

Disguised Legislation?

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I hereby declare and assure that I, Marat Shardimgaliev, have drafted this thesis independently, that no sources and/or means other than those mentioned have been used and that the passage of which the text content or meaning originates in other work – including electronic media – have been identified and the sources clearly stated.

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Précis:

This article is about doubletalk in legislation. Doubletalk is the communicative practice of making an utterance such that it is interpreted differently by different audiences. The question that I intend to answer is whether doubletalk in legislation leads to a situation in which no unique legal instruction is provided due to different interpretations that are given to the law by different audiences. I will argue that this is not the case, because the content of the law is uniquely determined by the interpretation given to the law by the audience that it addresses: legal experts. My argument will be based on a linguistic account that explains how doubletalk works and how the audience of an utterance can be determined.

Introduction

A hotly debated issue in modern jurisprudence is whether the work on pragmatics by the philosopher Paul Grice (1989) can contribute to our understanding of legal language. A particular and central question in these debates is whether Grice's analysis of *conversational implicature* might be useful for a better understanding of statutes. Very roughly, an implicature is information that is communicated implicitly by a speaker and, on Grice's account, implicatures can be conveyed because interlocutors expect each other to *cooperate* in communication. This includes the mutual expectation to try to grasp what speakers mean with an utterance, even if it goes beyond what is explicitly said. The interesting question for legal theory with respect to the notion of implicature is whether Grice's analysis might be employed to investigate whether legislators also communicate rules implicitly when enacting statutes. This might have important implications for our legal rights and obligations.

However, the legal theorist Andrei Marmor (2008; 2011a; 2011b; 2014; 2016) has influentially argued on several occasions that insights from Gricean Pragmatics cannot be simply applied to legal communication, because it differs in important respects from the kind of ordinary discourse that Grice allegedly tried to explain. In particular, Marmor claims that legal discourse is a *strategic* form of communication in which the expectation of cooperation does not hold to the same extent as in ordinary conversations. Marmor argues that because the successful communication of implicated content essentially depends on the presumption of cooperation, it is therefore unreliable or indeterminate if implicatures are communicated by lawgivers.

In this article, I want to focus on one of the particular arguments that Marmor makes to support his claim that legal communication is strategic. According to him, a commonly employed strategy in legislation is to use implicatures for so-called *doubletalk* (2008; 2011b). Doubletalk is the practice of making an utterance such that it is interpreted in different ways by different audiences. Marmor claims that in legislative doubletalk statutes are made such that citizens and judges take

mutually inconsistent implicatures to be conveyed. Roughly, Marmor claims that doubletalk is not cooperative, because the mutual inconsistency of the interpretations leads to a situation in which no uniform implicature – and hence no uniform legal instruction – can be said to be communicated by lawmakers.

In this article I want to put this argument to critical scrutiny. In particular, I want to provide an answer to the question whether in cases of legislative the law does not provide a determinate legal instruction. I will try to demonstrate that this is not the case by applying the analysis of so-called *disguisement* that was developed by the neo-Gricean linguist Herbert Clark and his colleagues (Clark and Carlson 1982; Clark and Schaefer 1987; 1992; Clark and Schober 1989)¹ to legislative doubletalk. Roughly, Clark characterizes *disguisement* as the deception of overhearers to a conversation about what the speaker communicates to her actual addressee. Clark argues that only the interpretation of addressees can reflect what the speaker means with her utterance and that the interpretation by overhearers only consists in an inconclusive conjecture about this meaning. By using Clark's remarks concerning the question how addressees are to be distinguished from overhearers, I will demonstrate that legislation only addresses legal experts such as jurists and not the general public. If correct, then the interpretation that is given to a particular statute by legal laymen does not reflect its meaning, and therefore also cannot be in genuine conflict with the interpretation that is given to the rule by jurists. Hence, my argument will be that an application of Clark's account can resolve the problem of conflicting interpretations given to the law in legislative doubletalk, because it can determine a correct interpretation: the qualified interpretation that is given to the law by jurists.

The article will be structured as follows. In the first part, I will provide a very brief outline of Grice's notion of implicature and its relation to the presumption of cooperation in communication. Then I will go on to present Marmor's argument and related accounts on legislative doubletalk that support some of the

¹ For the sake of brevity and simplicity, in the following I will refer to this account as "Clark's account". The label is intended to apply to his colleagues as well.

claims that are made by Marmor. Third, I will present Clark's analysis of disguise-ment and his remarks on how addressees are to be distinguished from overhearers. In the fourth part, I will apply this analysis to Marmor's argument from legislative doubletalk and resolve the problem that it poses. Here I will also critically discuss the work by Drury Stevenson who has already made first attempts to apply Clark's work to identify the addressee of the law and relate my own account to it. I will conclude that Marmor's argument can neither serve to undermine the presumption of cooperation in legal communication, nor to establish the indeterminacy of implicated content in the law.

1. Grice on implicature and cooperation

In order to understand Marmor's argument, first some background knowledge about Gricean Pragmatics is required. A fundamental distinction that Grice (1989) famously introduced to philosophy of language is the distinction between *what is said* and *what is implicated* by a speaker when making an utterance. Roughly, what is said is the truth-conditional content that is explicitly expressed by an utterance. It is determined by the semantic meaning of the utterance and contextual information that is necessary to ascribe referents to indexicals (e.g. "I", "here", "tomorrow", etc.), and to resolve how ambiguous terms are used (e.g. "bank", "crane", etc.).² Implicatures,³ on the other hand, are pieces of content that are not stated explicitly, but that can nonetheless be taken to be conveyed by speakers in

2 In the more recent literature on what is said it seems to be agreed that determining what is said might require the consideration of more contextual information than assumed by Grice (Borg 2004; Recanati 2004), but since this issue does not play any particular role for doubletalk it can be neglected here.

3 I will use "implicature" to refer to *conversational* implicatures which Grice (1989) distinguished from *conventional* implicatures. Roughly, conventional implicatures are part of the conventional meaning of utterances, but do not change their truth-conditional content. For instance, "He is poor, but he is honest" and "He is poor, and he is honest" have the same truth-conditions, but only the former implicates that the person's poverty clashes in some way with his honesty. Marmor explicitly states that his remarks on the indeterminacy of implicatures do not apply to conventional implicatures which he calls "semantically encoded implications" (Marmor 2008, 442ff.). Within the class of conversational implicatures Grice (1989) further distinguished between *particularized* (PCIs) and *generalized* (GCIs) conversational implicatures, but since this distinction neither plays any important role in Marmor's account (Slocum 2016) nor for the practice of doubletalk, I will not go into its details here.

certain contexts. To illustrate this, consider the following exchange:

(1) A: Can we go to the cinema tonight?

(2) B: I have to work.

Here, it is clear from the conversational context that although A only says that she has to work, she also informs A that she cannot go to the cinema with him. Consider a second example. Imagine that a professor says in front of a class:

(3) Some students have passed the exam.

Although the professor does not say it explicitly, she can be presumed to mean that *not all* students have passed the exam. Such acts of communicating something by saying something else are what Grice called implicatures and one of his main contributions to philosophy of language was to provide an explanation of how they can be conveyed in conversation (Davis 2014).

Central to his explanation is the claim that interlocutors expect each other to cooperate when engaging in conversation. This presumption is captured by Grice's famous *Cooperative Principle* (CP):

CP: 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 (Grice 1989, 26).

This principle is further fleshed out in several maxims that fall under four categories: quantity, quality, manner and relation. Maxims under these categories require, for instance, that speakers give the right amount of information (quantity), make contributions that are true (quality), perspicuous (manner) and relevant to the conversation (relation).

