

## *Implicatures in judicial opinions*

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Shardimgaliev, M. (2019) Implicatures in judicial opinions. International Journal for the Semiotics of Law, 32 (2). pp. 391-415. ISSN 1572-8722 doi: 10.1007/s11196-018-09601-4 Available at <https://centaur.reading.ac.uk/81633/>

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To link to this article DOI: <http://dx.doi.org/10.1007/s11196-018-09601-4>

Publisher: Springer

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# Implicatures in Judicial Opinions

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## Abstract

A frequently discussed question in recent jurisprudential debates concerns the extent to which conversational implicatures can be conveyed reliably in legal language. Roughly, an implicature is a piece of information that a speaker communicates indirectly, that is without making the conveyed information explicit. According to the classical analysis of implicatures, their successful communication depends on a shared expectation of interlocutors to be cooperative in conversation. However, recently some legal theorists have claimed that in legal language implicatures tend to be unreliable because—according to them—communicative cooperation cannot be presumed in legal discourse to the same extent as in ordinary conversations. In this article, I will focus on implicatures in a particular kind of legal discourse, namely judicial opinions, and I will discuss to what extent we should also be sceptical about implicatures in this type of legal discourse. My aim is to suggest that scepticism about the reliability of implicatures in judicial opinions appears rather implausible once we take evidence into account, i.e. examples of implicatures from judicial opinions. I will argue that the evidence that sceptics provide is not only scarce but inconclusive and present a wealth of implicatures from judicial opinions that are not unreliable. I will conclude that an evidence-based approach casts the sceptical view into doubt and suggest that communicative cooperation is presumed in judicial opinions, as well.

**Keywords** Implicature · Cooperative principle · Legal pragmatics · Judicial opinion · Judicial decision · Case law

## 1 Introduction

A widely debated question in contemporary jurisprudence is whether so-called conversational implicatures are conveyed reliably by legal authorities—such as legislatures and courts—when they engage in legal discourse [1]. Very roughly,

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implicatures are pieces of information that are communicated by speakers implicitly or indirectly, and, according to the classical analysis that was provided by the philosopher of language Paul Grice, they can be conveyed because interlocutors expect each other to cooperate in conversation [2]. However, while clear implicatures are commonplace in ordinary conversations, some legal theorists have argued that their communication is less straightforward in legal discourse, such as statutory language or judicial opinions [3–11]. Most prominently, Andrei Marmor has claimed that implicatures tend to be “unreliable” or “indeterminate” in legal discourse because cooperation can supposedly not be expected to the same extent in this type of discourse as in the ordinary conversations that Grice focused on [4, 6–9]. Further, Luke Hunt has recently tried to back up Marmor’s arguments which are supposed to apply to legal language in general but have primarily focused on legislation, by arguing that implicatures are also unreliable in judicial opinions [3].

In this article, I want to subject the scepticism concerning the determinacy of implicatures in the particular legal genre of judicial opinions to critical scrutiny. In particular, my aim is to challenge Marmor’s and Hunt’s view according to which implicatures are unreliable in judicial opinions, a position that I will refer to as “the sceptical view”.<sup>1</sup> However, instead of objecting to the sceptics by challenging their theoretical arguments—as some other scholars have already done—my strategy is to take an evidence-based approach [12–14]. In particular, I will try to show that the evidence that is provided by sceptics to back up their view is not only scarce but also inconclusive and, further, I will provide a wealth of examples of implicatures from judicial opinions that are not unreliable. My conclusion will be that although the evidence might not provide a definite refutation of the sceptical view it casts it at least into doubt and gives us a good reason to resist the claim that communicative cooperation is presumed to a lesser extent in judicial opinions than in ordinary discourse.

The article is structured as follows. In the first section, I explain Grice’s theory of implicature. In section two I present the sceptical view and discuss some of its problems, especially its lack of evidential support. In the third and last section I present several examples of reliable implicatures from judicial opinions and argue that they pose a challenge for the sceptics.<sup>2</sup>

<sup>1</sup> Some other sceptics explicitly limit their scepticism to statutory language or even argue proactively that implicatures might be conveyed reliably in certain types of legal discourse. For instance, Francesca Poggi broadly shares Marmor’s opinion about cooperation and implicatures in statutory language but argues that the language of contracts might be more cooperative and convey implicatures more reliably [10]. My argument is only supposed to constitute an objection to views on which implicatures are unreliable in judicial opinions.

<sup>2</sup> In this article, I do not take any stance on the controversial jurisprudential question to what extent legal norms are determined by implicated content or communicated content more generally. That is, I only consider what legal authorities *communicate* when engaging in legal discourse and not the legal norms that their communicative acts might give rise to. While it is arguably still the “standard view” that legal rights and duties are determined to a large extent by what legal authorities communicate, there are also some legal theorists, such as Ronald Dworkin and Mark Greenberg, who have tried to resist this idea [1, 5, 8, 15].

## 2 Implicature

I begin with Grice's classical analysis of implicature [2].<sup>3</sup> Grice famously distinguished the notion of implicature from the notion of what is said. The distinction can be illustrated with the following example:

Anna: Are you going to the party tomorrow?  
 Bob: I have to work

It is clear that while Bob merely says that he has to work, he conveys more than that: Bob means that he cannot come to the party tomorrow. This indirect or implicit instance of meaning one thing by saying something else is an example for an implicature.<sup>4</sup>

What is said is largely a context-independent notion for Grice [2].<sup>5</sup> Roughly, it is determined primarily by the 'literal' or 'conventional' meaning of the utterance. Contextual information can only contribute to what is said if its consideration is mandated by the conventional meaning of an expression that is part of the utterance. For example, the indexical term "I" in Bob's utterance requires considerations of contextual information about who the speaker of the utterance is to determine its truth-conditional content. Other standard examples for such essentially context-sensitive expressions are demonstratives ("this", "that", etc.) and ambiguous terms ("bank", "crane", etc.). Implicatures, on the other hand, crucially depend on contextual information that goes beyond the information that contributes to what is said. For instance, in a different context Bob might have said exactly the same and conveyed a different implicature or no implicature at all. For instance, he could have said it to respond to the question whether he will go to a concert or the question what he is doing tomorrow. Further, implicatures also depend on an expectation of communicative cooperation. This expectation is captured by Grice's famous 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." [2]. The Cooperative Principle is further fleshed out in four categories: quantity, quality, relation and manner [2]. The category of quantity relates to the amount of information that is provided and instructs speakers to give the right amount of information, i.e. to provide sufficient information, but also no

<sup>3</sup> For the sake of conciseness, the overview that I provide in this section is very rough. I refer to the recent surveys by Wayne Davis and Yan Huang for further details [16, 17].

<sup>4</sup> In this article, I only consider the paradigmatic type of implicatures, namely particularized conversational implicatures, and I will not discuss other kinds of implicatures in legal language, such as generalized conversational implicatures and conventional implicatures (for details, see Grice's classic analysis and some recent overviews [2, 16–18]). Since it is not always clear to what extent the sceptics take their view to extend to these less paradigmatic kinds, I am unsure to what extent they can be used in an argument against the sceptics [3, 4, 8]. However, for an argument against Marmor's view that is based on considerations of generalized conversational implicatures, see a recent article by Brian Slocum [14].

<sup>5</sup> The classical Gricean notion of what is said is often understood to be a semantic notion, even though Grice himself usually did not speak of "semantics" or "pragmatics" [19]. This notion has come under attack in the recent literature and is now often considered to be a pragmatic notion [20, 21].

unnecessary information. The category of quality is primarily related to the notion of truth and its maxims require speakers only to say things that they believe to be true and for which they have sufficient evidence. The only maxim under the category of relation is to make one's utterance relevant to the conversation. Finally, the category of manner concerns how something is said and maxims that fall under it instruct speakers to be perspicuous and orderly and to avoid ambiguity and unnecessary prolixity.

