when I use a torch, I light my way with it, etc. In each case, the context gives rises to a variety of narrowed concepts (USE*, USE** etc.). Of course, it is possible to employ the word "use" for non-stereotypical purposes (e.g., "I used the torch to prop the door open") but here the purpose is specified. If no purpose is specified, the hearer will narrow the meaning of "use" by reference to the direct object of the verb, so that it is understood to mean "use (for its intended purpose)".

This type of process accords with that set out by Scalia, in which he notes that the meaning of the word "use" may be narrowed by its relation to "a firearm", just as in another context it may be expanded or broadened, as I will show below. While O'Connor concedes that use of a firearm *as a weapon* is the first interpretation that comes to mind, she argues that this does not preclude other interpretations. I disagree (following Carston): if the first interpretation is sufficiently relevant, this is the interpretation that is rationally justified. Thus, if someone tells you that they use a cane, you understand that they mean that they use one to help them walk, and do

not waste time wondering whether they mean that they use a cane to decorate a hallway, or to herd cattle, or to conduct an orchestra, despite all these things being possible. If the aim, as O'Connor says, is to interpret the language of law according to its "ordinary or natural meaning", it is hard to disagree with Carston's relevance-theoretic approach. Further, I would argue that the verb "use" belongs in the same category as Carston's "open", in that it is difficult to conceive of what it means in a concrete sense (rather than simply providing synonyms for it, such as "employ") unless it is understood in relation to some direct object.

There are many words which follow a similar pattern to "open" and "use", some of them extremely common in usage. For example, the verb "have" means something quite different in each of the following statements:

> I have dinner every night at Le Caprice.
>
> I have doubts about his suitability for the role.
>
> I have measles and can't come to the party.
>
> I have a new car.
>
> I have two children.

Each use of "have" above indicates a different concept (HAVE*, HAVE**, HAVE*** etc.), from HAVE* dinner (eat dinner) to HAVE** doubts (to be in a mental state of doubt) and so on. Just as with "open", hearers have no trouble in accessing the relevant concept. The fact that this is done easily and automatically does not mean that it should be overlooked as an example of pragmatic narrowing. (The wide range

of senses of ‘have’ and their ubiquity in the language make it difficult to attempt to say what the encoded meaning of the word might be. Perhaps “to exist in a particular relation to”, where that relation could take a very wide range of forms, such as ownership (“I have a new car”), possession (“I have a fiver in my pocket”), parenthood (“I have two children”), and so on).

The relevance of this point for legal drafting and interpretation can be seen from the discussion of "use" in *Smith v US* above. There will be cases where it matters which of a range of distinct yet closely related concepts is meant where a simple word such as "use", "open" or "have" is employed. One can imagine a law stating:

> Anyone who has one or more children is entitled to apply for tax credits.

Here, it is clear that what is meant by "has" is something like "is a parent of" rather than "has in their possession" (compare "I have a piano in my drawing room"). The specific concept HAS* that is relevant here is easily accessed, but this does not mean that the pragmatic processes involved can be disregarded. An awareness of this kind of pragmatic narrowing in the drafting of legislation may help to avoid the kinds of issues raised in *Smith v US*.

Returning to the use of dictionary definitions in *Smith*, one obvious problem with such use is that dictionaries often set out multiple senses within a single entry, and there is no obvious way for a court to know which sense it should employ in reading the statute.

While it is clear that a dictionary can sometimes be an aid to a court, it is liable to misdirect itself if it sees dictionary definitions as akin to defined terms within a statute or contract. The purpose of defined terms in statutes is as an aid to understanding and to reduce "wordiness", making texts easier to read. For example, the Law of Property Act 1969 contains the following definition:

> In this Act…"puisne mortgage" means a legal mortgage not protected by a deposit of documents relating to the legal estate affected.
>
> (Law of Property Act 1969, s.30(1)

Thus, in any provision of the Act, where the words "puisne mortgage" appear they should be understood to mean "a legal mortgage not protected by a deposit of documents relating to the legal estate affected". The defined phrase "puisne mortgage" is simply substituted by its much longer definition. This approach, however, does not work with dictionary definitions, as dictionary definitions are not definitions in the sense that legal (or scientific, or mathematical) definitions are. Rather, they are better considered as guides to usage.