CP and the maxims can be used to analyse how implicatures in our examples are conveyed. For instance, on the assumption that B is cooperative, A can infer that B wanted to convey more than just that she has to work, because by itself this would not provide a sufficient answer to A's question and therefore fail to be in line with CP. Assuming that B's contribution is relevant to the question, however, A can infer that B's obligation to work clashes with A's proposal to go to the cinema. A similar analysis is available for the second example. The assump-

tion that the professor is cooperative and provides the right amount of information – as required by the maxim of quantity – allows the students to expect that the professor would have made the more informative statement that all of them have passed, if it was true. Because she did not, they can infer that she means that not all students have passed.

This is admittedly only a very rough sketch of Grice's work on pragmatics, but it already equips us with sufficient background knowledge to understand Marmor's argument from doubletalk, to which I come next.

2. Marmor's argument from doubletalk

In this section I want to proceed as follows. First, I want to present Marmor's argument and discuss some problematic exegetical issues. Then, I will point to some of the underlying assumptions of the argument and critically assess how they relate to Marmor's overall account. Finally, I will present some related accounts on doubletalk in the literature that support some of Marmor's central claims.

2. 1. The argument

As already stated in the beginning, Marmor has influentially (2008; 2011a; 2011b; 2014; 2016) put forward the position that legal discourse is a *strategic* form of communication. He defines strategic communication technically (but rather vaguely; see below) as a type of communicative interaction that is characterized by certain "non-cooperative elements" (2011a, 92). Marmor's general claim is that the strategic nature of legal communication constitutes an important difference between this form of discourse and the ordinary cooperative conversations that Grice described. Pointing out, however, that implicatures crucially depend on the presumption of cooperation, Marmor claims that "the strategic nature of legal communication calls into question the reliability of implicated content in the law" (2014, 7). Marmor's idea seems to be that if we cannot rely on cooperation in legal communication, then we also cannot be sure that implicated content is conveyed in legislation. Marmor supports his argument with analyses of allegedly

characteristic elements of legal discourse that he claims to be non-cooperative.

The particular element that I want to focus on here is *doubletalk*. Marmor's argument from doubletalk is based on the claim that "[t]here are legislative enactments in which the legislature intends to convey one message to the public at large and a different one to [...] the courts." (2008, 437).⁴ For instance, according to Marmor, a legislative context in which lawmakers might have strong incentives to engage in doubletalk is the regulation of campaign finance contributions (2011b, 155ff). In such cases, legislators might easily get into a conflict of interests. On the one hand, they might want to create the public impression that they seriously restrict such contributions in order to gain support from voters, but, on the other hand, they might have an interest in allowing such contributions to flow freely in order to receive financial support for their own campaigns. According to Marmor, in such cases there is a great temptation for legislators to use implicatures in order to convey the different messages to the public and to the courts implicitly. He claims, however, that the use of this method does not allow to infer one determinate implicated content from the law. The following passage is crucial for Marmor's argument:

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. The same speech act implicates different content in different contexts, or for different audiences, even if the contents are mutually inconsistent. (2011b, 155ff.)

The crucial statement here is that in cases of doubletalk in which different audiences infer mutually inconsistent implicatures from the law there is no answer to the question which implicature constitutes its unique content. Marmor concludes therefore that implicated content is indeterminate in cases of doubletalk.

Although, at first sight, this argument might seem straightforward, I think that there is an important exegetical issue that needs to be addressed here which

⁴ Marmor's most detailed statements of the argument from doubletalk are made in his influential article 'Pragmatics of Legal Language' (2008, 437ff.) and his book *Philosophy of Law* (2011b, 155ff.), but he also refers to it briefly in other publications on the topic (2011a, 104; 2014, 50).

has to do with the fact that the way the argument is put completely leaves out the question what exactly makes the practice of doubletalk in legal communication non-cooperative, although Marmor explicitly claims it to be strategic behaviour (2011b, 155). In particular, Marmor arrives at the conclusion that implicatures in legislative doubletalk are indeterminate without referring to a diminished presumption of CP as an explanatory intermediary which seems to make the claim that doubletalk is non-cooperative irrelevant for the conclusion. If the argument is correct, then the conclusion follows directly from the mutual inconsistency of the two interpretations that different audiences give to the law and not from a diminished expectation of cooperation. This becomes even more problematic in the light of the suspicion that the argument might actually be incompatible with such a diminished expectation, because the expectation of CP on the side of the citizenry and judges is necessary in order for them to infer the respective conflicting implicatures in the first place. Finally, it should be noted that if the argument from doubletalk deduces the indeterminacy of implicatures only from the mutual inconsistency of the different implicated contents in cases of doubletalk and not from a generally diminished expectation of cooperation, then the argument *only* demonstrates that implicatures are indeterminate in cases of doubletalk and not the stronger claim that they are *generally* indeterminate in legal language, although this seems to be the claim that Marmor intends to establish (2008; 2011a; 2011b; 2014; 2016).

These considerations expose an important and general problem about Marmor's account, namely that he is not really clear in his definition of what exactly he means when he says that certain forms of communication are "strategic".⁵ Although he is explicit that he does not intend to pursue the claim that strategic dis-

5 For similar complaints about the obscurity of Marmor's remarks on strategic speech, see the review of Marmor's *Philosophy of Law* by Timothy Endicott (2014, 53). Endicott's review is the only contribution that I am aware of in which a critical remark on Marmor's particular argument on doubletalk is made. However, this merely consists in the claim that doubletalk is not a characteristic of legal communication, because doubletalk is also used in ordinary conversations (2014, 53). Endicott neither elaborates his claim nor provides any evidence for it. More importantly, he also does not argue that in legislative doubletalk a unique content can be determined, as I will try to show.

course is entirely non-cooperative, because he accepts that a certain degree of cooperation is necessary in all forms of communication (2014, 44), it is not clear where exactly between “cooperative” and “non-cooperative” he locates “strategic”. This question is also not further clarified by the claim that “strategic interaction [...] is always partly a cooperative and partly a non-cooperative form of interaction” (2011a, 94). Marmor also admits this weakness when he says that his remarks are “very general and imprecise” (Marmor 2011a, 96; 2014, 48).

In order to try resolve this problem for the particular example of doubletalk, I suggest, however, that a first step might be to try to make sense of Marmor’s remarks by identifying the particular cooperative and non-cooperative parts of this practice. As pointed out, on the one hand, doubletalk certainly requires the presumption of CP on the side of the public and the courts in order for the conflicting implicatures to be inferred in the first place. On the other hand, it seems that the practice as a whole is non-cooperative, because it does not convey a uniform legal instruction. To put this in the terms of CP: since law has the purpose of regulating behaviour, what is certainly required by the particular kind of communication in which legislators are engaged is that uniform legal rules are provided. However, because doubletalk conveys instructions that are not uniform but mutually inconsistent, it fails to respect CP. On this reading, doubletalk in legislation might make legal communication a strategic enterprise as understood by Marmor, because it has both cooperative and non-cooperative elements. And, on the assumption that doubletalk is characteristic for legal discourse because legislators have strong incentives to use it frequently in order to resolve conflicts of interests, it might perhaps lead to a generally diminished presumption of cooperation in the law. The diminished expectation of CP might then cast a general doubt on the reliability of implicatures in legal discourse, i.e. a frequent use of doubletalk might also negatively affect the determinacy of implicated content in cases in which doubletalk is not used.

