University of Southern California Law School
Legal Studies Working Paper Series

Year 2009 *Paper* 55

Can the Law Imply More Than It Says? – On Some Pragmatic Aspects of Strategic Speech

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Andrei Marmor

Abstract

The content of the law is often determined by what legal authorities communicate. Both lawyers and philosophers of language know very well, however, that the full content of communication in a natural language often goes beyond the meaning of the words and sentences uttered by the speaker. Semantics and syntax are essential vehicles for conveying communicative content, but the content conveyed on particular occasions of speech is often pragmatically enriched by various factors. The standard model in the pragmatics literature, however, focuses on ordinary conversations, in which the parties are presumed to engage in a cooperative exchange of information. The legal context offers an example of conversation that is strategic in nature. Part of my purpose here is to show that the pragmatics of strategic conversation has certain features that deviate from the standard model.

The first section focuses on two main instances of implied communicative content, namely, implicatures and utterance presuppositions. I argue that in both of these cases, there is an important distinction between implied content that is semantically encoded in the utterance – and therefore forms part of what the law communicatively determines – and implied content that is essentially contextual and thus much more problematic in the legal case. In the second section I focus on the idea of pragmatic commitments and their normative foundations. My main concern here is to explore the normative framework of strategic speech and ways in which it differs from ordinary conversations. Finally, I will try to explain in what sense legal speech is strategic, and demonstrate how the pragmatic aspects of strategic speech actually work in the legal context.

Draft/ November 2009

CAN THE LAW IMPLY MORE THAN IT SAYS? -- ON SOME PRAGMATIC ASPECTS OF STRATEGIC SPEECH

Andrei Marmor

A great deal of the law (even if not all) in any given jurisdiction consists of directives issued by various legal authorities, such as legislatures, judges, administrative agencies, and others. In a fairly clear sense, therefore, the content of the law is determined by what legal authorities communicate. Both lawyers and philosophers of language know very well, however, that the full content of communication in a natural language often goes beyond the meaning of the words and sentences uttered by the speaker. Semantics and syntax are essential vehicles for conveying communicative content, but the content conveyed on particular occasions of speech is often pragmatically enriched by various factors. My purpose in this essay is to explore some of the pragmatic aspects of legal speech. Some of these aspects are unique. The standard model in the pragmatics literature focuses on ordinary conversations, in which the parties are presumed to engage in a cooperative exchange of information. Unlike ordinary cases of conversation, however, the legal context offers an example of conversation that is strategic in nature. Part of my purpose here is to show that the pragmatics of strategic conversation has certain features that deviate from the standard model.

The essay proceeds as follows: the first section aims to clarify the conceptual framework, focusing on two main instances of implied communicative content, namely, implicatures and utterance presuppositions. I will argue that in both of these cases, there is an important distinction between implied content that is semantically encoded in the utterance – and therefore forms part of what the law communicatively determines -- and implied content that is essentially contextual and thus much more problematic in the legal case. In the second section I focus on the idea of pragmatic commitments and their normative foundations. My main concern here is to explore the normative framework of strategic speech and ways in which it differs from ordinary conversations. Finally, I will try to explain in what sense legal speech is strategic, and demonstrate how the pragmatic aspects of strategic speech actually work in the legal context.

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I. The Implied Content of Speech

There are at least three levels of content that can be conveyed by an occasion of speech: communicative content may consist of *semantic* content, *assertive* content, and some further content that is *implicated* by the speech in the particular context of its utterance. The semantic content consists of the content that is determined by the semantics and syntax of the expression uttered. Normally, this would consist of the literal meaning of the words used and the syntactical structure of the sentence. The assertive content is the content of the truth-evaluable proposition that is conveyed by the speaker in the particular context of the utterance. It has long been recognized, however, that what a speaker actually says or asserts on a particular occasion of speech often goes beyond what the words and sentences semantically mean, depending on various pragmatic features of the context of the utterance and the speaker's communicative intentions.[1] The relevance of this distinction in the law is something that I will not consider here, I have done part of it elsewhere.[2]

The distinction that forms the topic of this essay concerns those cases in which the content communicated by a speaker goes beyond what the speaker asserts. In many instances of speech, there is some communicative content that is implicated, though not quite asserted, by the speaker in the particular context of his utterance. Generally, the implied content of the utterance of P in context C can be defined as the content that the speaker, in the specific context of C, is *committed to* by uttering P, and the hearers are expected to know that the speaker is committed to, and the speaker can be expected to know this. A speaker can be expected to be committed to such implied content if and only if an explicit, *ex post* denial of the implied content would strike any *reasonable* hearer under the circumstances as perplexing, disingenuous, or contradictory. There are several kinds of implied content. The two most familiar cases are implicatures and utterance presuppositions, and these are the cases that I will discuss here.[3]

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[1] All this is well recognized in the literature. See, for example, Soames, Scott, "Drawing the Line Between Meaning and Implicature—and Relating both to Assertion", in Soames, *Philosophical Essays. 1: Natural Language: What It Means and How We Use It.* Princeton University Press (2009). Perry suggested to call the pragmatic aspects of speech which determine the assertive content "near-side pragmatics", as distinguished from "far-side pragmatics" that concerns the ways in which we infer content that goes beyond what the speaker asserted. This essay is focused on far-side pragmatics of strategic speech.

[2] Marmor, "The Pragmatics of Legal Language", *21 Ratio Juris*, (2008), 423. See also Soames, "Interpreting Legal Texts: What is, and what is not, special about the law", arguing for a very similar conclusion.

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[3] Irony is another example, but I will not discuss it here. Irony is a rather special case, typically implicating that the speaker intends to convey the opposite of the assertive

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a. Implicatures

Consider, for example, a municipal ordinance requiring restaurants to have clean and well maintained bathrooms indoors. Even if the regulation does not explicitly say so, surely we would assume that a restaurant that had impeccable bathrooms that are kept locked at all times would violate the ordinance. That the restrooms need to be open for patrons to use is content that is clearly implicated by such an ordinance. It is, as it were, a conversational implicature.