Further, dictionary definitions are often circular, meaning that they offer little assistance to the court at all. Black's Legal Dictionary (which was used in the case) defines 'to use' as "[t]o make use of; to convert to one's service; to employ": it is not clear what "to make use of" adds here. Webster's New International Dictionary

similarly defines “use” as “[t]o convert to one’s service” and ‘to employ”, but then defines “employ” as “to make use of”, putting us back where we started.

Taken together, this issue (that dictionary definitions are circular) and the preceding point (that dictionary definitions are guides to usage, not definitions in the sense that the definition can simply be substituted for the word, as legal definitions can), mean that any attempt to determine the “ordinary meaning” of ‘use’ by reference to a dictionary definition is likely to be flawed.

Geis (1995) notes that, rather than seeking to rely on dictionary definitions:

> Justice O'Connor's analysis would have been better served had she simply argued that “use a firearm as an item of barter during and in relation to a drug trafficking crime” entails “use a firearm during and in relation to a drug trafficking crime”, which is the language found in s. 924(c)(1), for this claim is true and makes the point she wished to make.
>
> (p. 1135)

Arguably, Scalia overstates his case when he claims that “to speak of using a firearm is to speak of using it for its distinctive purpose, i.e. as a weapon”. Rather, the context determines whether what is meant is use for its distinctive purpose or for some other purpose. As Geis comments:

… against Justice Scalia, [O'Connor] might have responded by noting that sentence (8a) clearly does not entail (8b).

(8) a. John used the pistol to hammer in the nail.

b. John used the pistol as a weapon in hammering in the nail.

(p. 1135)

Geis puts forward an alternative analysis to the relevance-theoretic analysis I set out above; I outline his analysis here along with that of Solan (1995)(2010)(2018) to illustrate some of the different approaches which have been used to discuss the interpretation of "use". Note that both Geis's and Solan's accounts rest on the particular nature of the verb "use" rather than providing a general theory of narrowing/broadening in legal interpretation.

Rather than considering the process as one of pragmatic narrowing, Geis argues that it is the particular nature of the verb "use" to require a parameter specifying the purpose of the use:

1. a. Harry used the pistol to shoot the intruder.

   b. Harry used the pistol as a weapon.

2. a. Harry used his pistol to drive in the nails.

   b. Harry used his pistol as a hammer.

3. a. Harry used his shotgun to prop the door closed.

   b. Harry used his shotgun as a door prop.

(p. 1136)

He compares “use” to other verbs in this regard:

4. a. *Harry found a rifle as a weapon.

   b. *Harry kissed his firearm as a weapon.

   c. *Harry threw his firearm away as a weapon.

So, “use” can occur with an explicit purpose parameter (as shown in 1-3), which some other verbs cannot (4). Geis goes on (p. 1137) to argue that, in the absence of an explicit purpose parameter, the purpose parameter of “use” will be implicit and will depend on the linguistic or non-linguistic context of the word’s usage. Thus “to use” carries with it, as part of its linguistic meaning, a purpose parameter which may be linguistically or pragmatically instantiated.

Harry: I can’t find anything to prop the door closed.

Sam: Use your shotgun.

In the example above, the purpose parameter of “use” is easy to determine: “use your shotgun to prop the door closed”, from the context of Harry’s initial statement. To give a quick relevance-theoretic analysis of this:

Sam has said to Harry “Use your shotgun”.

Sam’s utterance will be optimally relevant to Harry.

> Sam's utterance will achieve relevance by advising Harry how to prop the door closed (an expectation raised by Harry's utterance, together with the fact that such advice would be most relevant to Sam at this point).
> Sam therefore intends to communicate to Harry that he should use his shotgun to prop the door closed.

However, there may be cases where the implied parameter is less clear. Geis (p. 1137) compares:

> Harry used a firearm to rob the bank.
> Harry used a firearm to break into his kid's piggybank.

In the first example, the complement phrase "to rob a bank" provides the linguistic context for the implied parameter "as a weapon". Robbing banks is an activity during which a firearm may well be used as a weapon and so that narrowed sense of USE* (as a weapon) is likely to be easily accessible. Breaking into a piggybank, on the other hand, does not usually involve firearms being used as weapons (notwithstanding that they could be so used). Although the distinctive purpose of a firearm is to be used as a weapon, in this case it is likely that the narrowed sense of USE** (as a hammer) will be more accessible.