To get a better idea of the role that the Cooperative Principle and the maxims play in explaining implicatures it is instructive to have a look at our example again. If we only consider what Bob says as a response to Anna's question, then his utterance would violate the maxim to make a relevant contribution to the conversation because, by itself, saying that he has to work does not provide a relevant answer to the question if he is coming to the party. However, the assumption that Bob *does* intend to make a relevant contribution to the conversation entitles Anna to infer that Bob conveys more than just what he says and that his obligation to work is somehow related to his attendance of the party. And since it is likely that there is a clash between the two, Anna is entitled to infer that Bob implicates that he cannot come. According to Grice, this type of reasoning can be generally applied to explain how implicatures are conveyed [2].

Implicatures have several important features but the three that are most relevant for the purposes of this article are calculability, cancellability and indeterminacy.<sup>6</sup> Calculability accounts for the fact that there must be a rational argument from the information on which implicatures depend—what is said, context and the Cooperative Principle—to the conclusion that an implicature was conveyed. In Grice's own words: "the presence of a conversational implicature must be capable of being worked out; for even if it can in fact be intuitively grasped, unless the intuition is replaceable by an argument, [it] will not count as a conversational implicature" [2]. As opposed to the other features, the calculability constraint is not only a characteristic but a necessary feature of implicatures, for if no calculation can be provided, then there can be no argument to the claim that an implicature has been conveyed. The second feature is cancellability. An implicature is cancellable in the sense that the speaker can almost always add a clause that states or implies that the speaker does not want to commit herself to the content that is supposed to be implicated, without thereby giving rise to conversational oddity. For instance, Bob might add "but I will call it a day earlier and come to the party" and thereby cancel his implicature. Cancellability accounts for the fact that a speaker is not committed to an implicature in the same way as to something that was explicitly said. For instance, it would be odd for Bob to say "But I don't have to work" because it would constitute an explicit contradiction. Third, implicatures are often indeterminate. Grice writes:

Since, to calculate a conversational implicature is to calculate what has to be supposed in order to preserve the supposition that the Cooperative Principle

<sup>6</sup> For more details, see Grice's classical analysis and a recent overview by Michael Blome-Tillman [2, 18].

is being observed, and since there may be various possible specific explanations, a list of which may be open, the conversational implicature in such cases will be a disjunction of such specific explanations; and if the list of these is open, the implicature will have just the kind of indeterminacy that many actual implicatures do in fact seem to possess. [2]

Indeterminacy, as understood by Grice, accounts for the fact that there might be different but similarly plausible explanations for what exactly a speaker conveys when making an utterance and that in such cases the implicature can be a disjunction of different possible explanations. For instance, we might just as plausibly analyse Bob's utterance as implicating that he *will* not come to the party (rather than that he *cannot* come) and so it is indeterminate what exactly the speaker meant.

### 3 The Sceptical View

In this section, I present and discuss the sceptical view according to which implicatures are indeterminate in judicial opinions. The section is divided in two parts. In the first part I explain the arguments that are put forward in support of the sceptical view and in the second part I discuss some of its problems.

#### 3.1 The Arguments

The most prominent proponent of a general sceptical view concerning implicatures in legal language is Andrei Marmor [4, 6–9]. To get a first overview, his argument can be roughly outlined as follows. Using legislation as his primary example, Marmor starts out with the claim that statutory language is characteristically different from the kind of ordinary conversations that Grice considered. In particular, Marmor claims that legislation is a “strategic” type of discourse which means that cooperation cannot be presumed in this type of discourse to the same extent as in ordinary conversations.<sup>7</sup> But, the argument continues, since the communication of implicated content depends on the expectation of cooperation, it is unreliable whether implicatures are communicated in legislation. The argument then seems to be that since legislation is “a paradigmatic example of legal speech”, it is plausible that other types of legal language are also strategic and do not allow for the reliable communication of implicatures [4].

<sup>7</sup> Marmor also briefly considers another possible source of indeterminacy of implicatures in legal language, namely the alleged unreliability of contextual information in this type of discourse [4]. He argues that the context of legal discourse is unreliable because it does not have any “clear boundaries” as ordinary conversations supposedly do [4]. However, since Marmor's remarks on context are rather tentative and he says himself that he sees “the main difficulty” in conveying implicatures in legal discourse with the Cooperative Principle and the Gricean maxims, I will not discuss his remarks on context in the following [4]. Since my aim here is not to directly challenge the theoretical arguments of the sceptics but rather to suggest that they are at odds with evidence from judicial opinions, this will not affect my main argument.

However, this is only a rough outline of the argument and for a more thorough assessment I have to discuss some of its core ideas in detail. First, we need a better understanding of the central notion of strategic speech. This already proves difficult because, as Timothy Endicott has pointed out, Marmor “does not really explain the idea” [13]. On the one hand, Marmor contrasts strategic speech with cooperative speech and says that he “use[s] the term ‘strategic speech’ [...] to indicate that there are some important non-cooperative elements in certain types of communicative interactions” [6]. On the other hand, Marmor stresses that strategic speech is not entirely non-cooperative because “[a] certain cooperative element is probably present in any communicative interaction”, and that “[t]he point about strategic interactions is that it is always partly a cooperative and partly a non-cooperative form of interaction.” [6]. However, he does not elaborate on how much non-cooperative behaviour must be present in a certain type of discourse for it to count as strategic. This is problematic because some non-cooperative elements (examples are discussed below) are also present in ordinary discourse, as Endicott points out [13]. Be that as it may, I do not want to dwell too much on this problem here and restrict myself to pointing out which role the notion of strategic speech plays in Marmor’s overall argument. According to him, the allegedly strategic nature of legislative speech makes it uncertain whether we can presume the Cooperative Principle and the maxims in inferring implicatures, such that this “lack of certainty leaves some content hanging in the air” [6]. His claim is then that “[c]onversational implicatures tend to be unreliable in the legal context, because there are no clear and uncontroversial norms that determine what counts as relevant contribution to the communicative situation” [4].

This raises the further question why we should believe that legislation is strategic. Marmor claims that the strategic nature of legislation manifests itself in several communicative strategies that are used by lawmakers. He describes two of them at least in some detail: so-called tacitly acknowledged incomplete decisions and legislative doubletalk. In cases of tacitly acknowledged incomplete decisions two different groups of legislators fail to agree on a particular legislative issue and decide on a statutory wording that might implicate mutually contradicting instructions. Marmor analyses the phenomenon as follows (where X and Y stand for two different groups within a legislative body):

- (1) X says “P” intending to implicate Q;
- (2) Y says “P” intending to implicate not-Q;
- (3) X and Y act collectively, intending their collective speech in saying P to remain undecided about the implication of Q. [4]

According to him, the uncertainty about cooperation might allow to infer Q as well as not-Q from the wording of the statute and “the problem in such cases is that [...] it is far from clear which one ought to prevail.” [4]. Marmor also claims that this type of case is likely to occur frequently because legislators often have conflicting interests but need to reach a compromise on statutory wordings [4]. A similar problem arises in cases of legislative doubletalk where legislators

allegedly exploit the uncertainty about cooperation to convey mutually conflicting implicatures to different audiences, such as judges and the general public:

What we have in such cases is almost like a conflicting implicature: Looked at from one angle, the legislature implicates one thing; looked at from a different angle, it implicates the opposite. [...] I do not think that there is a clear answer to the question of what is the unique content of the law in such cases of double-talk. [7]

Again, Marmor suggests that this strategy is likely to be used frequently because “the temptation to use this device might be great in many legislative contexts” [4], in particular in situations in which legislators have an interest in deceiving the public about the outcomes that are to be expected from legal proceedings. Marmor claims that these communicative strategies are indicative of the strategic nature of legislation. Based on these claims he makes the crucial prediction that “cases in which it is quite obvious that the content the legislature prescribes is not exactly what it says [...] would be very rare” [4] and that “[g]iven the strategic nature of legislation, it would seem rather unlikely that the prescribed content of an act of legislation is obviously and transparently different from what it says.” [4].