To get a more precise idea of how such implications work, let me briefly review some of Grice's main ideas about implicatures.[4] His main insight is that our ability to understand content of expressions beyond their assertive[5] content is due to a combination of two kinds of factors: general norms of conversation that apply to the relevant speech situation, and specific contextual knowledge that is shared by speaker and hearer in the circumstances of the utterance. In normal conversational situations, when the main purpose of speech is the cooperative exchange of information, there are certain general maxims that apply. Grice helpfully listed and classified these maxims of ordinary conversation, and they are basically as follows:

(a). *maxims of quantity* – make your conversational contribution as informative as required, *viz*., don't say too little and don't say too much;

(b). *maxims of quality* – don't say what you believe to be false, and don't say something if you do not have adequate evidence for it;

(c). *maxim of relevance* – make your contribution relevant to the conversation;

(d). *maxims of manner* – avoid obscurity, ambiguity, be brief and orderly.[6]

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content of his utterance. Some forms of metaphor may also implicate content beyond what is said, and there may be other cases.

[4] P. Grice, *Studies In The Way of Words*, Harvard University Press, 1989.

[5] The question of beyond what, exactly, conversational implicatures operate is somewhat controversial. Grice typically speaks about the distinction between what is said and what is implicated; presumably, by 'what is said', Grice includes assertive (and not just semantic) content. Scott Soames, however, argues that a great deal of assertive content is also partly determined by pragmatic features of conversation, including implicatures. See Soames, 'Drawing the Line Between Meaning and Implicature – and Relating both to Assertion'.

[6] Grice, *Studies in the Ways of Words*, 28.

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As noted, these maxims apply to ordinary conversations where the purpose of the conversation is the cooperative exchange of information. The maxims are norms that directly instantiate the specific functions or purposes of communicative interactions and facilitate those functions.

A certain content is conversationally implicated by a speaker if it is not part of what the speaker had actually asserted, but nevertheless implicated by what he said in the specific speech situation, given the conversational maxims that apply. In other words, a speaker S conversationally implicates q by saying p in context C, iff

(a). S is presumed to observe the relevant conversational maxims in C;

(b). the assumption that S meant (or intended that) q is required in order to make sense of S's utterance of p in context C, given the conversational maxims that apply;

(c). S believes/assumes that his/her hearers can recognize condition b, and can recognize that S knows that.[7]

As Grice himself emphasized, there are two main features essentially associated with conversational implicatures:

1. Conversational implicatures are always *cancelable* by the speaker. The speaker can always add an explicit clarification to cancel the implication that would otherwise follow from his utterance. As we shall see, this is an essential feature of conversational implicatures.

2. Conversational implicatures are very context specific; they are not conventionally determined by the rules of language. There is always some derivation, as a Grice called it, that leads us to construe the content of an implicature; some story has to be known or to be assumed to make it explicit.

The second condition needs to be qualified, however. In addition to regular conversational implicatures, Grice also identified a category of cases he called *generalized conversational implicatures*. His examples are the following:

'Anyone who uses a sentence of the form X *is meeting a woman this evening* would normally implicate that the person to be met was someone other than X's wife, mother, sister or perhaps even close Platonic friend. Similarly, if I were to say X *went into a house yesterday and found a tortoise in-*

[7] Note that the last condition, of transparency, is actually rather problematic and controversial. Grice himself was aware of a serious problem here considering the implicatures involved in using disjunction. See Soames, 'Drawing the line …'.

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side the front door, my hearer would normally be surprised if some time later I revealed the house was X's own."[8]

Generalized conversational implicatures are those in which an expression is used that would normally implicate a certain content, unless that implication is explicitly cancelled. A speaker can say "X is meeting a woman this evening" and immediately add "I wonder if the woman is X's wife or not". Here, the implicature is explicitly cancelled by the latter sentence. Now, what Grice seems to suggest is that in the non-cancelled cases, when somebody says "an A", the expression would normally implicate that one has no specific knowledge about it or that one deems it irrelevant to the context to specify whose A it is. Otherwise the speaker would simply fail to follow the conversational maxim of quantity (don't say too little).

In other words, generalized conversational implicatures are created by a combination of the semantic features of certain standard expressions in natural language – hence the generality – and particular contexts in which the conversational maxims apply. Expressions of the form "an A" are semantically such that they generate a certain type of expectation; given the conversational maxims that apply in concrete speech situations, this expectation normally generates an implicature.[9]

b. Presuppositions

In addition to content that is conversationally implicated by an utterance in a given context, there are many cases in which a given utterance would only make sense if there is a certain content that is presupposed by the speaker in relation to the background knowledge shared by his hearers. A presupposition consists in content that is not actually asserted, but would need to be taken for granted in order to make sense of the asserted content or its relevance to the conversation. This is the type of content that is either already shared by the conversational partici-

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[8] *Studies in the Way of Words,* at 37.

[9] Cases of generalized conversational implicatures should be distinguished, however, from another familiar type of cases, in which a certain implicature has been used so frequently that it actually became an idiomatic expression with a conventional meaning that differs, somewhat, from the literal meaning of the words used. Examples are very familiar: "Do you have the time?" – which is not normally used as a question about possession, but to ask the hearer what time it is; or, similarly, "Can you pass me the salt?" – used to make a request, not to ask the hearer about his or her ability to do something. These expressions have long gained a certain conventional meaning, which is no longer a matter of implicature. See for example, Bach and Harnish, *Communication and Speech Acts*, (MIT, 1992) at 173; Searle refers to these cases as conventionally used indirect speech acts; see his *Expression and Meaning*, (CUP, 1979) at pp. 36-43.

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pants, or else, the hearers would be willing to accommodate for the purpose of the conversation. The interesting cases, however, are those in which we can infer the presupposition from the utterance itself. Soames defines *utterance presuppositions* as follows:

"An utterance U presupposes P iff one can reasonably infer from U that the speaker S accepts P and regards it as uncontroversial, either because

(a) S thinks that P is already part of the conversational background at the time of U; or because

(b) S thinks that the conversational participants are prepared to add P, without objection, to the background."[10]

Consider the following examples:

(1). "Bill regrets lying to his parents"

Presupposition: Bill [believes that he] lied to his parents.[11]

(2). "Sarah forgot to pick up Jane from the airport"

Presupposition: Sarah was supposed (or intended) to pick Jane up at the airport.