Solan (2010), (2018) also criticises the use of dictionaries in *Smith*. In doing this, the court gave the language of the provision its "definitional" meaning, not its ordinary meaning. While he accepts that swapping a gun for drugs is a sort of use, it is a

"very peculiar one, in all likelihood remote from the core concept that motivated Congress to enact the statute and the President to sign it" (Solan, 1995, p. 1076). If so, it is hard to see how this interpretation can reflect legislative intention. Definitional meaning should therefore not be considered equivalent to ordinary meaning. Rather, Solan argues for what he terms a "prototypical approach" as equivalent to ordinary meaning (1995, 2010, 2018), noting that "[t]ypically, but not always, the definitional approach will lead to broad interpretation and the prototypical approach will lead to narrow interpretation" (1995, p. 1076).[160]

7.2.2 Using a car - narrowing by reference to legislative context

Elliott v Grey (1959)

The defendant in this case owned a car which had broken down and could not be driven. He left the car parked on the street outside his house until it could be repaired. While the car was immobile outside his house, the defendant suspended his third party car insurance.

He was convicted of unlawfully using the car without having third party insurance, contrary to s. 35(1) of the Road Traffic Act 1930. The appeal upheld the conviction as the use was of the kind within the mischief contemplated by s. 35(1).[161]

[160] This comment accords with the arguments made in this thesis that, in cases of doubt, judges tend to interpret in a way that narrows the application of an onerous provision, although as we shall see below (regarding USE and HAVE-THE-USE-OF) broadening can also occur.

[161] This is a reference to the "mischief rule" of statutory interpretation (see below).

Hewer v Cutler 1973

The defendant in this case owned a car which he kept parked on the street. He had disconnected the linkage in the gear box, with the effect that the car could not be driven or moved.

While the car was parked on the street, its MOT certificate expired. The defendant was charged with having used the car on the road without a valid MOT certificate, under s. 44 of the Road Traffic Act 1972. The case was appealed to the Crown Court, where the conviction was quashed, and then further appealed. This further appeal was dismissed (meaning that the defendant remained not guilty) on the ground that, as the car was wholly and effectively immobilised, there was no use of the kind within the mischief contemplated by s. 44.

Analysis

In *Elliott v Grey*, the meaning of the word "use" is broadened. In *Hewer v Cutler* it is also broadened, but to a lesser extent. The wording of the legislation in each case is very similar.

Section 35(1) Road Traffic Act 1930

> …it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may

> be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.

Section 44 Road Traffic Act 1972

> A person who uses on a road at any time, or causes or permits to be so used, a motor vehicle to which this section applies, and as respects which no test certificate has been issued within the appropriate period before the said time, shall be guilty of an offence.

In each case, the requirement (for third party insurance and an MOT certificate, respectively) applies to a person who uses a motor vehicle on a road or causes or permits a motor vehicle to be used on a road. I consider below how the courts reached their decisions, and how relevance theory might be applied to their deliberations.

The first question to be considered is whether simply owning a motor vehicle which is on the road constitutes "using" that vehicle within the meaning of the relevant Act. It was held in *Elliot v Grey* that the meaning of the word "use" was not limited to active use but included "hav[ing] the use of a motor-vehicle on the road". USE* (have the use of) is a significant broadening of the lexically encoded sense of the word. Consider:

> I have the use of a house in the Lake District, but I have never actually used it.
>
> I use a house in the Lake District, but I have never actually used it.*

That negation is possible in the first example but not in the second suggests that "have the use of" and "use" are not generally seen as synonymous. How then did the court reach this conclusion?

The first point made by the court (per Lord Parker CJ) was that the wording of s. 35(1) Road Traffic Act 1930 could be contrasted with other sections of the Act. In both s. 11 and s. 12, which dealt with dangerous and careless driving, the verb used was "drive". Lord Parker noted that:

> [p]rima facie, ["use"] is a wider term [than "drive"] and includes something more than driving and certainly would include moving.
>
> (p. 371-372)

In effect, if Parliament had meant to limit the application of s.35(1) to driving, then they would have used this narrower and more informative term. They did not do so, and so they cannot have intended to so limit it. He goes on to approve the prosecution's definition of "use":

> Mr Miskin's suggested definition, which I think was that "use" means to have the advantage of the vehicle as a means of transport, including any period or