Although I think that this interpretation still leaves us with some important interpretive questions, I will not pursue them further here, because they would

carry us too far into muddy exegetical waters.⁶ However, I also do not think that this is necessary, because it is sufficient for the further argument to point out that these considerations make it very plausible that both of Marmor's central claims – that doubletalk leads to the indeterminacy of implicatures and that it makes legal communication strategic – depend on his explicit claim that in doubletalk mutually inconsistent implicatures are conveyed and that this does not allow to determine a unique content of the law. This would not only be uncooperative behaviour, but also not allow to infer a unique implicature from the law. Because this claim seems to be the central root of Marmor's argument from doubletalk, I will focus on it in my further analysis. In any case, given the imprecision of Marmor's remarks, the burden to provide an alternative explanation of how doubletalk would make legal discourse strategic and implicatures in legal language indeterminate is surely on Marmor's side.

2. 2. Underlying assumptions

For the further discussion of Marmor's argument I would like to point out that Marmor's central claim depends on two fundamental assumptions. One assumption is that when two conflicting *contents* are conveyed in legislation to judges and the public, then there is no way to determine a unique legal instruction that is communicated. The second – and directly related – assumption is that when legislators enact the law (or at least when they engage in doubletalk) they actually do communicate with two audiences, judges and the public. In the following, I will

6 I think that the most pressing issue on this reading is still that doubletalk as described by Marmor seems to be incompatible with a diminished presumption of cooperation. My concern is here that legislators who use doubletalk frequently enough for it to undermine the presumption of cooperation and thereby the determinacy of implicatures in general would be sawing at the branch they are sitting on, because, by doing so, they would undermine the presumption of a principle that is necessary for doubletalk to work. Marmor might respond to this that his argument from doubletalk is not intended to establish a diminished presumption of cooperation or the general indeterminacy of implicatures in legal language, but only that implicated content is indeterminate in cases of doubletalk. Although such a move would resolve the problem described it must be noted that it would be a much weaker claim than the ones that Marmor intends to put forward. Be that as it may, since my argument in this article is supposed to show that implicated content is not even indeterminate in cases of legislative doubletalk, I take it to refute Marmor's argument on every possible reading.

give a first critical assessment of these two assumptions and relate them to Marmor's overall account.

To start with the first assumption, I have emphasized "contents", because I would like to point out that the problem in cases of doubletalk seems to be more general than Marmor seems to believe, i.e. that only conflicting *implicatures* lead to indeterminacy. It seems, however, that if there was a mutual inconsistency of messages conveyed on the level of what is said, for instance, then there would also not be any possibility to resolve the problem of conflicting interpretations. Conflicting interpretations on the level of what is said might be achieved, for example, by using terms in legislation that are ambiguous between an ordinary meaning and a specific legal meaning, such as "action" (which is a lawsuit and not a physical movement), "notice" (which is notification and not observation), or others.⁷ In fact, this strategy has even been suggested by Meir Dan-Cohen (1984) in order to transmit different contents to the public and judges in legislation and Marmor (2008, 437) even explicitly refers to Dan-Cohen's work when presenting his own account (I will have more to say about Dan-Cohen's account below). As we have seen, however, such semantic ambiguities are resolved at the level of what is said and, therefore, there does not seem to be any reason why in such cases of doubletalk what is said by the law should not be indeterminate as well.

The same goes for conflicting interpretations on *different* levels of communication, i.e. implicature and what is said. Consider, for instance, an example of doubletalk in a health care bill that is provided by Mark Greenberg (2011, 240ff.) which goes as follows

(4) Federally funded facilities may provide abortions if necessary to save the mother's life.

On a Gricean analysis this bill implicates that federally funded facilities may provide abortions *only* if necessary to save the mother's life and not in other cases, because the maxim of quantity requires to provide the right amount of informa-

⁷ The examples of terms that are ambiguous between an ordinary and a legal meaning are taken from Stevenson (2003, 149).

tion. After all, if legislators wanted to allow for abortions in general it can be assumed that they would have spared stating the if-clause and simply stated that federally funded facilities may provide abortions, *full stop*. Because the maxim of quantity is usually respected in ordinary discourse it does not seem unlikely that on an ordinary public understanding this rule would be interpreted as conveying the implicature that abortions are forbidden in cases that are not life-threatening. However, according to Greenberg (2011, 240ff.), there might be reasons on the side of the legislator to expect that judges would not infer the implicature. Although he does not specify these reasons, it seems like a fair guess that in cases in which physicians who are employed at federally funded facilities actually provided abortions in non life-threatening cases, judges would not feel entitled to penalize the physician, because penalties usually require *explicit prohibitions* of the relevant acts.⁸ Since the rule does not explicitly forbid abortions at any point, judges might therefore allow federally funded facilities to provide abortions also in cases that are not life-threatening. This example indicates that mutually inconsistent interpretations might also arise between different levels of communicated content. Hence, because the problem of mutually inconsistent interpretations does not seem to depend on the communicative level on which the contents is conveyed, the problem here seems to be broader than presumed by Marmor and not only to concern implicated content, but to extend to the communication of mutually inconsistent contents in general. And note also that such examples would constitute non-cooperative speech as described by Marmor, because in such cases no uniform legal rule would be conveyed, as required by CP.

The second crucial assumption in Marmor's argument is obviously that legislators actually communicate with two audiences in cases of doubletalk. This seems to be necessary in order to account for the genuine inconsistency that Mar-

⁸ This example demonstrates that certain interpretive principles – so-called *normative canons of construction* – that are specific to legal discourse might clash in some particular cases with the Gricean maxims and prevent that implicated content is inferred. However, this of course does not show that the maxims or CP are generally not observed in legal discourse or that no implicatures can be derived. For a brief discussion of canons of construction and their relation to the Gricean maxims, see: Carston 2013.

mor claims to hold between the different interpretations given to the law by the public and judges, for if the legislator did not communicate with one of them, then this audience also cannot claim that the way it understood the law reflects what is communicated, because there simply is *no communication* between the lawgiver and this audience. I will come back to this point in the third and fourth part of the article. For the moment I just want to point out that this presumption is made by Marmor without any argument and, in fact, seems to be at odds with some other statements that he makes on this issue. For instance, on one occasion he describes legal discourse as follows:

[T]he courts respond to the legislature by the ways in which they apply the law and interpret it in doubtful cases. And then the legislatures tend to respond to the courts in various ways in which they apply the law and interpret it in doubtful cases. And then the legislatures tend to 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. Generally, my assumption here is that both the legislatures and the courts have an interest in maintaining a strategic form of communication on the ongoing discourse between them. (2014, 50)

Surprisingly, in this passage there is no mention whatsoever of the general public as a participant to this “ongoing discourse”. Here is another instructive passage:

I think that [it is] quite right to assume that the relevant reasonable hearer, in the context of statutory interpretation, is an adequately informed legal hearer, so to speak – namely, one who is reasonably informed about all the background legal landscape and the technicalities of legal jargon. (2014, 117)

It is hard to see how this statement can be reconciled with the claim that the public is a “relevant reasonable hearer” of legal discourse, for it is clear that the vast majority of people are laymen with respect to the law; one can neither expect that they are informed about the background legal landscape, nor that they are familiar with legalese. Although I will discuss this issue in further detail in section four, I wanted to point this out already in order to demonstrate that the assumption that lawgivers communicate with both judges and the citizenry is not entirely unproblematic on Marmor's account.