(3). "John's wife is going to the concert tomorrow."

Presupposition: John is married.

Some linguists have noted that a speaker's commitment to presupposed content is a matter of degree. In our examples, it seems plausible to maintain that the speaker's commitment to the presupposed content in (1) and (2) is somewhat stronger compared with the commitment to the presupposition in (3). That seems correct. We should also note, however, that some presuppositions are more context sensitive than others. Consider (3) again: in some conversational contexts it might be important to the conversation whether the person spoken about is married to John or not, and in other contexts of conversation, it might be quite immaterial. At least in part, this context sensitivity can be seen by looking at those cases in which the presupposed content turns out to be false, and then ask how would that falsehood affect the con-

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[10] S Soames, "Presupposition", D Gabbay & F Guenthner (eds), *Handbook of Philosophy of Logic*, Volume IV, (1989), 553, at 573 (reprinted in his *Philosophical Essays*, Volume 1.)

[11] I take it that it is possible for an agent to regret that P, even if P has not actually occurred; it is impossible for an agent to regret that P, however, if the agent does not *believe* that P occurred.

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tent that the speaker managed to convey. Suppose, for example, that it turns out that John is not married. Would it necessarily defeat the main content of the speaker's utterance of (3)? That depends on circumstances: if both speaker and hearer knew the identity of the woman spoken about, then the fact that she is not really married to John would have made little difference to the main content of the utterance. On the other hand, with respect to utterances like (1) or (2), it would be much more difficult to think of any context where the falsehood of the presupposition would not defeat the main content of the utterance. This follows from the fact that some presuppositions are particularly sensitive to the context of the conversation, and others are less so.

c. Semantically encoded implications

Grice suggested in a few famously cryptic remarks, that there are cases in which implicated content follows from *the meaning* of the words used in the expression uttered. Implicated content is often *semantically encoded* in the expression that the speaker used. Grice called them *conventional* implicatures.[12] However, the same phenomenon is often present in utterance presuppositions as well. In both cases, certain content might be implicated in a way that is semantically encoded in the expression uttered by the speaker.[13] So let us look at some examples, disregarding, for now, the distinction between implicatures and presuppositions. Consider the following utterances:

(4). "Even X can A" (implicating that there are some others, besides X who can A, and that X is one of the least likely among them to A)

(5). "X managed to find A" (implicating that finding A was expected to involve some difficulty)

(6). "It was X who broke the vase" (implicating that somebody must have broken the vase)

(7). " X is not coming to the party tonight" (implicating that there must have been some expectation that X would/might come to the party tonight)

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[12] See Grice, at p 25. The question of whether there is anything really conventional about such semantically encoded implications is a question I have dealt with in my *Social Conventions*, chapter 5.

[13] Indeed, Karttunen & Peters, in "Conventional Implicatures", (in *Syntax and Semantics*, vol. 11, *Presupposition*, ed. C.K. Oh and D.A. Dineen, NY Academic Press) argued that utterance presuppositions just are conventional implicatures. (I don't quite agree with their view; see my *Social Conventions* at 115, but this disagreement does not affect my arguments in this paper.)

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(8). "The Republicans and Senator X voted against the bill" (implicating that X is not a Republican)

(9). "I cannot join you for dinner, I have to meet with X" (implicating that the two events in question – the dinner and the meeting with X -- are simultaneous)

Common to utterances (4) –(9) is that in addition to the assertive content of the utterance, there is some content that is implicated by the speech, as indicated in the bracketed text. There is, however, this crucial difference: in the utterances of (4), (5) and (6), the relevant implicated content is semantically encoded in the expression used. This is clearly manifested by the fact that the implied content is not cancelable by the speaker. It simply makes no sense to say that "it was X who broke the vase" and then immediately try to cancel the implication/presupposition by saying that actually nobody broke the vase.[14] On the other hand, the relevant implications in (7), (8) and (9) are not semantically encoded. And again, this is attested by the fact that the implied content is cancelable by the speaker. A speaker can sensibly express (7) and immediately cancel the implied content by saying that X was never invited to the party or such. Similarly, there can be a context in which it would make sense to express (8), even if X is also a Republican. For example, it could have been a known fact, shared by the conversational parties, that senator X was widely expected to vote for the bill. By saying that the "Republicans and X" voted against the bill, one may be clarifying something that the conversational parties would have found informative and relevant, given their specific background expectations.[15]

Generally speaking, I will assume here that cancelabillity is a sound criterion for distinguishing between implied content that is semantically encoded and content implied that is not semantically encoded.[16] If the implication of an utterance is not cancelable, it is due to

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[14] Notice that semantically encoded implications are typically projectable: the implication remains even when the expression is embedded in negations, conditionals, etc. (anaphora might be an exception, though. See the note below.)

[15] Note that a semantically encoded implication does not necessarily follow from the meaning of individual words; in some cases, different content is implicated by the same word used in different types of sentences. As an example, compare the implication of the word "too" in these two cases of anaphora: "Joseph was in the room, *too*" (implicating that others were in the room), and "If Joseph goes to the meeting, the department chair will be there *too*" (implicating that Joseph is not the department chair). The example – though not quite the point of it -- is taken from an unpublished transcript of a lecture by Saul Kripke, "Presupposition and Anaphora: Remarks on the Formulation of the Projection Problem". See also my *Social Conventions*, at 113.

[16] This assumption is widely shared in the literature.

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the fact that the implication is semantically encoded in the expression uttered. By choosing to use a certain expression the speaker has already committed himself to the content that is implicated by the meaning of that expression. Implications that are not semantically encoded are such that their content is inferred from the combination of the expression used in a given conversational context and some conversational norms (maxims, in Grice's terminology) that the speaker is presumed to follow.