Now that we have a somewhat better understanding of Marmor’s arguments from legislation I want to explain how they relate to judicial opinions and, more fundamentally, why I want to focus on judicial opinions in the first place. Let me start with the latter. Even if I can show that Marmor believes that judicial opinions are also strategic, one might still find my appeal to evidence from this type of legal discourse surprising, because arguably the more natural choice would be to focus on Marmor’s own example of legislation.<sup>8</sup> However, although I agree with this point, there is an important problem concerning evidence from legislation: implicatures, whether reliable or unreliable, are generally very rare or even non-existent in legislation, such that it is very difficult or even impossible to test their reliability in this type of legal discourse. This claim is supported by a recent study by Nicholas Allott and Benjamin Shaer who observe that “the utterance content of legal instruments rarely if ever includes implicatures” which, according to them, is due to the fact that “[legislators] seek to achieve a high level of explicitness and thus to minimize or even to eliminate implicated content” [22].<sup>9</sup> Further, as I will argue in the second part of this section, Marmor’s own examples of implicatures in legislation are unsuccessful and therefore cannot serve as evidence to test his claims. By contrast, I will show in section three that judicial opinions contain a wealth of implicatures and therefore provide better sources for testing the reliability of implicatures. As regards legislation: because I have no evidence of implicatures from this type of

<sup>8</sup> I thank an anonymous reviewer for bringing this point to my attention.

<sup>9</sup> Although Allott and Shaer only consider statutory language in their study, they speculate that their “remarks should be applicable to a wider variety of legal texts” which suggests that they also believe that implicatures occur, if at all, very rarely in judicial opinions [22]. In that case, the evidence that I will provide would cast their view into doubt, as well. However, since their claims remain very tentative with respect to other kinds of legal discourse and they do not argue that legal discourse is strategic, I will not consider their account in the following.



legal discourse against which I could test Marmor's prediction, in the following I will remain agnostic about the reliability of implicatures in legislation.

If this is accepted, it only remains to be shown that Marmor is committed to the view that implicatures are unreliable in judicial opinions. A lot of textual evidence is available to support this claim. To begin with, although Marmor uses legislation as a paradigmatic example, he is explicit that he does not limit his claims to legislation when he makes the more general claim that "legal speech is strategic" [6]. He also explicitly says that he considers judicial opinions to be a type of legal speech:

[There are] multitude ways [sic!] in which institutional performative speech acts modify the law. Judicial decisions can create or modify the law by the court's holding that the law is this or that; contractual obligations are formed by speech acts [...]; official acts with legal ramifications are carried out by regulations and instructions, and so on and so forth. All over the spectrum we create and modify the law by performative speech acts. [23]

Further, Marmor also tentatively discusses whether some types of legal discourse might be less strategic than legislation and mentions contracts and regulations that are made by administrative agencies as two types of legal discourse for which this could be the case [4]. However, he never discusses whether judicial opinions also fall under the less strategic category although they are surely a salient candidate. Marmor is even more explicit when he characterizes legislation and its interpretation in judicial opinions as a form of "discourse" or "conversation" between legislatures and courts and says "[g]enerally, my assumption here is that both the legislatures *and the courts* have an inherent interest in maintaining a *strategic* form of communication in the ongoing discourse between them" [8].<sup>10</sup> Similarly, he says that "the conversation between legislators *and the courts* [...] is *clearly strategic in nature*" [6].<sup>11</sup> Finally, he also claims that "[t]here is, probably, a great deal of strategic conversation going on between the judges themselves", just as there is strategic conversation between legislators in tacitly acknowledged incomplete decisions [8]. I think that these claims unequivocally demonstrate that Marmor is committed to the view that reliable implicatures will be very rare in judicial opinions because for him judicial opinions also constitute a strategic type of communicative interaction.

Finally, the claim that Marmor's arguments are directly relevant for judicial opinions is supported by the fact that they were recently applied by Luke Hunt to this type of legal speech [3]. Hunt claims that "legal speech does not share the goals of the cooperative principle because it is strategic in nature, particularly in the context of legislation that Marmor has masterfully described" and he goes on to "extend [...] the analysis to case law" [3]. He does so by arguing that the non-cooperative elements that allegedly characterize legislation—such as tacitly acknowledged incomplete decisions and doubletalk—have direct parallels in judicial opinions. Hence, Hunt is another clear proponent of the sceptical view.

<sup>10</sup> The emphasis is mine, [N.N].

<sup>11</sup> The emphasis is mine, [N.N].

### 3.2 Critical Remarks

Here, I want to highlight two problems about the sceptical view. One has to do with the sceptics' notion of "indeterminacy" or "unreliability" of implicatures and the other with the evidence that the sceptics provide in support of their view.

The problem about the sceptics' notion of indeterminacy is that Grice himself has already identified indeterminacy as one of the characteristic features of implicatures and therefore the sceptics' claim that implicatures are indeterminate in legal discourse does not establish any difference between legal discourse and ordinary conversations, at least if we assume that they have the same notion of indeterminacy in mind as Grice. That is, one might simply agree with the sceptics that implicatures are indeterminate in legal language but say that this is hardly any news because it is a general characteristic of implicatures to be indeterminate, irrespectively of the type of discourse in which they occur. Then one might reject the sceptical view straight away because it would fail to establish any difference with respect to implicatures between ordinary discourse and legal discourse, as it claims to do. Further, the indeterminacy of implicatures in legal discourse would also not lend any support to the claim that cooperation is not presumed in this type of discourse, since the indeterminacy of implicatures is compatible with the presumption of cooperation. In the light of this obvious objection, it is quite baffling that sceptics never mention that Grice emphasises that indeterminacy is characteristic for implicatures.

However, there might be a way for the sceptics to avoid this problem which is to claim that the relevant notion of indeterminacy is different from Grice's use which, we remember, refers to the possibility of alternative explanations of spelling out what the speaker implicates. As far as I can see, two possible alternative notions of indeterminacy are suggested by the sceptics. One understanding that is particularly salient from most of Marmor's work is that indeterminacy or unreliability consist in the feature of a legal rule to be interpretable as conveying *conflicting implicatures*, i.e. implicatures that are mutually inconsistent such as *q* and *not q*. This seems like a plausible interpretation because this is what happens in both legislative strategies that he describes. The interpretation is also supported by the fact that this is how Hunt interprets Marmor when he concludes from his application of Marmor's account that implicatures in judicial opinions are indeterminate "because conversational implicature may be generated in contradictory ways" [3].