2.3. Support for Marmor (?)

I think that the points mentioned in the foregoing – such as exegetical difficulties and perceived inconsistencies of Marmor’s argument – already indicate that his argument is not as straightforward as it might seem. However, I think that it is also relevant to mention on this occasion that Marmor is not alone in his argument or in making some of the assumptions that are central to it. For instance, I have already mentioned that Greenberg made remarks with respect to doubletalk in legal language. Although Greenberg does not refer to Marmor’s argument from doubletalk and also does not focus extensively on this phenomenon, he clearly agrees with the presumption that cases in which mutually inconsistent communicated contents are conveyed to different audiences – as in his own example – lead to problems for Griceans (who he calls “communication theorists”), when he says that

[t]he example illustrates [...] that an utterance may communicate different contents to different audiences. This point raises [...] difficulties for the communication theorists because they need an account of which content communicated by the statutory text is the relevant one. (2011, 240ff.)

In particular, this clearly supports Marmor’s claims that legislators communicate with different audiences and that cases in which different contents are conveyed pose problems for a Gricean account. Also, Greenberg claims that cases of doubletalk are “probably very common” (2011, 240) in legal language, because they can serve “in order to perform political balancing acts” (2011, 240). This seems to be very close to Marmor’s position that doubletalk is a characteristic of legal discourse and that it is used to resolve conflicts of interests.

Another theorist who has been mentioned already is Meir Dan-Cohen (1984). Although Dan-Cohen does not address issues related to Gricean Pragmatics such as cooperation and indeterminacy of implicatures, he also puts forward the claim that legislators address both judges and citizens when enacting law. Moreover, he also claims that sometimes legislators convey different legal instructions to these audiences in cases of what he calls “selective transmission”, which

seem to be very close to the kind of doubletalk that Marmor describes.

Finally, the only contribution that I am aware of in which Marmor's argument from doubletalk has been considered in detail takes over the argument without any critical remarks whatsoever. This contribution has been made by Luke Hunt (2016). He applauds Marmor for having "masterfully described" (2016, 12) the strategic nature of legislation and sets out to extend the argument to precedent-setting judicial opinions. Roughly, on Hunt's account not only legislators resort to doubletalk when enacting law, but also judges when drafting judicial opinions. According to Hunt, this makes implicatures in judicial opinions as unreliable as in statutes.

What these examples are supposed to demonstrate is that although Marmor's account is not unproblematic, the argument itself and some of its central claims and premises are explicitly endorsed by other scholars. And although I will not discuss these particular accounts in any detail in my critical remarks, the reader should keep in mind that several of my critical remarks apply to these theorists, as well. Before coming to my own account I want to point out, however, that these accounts also rarely provide any support to Marmor's argument that is build on evidence. The most striking problem is here that none of these accounts actually provides a *single* example from existing statutory wordings that might suggest two conflicting interpretations to different audiences, let alone two conflicting implicatures. Marmor merely points out that in certain cases legislators might have conflicting interests, but he never provides any examples of laws that might suggest different interpretations.⁹ He only refers to Dan-Cohen's work and claims that he has shown that this "actually happens" (Marmor 2008, 437) in criminal and common law. However, as Drury Stevenson has already complained, in his account on selective transmission Dan-Cohen also "does not quote or examine a single statutory excerpt to illustrate his point." (2003, 133). Greenberg only comes up with the fictitious example described above which seems quite weak given his

⁹ Slocum (2016, 35) has also pointed out that it is a general problem of Marmor's account that he does not provide any examples of implicatures.

claim that such cases are “probably very common” (2011, 240). Further, he does not even specify why the different audiences would arrive at different interpretations. Hunt primarily considers judicial opinions but even there he fails to provide any particular wording from an existing opinion that might suggest diverging interpretations to the public and judges. I think that this complete lack of evidence is especially problematic for Marmor’s account, because he intends to make an empirical claim about the extent of strategic behaviour in legal communication.¹⁰

A related point that I want to highlight is that in the literature there is also no clear explanation of *how* doubletalk might be accomplished in legislation. This also seems quite problematic because *prima facie* it is not obvious how different audiences can be led to interpret the same law in different ways (this intuition will be supported theoretically in section three). Marmor and Greenberg do not provide any explanation of how this might work but at least some remarks on this issue can be found in the work by Dan-Cohen and Hunt. Dan-Cohen suggests to make use of the probably most salient difference between judges and the citizenry: legal expertise. In particular, in wording legal rules he proposes to create a “barrier for the layperson [by using] technical and esoteric professional language” (1984, 58) or to employ the circumstance that rich bodies of decisional law are often relevant to interpret statutes but “elude the legally untutored citizen” (1984, 48). However, although I think that considerations of legal expertise might indeed be relevant for accomplishing legislative doubletalk, I do not think that these particular strategies will help. The reason is that when using these strategies no legal instruction will be conveyed to legally untutored citizens *exactly because* they elude them and pose barriers for them. Another strategy proposed by Dan-Cohen that has been mentioned already and that I take to be more promising is to employ

¹⁰ Note also that even if Marmor could come up with a handful of existing examples this would still not be sufficient to support the claim that doubletalk is characteristic for legal discourse. Much more extensive and specific empirical analyses that compare ordinary situations of discourse and legal communication would be necessary to support this claim and I am not aware of any attempts in this direction. Personally, I think that this is not primarily due to a neglect of this issue or methodological difficulties (which might of course also play a role), but rather to the suspicion that there is simply nothing to be found.

terminology that is ambiguous between an ordinary and a specific legal meaning. On such occasions, indeed, different instructions – though not implicatures – would be conveyed to the two audiences. However, again, Dan-Cohen does not provide any examples.

A somewhat related proposal has been made by Hunt who vaguely hints at the possibility that different interpretations on the side of the audience might be accomplished by making use of the fact that judges and the public take different information to constitute the contextual frame of legal discourse (Hunt 2016, 14ff.) which is commonly labelled “common ground” in the pragmatic literature. Hunt says correctly that “[c]ommon ground may be thought of as the context—or background information—that is taken for granted in a conversation” (2016, 14) and remarks that – at least for the case of judicial opinions – “many items [in court-to-court conversations] will not be in the common ground with respect to court-to-public conversations” (2016, 15). Unfortunately, Hunt does not elaborate this point any further.

In the following section, however, I will point out that this is a guess in the right direction, by presenting Clark’s (Clark and Schaefer 1987; 1992; Clark and Schober 1989) analysis of disguise which indeed explains different interpretations by different audiences in terms of different presumptions that are made by these audiences about the common ground.

3. Clark on disguise and audience design

In this section I want to present Herbert Clark’s (Clark and Schaefer 1987; 1992; Clark and Schober 1989) analysis of disguise which will be applied in the final section to refute Marmor’s argument. I want to highlight from the start that Clark’s account follows a Gricean tradition, since it is also build on several of its claims such as that cooperation is essential for communication. However, it also extends Grice’s account in several respects. One of the central additions that Clark (Clark and Carlson 1980; 1982) has made to Grice’s classical account is that the audience of an utterance does not only consist of the individuals that are addressed

by it but that audience members can take several other roles with respect to an utterance and that speakers take these roles into account in so-called *audience design*. Generally, audience design is the practice of suiting one's utterance to the audience and Clark (Clark and Carlson 1982) has put forward the hypothesis that audience design is an essential and ubiquitous phenomenon in communication which since then has been confirmed by a wealth of evidence (e.g. Bell 1984; 1997; Clark and Schaefer 1987; Isaacs and Clark 1987). One particular aspect of Clark's account is that there is a difference between the attitudes that speakers can take towards those audience members who participate in a conversation and those who merely overhear it. According to Clark, *disguisement* is an attitude that is taken by speakers towards overhearers. Therefore, a clear understanding of Clark's analysis of *disguisement* first requires an explanation of the fundamental distinction between participants and overhearers to a conversation and how it is accounted in audience design.