Now, when we turn our attention to the legal context, particularly in the case of legislation, I think that it should follow quite naturally that implications which are semantically encoded inevitably form part of the content of the law. Precisely because such implications are not cancellable, and they do not normally depend on the particular context of the conversation, we may safely conclude that if an instance of legislative speech saying that P semantically implicates that Q, then Q is part of what the legislative speech actually determines as a matter of communicative content. In other words, semantically encoded implications are basically on par with assertive content.

To be sure, I am not suggesting that a speaker is committed to all the content that is logically or otherwise *entailed* by what he said. People cannot be expected to be committed to content that they could not be aware of.[17] Generally speaking, however, speakers can be taken to be committed to content that is *obviously and transparently* implicated by the semantic features of the expression they have uttered, given normal linguistic competence in the relevant natural language.

Is there any reason to doubt that semantically encoded implications are necessarily part of law's communicated content? If there is any doubt about this, it might stem from the relative lack of specificity of the implied content. Content that is implied by the kind of expressions under consideration here is often somewhat unspecified. The specification of such content is typically context dependent. Nevertheless, even if the relevant expression leaves some content unspecified, the information encoded might be sufficient to make a difference. If a speaker asserts, for example, that "Even John can pass the exam", the speaker is clearly committed to the following content: (i) that there are others, beside John, in some relevant reference group, who can pass the exam; and (ii) that amongst those in this group, John is one of the least likely to be able to pass it. Of course the hearers would need some contextual background to know what is the relevant reference group here. In this respect, the content is semantically underspecified. But the rest of the con-

[17] Surely, all those who have used and expressed the axioms of arithmetic for centuries cannot be taken to have been committed, in any sense whatsoever, to the truth of Gödel's theorems, though as we now know, Gödel's theorems are entailed by those axioms and some truths about set theory. I owe this example to Scott Soames.

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tent in (i) & (ii) is semantically entailed by the use of the word "even" in this sentence, regardless of the particular context of this utterance. And this content is not cancelable: imagine a speaker who says: "Even John can pass the exam, after all, he was the best student" – this would be a very perplexing utterance; it is difficult to imagine a context in which it would make sense.

Admittedly, however, the distinction between implications that follow only from the semantics of the expression used, and those in which some pragmatic elements also play a role, is not always so easy to discern. Consider, for example, a speaker S, uttering the following sentence:

(12). "All Xs who are F ought to φ".

There is a clear sense that in uttering (12), the speaker, S, is committed to the content that *there might be an X that is not F*. Is this an implication that is semantically encoded in (12)? Not entirely. What (12) implies is something like this: *For all that S knows*, (in the context of this utterance) there might be an X that is not F. Why is that? Arguably, because otherwise S would have violated the maxim of quantity (don't say too little). Had S *known* that all Xs are Fs, his utterance would have expressed too weak a proposition, it would have said too little, as it were. Therefore, we may safely conclude from the utterance of (12) that for all the speaker knows, there might be an X that is not F. But this implication partly depends on the Gricean maxim of quantity, it is generated by some pragmatic features of the speech. What we have here, I think, is some information that is encoded in the expression used, that together with the assumption that the speaker adheres to the maxim of quantity, generates a certain implicature. It is a case of a *generalized conversational implicature*. Note, however, that generalized conversational implicatures are cancellable, and therefore, not quite on par with assertive content.

Let us now return to those cases in which the implication is thoroughly pragmatic. In such cases the content implied is partly derived by assuming that the conversational parties follow certain maxims of conversation. But then the question arises: what are the maxims of conversation that would apply to legislative speech? The normative framework of legal speech may be different from the framework of an ordinary conversation. This is the main topic that we need to explore in the legal context. Once we realize that legislative speech is basically a *strategic* form of communication, not necessarily a cooperative one, we will be able to see that the kind of pragmatic commitments that apply in the legal context are different from those that apply in the regular conversational context. Before I try to explain this in some detail, let me clarify a terminological point: I am not going to assume that strategic forms of communication are entirely non-cooperative. A certain cooperative element is probably present in any communicative interaction. I

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use the term "strategic speech" only to indicate that there are some important non-cooperative elements in certain types of communicative interactions, and I will try to explore how these non-cooperative elements affect the relevant implications in question.

II. The Normative Framework of Strategic Speech

As noted, the maxims Grice identified apply to ordinary conversations where the purpose of the conversation is the cooperative exchange of information. The maxims are norms that directly instantiate the specific functions or purposes of such communicative interactions and facilitate those functions. Now of course, not all speech situations are cooperative exchanges of information. Consider, for example, expressions we use in context of courtesy or politeness. These are cases in which some form of cooperation is going on, but not typically of the kind that involves a truthful exchange of information. A polite remark or an expression of courtesy is not meant to be entirely truthful or implicate anything beyond what is conventionally regarded as appropriate. (Perhaps in such cases there is a certain commitment to pretend that you say something true, even if the commitment is not to the truth of what you say. I'm not sure, sometimes there is not even a pretence, just a compliance with a certain ritual.)

Some types of speech are strategic. Parties to a strategic conversation may wish to employ conversational maxims in ways which generate implications that act to their advantage, without a real intention to be committed to such implicated content. The extreme example is manipulative speech: these are cases in which a speaker asserts something true while deliberately implicating something that he knows to be false. As an example, consider this case: Mr. Smith goes to a hospital, and in making some medical enquiries with one of the nurses, he presents himself as "Dr Smith". As it happens, Smith's doctorate is in philosophy. Wouldn't the nurse be rather surprised, and quite rightly annoyed, in learning this little detail later? True, Mr. Smith did *not assert* that he is a medical doctor, but given the circumstances, it is an implication that would naturally follow. In other words, the asserted content here is true; it is only the implicature that is false.

Such cases of manipulative speech show that an implicature can be abused. But in fact, the abuse or manipulation is made possible precisely because the hearer wrongly assumes that the speaker adheres to the ordinary Gricean conversational maxims. I am not trying to argue that legislative speech is typically manipulative; far from it. My point in raising this possibility of manipulation is much more limited: It is to show that the communicative commitments that we ascribe to a speaker are crucially dependent on the assumptions about the normative framework of the relevant conversation. Manipulative implications are possi-

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ble only because the hearers are led to assume that the speaker follows the ordinary conversational maxims.