However, it is also possible to interpret the notion of indeterminacy in a different way which is suggested by Marmor's most recent work on the matter [9]. Here, Marmor claims that pragmatic inferences—in particular implicatures—have a special unreliability in legal language because so-called "conflicting defeats" allegedly occur frequently in legal discourse [9]. As Marmor explains, conflicting defeats are cases in which a premise is added to a cancellable inference—such as an inference about implicated content—such that

the superseding premise renders the initial inference genuinely *indeterminate*. A conflicting defeat neither negates the conclusion nor undercuts the initial evidence for it. The defeasibility in such cases consists in the fact that it becomes indeterminate whether the putative conclusion follows or not—

namely, it is a conclusion that one would not be unreasonable to deny, nor unreasonable to affirm. [9]

The indeterminacy introduced by a conflicting defeat is different from the features of cancellability and ‘Gricean’ indeterminacy. If a superseding premise cancels the implicature it is determinate that there is no implicature and if there are multiple explanations available, it is determinate that several alternative contents can be inferred. In a case of a conflicting defeat, however, there is an inference to an implicature which becomes indeterminate through the introduction of an additional premise which makes it unclear if the initial inference was reasonable or not (I discuss Marmor’s examples for conflicting defeats below). Because these two notions of indeterminacy or unreliability both have at least some exegetical plausibility, I will take both of them into account in the following. For the rest of this paper, I use the terms “unreliable” and “indeterminate” interchangeably and in the same way as the sceptics, and not in the Gricean sense of the possibility of multiple explanations.

Assuming for the sake of the argument that sceptics can deal with the problem of the notion of indeterminacy, we can turn to a second problem of their accounts: the already mentioned lack of evidence to support their view. The problem here is not only that sceptics provide very few examples of implicatures from actual legal discourse that would exemplify that implicatures are unreliable, but also, I will argue, that these examples are inconclusive. In the case of Marmor it has already been criticized by Slocum that “he does not offer any examples” [14].<sup>12</sup> It must be conceded, however, that Slocum could not take into account Marmor’s latest contribution to the topic in which he does present some examples—exactly two, to be precise [9]. The first comes from the case *FDA v Brown & Williamson Tobacco Corp.*<sup>13</sup> In this case, the U.S. Supreme Court had to decide whether the Food and Drug Administration (FDA) had the legal authority to regulate tobacco products. On the one hand, as the newly appointed director of the FDA claimed in 1996, such an authority was granted to the FDA by Congress by means of the amendment of the Food, Drug and Cosmetic Act (FDCA) from 1965 which, in the relevant section, gives the FDA the authority to regulate any ‘articles (other than food) intended to affect the structure or any function of the body.’ On the other hand, in 1965 and until 1996 nobody—including Congress and the FDA itself—understood this act to apply to tobacco products. This second point is evidenced by at least three facts. First, over these 30 years the FDA itself explicitly denied having any such authority. Second, if the FDA had this authority then, according to its own regulations, it would have to put an absolute ban on the sale of tobacco products, which, given such factors as the economic importance of the tobacco industry, Congress could not have possibly intended. Third, between 1965 and 1996 Congress did not only pass six pieces of legislation in which it regulated the sale and advertisement of tobacco products, but also rejected legislative proposals to grant the FDA the authority to regulate tobacco products, thereby clearly suggesting that it has the sole authority to regulate tobacco products.

<sup>12</sup> The only exception is the case *Church of Holy Trinity v United States*, 143 US 457 (1892). However, since Slocum has already argued that this case is problematic, I will not discuss it here [14].

<sup>13</sup> *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120 (2000).

Marmor claims that the six pieces of legislation enacted by Congress contain an indeterminate implicature, namely that the sale of tobacco is generally legal [9]. His argument is that although Congress never said explicitly that the sale of tobacco is legal, putting certain restrictions on its sale and advertisement implicates that its sale is generally legal. This alleged implicature becomes unreliable, however, because the FDA adds a further premise to this inference, namely that the FDCA gives it authority to regulate tobacco which, according to the own regulations of the FDA, would lead to the conclusion that selling tobacco is illegal. According to Marmor, the introduction of this superseding premise constitutes a conflicting defeat. It makes the implicature unreliable that the sale of tobacco is generally legal.

Marmor's second example is *West Virginia University Hospitals Inc. v Casey*.<sup>14</sup> Here, the Supreme Court was faced with the question whether fees for services rendered by experts in civil rights litigations can be shifted to the losing party pursuant to a law that permits the award of "a reasonable attorney's fee." According to Marmor, Justice Scalia who delivered the majority opinion based his opinion "on a kind of pragmatic inference" [9].<sup>15</sup> Scalia argued that the permission to award "a reasonable attorney's fee" does not include expert fees because in most other acts of Congress that were related to this issue Congress explicitly mentioned attorney *and* expert fees which suggests that on this occasion the expression "attorney's fee" excludes expert fees. However, dissenting judges disagreed with this inference because they pointed out that the purpose of the law in question was to ensure that a plaintiff in a civil lawsuit can recover litigation costs from the losing party. Further, they held it to be obvious that litigation costs often include fees for experts who are employed by the attorney such that the law must also apply to expert fees. According to Marmor, the introduction of these additional premises constitutes a conflicting defeat because it renders the initial inference that expert fees are excluded unreliable.

However, I want to resist the claim that these two cases provide examples of indeterminate implicatures in legislation.<sup>16</sup> The problem with the first example is that Marmor never provides a single quotation from any of the six acts of Congress that followed the FDCA which would tell us *what was said* by Congress. However, because implicatures are carried by what is said, the claim that some implicature is indeterminate without quoting what is said does not even show us that there is any defeasible implicature. Put somewhat differently, because calculability is a necessary condition for an implicature to occur and a calculation requires what is said as input, Marmor does not show that there is an implicature in the first place, which

<sup>14</sup> *West Virginia University Hospitals Inc. v Casey*, 499 US 83 (1991).

<sup>15</sup> Marmor does not make explicit if this "pragmatic inference" is an inference about implicated content or another kind of pragmatic content. My discussion is supposed to account for the case that he means the former. If it is the latter, then my criticism does not apply but in this case his example would also not be relevant to my discussion since it is limited to implicatures.

<sup>16</sup> Please keep in mind that even if these were good examples they would still be examples of unreliable implicatures in legislation and not judicial opinions. Hence, even if conclusive they would not undermine the point that I want to make in this article in any substantive way. I discuss the examples merely to illustrate what Marmor means with his notion of conflicting defeats and to demonstrate that the evidence that he provides is inconclusive.

then might be disputed. The problem with the second example is that the question at hand was not a question of implicature but of what the conventional use of a certain expression—namely “attorney’s fees”—is in a certain area of law. This is evidenced by the fact that Scalia does not argue for any implicit exclusion clause conveyed by the use of this expression but rather for the claim that it is usually understood to have a narrow meaning. Similarly, the dissent does not dispute any such exclusion but rather the narrow construal of the expression in question, as evidenced by the dissent of Justice Stevens when he writes that “[t]he term “costs” has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation.”<sup>17</sup> Hence, the problem in this case was indeterminacy (or vagueness) of what is said and not of what is implicated. Since Marmor does not offer any other examples of implicatures, the already very thin evidential support that he provides for his views appears to be inconclusive.

Hunt similarly fails to provide conclusive supporting evidence for the sceptical view. He discusses exactly one example from an existing legal opinion to illustrate his point, the famous case of *Miranda v Arizona* in which the U.S. Supreme Court had to decide how suspects must be informed about their rights before interrogations by law enforcement officers.<sup>18</sup> Hunt claims that conflicting implicatures might be derived from this opinion which leads to unreliability [3]. We do not need to go into the details of Hunt’s example, however, because it suffers from the same problem as Marmor’s example of *Brown*: he never provides any wording from this opinion. Again, this violates the condition of calculability and therefore he does not show that there was an unreliable implicature. The upshot is then that sceptics do not offer us any conclusive evidence that would support their view.

## 4 Implicatures in Judicial Opinions

In this section, I present several examples of reliable implicatures from judicial opinions which suggest that such implicatures are not “very rare” in this legal genre. The section is divided in four parts, each dedicated to examples from one of the Gricean categories of quantity, quality, relation and manner.<sup>19</sup> However, before I come to the examples, I first have to say a little bit about the method and its limitations.<sup>20</sup> My strategy for each Gricean category is to quote a handful of passages from a variety of different judicial opinions and to argue that if we do

<sup>17</sup> *Casey* (n 13) 104.