> time between journeys, itself suggests availability. In other words, it is really equivalent to what [defence counsel] suggests by the expression "have the use of".
>
> (p. 372)

Lord Parker noted that the defence counsel had argued that:

> the ordinary use of the word to "use" a motor-car does contemplate some active movement either in driving it or taking part in a journey in it or moving it, and that the word is quite inapt to describe a motor-car which cannot be used because it is out of action, not merely because it needs a little petrol but because the machine cannot work at all.[162]
>
> (p. 372)

However, he does not accept this argument. He then considers, effectively, whether having a broken-down car on the road falls within the extension of USING* the car. To do this, he relies on the influence of the heading of the relevant part of the Act ("Provision against third-party risks arising out of the use of motor-vehicles"). He uses this heading, along with the wording of s. 36 (which describes the type of insurance required), to support his view that the meaning of "use" should be substantially broadened. The purpose of the provision is the protection of third

[162] It is interesting here that Lord Parker describes such a car as a car that "cannot be used", given that he will go on to conclude that such a car is used.

parties. Lord Parker noted that a car on the road could be a risk to third parties irrespective of whether it can be driven:

> though this car could not be driven, there is nothing to suggest that it could not be moved…for all we know it was on the top of a hill and a little boy could release the brake and the car could go careering down the hill.
>
> (p. 372)

Lord Parker does not consider whether the offence would be committed in the case of a car which was entirely immovable. However, prosecution counsel did argue this and the argument is persuasive: if the purpose of the provision is the protection of third parties, then any car on the road should be covered. A car can present a risk to third parties even if it is entirely immovable (for example by being illegally parked in a location that causes danger to others, such as on a blind corner, or by leaking oil onto the road or by exploding).

Although in his analysis, Lord Parker deems the word “use” to mean “have the use of”, he in fact then modulates the concept HAVE THE USE OF to mean something more like ownership or perhaps control. By holding that simply owning a car which cannot be driven constitutes “having the use of a car”, Lord Parker appears to broaden the offence yet again (from USE to USE* (having the use of) and from HAVING THE USE OF to HAVING THE USE OF* (being in ownership or control of)).

In contrast, the defendant in *Hewer v Cutler* was not guilty, despite his car being on the road without an MOT certificate. Again, in this case "use" was taken to mean "have the use of". Prosecuting counsel relied on the decision in *Elliott v Grey* to argue that simply owning a car (albeit one that was undrivable and immoveable) on the street was sufficient to breach the requirement that a car should not be used on the road without an MOT certificate (in other words that it fell within the extension of HAVING THE USE OF*).

However, Lord Widgery did not agree. In the earlier case, the court had broadened the meaning of "use" from USE to USE* (have the use of) and from HAVE THE USE OF to HAVE THE USE OF* (be in ownership or control of). But in this case, the court was not willing to accept that mere ownership of a car constituted having the use of it, where the car was immobile. Thus it did not allow that second broadening from HAVE THE USE OF to HAVE THE USE OF*. The meaning of "use" was thus held to be narrower in s. 44 RTA 1972 than in s. 35(1) RTA 1930, despite the similarity of the linguistic context. How did this happen?

The answer is that the courts were not relying on linguistic context (of the sort identified by Scalia in *Smith*) but rather on legislative context. They did this by reference to a rule of interpretation in the English courts known as the mischief rule.

The mischief rule of legal interpretation is based on the idea that every statute is passed for a reason; that is, that Parliament makes laws because there are "mischiefs" that it wishes to remedy. These may be legal mischiefs (defects in the

law) or social mischiefs (such as the outbreak of a new sort of antisocial behaviour). It is a longstanding convention that English courts may have regard to the purpose for which an Act is passed (the mischief it is intended to remedy) in construing it. This can give rise to interpretations which differ quite markedly from the lexically encoded sense of the words used. Note however that the willingness of the courts to stray far from the lexically encoded sense of words is not unbounded. In *R v Bentham [2005] UKHL 18*, for example, Bentham had been convicted of possession of an imitation firearm. In fact, he had held up two fingers in the shape of a gun underneath his coat. The Court of Appeal upheld his conviction, applying a purposive construction (the mischief rule) to the legislation and so determining that what mattered was whether the defendant appeared to have a firearm. This was overturned on appeal to the House of Lords and the conviction quashed. Per Lord Bingham:

> In my respectful opinion, the conclusion reached by the lower courts is insupportable. One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it. Resort to metaphor is impermissible because metaphor is a literary device which draftsmen of criminal statutes do not employ. What is possessed must under the definition be a thing. A person's hand or fingers are not a thing …
>
> Parliament might have created an offence of falsely pretending to have a firearm (although not an imitation firearm). But it has not done so. And the

> appellant was not accused of falsely pretending to have a firearm but of possessing an imitation firearm …

(One might argue in response that the linguistic concept of inalienable possession does allow the notion that one may possess something that is not separate or distinct from oneself: I may talk about "my finger" whether it is attached to my hand or not.)

Returning to the mischief rule, in relevance-theoretic terms, the mischief which an Act seeks to remedy is part of the context in which the utterance was made. So, for *Elliott v Grey*, the analysis might be as follows. Parliament has said:

> …it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.

The judge, in construing the word "use" will be guided by the search for relevance. He will follow the path of least effort in whatever direction it leads (broadening or narrowing, or a combination of both) given the specific context in which the utterance was made. This context includes the heading to the relevant part of the Act ("Provision against third-party risks arising out of the use of motor-vehicles"). The utterance will meet his expectation of relevance if it provides against third party risks

arising out of the use of a motor car (expectation raised by the heading). This expectation, along with the judge's encyclopaedic knowledge regarding the ways in which cars may pose risks to third parties, leads to a broadening of USE to USE* (make use of) and from MAKE USE OF to MAKE USE OF* (own or control).

In *Hewer v Cutler,* the judge explicitly rejects the argument that the same broadening should apply simply because the linguistic context in which the word "use" arises in s.44 Road Traffic Act 1972 is (for relevant purposes) the same as s.35(1) Road Traffic Act 1930. Again, he considers legislative context. There is nothing in the Act to suggest that the purpose of this provision is to provide against third party risks. Per Bridge J:

> "I am wholly unconvinced that there was here any user of a kind which was within the mischief against which this enactment prohibiting user without a valid test certificate was directed. I cannot see how any of the dangers against which the mandatory requirement to hold a valid certificate is intended to protect the public could conceivably have arisen out of the presence of Mr Hewer's wholly and effectively immobilised vehicle in Lullington Road."

In each case, the extent of broadening of USE was determined by the harm which the legislative provision was intended to remedy. The provision would achieve relevance if addressed the harm which it was intended to prevent. Each judge therefore broadened USE up to this point, and no further, with the different harms which the two provisions were aimed at justifying the different broadenings.

Note, however, that there is an alternative analysis, which might be that the statutes in question were (unintentionally) vague. While the judges may have considered what they were doing to have been determining (constitutively) the meaning of “use” in the provisions in question (by broadening it to include ownership or control), another possible explanation is that ownership or control is merely implied, perhaps by means of an additional premise (that to have use of a car implies ownership or control of it), which together with the text of the provision gives rise to the implication that the statute applies to those who have ownership/control of the car. According to this view, the extra material is not part of the explicature of the provision at all, but is merely implied.

I find this alternative analysis somewhat unconvincing. It places too little weight on the reasoning process set out in the judgments: each judge clearly considers himself to be determining the meaning of “use” having regard to the purpose for which the legislation in question was enacted, rather than importing any sort of additional implied content. While of course there can be a gap between what we think we are doing in utterance interpretation and the actual cognitive processes involved, arguably statutory interpretation should be considered a special case: given that the judge’s interpretation constitutively determines the meaning of the provision, his conscious process of reasoning as set out in the judgment should be considered to carry some weight, not least because any appeal against the judgment based on the judge’s interpretation will consider the reasons he gave for that interpretation.

That said, there inevitably will be times when a judge's interpretation of a provision is actually unconsciously based on implicit content, which the judge effectively presents as explicit content through a process of post hoc reasoning — judges are fallible. But this in no way undermines the general argument that judges *tend* to recover the explicature of a provision in interpreting it nor the notion that it is an appropriate normative aim for them to do so.