There is another lesson to be drawn from this. In an ordinary conversation, the kind of intentions and commitments that we can rightfully ascribe to the speaker is identical to the content that the hearer would be interested in grasping and acknowledging it as such. However, when the conversational situation is not guided by a mutual interest in cooperative exchange of information, the interests of the speaker and hearer may be misaligned. Manipulative speech is simply the extreme example of this divergence of interests. There are, however, other and more subtle cases of strategic speech where something very similar is going on.

The essential feature of a strategic speech – as I will use this tem here -- is that the speaker strives to implicate more than he would be willing to make explicit.[18] Consider, for example, two legislators striving to achieve a compromise on a particular legislative act. Each legislator would want to advance a certain agenda that the other might (partly) oppose. If they make their aims very explicit *ex ante*, it is very unlikely that they will reach a compromise. Part of what enables opposing parties to reach a compromise consists in their ability to conceal, or at least not make very explicit, the overall implications of their collective speech. Compromise often requires, as I will explain shortly , tacitly acknowledged incomplete decisions: Parties engage in an act of collective speech in a way that leaves some of the implications of their collective expression undetermined or deliberately vague or ambiguous. It is the nature of such strategic interactions that they allow the parties to make moves within the game, so to speak, without disclosing *ex ante* all their ulterior motives, expectations, or aims. I am not claiming that strategic communication instantiates norms that dispose of any requirement of truthfulness or relevance. It would be very difficult to have any kind of conversation in which hearers cannot assume that the speaker is committed to some norms of truthfulness and relevance. The point about strategic interactions is that it is always partly a cooperative and partly a non-cooperative form of interaction. But then the question is: what is it that enables this mixture of cooperative and non-cooperative forms of communication? How does it work? The answer I suggest is that there is some inherent uncertainty about the norms that govern the particular conversation which enables the parties to the conversation to make strategic moves in it. Had the conversational maxims that govern a strategic conversation been as clear and determinate as they are in the case of an ordinary conversation, it would have been very difficult to make strate-

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[18] *Cf* Peter Strawson's interesting discussion of essentially non-avowable intentions of manipulative speech-acts in his "Intention and Convention in Speech-Acts" (1964), at 163.

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gic moves in the conversation. Precisely because there is some degree of uncertainty about the norms that govern the conversation, parties can exploit implications of what they say in ways which they would not be willing to make very explicit *ex ante*.

The uncertainty about the relevant conversational maxims can be of two kinds: sometimes it may not be entirely determinate whether a certain maxim applies or not, and sometimes the uncertainty concerns the level of commitment or adherence to maxims that are taken to apply. For example, there are cases in which it is not entirely clear whether the maxim of truthfulness applies at all; do I really have to tell the truth when the waiter asks me if I liked the food? Or what exactly am I to reply when asked by my wife whether I like the expensive new dress she just bought? Note that there is an inherent uncertainty at play here: had it been clear that the hearer does not expect a truthful answer, it is doubtful that there would be a point in asking. In other cases, it may be relatively clear what maxims apply, but it is somewhat uncertain or indeterminate how seriously parties to the conversation are presumed to adhere to the relevant maxims. Consider, for example, parties engaged in commercial negotiations: How truthful, or how relevant, the speaker's contribution to the conversation can be taken to be assumed? And how much can they be expected to adhere to the maxims of quantity?

Consider an example of strategic speech which is familiar to us in the academic context. Think about the ways in which we read letters of recommendation. Suppose that you are considering a job candidate who just finished her PhD in another university, and you are reading the letters of recommendation written by her professors. Naturally, you are interested not just in what the letter explicitly asserts but, perhaps even more so, in what the content of the letter actually implies. You try to read, as it were, between the lines. But you also suspect that the recommender, interested as he may be in the promotion of his student, might try to imply a bit too much. So you try to figure out the implications of what you read in the letter, but you take it with a grain of salt. And of course, the colleague who wrote the letter knows all this, and you know that he does. So how does it work? Are we fooling ourselves? Not quite. It works for both parties, speaker and hearer, precisely because the normative framework of the conversational situation is somewhat uncertain. I think that this is a case where the maxims are known and generally followed, the uncertainty pertains to the level of commitment or adherence to the maxims. Does the speaker really adhere to the maxim of quantity, for example (don't say too much? – that is not a norm that letters of recommendation strictly follow, they would be much shorter if they did….)

The relative uncertainty of the norms of strategic communication may result in different forms of indeterminacy of communicative content. In some cases, the result might be that the speaker is commit-

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ted to – or, at least, regards himself to be committed to -- less than he would otherwise be. (It is as if the speaker says "this is a game we are playing here, don't expect me to be really committed to everything I imply".) This would typically be the case when the uncertainty about the normative framework pertains to the level of commitment to the norms. At other times, particularly in cases where the uncertainty pertains to the question of whether a certain maxim applies at all, the result is that the content implicated by the speech is itself somewhat indeterminate or uncertain. It is difficult to generalize about all cases. Different forms of strategic communication may generate different results in this respect.

To sum up so far: There are two main features of strategic communication that distinguish it from an ordinary cooperative exchange of information. First, there is typically a certain misalignment of interests: A speaker's interest in implicating a certain content and the hearer's interest in acknowledging the uptake of that content might diverge, to some extent. The speaker wants to communicate more than she would be willing to make explicit, while the hearer may not have an interest in acknowledging the uptake of such oblique implications. The hearer's interest is often one of maintaining some plausible deniability of the uptake of the implication, acting *as if* he did not grasp or hear it. Second, this mixture of cooperative and non-cooperative elements of strategic communication is made possible by a certain degree of uncertainty about the relevant maxims of conversation or the level of adherence to them, that the parties are presumed to follow. It is precisely this lack of complete certainty about the maxims of conversation that enables the success of communication in spite of a certain divergence of communicative expectations or intentions. The lack of certainty leaves certain content hanging in the air, as it were, leaving each party to the conversation with an option of understanding the full communicated content somewhat differently.