For Clark (1992, 248ff.), the group of participants to a conversation consists of the speaker(s), the addressee(s) as the primary target of an utterance, and possible side-participants who are not directly addressed but who are part of the conversation. Overhearers, on the other hand, can either be bystanders, of whom the speaker knows that they can overhear what she says, or eavesdroppers, who overhear the conversation unnoticed by the speaker. These different roles must be ascribed to the listeners by the speaker and this ascription must be made available to the listeners in audience design such that they can understand which role they take with respect to a particular utterance. Clark (1982, 222ff.) lists five major devices that speakers use to accomplish role-assignment in audience design: the physical arrangement of the interlocutors, the conversational history, gestures, the manner of speaking and the linguistic content. I will come back to these devices in section four.

For now, I want to focus further on the distinction between participants and overhearers. The theoretical principle that distinguishes them is the *Principle of Responsibility* (PR):

PR: In a conversation, the parties to it are each responsible for keeping track of what is said, and for enabling the other parties to keep track of what is said. (Clark and Schaefer 1992, 251)¹¹

The basic idea behind PR is that to be in a conversation means to hold certain responsibilities towards each other (Clark and Schaefer 1992, 252). In particular, it requires from the speaker to make her utterances such that other participants can understand what she means, and it requires the listening participants to follow what the speaker communicates. These responsibilities come with certain benefits. Because participants have these responsibilities towards each other, speakers can expect the other participants to follow their contributions and participating listeners can expect speakers to make themselves understood. Importantly, because overhearers do not participate in the conversation, they neither share the responsibilities nor the benefits that participants have in a conversation.

Because there are no conversational responsibilities between speakers and overhearers there is an important difference in the legitimate conversational attitudes that speakers can take towards participants and overhearers (Clark and Schaefer 1992, 255ff.) in audience design. Because of their responsibility to make themselves understood to participants, speakers can only take one legitimate attitude towards them, namely to be openly informative about what they mean with their utterances. However, because there is no such responsibility towards overhearers, speakers are free to choose between the four following attitudes towards them: indifference, disclosure, concealment and disguise. When speakers are indifferent towards their overhearers, they do not care about whether overhearers understand what they say. When they disclose the meaning of their utterance to overhearers, they make it such that it can be grasped by overhearers.¹² When concealing the meaning of their utterances, speakers design the utterance such that it

¹¹ Clark's use of "what is said" should not be understood in the technical Gricean way here, but more generally as what is communicated.

¹² By disclosing the meaning of their utterances to overhearers, overhearers are not turned into participants, because disclosure neither comes with the responsibility for speakers to make themselves understood, nor with an expectation on the side of the overhearer that the speaker will make herself understood.

cannot be understood by overhearers and overhearers recognize that this is the case. Finally, and most importantly, when disguising their utterances speakers make them such such that overhearers believe to understand what the speaker means, although they do not. What makes disguise different from the other attitudes is that it is deceptive, it is “the disclosure of a misrepresentation” (Clark and Schaefer 1992, 262).

However, knowing that a speaker can take different attitudes towards different members of her audience does not yet explain *how* these attitudes can be accounted for in audience design. This is where the notion of common ground comes into play. As already remarked by Hunt, common ground is the information that is taken for granted as the shared background knowledge that holds between participants in a conversation. It is interesting to observe that although this notion has played a crucial role in many neo-Gricean accounts (e.g.: Allan 2013; Clark 1992a; 1996; Geurts 1999; 2016; Lewis 1969; 1979; Schiffer 1972; Stalnaker 1973; 2002; 2008)¹³, it is usually neglected in the literature on the pragmatics of legal language.¹⁴ The notion of common ground has been so important to neo-Gricean pragmatics, because – among other things – it provides an account of how the notion of the *context* of a conversation must be understood (Clark 1992a, 1996). The idea is here that something can only be taken to be contextual information in a conversation if it is available to all participants and known among them to be available to everybody. A speaker can only presuppose that some information can be used for grasping what she means when she thinks that this information is shared and the same applies the other way around. The guiding thought behind these theories is that when making their utterances, people constantly take into account what they can presuppose to be shared knowledge among the participants and design their utterances accordingly (Clark 1992, 6).

¹³ Other labels that are frequently used in the neo-Gricean literature to refer to this notion are *common knowledge*, *mutual knowledge*, *shared knowledge*, *assumed familiarity*, *presumed background information*, *common set of presumptions*, *shared sets*, *contextual domain*, *tacit assumptions* and *pragmatic presuppositions* (Allan 2013; Clark and Marshall 1981).

¹⁴ Two noteworthy exceptions are Slocum (2016) and Solum (2013). However, neither of them refers to Clark’s work or discusses doubletalk.

This knowledge can be personal and come from experience or conversations that were shared by participants, or it can be communal and come from knowledge about the communities that people know each other to belong to (Clark and Carlson 1980; Clark and Marshall 1981; Clark and Schaefer 1992). For instance, two close friends have a rich common ground from past personal interactions that they have shared and can refer to it in conversation, while no such information can be presupposed in conversations between strangers. An example for communal common ground is that two doctors can presuppose each other to know certain things about medicine, to be familiar with medical language, etc. which need not to be explained first in communication. However, a doctor cannot presuppose this knowledge when speaking to her patients (presuming that they are laypersons), and will need to design her contributions accordingly. Although there is much more to be said about common ground, I think that for now these remarks are sufficient to hint at its importance for successful and efficient communication. In the following, I will focus in particular on how considerations of common ground allow speakers to give effect effect to the different attitudes that they can take towards their audiences.

Let me start with the attitude of being openly informative towards one's addressees. The requirement towards a speaker here is simply that she makes her utterance such that the other participants can easily recognize its meaning on the basis of the common ground between them (Clark and Schaefer 1992, 259ff.). Because the only legitimate attitude that speakers can take towards other participants is to be openly informative about what they mean, participants can presume that the interpretation that they give to an utterance on the basis of the common ground *conclusively* reflects what the speaker means. Importantly, this does not apply to overhearers. Because overhearers do not participate in the conversation, they are not entitled to presume that their interpretation of a speaker's utterance correctly reflects what the speaker meant, exactly because they cannot presume that it is made such that it can be understood by them on the basis of the information about the conversation that is available to them. This also has the important consequence

that even if overhearers manage to grasp correctly what the speaker means, their interpretation will still be inconclusive, because they do not have any guarantee that it is correct, for they do not share the benefits of participating in the conversation, i.e. they cannot expect that the speaker will take their knowledge about the background of the conversation into account.

This reveals a crucial difference in the mode of understanding between participants to a conversation and overhearers. Participants are supposed to *recognize* what the speaker means while overhearers can only *conjecture* about it. In particular, when trying to understand what a speaker means, participants can simply rely on the common ground while overhearers will need to make guesses about what is in the common ground (Clark and Schaefer 1992, 262ff.). This difference in the modes of interpretation is also what makes disguisement and the other attitudes possible. Knowing that overhearers do not have access to all the information that is in the common ground when interpreting what a speaker means, they can make use of the circumstance that some information in the common ground is *open* to overhearers while other information is *closed*. How they make use of this information characterizes more exactly the attitudes that they can take towards overhearers. When they are indifferent towards overhearers, speakers do not take into account – do not even care – which information is open or closed to overhearers. When they want to disclose the meaning of their utterance they will need to make their utterance such that it can be understood on the basis of the information that is available to overhearers. When they want to conceal their utterance's meaning, speakers need to design it such that it can only be understood on the basis of information that is closed to overhearers. Finally, when disguising an utterance, speakers will need to use information in the common ground that is closed to the overhearer, but of which the overhearer does not know that it is closed. To illustrate this, consider how disguisement might be achieved by means of semantic ambiguity. For example, consider a speaker A who addresses B with the following utterance while C is overhearing:

(4) Let us meet at the bank this afternoon.