7.3 Vehicles in the park - narrowing by reference to moral context

Finally, I consider the role of moral context in lexical modulation, by which I mean the set of assumptions concerning moral behaviour which will be highly accessible in a particular case. I shall argue that the desire to achieve what seems the right moral outcome to a case drives judicial interpretation, so that the distinction set out in Chapter 1 between legal positivism[163] and natural law[164] is less marked than is sometimes thought: if the legal effect of a statute is its communicated meaning, and this is dependent on factors such a modulation (which occurs in context, including moral context), then the effective positive law will inevitably be tempered by moral values.

Hart (1958) asks a question which has been widely considered:

[163] Broadly, that the only legitimate sources of law are those positive norms (such as legislation and case law) that have been enacted, adopted, or recognised by the relevant body.

[164] Broadly, that law derives from values inherent in human nature and that can be deduced independently of positive law.

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not?
>
> (p. 607)

Various factual variations to this have been proposed. For example, would a war memorial comprising a World War II military truck on a pedestal constitute a vehicle in the park?[165] Alternatively, how about an ambulance being driven into the park in order to provide assistance for somebody who had been injured? The lexically encoded meaning of the word "vehicle" would certainly include an ambulance (See Solan (1998, p. 79), "[W]e know perfectly well that ambulances, for example, are vehicles" and Waldron (1994, p. 537), "An ambulance is not a borderline case of a vehicle; if anything it is a paradigm case of vehicle"). Yet we would not expect a judge to impose a penalty on the ambulance driver. Why not? On a strictly (exclusive) positivist[166] approach, the law is that the ambulance (being a vehicle) is banned from the park.

One argument might be the judge understands the meaning of the statutory text as forbidding ambulances from entering the park but decides that in this case other legal facts (such as facts about fairness and justice) mean that the statute should not

[165] Fuller (1958)

[166] The exclusive positivist position is that the legal validity of a norm can never be a function of its consistency with moral principles or values.

apply. However, I will argue here that there is an alternative view which perhaps provides a more useful account.

As I have set out in this section, judges very regularly interpret legislation in a way which makes clear that they have interpreted words within it in a narrower or broader sense than the lexically encoded one. This may be because of linguistic context (as the court failed to do in *Smith v United States* but did successfully in *Watson v United States*) or legislative context (as in *Elliot v Grey* and *Hewer v Cutler*) by way of an inferential process in the search for optimal relevance. Could this same process apply to moral context, in the case of the word 'vehicle' with regard to an ambulance in the park?

The task of the judge is to identify the intention of Parliament in passing the legislation.[167] It seems highly unlikely that Parliament would have intended to ban ambulances in this situation, and highly likely that Parliament would have expected the courts to understand that ambulances helping injured people were not included in the ban, as this would be a morally and socially undesirable outcome. Thus, a relevance-theoretic approach might posit that what Parliament has communicated in passing legislation banning vehicles from the park is not that VEHICLES (in the lexically encoded sense) are banned but that VEHICLES* (in a narrower sense, which would exclude ambulances being driven to help injured people, and possibly other vehicles so driven as well) via an implicated premise that Parliament would not have intended such a morally and socially undesirable outcome.

[167] See Chapter 3 for a discussion of the nature of this intention.

This approach, I believe, suggests that the gap between natural law and legal positivism is perhaps less broad than one might imagine. If the legal effect of legislation is based on the explicature of what Parliament says (as it appears to be), rather than on an unenriched version of it, and if judges make use of the social and moral context in question in deriving that explicature (as they appear to do), then even a strictly positivist approach will incorporate moral considerations.

7.4 Conclusions

In this chapter, I have argued that lexical modulation (contributing to the explicature of a provision) is a very common feature of legal interpretation and I have shown that it may occur by refence to a range of factors, from the encyclopaedic entries of relevant encoded concepts, to the mischief the Act is intended to address, to implicated premises regarding moral and social outcomes.

Chapter 8: Conclusion

8.1 Key arguments

My aim in this thesis has been to consider legislation as communication and how the application of the tenets of relevance theory to legislative drafting and interpretation might aid clarity and consistency in those processes. As I set out in the Impact Statement, improving understanding of the cognitive processes involved in linguistic communication and their application to statutory interpretation may lead both to better drafting of laws and to better interpretive practice. Awareness of processes which are <u>unconscious</u> in ordinary communication (such as modulation) is likely to assist those involved in drafting the law in achieving better outcomes (taking here a better outcome to be a reduction of the risk of a judge interpreting a provision in a way that was not foreseen in its drafting and enactment).