Admittedly, all this is very general and imprecise. We need to see how these features of strategic communication actually work. In the next section and I will use the example of legislative speech to demonstrate some of these unique aspects of strategic communication. The account is not meant to be exhaustive. My purpose is to demonstrate some of the difficulties and their possible solutions. Undoubtedly much more work needs to be done to fill in crucial details.

III. Strategic Speech in the Law.

Let us take the example of legislation as a paradigmatic case of legal speech. The enactment of a law is not a cooperative exchange of information. Legislation is typically a form of *strategic behavior*. In fact, the situation is more complicated because legislation consists of at least two conversations, so to speak, not one. There is a conversation among the

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legislators themselves during the enactment process, and then the result of this internal conversation is a form of collective speech addressed to the subjects of the law enacted, often mediated by the courts (or various agencies).[19] Mostly, however, it is the conversation between legislatures and the courts that I would like to focus on here. It is a good example for our purposes because it is an ongoing conversation that takes place over time and clearly strategic in nature. Now, of course, the internal conversation among legislatures is very strategic. It certainly does not abide by the Gricean maxims of a cooperative exchange of information. And then, when courts get to hear the legislative speech, as it were, it would be difficult for them to ignore the strategic nature of the conversation that generated the collective speech. Furthermore, this is not a one-sided conversation: the courts respond to the legislature by the ways in which they apply the law and interpret it in doubtful cases. And then the legislature can respond to the courts in various ways, sometimes by overruling the courts decisions, or by adjusting the legislative discourse to the courts' signals, and so forth. Let me mention some familiar examples to demonstrate these points, and then try to draw some general conclusions.

The most familiar aspect of legislation is that it is almost always a result of a compromise. Compromise often consists in what I would like to call *tacitly acknowledged incomplete decisions* – that is, decisions that deliberately leave certain issues undecided.[20] This is closely tied to the fact that legislation is an instance of collective agency:

X would want to say that "P" intending to implicate Q

Y would want to say that "P" intending to implicate not-Q

X and Y act collectively, *intending their collective speech in saying P* to remain undecided about the implication of Q.

The general problem is that the underlined *intending* is often not so clear; in fact, the typical case would be one of conflicting and incompatible intentions, hopes, expectations, etc., *viz.*, both X and Y intending – or hoping, or expecting – their intentions to prevail.[21] In some cases, this may not be problematic: it is certainly possible that both X and Y

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[19] Actually, the situation might be more complicated because sometimes the legislature purports to convey different messages to different audiences. This general phenomenon of legislative double talk is familiar from Dan-Cohen's work on acoustic separation in criminal law (see his…); I have tried to explain the linguistic relevance of such double-talk in my "The Pragmatics of Legal Language" at...

[20] There is nothing new in this idea, it has been noted by numerous writers.

[21] This has been noted, among others, by R. Dworkin, *A Matter of Principle*, at…

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would have conflicting intentions or expectations about the implication of Q, without intending their *collective* speech to implicate anything about Q. This kind of compromise is often achieved by settling on a wording in the bill that is more vague (or ambiguous) than would be otherwise required. In such cases, the legislators basically agree to a delegation of power, leaving the specification of the vague term to be settled by the courts. But it would be unrealistic to assume that this is always, or even typically, the case. More often than not, legislators would like to have their legislative agenda realized in practice; they would want to achieve certain goals which are better served by an application of the bill they enact in ways in which they want it to be understood. In other words, the typical case would be the one in which both X and Y expect or least want that the *collective expression of P* would implicate (or not) that Q.

As an example, consider two legislators agreeing to the following formula of an anti-discrimination provision: "… it is unlawful to discriminate against persons on the basis of gender, race, ethnicity, or nationality." Now suppose that one of the legislators assumed that "to discriminate against a person" clearly implies that discrimination would be unlawful if, and only if, it is *intentional*. But the other legislator may not have shared this intended implication. After all (she thought), people can engage in discriminatory practices even if they are not aware of the discriminatory effect of their conduct. And similar divergence can be present with respect to the question of whether the list of grounds for discrimination in the legal provision is exhaustive or not; does this law allow discrimination if it is not based on the listed grounds? (I will say more on this type of implication below.) Once again, it is certainly possible that the collective expression is intended to be indeterminate about these questions (which is typically tantamount to an intention to delegate the decision to the courts). But it is equally possible that legislators simply intend to implicate different content by their collective expression.

Now of course, when this kind of collective action involves numerous agents, sometimes hundreds of legislators, with different political agendas and intentions about bills they enact, and different roles they play in the legislative process, the difficulties are evident. In Gricean terms, the problem in such cases is twofold: first, there is a considerable indeterminacy about *who* counts as a relevant party to the conversation – e.g. the initiators of the bill, the less than enthusiastic supporters, those who voted against as well?[22] And, second, there is an inherent uncertainty about *what* counts as a relevant contribution to the conversation that different parties are allowed to make. Remember that part of what

[22] For an excellent analysis of the political dynamics of legislation and the differences between various groups of legislators, see , D.B. Rodriguez and B.R. Weingast, 'The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation', *University of Pennsylvania Law Review*, vol. 151, 2003.

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enables legislators to reach compromises is the fact that they do not have to make their motives, intentions or expectations all too evident.

Let me pause to take some stock. I have tried to show that unlike regular conversational contexts, where the parties to the conversation aim at a cooperative exchange of information, a partly non-cooperative form of communication is present in the legislative context. The process of legislation itself is plagued with strategic behavior that tries to overcome the lack of initial cooperation between the relevant agents. And then, once we have the result of this process, it becomes very difficult to determine which aspects of it are relevant to determining the content of the legislative speech, and which aspects ought to be ignored.

Assuming that I am correct about this, the following question arises: if the set of maxims of conversation that Grice identified do not necessarily apply to the context of legislative speech, are there other norms that apply instead? Or can we identify which of the Gricean maxims of conversation would apply to the kind of strategic behavior manifest in legislative speech situations, and which would not apply? The answer is rather complex: it partly depends on the normative, that is, moral-political, understanding of the role of legislation in a legal system, and partly on the interpretative practices that courts actually follow. However, as the argument in the previous section suggests, we should not expect such norms to be fully determinate in any case. Let me try to explain these points.