Now, imagine that A wants to deceive C into thinking that A and B will meet at the river bank this afternoon while informing B that their meeting point is a financial institution. This will only work if it is common ground between A and B that “bank” is used to refer to a financial institution *and* this information is closed to C *and* C falsely believes it to be open information that “bank” is used in the conversation to refer to a riverbank. It should be obvious that such a deceptive act will be very difficult to achieve in many cases, because very special conditions must be satisfied in the respective speech situation. Therefore, Clark (Clark and Schaefer 1992, 272 ff.) points out that the specific requirements that disguisement puts on the speech situation as compared to the other attitudes do not only make it the most difficult attitude, but also very rare.

Although there is certainly much more to be said about Clark’s work on audience design and about the different attitudes, I will show that the brief outline provided here is already sufficient to understand how Clark’s account can be applied to legislative doubletalk and refute Marmor’s argument.

4. Discussion

In this section, I will apply Clark’s work on audience design and his analysis of disguisement to legislative doubletalk in order to refute Marmor’s argument. In order to do so I will divide this section in two parts, each corresponding to the two underlying assumptions that are central to Marmor’s argument. In the first part, I will discuss the crucial question whether Clark’s work on audience design can be used to identify one of the two parties that are claimed by Marmor to receive conflicting messages in legislation as *overhearers* to legal discourse. Obviously, this is necessary in order to get the application of Clark’s analysis of disguisement as an attitude towards overhearers to legislative doubletalk off the ground. On the basis of Clark’s account, I will argue that legislation addresses legal experts and that lay citizens are, at most, overhearers to legal discourse. Because, as I have pointed out, Marmor makes the assumption that legislators communicate with the public and judges without argument, his remarks will not play any particular role

in the first part. Rather, I will develop my position with critical reference to an account that has already made an attempt at applying Clark's work to legal discourse: Drury Stevenson's position that the law addresses state officials. After having established my position, in the second part I will demonstrate that it can be employed easily to reject Marmor's second assumption that in cases of doubletalk no unique content can be ascribed to the law and thereby show that his argument from doubletalk is inconclusive.

4. 1. The audience of the law

As we have seen in section two, Marmor assumes that legislators address two groups when making the law, judges and the general public. However, this is not the only answer available from the legal literature to the question at whom the law is addressed. Broadly speaking, at least two other positions have been proposed (Stevenson 2003).¹⁵ The first goes back at least to Jeremy Bentham (1843; 1844) and holds that the law ought to address the citizenry. The second position is that the law is addressed at state officials, in particular judges. A recent argument for this position has been provided by Drury Stevenson (2003; 2016).¹⁶ Because Stevenson does not only develop a detailed version of this position but also bases it on Clark's work on audience design, I will develop my application of Clark's account by critically relating it to Stevenson's account.

Before coming to Stevenson, however, I want to point out briefly why Bentham's position can be neglected in the following. Very roughly, Bentham (1844; 1844) argues that the law ought to address the citizenry, because it is the

15 Stevenson also considers a fourth position, namely Heidi Hurd's (1990) proposal that the law is not addressed at anybody which is based on her claim that legislation is not a communicative act. I will not consider this position here, not only because it would require a very extensive discussion of a fundamental (and very common) presumption about law that would go beyond the scope of this essay, but also because it is highly counter-intuitive, because it has not found many supporters and because Hurd has not fleshed out her position in any detail, such that a discussion is unlikely to be fruitful.

16 Stevenson's work was preceded by (and builds on) Henry Smith's (2003) application of Clark's work on audience design to legal discourse in property law. However, because Stevenson provides an extended account that generalizes to legal discourse in general, I will focus on his work here.

citizenry whose behaviour is supposed to be regulated by the law and who is supposed to follow legal instructions. Bentham's ideal is a legal system in which citizens are independent of the advice of a lawyer which includes, for instance, that statutes are worded in a language that is accessible to laymen and free from unnecessary wordiness:

“law-books must be made up into sentences of moderate length, such as men use in common conversation, and [...] with no more words than necessary: not like the present statutes in which I have seen a single sentence take up thirteen such pages as would fill a reasonable volume, and not finished after all: and which are stuffed with repetitions and words that are of no use, that the lawyers who draw them may be better paid for them.” (1844, 150)

This passage, however, does not only give us a hint at what Bentham's position is, but also why it is not particularly relevant for the present investigation. The reason is simply that Bentham's argument is a *normative* argument that tries to establish that legislation *ought* to address the citizenry, and not a *descriptive* account of whom the law actually addresses.¹⁷ In fact, from Bentham's account it becomes clear that it is exactly not the case that the law is made such that it addresses the citizenry, as he would like it to have. Rather, on Bentham's description it seems to be written for legal experts because it makes use of legal jargon for which technical legal terminology and syntactic complexity is characteristic. I will come back to this point later.

Let me now consider Stevenson's account (2003; 2016) and develop my own application of Clark's work on audience design to legal discourse. Stevenson's overall argument can be divided into two parts. One of them is a critical argument against the claim that the law is addressed at the citizenry and the second is a constructive argument for his claim that the law addresses the state. I will begin my discussion with Stevenson's critical argument which is based on Clark's work on audience design. Stevenson's basic idea is to employ Clark's definition of addressees as “the ostensible targets of what is being said” (2003, 108) in order

¹⁷ The position that I am going to put forward in this paper, namely that the law is addressed at jurists, should not be read as a normative argument that it *ought* to be addressed at them. I will have nothing to say about such normative questions here.

to criticize the alternative positions that claim that the law addresses the citizenry or the citizenry and state officials. Stevenson argues that from Clark's perspective both accounts are untenable, because the claim that the law addresses citizens is at odds with what can be observed in the current practice of legal communication and decision-making.

Stevenson supports his argument with several points, for instance that citizens almost never read statute books (Stevenson 2003, 110) or that a citizen's interpretation of the law has only little or no significance for court decisions (2003, 131). Stevenson argues that taken together his points show that it would be "too far a stretch [...] to maintain that the written formulations [of statutes] are directed or addressed to the citizens primarily." (Stevenson 2003, 131). However, although I think that Stevenson's considerations point in the right direction and I agree with him that the law cannot plausibly be addressed at the citizenry, I do not want to base my own argument on these considerations for three reasons. First, Stevenson does not show that the citizenry is an overhearer to legal discourse, second, I do not think that his points decisively show that the law does not address the citizenry, and, third and most important, a stronger argument for my position can be made on the basis of Clark's account.

With respect to my first remark, it is important to point out that Stevenson is merely interested in showing that the law is *not addressed* at the citizenry but at the state. However, he does not exclude the possibility that citizens might still be participants to legal discourse (2003, 124). Probably one of the reasons why Stevenson does not insist on the citizenry being an overhearer is that he does not seem to be interested in the attitudes that legislators take towards them. In particular, he does not discuss Clark's analysis of disguise in legal discourse, because he claims without argument that "the idea of law as deception is untenable" (Stevenson 2003, 119). Although I generally agree with this claim, I do not think that it can be asserted without argument, especially now that scholars such as Marmor have put forward the idea that doubletalk is characteristic for legal discourse. In order to develop such an argument, however, I will first need to show

that Clark's analysis of disguisement can be applied to legislative doubletalk. Hence, I will need to make the stronger argument that citizens cannot be more than overhearers to legal discourse.