<sup>18</sup> *Miranda v Arizona*, 384 US 436 (1966).

<sup>19</sup> I fully agree with Grice that alternative explanations might be available for what is implicated in a particular case and therefore the explanations that I propose in this section should merely be understood as possible explanations among several possible alternatives. Since alternative explanations might fall under other Gricean categories my classification should also be understood as a possible classification among many (for instance, quantity implicatures can often be explained in terms of relation and vice versa).

<sup>20</sup> I want to thank an anonymous reviewer for urging me to clarify some of the methodological aspects and limitations of my approach.

not assume that they carry implicatures they would neither be in accordance with our intuitions nor make sense from a communicative perspective. Further, I will also argue that the inferred implicatures are not unreliable as claimed by the sceptics. As to my selection of sources, I mostly adopt Marmor's and Hunt's focus on famous opinions of the U.S. Supreme Court. I have chosen these sources because I take this to be the best way to cast doubt on the view of the sceptics, since the occurrence of reliable implicatures in these opinions indicates that their view is even problematic for opinions of the court that they themselves focus on. Nonetheless, I also consider some opinions from lower courts, as well as the UK and—at times—other legal systems to indicate that reliable implicatures are also conveyed in opinions by other courts and thereby add at least some support to the claim that they are generally characteristic of this type of discourse. However, although I do not see any obvious reason for why opinions of other courts should differ from U.S. Supreme Court opinions with respect to implicatures, I do not take myself to provide evidence to sufficiently bolster this assumption and therefore my claims are much more speculative when it comes to opinions from other courts. Finally, I also consider dissenting and concurring opinions and statements from both *ratio decidendi* and *obiter dicta*.<sup>21</sup> The idea behind this is, again, that a demonstration of the occurrence of reliable implicatures across the whole range of judicial opinions and their different parts indicates that they are generally characteristic of this type of legal discourse.

Obviously, my method is very informal and I want to emphasise here that I take my evidence to be merely suggestive in the sense that a handful of examples for every Gricean category is surely not sufficient for a definite dismissal of the sceptical view. Even if the sceptics accept that the examples of implicatures that I provide are reliable, they might still object that they are compatible with their own view since I might just have picked out the few “very rare” examples of implicatures that they allow for. Although my impression is that the wording “very rare” is rather strong and I will present several opinions that contain many reliable implicatures to make such claims less plausible, I cannot fully dispel such doubts. Similarly, sceptics might claim that I have chosen the few cases that support my point and withheld

<sup>21</sup> One might object that the use of dissenting and concurring opinions, as well as *obiter dicta* against the sceptics is unjustified because these sources are not binding and might therefore not be considered instances of legal discourse. However, I believe this objection can be resisted in several ways. First, they are certainly not my only examples and further examples from binding sources could have been provided. Second, only because some source is not legally binding, it does not necessarily follow that it is not part of the same *discourse* as legally binding material. Third, sceptics themselves have a rather broad notion of legal discourse which also applies to non-binding sources. For instance, Hunt suggests that his view also applies to dissents and concurring opinions when he says that “it is difficult to say what dissenting and concurring opinions could consistently implicate about the specific details of future questions” [3]. Fourth, it has been recognized that although strictly speaking concurring and dissenting opinions are not binding, unanimous opinions are taken to have a special force which indicates that dissenting and concurring opinions still have a certain role to play in determining how much weight is to be ascribed to a decision [24]. In fact, sometimes they become even more famous and influential than the associated majority opinions [25]. Finally, it is also widely recognized that the notion of *ratio decidendi* is highly contentious which often makes it difficult to discern it from *obiter dicta* [26].

opinions that do not contain reliable implicatures.<sup>22</sup> In anticipation of this objection I will show that even the cases that the sceptics consider themselves contain several reliable implicatures. As to the other opinions, I have chosen them at random within the admittedly broad confines on sources mentioned above. However, because these and other objections are conceivable, and I can neither foresee nor address all of them here, I restrict myself to the claim that the evidence that I provide is not supposed to constitute an infallible rebuttal of the sceptical view but merely to cast it into doubt.

#### 4.1 Quantity

Respecting the Gricean order, I start with quantity implicatures. We remember that the category of quantity is related to the amount of information that must be provided in a particular conversational situation. Probably the best way to cast a first doubt on the sceptical view is to begin with an implicature from one of the opinions that the sceptics consider themselves. To do so, let us consider again Marmor's example of *Casey* in which the issue was whether a statute that allows for shifting attorney's fees also includes expert fees. As explained, Justice Scalia, writing for the majority, held that this is not the case. In one passage he wrote: "If, as WVUH [West Virginia University Hospital] argues, the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy."<sup>23</sup> Importantly, what is said here is only the conditional. However, the implicature is clearly that attorney's fees do *not* include expert fees exactly because dozens of statutes would be inexplicable if they did. This is a quantity implicature because understood as a mere conditional the statement does not provide the right amount of information as required by the quantity maxim. The reason is that from what is said we can clearly infer the stronger and surely important statement that attorney's fees do not include expert fees, because we have *modus tollens* at our disposal and it is made clear that the consequent is likely to be false. Hence, if we want to account for our intuitions and make sense of what the judges write as a support of their own point we must suppose that this implicature is conveyed.

It is hard to see how the implicated content might be indeterminate. In particular, it is surely implausible that a conflicting implicature, namely that attorney's fees *do* include expert fees, might be calculated from the data. This would not only lead to the inexplicable redundancy that the judges refer to but also fly in the face of the whole argumentative structure of the opinion (i.e. the context). As Marmor helpfully points out himself, the whole aim of the majority opinion was to show that attorney's fees do *not* include expert fees. Elsewhere the majority also states explicitly "that at the time this provision was enacted neither statutory nor judicial usage regarded the phrase "attorney's fees" as embracing fees for experts' services."<sup>24</sup> For similar reasons it is also difficult to see how a premise might be plausibly introduced

<sup>22</sup> I would like to thank an anonymous reviewer for raising this worry.

<sup>23</sup> *Casey* (n 13) 92.

<sup>24</sup> *Casey* (n 13) 97.



and lead to a conflicting defeat. In any case, the burden to show that there is such a premise is certainly on the side of the sceptic. Hence, there is no reason to believe that the implicature is unreliable.

To stay with Justice Scalia, conditionals and the sceptic's preference for decisions of the U.S. Supreme Court, another example of an implicature carried by a conditional can be found in the case *Moskal v United States*.<sup>25</sup> Without going into the details of the case, I merely want to point out that in this case Scalia dissented from the majority, basing his argument on the rule of lenity, a fundamental interpretive principle in criminal law that requires to apply ambiguous or vague statutes in the manner that is favourable to the defendant. He wrote: "If the rule of lenity means anything, it means that the Court ought not do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art, and (to make matters worse) give the words a meaning that even one unfamiliar with the term of art would not imagine."<sup>26</sup> Again, what is said here is only the conditional, but it is clear that Scalia implicates that the court ought not to do what it does today, etc. This is clear not only because the rule of lenity does mean something, but also because the wording of the consequent unambiguously conveys that it is thought to be a wholly unjustified judgment. Again, this is a quantity implicature because what is said strongly suggests that Scalia intends to convey a stronger statement than the mere conditional. Further, it is implausible to claim that the implicature is not reliable. In particular, it would be absurd to say that a conflicting implicature might be inferred because Scalia would undermine his own dissent. Further, I also do not see which conflicting defeat might be plausibly introduced that would make the inference less reasonable.