Abstractly, the idea is this: one might think that just as we draw conclusions about the maxims that apply to an ordinary conversation from the basic cooperative objective of ordinary conversations, we should be able to draw some conclusions about the maxims that would apply to legislative speeches from the nature and objective of such communicative interactions. Can we not simply observe the main objectives of legislation and then draw some conclusions about the relevant conversational maxims that would instantiate those objectives? Perhaps we can think about it in a way which is very similar to a competitive game. Games typically manifest certain forms of strategic behavior. The rules of the game determine what counts as the point of the game, what kind of skills and abilities one would need to exhibit in order to play the game and play it successfully. Typically we can draw some conclusions from the purpose of the game about different forms of conduct in it that would be deemed permissible, and others, which would not be permissible. Consider chess, for example. Since it is an intellectual kind of competition, we should be able to conclude that chess players are not

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allowed to use physical intimidation as part of their tactics in the game.[23] In other games, however, such as boxing, and perhaps even football, physical intimidation might be perfectly acceptable. In other words, we can draw some normative conclusions about the kind of moves players should be allowed to make, simply from the nature of the game and its general purposes. Can we extend this analogy to legislation, and try to deduce some maxims of conversation that would basically instantiate our conception of what kind of "game" legislation is, so to speak?

Two main considerations count against such a possibility. First, the problem is that any conception of the nature of the "game", which would be sufficiently thick to generate the kind of normative conclusions we are after, is bound to be controversial. People tend to have very different moral-political conceptions of the appropriate division of labor between legislative and adjudicative institutions in the relevant political system. There is, for example, a well known debate about the role of legislative intent in statutory interpretation. People hold very different views about the appropriate roles of legislative intent in statutory interpretation, ranging from those who advocate great deference to intentions of legislators to those who hold the view that such intentions are completely irrelevant. Now this is just an example of the kind of debate that reflects deeper controversies about the institutional role of a legislature in, say, a constitutional democracy. The question of whether we should take into account, and to what extent, the particular intentions of a legal-political authority in interpreting its directives, depends on one's views about the legitimacy of such authorities, and their moral-political rationale.[24] And these views tend to be very controversial.

Furthermore, as I have tried to argue here all along, this kind of partial uncertainty about the norms that apply to legislative communication is not incidental. In fact, it is precisely a certain level of uncertainty about the relevant conversational norms that enables the parties to engage in a strategic form of conversation. That is, both during the enactment process and during the ongoing conversation between courts and the legislature. There is, however, one caveat that needs to be mentioned. Over time, the norms of statutory interpretation that are actually followed by the courts may partly determine some conversational maxims of legislation. In following certain norms about the ways in which courts interpret statutory language, the courts could create some kind of Gricean maxims for the legislative context. For example, the extent to which courts are willing to hear evidence about statutory history would

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[23] An actual case of this kind is nicely discussed by R Dworkin, *Taking Rights Seriously*, ch 3.

[24] I have explained this in much greater detail in my *Interpretation and Legal Theory*, revised 2nd ed., ch 8.

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partly determine the norms of relevance about legislative implication. Such norms would partly determine what counts as a relevant contribution to the conversation between legislators and the courts, so to speak. Thus, to some extent, and greatly depending on the interpretative culture of the courts, some maxims of conversation might be specified for the legislative context.[25] Note that the reliability of such norms crucially depends on the actual consistency, over time, of the interpretative practices of the courts. If the courts do not consistently adhere to the relevant interpretative practices, the legislators would not have clear signals about what would count as a relevant contribution to the conversation between them and the courts, and therefore, inevitably, even between the legislators themselves. But again, if my argument about the uncertainty of norms of strategic conversation is correct, we should realize that neither the courts nor the legislature would necessarily have a strong incentive to have norms of interpretation that are followed very consistently.

Let me give a couple of examples to demonstrate these points. Consider first this familiar example of implicatures in legislative speech: Suppose that the law asserts that "All Xs ought to φ unless X is an F, a G, or an H." (Or, which is the more typical case, the law asserts that "all X's ought to φ ", followed by another section prescribing an explicit exemption to those who are F, G, or H.) Now, this kind of utterance would normally implicate that the mentioned exceptions are exhaustive: namely, that *all* Xs who are not (F or G or H) ought to φ. Note that this implicature is cancellable; the legislature can easily indicate that it does not consider the exceptions to be exhaustive. However, absent such indication, it would be natural to assume that the legislature has implicated that F, G and H are the only permissible exceptions to the requirement of Xs to φ. (This is an instance of a generalized conversational implicature.)

Every first year law student learns, however, that courts are not very consistent in applying such implicatures. Judges tend to be rather skeptical, and perhaps rightly so, of the legislature's ability to determine in advance all the possible justified exceptions to rules they enact. Sometimes, therefore – but, crucially, not always -- courts simply ignore the implicature; they treat a list of exceptions as illustrative or incomplete rather than exhaustive.[26] In such cases, the courts are basically hearing,

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[25] In the US courts have adopted numerous canons of statutory interpretation, some of which may look like quasi-Gricean maxims specific to legislative speech. The problem is that these canons, numbering well over a hundred, often come into conflict, and thus the courts often get to pick and chose which one prevails under the circumstances.

[26] A famous case in point is Holy Trinity….

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so to speak, the assertive content of the legislative speech while ignoring the communicative content that was not quite asserted but only implicated by it. And notice that part of what makes this possible is a certain level of uncertainty about the relevant maxims of conversation, uncertainty that is generated by the courts' selective and not quite predictable application of the relevant maxims (the maxim of quantity, in this case). Given the strategic interests of both parties in this interaction, namely, the courts and the legislatures, a certain level of uncertainty about the extent of the courts' willingness to infer implicatures is understandable. It allows both parties to make various strategic moves in this game, so to speak.