I considered first the question of whether legislating is communication at all, noting that most modern theories of human communication rely at least to some extent on the recognition of speaker intentions. Relevance theory posits a set of nested intentions – communicative and informative. I have argued that there is no theoretical reason why Parliament cannot hold a subjective collective intention as to the meaning of a legislative provision (such that, for a provision in the form, "Whoever, during and in relation to any drug trafficking crime, uses a firearm, shall, in addition to the punishment provided for such drug trafficking crime, be sentenced to imprisonment for five years," Parliament intends to communicate either that the sentence applies to someone USING* a firearm (any sort of use) or that the

sentence applies to someone USING** a firearm (use as a weapon)). However, in practice, the nature of the legislative process means that Parliament does not hold intentions of this kind. We can, however, say fairly safely that Parliament intends to do the things which it reasonably expects to flow from its actions. So, if Parliament votes to pass legislation in the form *T*, we can say that it intends that legislation to have legal effect: in other words, that the text in the form *T* has the status of an Act of Parliament, that it will be interpreted in line with standard interpretive practice, and so on.

The context in which judges carry out interpretation includes interpretive norms (such as legal presumptions and linguistic cannons of construction). From a relevance-theoretic perspective, these can be seen as implicated premises in the interpretive process which give rise to a number of outcomes. For example, the requirement for Parliament to have used clear words to impose a prohibition or penalty tends to limit the availability of implicated conclusions in the interpretation of onerous provisions: the communicated content of such a provision is generally its explicature (what Parliament has asserted, not merely implied). This conclusion supports the argument that a notion such as explicature is a necessary one in an account of linguistic communication, and case law provides plenty of real-life examples of judges seeking to recover asserted (not implied) content. Likewise, the presumption against doubtful penalisation requires that, in cases of genuine doubt, the less onerous interpretation is preferable. A relevance-theoretic account of this makes the presumption against doubtful penalisation an implicated premise in the interpretive process, so that (in a choice between a more and less onerous interpretation where there is genuine

doubt) a judge's expectations of relevance will generally not be met by the more onerous interpretation. Other possible implicated premises include information about Parliament's objective in passing a given Act and relevant moral precepts.

At various points in this thesis, I have compared the processes of legislative and literary interpretation, in order to demonstrate what is particular to the interpretation of legislation. Further, I have argued that implicated premises tend to *restrict* the availability of implicated conclusions in statutory interpretation, in literary interpretation they can do the opposite, *licensing* the reader to recovery a vast array of complex and possibly mutually-contradictory weak implicatures. While the outcomes of statutory and literary interpretation are clearly very different, relevance theory provides a convincing account of this difference.

I consider that the relevance-theoretic arguments I have made in this thesis provide a convincing account of the nature of legal interpretation and, in particular, a clear and coherent account of lexical modulation in legal interpretation. This gives rise to a number of benefits. A convincing account of lexical modulation in legal interpretation will assist people in understanding why judges interpret different words in different ways, depending on context. In turn, this should assist legislative drafters to foresee the possibility of modulation in judicial interpretation, and hence to draft in a way which reduces the risk of interpretations which were not foreseen or desired at the time of drafting and enactment. During the course of my PhD, I spent some months with the Office of the Parliamentary Counsel and presented my work both to them and to the Law Commission. My experience was that the people who draft statutes

are (unsurprisingly) very interested in the academic work being done on legislative meaning within the fields of linguistics and philosophy of language, but that there is not as much awareness of the work as linguists and philosophers might hope. Likewise, linguists and philosophers are not always aware of the practical drafting issues Parliamentary Counsel face in their work or the reasons for particular drafting choices. More discussion between academics and Parliamentary Counsel would be beneficial for all: one suggestion for achieving this is that Parliamentary Counsel should be invited to attend and speak at relevant academic conferences within linguistics and philosophy of language.

8.2 Future research

In the course of my research, I have focused on linguistic theory as applied to statutory interpretation; in other words, this thesis is primarily concerned with theories of communication in general and relevance theory in particular, as applied to the practical interpretation of certain types of text, rather than with the philosophy of law. I am interested in what the specifics of statutory interpretation (seen from a relevance-theoretic viewpoint) can tell us about linguistic communication generally and I believe that I have shown that relevance theory can provide a coherent account of statutory interpretation.