Second, to illustrate why I think that Stevenson's points are not necessarily decisive let me just consider his (2003, 110) point that citizens almost never read the law. The idea here seems to be that if the law was addressed at citizens then they would also regularly take a look at what it actually says. Because they do not, Stevenson holds that it undermines the claim that citizens are addressed by the law. However, although I think that this might serve as an indicator for the fact that citizens are not addressed by the law, it does not show it unequivocally. Consider, for instance, that I might write a letter to a person which this person never reads. Obviously, the person's not reading my letter does not change anything about the fact that it was addressed at her; after all, I even made clear whom I addressed on the envelope. The same might be said of the law. Only because citizens do not make the effort of reading the law it does not mean that it is not addressed at them. I think that similar points can be made with respect to Stevenson's other remarks, but since my aim here is not a rebuttal of his argument, I will confine myself only to this brief example.

Finally, and most importantly, I think that on the basis of Clark's account a much stronger – in fact, decisive – argument than Stevenson's points can be made for my position that citizens do not participate in legal discourse. The argument goes as follows. As we have seen, the roles that members of the audience take in a conversation are assigned by the speaker and must be made available to listeners in audience design by means of five major devices. It seems that three of these devices are mostly irrelevant for the form of communication at hand: physical arrangement, gestures and manner of speaking. The physical location of lawgivers, judges and citizenry does not seem to make any difference to their conversational roles, and neither gestures nor a special manner of speaking – such as using a high pitched voice to address children (Clark and Carlson 1982, 222ff) – are available in legal discourse. This leaves us with linguistic content and conversational his-

tory.

In order to see how these two devices are used for role-assignment in legislation, I think that one observation about statutory language is absolutely crucial and it is that the law is characteristically written in legal jargon or “legalese” as already pointed out by Bentham, and that it requires a broad legal knowledge.¹⁸ That is, the law is often put in a way that makes it only accessible to individuals who have acquired the necessary background knowledge to understand the law by means of a legal education. This includes – among other things – familiarity with a rich legal terminology, the ability to see through the syntactic complexity that is characteristic of legal language, and also background knowledge about the legal culture and other legal rules. Moreover, it is important to note that the claim that such specific background knowledge is required to understand the law seems uncontroversial, as it is explicitly accepted by theorists on all sides of the debate about the addressee of the law. For example, Dan-Cohen has remarked that legal language poses a barrier for laymen but not for lawyers because they are familiar with “technical and esoteric professional language” (1984, 58). Bentham’s complaints were considered above. Stevenson does not only point out that there is a rich technical legal terminology and syntactic complexity in legal language, but that these are also necessary for legal communication, because they allow for precision and efficiency (2003, 149). And, most importantly, above we have also seen that even Marmor points out that the relevant hearer must possess knowledge “about all the background legal landscape and the technicalities of legal jargon” (2014, 117).¹⁹

The fact that legal terminology and syntactic complexity are common features of statutory language demonstrates that the linguistic content of legislation presupposes a reader who has a legal background. Further, the fact that back-

¹⁸ For a recent and more detailed account on the difficulties and particularities of legal language, see: Jori (2016).

¹⁹ Solum (2013) points out that the use of legal jargon is especially common in judicial opinions. This makes Hunt’s claim that judicial opinions are addressed to the citizenry particularly problematic.

ground knowledge about other legal rules and the relevant legal culture plays a role in understanding statutes shows that legislation also presupposes certain knowledge about what can be seen as the conversational history of legislation; other legal rules are the legislative analogue to communicative contributions in ordinary conversations that preceded an utterance and the legal culture constitutes the historical development of the conversation which, in this case, often developed over centuries and decades. Further, these considerations also apply in cases in which a statute does not make use of legal terminology or syntactic complexity. Even in cases in which statutes might appear to be accessible to laymen on a semantic and syntactic level, they still presuppose background information about the legal culture.

However, by itself the insight that understanding legal rules requires certain knowledge does not allow yet to treat the citizenry as an overhearer to legislation. In order to do so we need considerations of PR and common ground. As pointed out above, what distinguishes participants from overhearers is that participants have obligations towards each other that they do not have towards overhearers. In particular, participants must make themselves understood to other participants which means that the meaning of their utterances must be easily recognizable on the basis of common ground. However, by making the law such that it cannot be understood by lay citizens, legislators indicate clearly that they are excluding them from legal discourse. That is, by presupposing a legal background as the common ground of the conversation, legislators cannot legitimately claim to have treated the citizenry as participant to legal discourse and this can also be clearly recognized by the audience. Hence, the citizenry is, at most, an overhearer to legislation.²⁰

Despite Stevenson's recognition of the fact that the law is written in legal

²⁰ I will not discuss here whether the citizenry is best considered as a bystander or eavesdropper to legislation, because for the purpose of this article it is only important that lay citizens are not participants to legal discourse. Considering, however, that ordinary citizens almost never read the law then it does not seem implausible to assume that they are merely considered as possible eavesdroppers to legal discourse.

jargon, it might appear surprising that he does not consider this point in his critical argument. This shortcoming can be explained, however, by another shortcoming of his account, namely that he never considers PR or the notion of common ground when referring to Clark's account, although, as we have seen, they are absolutely crucial to it. As I will try to demonstrate in the following, this neglect also has important consequences for Stevenson's constructive argument for his position that the addressees of the law are state officials.

This argument is primarily build on John Searle's (1979) work on declarations (Stevenson 2003, 119ff.). Following Searle, Stevenson defines declarations as special forms of communication in which assertions of certain facts bring these facts automatically into existence. Classic examples of assertions are "I now pronounce you man and wife" or "you're fired!". According to Searle (1979, 144) in such cases the assertion of the relevant state of affairs by the right person in the right context is sufficient for bringing the state of affairs into existence. That is, people can be married or fired simply by a priest or boss saying so in the right context. According to Searle, this context must be a specific institutional setting. For instance, the two examples just given only work within the institutional contexts of the church or a company. If the declaration is not made in the right institutional context, then the declaration will not be successful.

Stevenson's basic idea is then that statutes are best understood as declarations as analysed by Searle, because they are also "creating a state of affairs simply by being promulgated. They create the legal ramifications for anyone who fits the description in the statute." (2003, 121). On the basis of this idea, he states his argument as follows:

Declarations only work if there is some institution to receive the declarations and give them force and effect. This institution would appropriately be the "addressee." Without such an institution in the role of receiving and enforcing the declaration, there is no declaration. If there is no one in the role of receiving and enforcing the law, there would be no law. Therefore the law must have an addressee, and that addressee must be the institution that receives, effectuates, and enforces the law: the state. (2003, 122)

However, I think that there are at least two problems with this argument. The first has to do with the fact that Stevenson does not only claim that declarations must be *made* in an institutional context, but also that they must be *addressed* at an institution. Although it is correct that on Searle's account declarations must be made in institutional settings, in the work by Searle (1979) that Stevenson refers to, Searle never says that they must also *address* institutions, and I am also not aware of any other work in which Searle has made this claim. I think that the obvious reason why Searle does not make this claim is that it seems obviously incorrect. Declarations can be made without addressing institutions, as the two examples above clearly demonstrate. For if Stevenson were right, then the priest would not address the couple that he marries and the boss would not address the employee that he fires, although they are even explicitly spoken to by means of the word "you". However, this conclusion seems to be absurd.