Conditionals are surely not the only means that judges use to convey quantity implicatures. A much simpler example is the use of repetition as in the case *District of Columbia v Heller*.<sup>27</sup> In this landmark decision the U.S. Supreme Court decided that a District of Columbia prohibition on the possession of handguns violates the Second Amendment of the Constitution which provides that the right of the people to keep and bear arms shall not be infringed. When discussing the main precedent to which the dissent appeals to support its interpretation of the Second Amendment, Scalia (again), writing for the majority, notes that in this precedent there is "[n]ot a word (*not a word*) about the history of the Second Amendment."<sup>28</sup> On any plausible account the repetition is used here to implicate that it must be emphasized that in the precedent that the dissent invokes as its main support there is not a single word about the history of the Second Amendment. This implicature can be inferred because a simple repetition of already available information would violate the maxim of quantity to provide the right amount of information since—taken literally—it does not provide any new information at all. Hence, the majority must implicate something different from what it says, and the most salient implicature here is the emphasis.

<sup>25</sup> *Moskal v United States*, 498 US 103 (1990).

<sup>26</sup> *Moskal* (n 24) 132.

<sup>27</sup> *District of Columbia v Heller*, 128 S. Ct. 2783 (2008).

<sup>28</sup> *Heller* (n 26) 2815.



Finally, let me give an example of a quantity implicature from the House of Lords that was conveyed in the case *Salomon v Salomon*.<sup>29</sup> The House of Lords decided in this case to uphold the doctrine of corporate personality that recognizes a company as an entity that is distinct from its members. Without going into the details of this rather complex case, I want to draw the attention to a rhetorical question in the opinion of Lord MacNaghten when commenting on a declaration of the Court of Appeal: “I must say I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed himself to the full of the advantages offered by the Act of 1862 what is there wrong in that?”<sup>30</sup> Although Lord MacNaghten only asks what would be wrong with such a behaviour he clearly implicates more than that, namely that there is nothing wrong with it at all. For, based on quantity expectations, it can be presumed that he would give an answer to this question—which he does not—if the answer was not obvious. And since, from a legal perspective, there is nothing wrong with doing something that the law allows, the implicature is obvious indeed. Again, it would be extremely odd to say that a conflicting implicature might be calculated, namely that there is something wrong with it. Similarly, I just do not see any premise that might be plausibly introduced to make the inference unreasonable. Running the risk of constantly repeating myself, in the following I invite the reader to read all the cases that I present with the additional claim that I take these sources of unreliability to be highly implausible.

## 4.2 Quality

Let me now turn to quality implicatures. We remember that the category of quality is related to the notion of truth and that maxims falling under it instruct speakers to say things they believe to be true and for which they have sufficient evidence. Here, my examples are figurative uses of language and I provide more examples than for quantity implicatures to reflect my observation that they are particularly common in judicial opinions.<sup>31</sup> I start again with Marmor’s example of *Casey*. Even if we do not look at Scalia’s opinion we can find several quality implicatures in the different dissenting opinions that were put forward. Consider, for instance, Justice Marshall’s dissent in which he argues that “the Court uses the implements of literalism

<sup>29</sup> *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.

<sup>30</sup> *Salomon*, (n 28) 51–52.

<sup>31</sup> Although there has been quite some discussion in the post-Gricean literature on the question whether figurative uses of language are best classified as implicatures, as Grice claimed, I think that I can safely appeal to figurative language here to object to the sceptical view because sceptics agree that figurative uses of language are implicatures. Marmor is explicit on this point when he says that “[i]rony is a rather special case, typically implicating that the speaker intends to convey the opposite of the assertive content of his utterance” [8] and that “metaphor may also implicate content beyond what is said” [8]. Since Hunt endorses Marmor’s view and does not distance himself from these remarks on figurative language, it is not implausible to assume that he shares his views on this matter.

to wound, rather than to minister congressional intent.”<sup>32</sup> Obviously, intentions are not the sort of thing that can be wounded, and therefore a literal interpretation would violate the quality maxim. Rather, the court means that the majority’s literalist method of interpretation conflicts with what Congress intended to achieve when enacting the relevant statute. An implicature with a very similar content can be found in the dissent of Justice Stevens. He writes: “This Court’s determination today that petitioner must assume the cost of \$103,133 in expert witness fees is at war with the Congressional purpose”.<sup>33</sup> I think that the implicature is so obvious here that it does not require any further explanation. Further, the purpose of the statute is itself explicated in an implicature by Justice Stevens when he says that “[t]he Senate Committee on the Judiciary wanted to level the playing field so that private citizens, who might have little or no money, could still serve as “private attorney’s general” and afford to bring actions, even against state or local bodies, to enforce civil rights laws.”<sup>34</sup> Again, it is obvious that the meaning is not that the Senate Committee had an intention to literally level any playing fields, but that it wanted to establish equal opportunities for people who do not have the financial means to pay for legal support. And there is more in *Casey*. Another metaphor is used by Stevens when he argues that on other occasions on which courts have disregarded congressional intent, Congress responded to that by introducing legislation that opposes a literal construction: “On other occasions, however, when the Court has put on its thick grammarian’s spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different.”<sup>35</sup> A court’s putting on “thick grammarian’s spectacles” must here of course be understood as a pejorative metaphor to criticize a court’s literal method of interpretation. Finally, because I do not want to ignore Hunt, please also consider a metaphor in his example of *Miranda* which, according to him, does not contain any reliable implicatures. How about the judges’ claim that their “decision in no way creates a constitutional straitjacket”?<sup>36</sup>

However, the use of quality implicatures is surely not limited to metaphors. Consider, for instance, the following statement from *Brown*, the second case that Mar-mor referred to: “we are confident that Congress could not have intended to delegate a decision of such economic and political significance in so cryptic a fashion.”<sup>37</sup> This is a case of hyperbole because literally speaking Congress certainly *could* have intended such a delegation and therefore the statement would violate the maxim of quality. Rather the exaggerated usage of the term “could” conveys here that it is highly unlikely that Congress intended such a delegation. A similar hyperbole can also be found in the *Heller* opinion when Scalia says that “it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a “Do Not

<sup>32</sup> *Casey* (n 13) 103.

<sup>33</sup> *Casey* (n 13) 111.

<sup>34</sup> *Casey* (n 13) 108.

<sup>35</sup> *Casey* (n 13) 113.

<sup>36</sup> *Miranda* (n 17) 467.

<sup>37</sup> *Brown* (n 12) 160.

Walk” sign in order to flee an attacker.”<sup>38</sup> This, again is clearly an exaggeration because—in a literal sense—such a scenario certainly *is* conceivable. So, if we do not want to claim that the judges are expressing a trivial falsity here, the implicature must be that it is highly unlikely that such a thing would happen.

But even metaphor and hyperbole do not exhaust the range of figurative language use in judicial opinions. If we look at *Heller* again, we can even find sarcasm. For an example, consider what follows the repetition mentioned above that was used to emphasize that the main precedent that the dissent invokes to support its position does not say anything about the history of the Second Amendment: “Not a word (*not a word*) about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.”<sup>39</sup> The second statement gives rise to a complex quality implicature that comes in two stages of interpretation. First, there is the metaphor of the “mighty rock” which suggests that the precedent provides a strong support for the dissenting opinion. And, second, this metaphor is clearly meant sarcastically because, as the majority opinion itself argues, invoking something as the main precedent for one’s interpretation of the Second Amendment that does not say anything about its history is surely not strong support for one’s interpretation. Hence, the metaphorical understanding must be false, and the expression implicates the contrary: that the precedent is very weak support for the dissenting opinion. Surely, this is a very interesting example not only because it demonstrates the use of sarcasm in judicial opinions but also because the two stages of interpretation involving quality considerations indicate that even very complex implicatures can be conveyed reliably in judicial opinions. Finally, the fact that this complex quality implicature is directly preceded by a quantity implicature indicates that sometimes even in very short passages several implicatures can be found. This further undermined the sceptics’ claim that reliable implicatures are “very rare”.