My second example is about presuppositions. One interesting pragmatic aspect of presuppositions, noted by Soames in the definition I cited above, is the phenomenon of accommodation. When a speaker utters a sentence in a given conversation, the speaker would normally assume that there is some content that is already shared by his hearers and therefore does not need to be asserted. However, sometimes an utterance involves a presupposition that adds some information to the conversational background, information not previously shared by the conversational parties. In such cases, the speaker acts on the assumption that his hearers would be willing to add the presupposed content, without objection, to their shared background. Consider, for example, the utterance of (2) "Sarah forgot to pick up Jane from the airport". It is quite possible that the hearer of this utterance was not aware of the fact, or may have not known, that Sarah *was supposed* to pick up Jane from the airport. If the speaker is willing to utter (2) as stated, it is because he would assume that the hearer is willing to add this information to her background knowledge without any particular difficulty; so *now* she knows that Sarah was supposed to pick up Jane from the airport, and she's willing to add this information to her background knowledge in this conversation.

In the legal case, however, accommodation doesn't always work so smoothly, and for understandable reasons. Let me illustrate this kind of accommodation failure with the famous case of *TVA v Hill*.[27] This was a lengthy and complicated litigation about the construction of the Tellico dam by the Tennessee Valley River authority. Environmental organizations wanted to halt the construction of the dam, claiming that it would endanger the habitat of a small fish, called the snail darter, in violation of the newly enacted Endangered Species Act.[28] As it turned

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[27] 437 U.S. (1978) 153.

[28] The protection of the snail darter was not quite the main reason for the opposition to the dam; the issues involved were very complex, partly environmental and partly economic.

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out, however, after the environmental issues have come to the public's attention, Congress continued to fund the construction of the dam in its annual appropriation bills. Now, one would have thought that if Congress appropriates funds to the construction of a certain project, the presupposition is that the project is legally authorized.[29] Nevertheless, the Supreme Court decided that these appropriation bills cannot be taken to have implicated that Congress legally authorized the construction of the dam in face of the environmental opposition that was salient by that time. In effect, the court refused to accommodate the information that was conveyed by the presupposed content of the appropriation bills. By refusing to accommodate this fairly obvious presupposition, the court explicitly ignored content that the legislative speech is committed to.[30] I am not suggesting that the court was wrong (or right) to do this; I mention this case only to demonstrate how the pragmatic commitments of legislative speech – which were very clear in this case – do not necessarily form part of the uptake that the court is willing to accommodate, and perhaps legitimately so.

There is another point I wish to make by mentioning the TVA litigation: this is one of those cases in which the strategic nature of legislative speech is demonstrated very clearly. When Congress enacted the appropriation bills, it was already apparent that there was serious environmental opposition to the construction of the dam and that the construction might be halted if the snail darter were added to the endangered species list (as it was). However, instead of making the unpopular move of explicitly overruling the Endangered Species Act and authorizing the construction of the dam (or, explicitly overruling the Fish and Wildlife Service's decision to list the snail darter as an endangered species), Congress hoped to achieve the result more obliquely by continuing the appropriation of funds to the construction. One can only surmise that there was not enough support in Congress to face the environmentalists head-on. Now, as I have tried to argue here, the more strategic the nature of the relevant conversation, the more likely it is that the pragmatic commitments of speakers and the interests of hearers in the uptake of those commitments may diverge. Which is to say that the di-

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[29] In particular that there was a looming unsettled question about the application of the Endangered Species Act to the Tellico dam because the construction of the dam had started years before the Act came into effect. Many legal commentators assumed at the time that the Act should not be applied to projects that were underway by the time it came into effect.

[30] For more details on this case, see McCubbins & Rodriguez, "Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon", *14 J of Cotnemp. Legal Issues*, (2005), 699. (I do not quite share the authors' negative view about the courts' decision in this case. I do think that they are right, however, that the court relied on questionable information about the deliberative quality of appropriations procedures in Congress.)

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vergence of interests between speakers and hearers about implied content is likely to vary according to differences in legal areas, and the types of legislative speech that are characteristic of different types of legal regulation. The more strategic the legislative context is, the less we should expect to see an alignment of speaker's intended implications and hearer's interests in acknowledging the uptake of those implications; and *vice versa*, of course.

For example, in areas of regulatory legislation, particularly in areas in which the regulation is based on expertise, it is less likely that courts will have an incentive to ignore pragmatic implications of legislative speech.[31] In fact, the TVA decision itself nicely demonstrates this. One way to see the dilemma here is in terms of a conflict between two different types of legislation: on the one hand, there was the Endangered Species Act and the ensuing regulatory decision of the FWS that added the snail darter to the list of endangered species. On the other hand, there were the appropriation bills enacted by Congress. Basically, the court decided that the expert regulatory legislation prevails. Once again, my point here is not to justify the court's ruling; the point is to demonstrate that the courts are quite sensitive to the distinctions between different types of legislative speech, and that judges basically follow the principle that the more strategic the legislative context is, the less they are willing to hear more than what the speech actually asserts. I hope that my discussion shows that as a general policy, this makes a lot of sense, and not only for the courts but for the legislature as well. As long as both parties have an interest in maintaining a strategic conversation, both would have an interest in some level of opacity about the norms governing their conversation. Expert agencies, on the other hand, are typically not in the business of making strategic moves; they are under much less pressure to conceal their strategic aims, they need less strategic flexibility and more clarity. Therefore, in the case of agency regulations we should expect greater alignment between speaker's pragmatic commitments and hearer's willingness to grasp those commitments as such. Thus, generally speaking, the more strategic the nature of the interaction, the more we should expect a divergence between what speakers strive to implicate and what the hearers would be willing to uptake or accommodate. And *vice versa*: the less strategic the legislative context is, the closer it comes to the standard Gricean model of ordinary conversations.[32]

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[31] The US Supreme Court explicitly recognizes greater deference to expert agency regulations. This is called the *Chevron* doctrine. As commentators noted, however, the Chevron doctrine is itself discriminately applied, depending on the level of confidence courts have in the relative expertise of the agency in question. See, for example…

[32] I am grateful to Scott Altman, Marshall Cohen, Joseph Raz, and Scott Soames, for helpful comments on a draft of this essay.

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