A different approach would have been to focus more on legal theory than linguistic theory, and I believe that this may provide fruitful avenues for future work. In particular, so-called “inclusive positivist” approaches to legal theory posit that moral principles can form part of the content of the law, provided that they are made so

(either explicitly or implicitly) by the sources of the law. I have argued in this thesis that moral precepts can form implicated premises in a relevance-theoretic interpretive process undertaken by a judge, contributing to the asserted content the judge recovers. This seems to me a good example of how moral principles can form part of the content of the law, being made so implicitly by the sources of the law (given that interpretive norms allow for processes such as lexical modulation, which may be founded on (moral) implicated premises). It may be of interest to look at this more from the perspective of legal theory, rather than primarily from the perspective of linguistic theory.

Likewise, I have argued that implicated premises are part of the interpretive process in both statutory and literary interpretation, and that the very different outcomes they give rise to is adequately explained by relevance theory. It may be fruitful to consider these arguments regarding implicated premises in statutory and literary interpretation alongside the work of Ronald Dworkin (and others) comparing these two practices.

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Annex

Archaïscher Torso Apollos

Wir kannten nicht sein unerhörtes Haupt,

darin die Augenäpfel reiften. Aber

sein Torso glüht noch wie ein Kandelaber,

in dem sein Schauen, nur zurückgeschraubt,

sich hält und glänzt. Sonst könnte nicht der Bug

der Brust dich blenden, und im leisen Drehen

der Lenden könnte nicht ein Lächeln gehen

zu jener Mitte, die die Zeugung trug.

Sonst stünde dieser Stein entstellt und kurz

unter der Schultern durchsichtigem Sturz

und flimmerte nicht so wie Raubtierfelle

und bräche nicht aus allen seinen Rändern

aus wie ein Stern: denn da ist keine Stelle,

die dich nicht sieht. Du mußt dein Leben ändern.

Rainer Maria Rilke (1908/2014)

Invitation

Oh do you have time

to linger

for just a little while

out of your busy

and very important day

for the goldfinches

that have gathered

in a field of thistles

for a musical battle,

to see who can sing

the highest note,

or the lowest,

or the most expressive of mirth,

or the most tender?

Their strong, blunt beaks

drink the air

as they strive

melodiously

not for your sake

and not for mine

and not for the sake of winning

but for sheer delight and gratitude –

believe us, they say,

it is a serious thing

just to be alive

on this fresh morning

in the broken world.

I beg of you,

do not walk by

without pausing

to attend to this

rather ridiculous performance.

It could mean something.

It could mean everything.

It could be what Rilke meant, when he wrote:

You must change your life.

Mary Oliver (2013)

Lying in a Hammock at William Duffy's Farm in Pine Island, Minnesota

Over my head, I see the bronze butterfly,

Asleep on the black trunk,

Blowing like a leaf in green shadow.

Down the ravine behind the empty house,

The cowbells follow one another

Into the distances of the afternoon.

To my right,

In a field of sunlight between two pines,

The droppings of last year's horses

Blaze up into golden stones.

I lean back, as the evening darkens and comes on.

A chicken hawk floats over, looking for home.

I have wasted my life.

James Wright (1992)

A Moment

Across the highway a heron stands

in the flooded field. It stands

as if lost in thought, on one leg, careless,

as if the field belongs to herons.

the air is clear and quiet.

Snow melts on this second fair day.

Mother and daughter,

we sit in the parking lot

with doughnuts and coffee.

We are silent.

For a moment the wall between us

opens to the universe;

then closes.

And you go on saying

you do not want to repeat my life.

Ruth Stone (2020)

American Sonnet for my Past and Future Assassin

Rilke ends his sonnet "Archaic Torso of Apollo" saying

"You must change your life." James Wright ends "Lying

In a Hammock at William Duffy's Farm in Pine Island,

Minnesota" saying "I have wasted my life." Ruth Stone ends

"A Moment" saying "You do not want to repeat my life."

A minute seed with a giant soul kicking inside it at the end

And beginning of life. After the opening scene where

A car bomb destroys the black detective's family, there are

Several scenes of our hero at the edge of life. A shootout

In an African American Folk Museum, a shootout

In the middle of an interstate rest stop parking lot, a shootout

In a barn endangering the farm life. The life

That burns a hole through life, that leaves a scar for life,

That makes you weep for another life. Define life.

Terrance Hayes (2018)