Just as with quantity implicatures, the use of quality implicatures is not limited to American courts. Again, consider *Salomon*. After explaining in his opinion that in order to form a company that is limited by shares a memorandum must be signed by at least seven persons, citing the relevant statute Lord MacNaghten writes: “When the memorandum is duly signed and registered [...] the subscribers are a body corporate “capable forthwith,” to use the words of the enactment, “of exercising all the functions of an incorporated company. “Those are strong words. The company attains maturity on its birth.”<sup>40</sup> Since there is no literal sense in which a company might have a birth we can be confident that what is meant instead is that the words of the enactment state that a company acquires all its capacities immediately when it is formed.

Or consider the Irish case of *Ryan v Attorney General* in which the plaintiff Gladys Ryan argued—among other things—that the fluoridation of water in Dublin’s public water supply constituted an infringement of her parental right to decide

<sup>38</sup> *Heller* (n 26) 2820.

<sup>39</sup> *Heller* (n 26) 2815.

<sup>40</sup> *Salomon* (n 28) 51.

over her children's diet.<sup>41</sup> When interpreting the relevant statute, the judges wrote: "Despite the wide and somewhat loose wording of the definition it cannot be doubted that the word "fluoridation" is to be given its technical and scientific meaning".<sup>42</sup> Surely, giving a certain meaning to words *can* be doubted. Hence, if judges want to avoid committing themselves to expressing an obvious falsity they have to implicate something weaker than what they say, namely that the technical and scientific construction of the term cannot be *plausibly* doubted.

These examples indicate that reliable quality implicatures occur frequently in judicial opinions in the form of figurative uses of language. Interestingly, other authors have already noted the omnipresence of metaphors and other tropes in judicial opinions, although they have not discussed them with relation to the Gricean framework. Consider, for instance, Michael Moore's observation—and accompanying examples—that "there is one major area of legal rule-making in which metaphors abound. Judicially created rules posited in the opinions of judges are filled with metaphors" [27]. Or Haig Bosmajian's book-length study of metaphors and other tropes in judicial opinions in which he does not only provide numerous examples but also ascribes important rhetorical functions to the use of these rhetorical figures in judicial opinions [28]. This clearly suggests that the occurrence of figurative language does not constitute a merely incidental but a structural feature of judicial opinions and that therefore they are likely to occur frequently in judicial opinions.

As a last point about figurative language use I would like to point out that the frequent occurrence of figurative language in judicial opinions is even more problematic than the occurrence of other kinds of implicatures for Marmor's claim that "cases in which it is quite obvious that the content [of the law] is not exactly what it says [...] would be very rare." [4]. The reason is that in these cases the content that is communicated does not only go beyond what is said but does *not even include what is said*. This is a consequence of the fact that in figurative language use speakers do not communicate something *in addition* to what they say, but *instead* of it.

### 4.3 Relation

Here I will present relation implicatures. The first example is very well-known in the American legal culture. In fact, the opinion in which it has been communicated is described by Richard Posner as "the most famous opinion by our most famous judge" [25]: Oliver Wendell Holmes's dissent in *Lochner v New York*.<sup>43</sup> The question in this case was whether a New York law that limited the working hours of bakery employees to ten hours a day and sixty hours a week violated the due process clause of the Fourteenth Amendment. The majority held that it did because, in their opinion, the clause contains a right to freedom of contract which allows employers and employees to make any contract they wish. Holmes objected that the clause

<sup>41</sup> *Ryan v Attorney General* [1965] IR 1.

<sup>42</sup> *Ryan* (n 40) 351.

<sup>43</sup> *Lochner v New York*, 198 US 45 (1905).

does not enshrine such a right and that examples like Sunday and usury laws proved the contrary.<sup>44</sup> Further, he accused the majority of engaging in judicial activism by forcing a libertarian economic theory upon the American people that the Fourteenth Amendment does not contain. The relevance implicature is then conveyed by “the most famous sentence in the dissent” [25]: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”<sup>45</sup> Taken literally, the sentence is obviously true but unrelated to the question whether the Fourteenth Amendment guarantees freedom of contract. However, assuming that Holmes conveys something that is related to the question at hand and taking into account that Spencer’s book is widely considered to be a manifesto of libertarianism it can be readily inferred that he means that the Fourteenth Amendment does not contain any such libertarian clause.

A second example is the Thin Ice Principle, a familiar principle from English criminal law. This principle was formulated by Lord Morris in the case *Knüller v Director of Public Prosecutions*.<sup>46</sup> The question before the House of Lords in this case was whether it should uphold the decision that the appellant was guilty of a ‘conspiracy to corrupt public morals’ for publishing magazines that contained columns which advertised homosexual practices. Because it was not clear what exactly such a conspiracy would consist in, there was some uncertainty on the question whether the appellant’s act was prohibited. Morris, however, argued that this mere uncertainty did not let him off the hook and formulated his famous principle as part of his decision: “those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he [sic!] will fall in”.<sup>47</sup> The implicature here is that citizens who know that their conduct is on the borderline of illegality take the risk that their behaviour will be held to be criminal even if it might not be obvious at the outset that the respective rule prohibits the act in question. The reliability of the implicature is clearly indicated by the fact that it has been widely understood and applied in this way in English law [29]. And it is a relation implicature because what Lord Morris says about ice-skating is, if taken literally, certainly unrelated to the case at hand, such that we have to infer that he means more than what he says.<sup>48</sup>

<sup>44</sup> *Lochner* (n 42) 75.

<sup>45</sup> *Lochner* (n 42) 75.

<sup>46</sup> *Knüller v DPP* [1973] AC 435.

<sup>47</sup> *Knüller* (n 45) 463.

<sup>48</sup> An anonymous reviewer points out that some of the examples—such as *Knüller*—might raise questions concerning how the implicatures that are conveyed in judicial opinions relate to considerations of justice. However, although this is an interesting question I do not think that it is of special importance with respect to implicatures as opposed to other types of communicated content, such as what is said. Just as a judicial opinion (or any other legal text) might implicate content that gives rise to a legal norm which is unjust, it could also say something that gives rise to a legal norm which is unjust. For this reason, I will not discuss the relation between implicatures and justice in this paper. Relatedly, the same reviewer remarks that my focus on considerations of communication is reminiscent of legal positivism because positivism supposedly does not take considerations of justice into account in statutory interpretation but focuses exclusively on statutory wordings. In response, I want to say that irrespective of my belief that positivism does not necessarily have to ignore considerations of justice in statutory interpretation I do not think that the views expressed in this paper commit me to positivism or any other theory of law [26]. The reason is that (as I have said above) in this paper I remain agnostic about how—and if at all—communicative acts give rise to legal norms and since it is the latter that theories of law are concerned with I do not have to commit myself to any such theory. Nonetheless, I think that the evidence

Another relation implicature comes again from *Salomon*. When discussing the purpose of the statute in question, in his opinion Lord Herschell notes the following:

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it<sup>49</sup>

The relation implicature is carried by the last sentence. If we take Herschell only to say that judges have to interpret the law and not to make it, this would be irrelevant to the possibilities that are described before. Hence, we are entitled to presume that Herschell intended to convey more than just what he said. And intuitively it is clear what that is, namely that declaring that all these possibilities (or even one of them) are contained in the rule would go far beyond the interpretive function of the judiciary and rather constitute an act of law making.

#### 4.4 Manner

We remember that the category of manner concerns the way *how* something is said. It instructs speakers to avoid odd ways of speaking, such as obscurity and unnecessary prolixity. I begin with two examples related to prolixity. The first is the case *Kilcrease v Harris* that was decided by the Supreme Court of Alabama.<sup>50</sup> Without going into the details of the case, I would like to point to a passage in the decision in which the judges explain under which circumstances a question must be decided by a jury in a civil case: “In civil cases, a question must go to the jury, if the evidence, or any reasonable inference arising therefrom, furnishes a mere gleam, glimmer, spark, the least particle, the smallest trace, or a scintilla in support of the theory of the complaint.”<sup>51</sup> This carries a manner implicature because the judges deliberately flout the maxim to avoid unnecessary prolixity by restating the same point in synonymous or nearly synonymous ways and thereby put a strong emphasis on the requirement that a question in a civil case must be decided by a jury no matter how small the support might be that it provides for the claim of the complaint.

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Footnote 48 (continued)

that I provide is likely to be relevant to every theory of law since all such theories have to make sense of (or at least room for) the use of implicatures in legal discourse. Intuitively, it is not implausible that positivism might be particularly well equipped to do so because of its affinity to considerations and theories of communication but, at the same time, it is also not evident that other theories of law would be incapable of this.

<sup>49</sup> *Salomon* (n 28) 46.

<sup>50</sup> *Kilcrease v Harris*, 259 So.2d 797 (AL 1972).

<sup>51</sup> *Kilcrease* (n 49) 802.

A similar implicature can be found in the English case *R v Blaue*.<sup>52</sup> The facts of the case were that the appellant stabbed a young woman several times after she refused to have sex with him. When she was taken to the hospital she was told that due to the injury and the amount of blood that she had lost, surgery that involved blood transfusion was necessary to save her life. Being a Jehovah's witness, she refused surgery because of the necessity of blood transfusion and died shortly after. The appellant was convicted of manslaughter but appealed because he contended that her refusal of blood transfusion was "unreasonable" and that his act therefore does not constitute the cause of her death. The appeal was dismissed because the judges questioned—among other things—whether the victim's decision can be said to have been unreasonable. They wrote:

At once the question arises—reasonable by whose standards? Those of Jehovah's Witnesses? Humanists? Roman Catholics? Protestants of Anglo-Saxon descent? The man on the Clapham omnibus? But he might well be an admirer of Eleazar who suffered death rather than eat the flesh of swine or of Sir Thomas Moore [sic!] who, unlike nearly all his contemporaries, was unwilling to accept Henry VIII as Head of the Church in England.<sup>53</sup>

Again, the maxim to avoid unnecessary prolixity is flouted because the court provides a wealth of examples of persons or groups who might be thought to be plausible candidates but do not necessarily need to have what one might call reasonable convictions. The implicature arising from this passage is then simply that there is no evident answer to the question which standard has to be applied to determine what is reasonable and what is not.

Manner implicatures do not always have to be put in such extravagant and lengthy terms. Much more mundane examples for manner implicatures are simple cases of litotes. Consider, for instance, two of them in Lord MacNaghten's opinion in *Salomon*. When describing the family business of Salomon, he notes that factually the father of the family owned the business alone and that "the sons were not partners: they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position."<sup>54</sup> What is said by double negatives such as 'not unnaturally' is only its truth-conditional content, i.e. the positive counterpart 'naturally'. However, choosing this manner of speaking is certainly odd if one just wanted to state its positive counterpart, because one could simply have done so, thereby even saving one's breath or ink. Instead, litotes is often used to put an emphasis on the positive statement. Similar considerations apply to the following passage in MacNaghten's discussion of a precedent "which in some of its aspects is not unlike the present".<sup>55</sup> The implicature is an emphasis on the positive counterpart of the double-negative. This is supported by MacNaghten's description of the case which, indeed, is very similar to *Salomon*.

<sup>52</sup> *R v Blaue*, 139 JP 841 [1975] 1 WLR 1411 [1975] EWCA Crim 3, 61 Cr App Rep 271 [1975] 3 All ER 446 [1975].

<sup>53</sup> *Blaue* (n 51) 450.

<sup>54</sup> *Salomon* (n 28) 48.

<sup>55</sup> *Salomon* (n 28) 52.

Finally, I draw attention to a litotes in the recent case *Muehlleitner v Yusufi and Yusufi* that was decided by the European Court of Justice.<sup>56</sup> Without going into the details of the case, let me quote a passage in which the judges write that “[i]t is not irrelevant”<sup>57</sup> to consider an official report that discusses the legal question that is relevant for the case. Again, the implicature consists in the emphasis, namely that it is important to consider the report. Interestingly, at least some evidence for this comes from the fact that the decision is not translated in other EU-languages with a simple positive assertion but with a preservation of the double negative, as for instance in Italian, French and Dutch. And in Portuguese the decision is even translated directly in accordance with the implicature as “important” and not merely “relevant”, suggesting that it is a reliable part of the decision.

## 5 Conclusion

In this article I have argued that reliable implicatures occur frequently in judicial opinions and thereby tried to cast Andrei Marmor’s and Luke Hunt’s sceptical view concerning the reliability of implicatures in judicial opinions into doubt. I have done so by criticizing the examples that are offered by the sceptics and, more positively, by providing several examples of what I take to be clearly reliable implicatures in judicial opinions. Since I have only provided a limited sample and mainly focused on opinions of the U.S. Supreme Court, I have to emphasise again that my examples are only suggestive. Nonetheless, I think that in the absence of evidence to the contrary the examples indicate that the sceptic’s belief that reliable implicatures are very rare in legal discourse is rather questionable. I also want to suggest that because all the implicatures that were presented rely on assumptions of cooperation, the sceptics’ claim that the language of judicial opinions is strategic is equally problematic. That is, if we follow the sceptic’s claim that judicial opinions are strategic, then it will be difficult for us to make sense of the intuitions that speakers have with respect to the implicatures that were presented. For instance, on a sceptical view we would either have to claim that the sarcastic metaphor of the ‘mighty rock’ in the *Heller* decision is unreliable, but that the judges literally refer to mighty rocks when interpreting passages of the Constitution that regulate the possession of firearms, or we would have to claim that this metaphor is one of the few rare examples of reliable implicatures in legal discourse. Taking on board that many more examples of reliable implicatures are available from judicial opinions, both options appear rather implausible to me. Hence, I conclude that the evidence-based approach employed in this paper points away from a sceptical view and towards a more cooperative characterization of judicial opinions.

<sup>56</sup> Case C-190/11 *Muehlleitner v Yusufi* [2012] ECR 542 (2012).

<sup>57</sup> *Muehlleitner* (n 55) para 40.



**Acknowledgements** I would like to thank the participants of the Graduate Research Seminar of the Philosophy Department at the University of Reading in the Spring term 2018 for helpful comments on an earlier draft of this paper. The paper has also greatly benefited from discussions with audiences at the 2018 Law Student Colloquium at Trinity College Dublin and the 2018 Work in Progress Conference at the University of Bristol that was organised by the STEAM research cluster of the South, West and Wales Doctoral Training Partnership (SWW DTP). I owe special thanks to my Ph.D. supervisors Emma Borg and Dimitrios Kyritsis who have discussed the material on several occasions with me and provided written comments. Written comments on an earlier draft have also been provided by Sami Rissanen. I would further like to thank Faye Bird, Alexandre Lépine and Hazel Lobo for discussing and suggesting some of the examples that are used in the article, as well as four anonymous reviewers from the *International Journal for the Semiotics of Law* for providing very helpful comments on an earlier version of this paper. My work was supported by the SWW DTP (Grant Number: AH/L503939/1). The SWW DTP is funded by the Arts and Humanities Research Council.

## Compliance with Ethical Standards

**Conflict of interest** The author declares that he has no conflict of interest.

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