Further, and more importantly, Stevenson's claim that the law is addressed at state officials seems to be incompatible with Clark's notion of an addressee that Stevenson commits himself to in his critical argument. The problem here is that Stevenson does not only subsume judges and other officials with a thorough legal education under state officials, but also enforcement officers such as police officers. This is problematic, however, because during their training police officers usually do not receive legal education that would be comparable to the education of jurists (Haberfeld 2002). A clear case in point is the police training in the United States where law enforcement officers often only receive a training that lasts about six months and in which they do not only need to learn the legal aspects of their occupation but also firearms training, self defence, etc. (Haberfeld 2002). It should be obvious that in such short time periods no sufficient expertise can be acquired. Moreover, the training of police officers focuses on particular areas of the law that are relevant for their occupation such as criminal and traffic law and neglect other areas. For these reasons, it seems problematic to presuppose that the relevant legal background for understanding (several areas of) the law is shared by police officers which means that they cannot be considered as legitim-

ate addressees of the law (or even participants to certain areas of legal discourse) from the perspective of Clark's PR and considerations of common ground. If so, however, then we also cannot legitimately hold that the law addresses the state, because police officers constitute an important group within the group of state officials. Again, I think that Stevenson fails to see this, because he does not consider that participants to a conversation must share the knowledge that is presupposed in a conversation.

Because Stevenson fails to demonstrate that the law addresses the law or an institution, I therefore propose that from the perspective of Clark's work on audience design it is more plausible to claim that the law addresses jurists, because they share the relevant common ground to understand legal jargon. I would also like to point out that this can resolve an unwelcome consequence of Stevenson's argument, namely that on his account the law does not address lawyers because they are not state officials, although "lawyers probably make up the law's largest readership" (2003, 146), as he recognizes himself.

To sum up: I have developed my own position concerning the question which roles are played by different audiences in legal discourse from the perspective of Clark's work by critically analysing Stevenson's account. I have not only argued that the law is addressed at jurists and not at state officials, as Stevenson claims, but also that Stevenson does not go far enough with his claim that lay citizens are not addressed by the law, because they do not even seem to participate in legal discourse but, at most, to overhear it. These insights will be used in the second part of this section to reject Marmor's argument from doubletalk.

4. 2. Legislative doubletalk revisited

The upshot from the first half of my application of Clark's account to legal discourse was that legislation addresses jurists and that citizens can, at most, be seen as overhearers to legal discourse. This crucial step has a double function in my argument. First, it demonstrates that one of the underlying assumptions of Marmor's argument from doubletalk is incorrect: the claim that the law speaks to the cit-

izenry and judges. Second, it now allows also to apply Clark's analysis of disguise to legislative doubletalk in order to refute Marmor's second assumption, namely that there is no way to determine a unique content of the law in cases of doubletalk.

My argument goes as follows. Imagine that we have a case of legislative doubletalk. Due to the failure of legal theorists to provide an example from existing statutory language, here I will use the fictitious example of the health care bill provided by Greenberg as an illustration.²¹ Marmor's worry is that in such cases we cannot identify a unique content of the law because there is no way to resolve the question whether it is the content conveyed to judges or the content conveyed to the citizenry that reflects correctly what legislators have promulgated. Are federally funded facilities entitled to provide abortions in cases in which the mother's life is not in danger, or not? My claim is that this problem can be resolved if we apply Clark's analysis of disguise.

Because the law addresses judges and citizens merely overhear legal discourse, in such cases legislators do *not communicate* two different contents to two different audiences, but they create the impression to ordinary citizens to have communicated a content to judges that they did not. In Clark's words, in legislative doubletalk lawmakers disguise the meaning of a statute by disclosing a misrepresentation to the overhearers of legislative discourse: lay citizens. Hence, in the case of the health care regulation it is not communicated that federally funded facilities must not provide abortions. Rather, this interpretation is a misrepresentation of the rule that is conveyed by the regulation which does not prohibit abortions. Disguisement in legislation is made possible by the circumstance that judges are entitled to presume that they can *recognize conclusively* what the law means on the basis of the conversational background, which is the communal knowledge shared by jurists while lay citizens can only make *inconclusive conjectures* about the law's meaning; they are not participating in the conversation and

²¹ I do not want to commit myself to the claim that this is a plausible example or that examples of this kind are likely to occur in existing statutes (more on this later). I merely resort to it due to the lack of better examples in the literature.

therefore cannot presume to have the necessary background to recognize what the legislature meant. In the particular example of the health care bill the meaning of the rule would be disguised due to the circumstance that it might be unknown to lay citizens that it is common ground in legal discourse that individuals can only be penalized for behaviour that is explicitly prohibited. In Clark's terms, this would be information about the common ground that is closed to them. However, because they are not aware that information is closed to them that is necessary to grasp the law's meaning, they would presume that all the relevant information about the common ground that is necessary is open to them and therefore assume to have made the right conjecture.

The crucial upshot from these considerations is that there *is* a clear answer to the question what is the unique content of the law in cases of doubletalk: it is the qualified interpretation given to the law by legal experts. And for this reason the second presumption that is necessary for Marmor's argument is also false. Moreover, because a unique content of the law can be determined irrespectively of the level of communication on which the different contents are conveyed, *a fortiori* a unique content can also be determined in cases in which judges and citizenry take two conflicting *implicatures* to be conveyed by the legislature. Therefore, the main claim of Marmor's argument is also falsified.

This has important implications for Marmor's argument against the determinacy of implicatures and the presumption of the Gricean CP in legal discourse. Because there is a way to determine a unique implicated content in the cases of doubletalk that Marmor described, doubletalk does not render implicated content indeterminate or unreliable in the law. Therefore, it also does not fail to provide a clear legal instruction as required by CP and hence also does not go against it. His argument from doubletalk can therefore not undermine the expectation of cooperation in legal discourse. I concede, however, that my argument in fact demonstrates that there is no cooperation in legal discourse between legislators and the citizenry. But this is only because legislators simply do not engage in a conversation with the citizenry and *not* because they engage in a non-cooperative

conversation with them. Simply put, conveying misrepresentations to citizens is not non-cooperative communication because it just is not communication. Hence, because the use of doubletalk does not demonstrate that there are non-cooperative elements in legislation, it also does not support Marmor's claim that legislation is strategic. If so, then the claim that doubletalk is used in legislation cannot serve to support any of the points made by Marmor: neither that implicated content in legal language is indeterminate, nor that legal discourse is strategic.

To conclude my discussion, I would like to make some remarks about how plausible it is in the light of my account that doubletalk is used frequently by legislators. First, I think that it is important to point out that my position can also account for the claim that legislators might use doubletalk in order to pursue their conflicting interests, which seems to be the main consideration behind Marmor's assumption that it is a characteristic element of legal communication. Disguising the meaning of the law still allows legislators, for instance, to create the public impression to restrict campaign finance contributions, but, at the same time, to instruct judges that such contributions can flow freely in order for them to fund their own campaigns. Because all that is needed to pursue such interests is the deception of the public and not the indeterminacy of implicatures, resolving conflicts of interests by using doubletalk is also possible on my account.

However, I would also like to point out that on the basis of the preceding analysis it seems highly unlikely that legislators actually use doubletalk frequently. At least two points are relevant here. First, Clark's analysis of how disguise works demonstrates that it is generally very difficult to accomplish, because it requires that very specific conditions are satisfied by the context and the information that is available to the audience. This, of course, also applies to legal discourse. And because in legislation lawmakers talk to very large and heterogeneous groups that they do not know personally, in legal discourse it will be very difficult for legislators to estimate which information is closed and which is open to lay citizens. A second and probably even more important point is Stevenson's observation that ordinary citizens almost never read the law. If this is correct then

it also seems that it would not make sense for legislators to make great efforts to word the law in a deceptive way, for the public does not seem to care about this wording in the first place. The claim is here that doubletalk or disguise is unlikely to occur in legal language, simply because the public is unlikely to overhear legal discourse very often and therefore will also not be deceived about its meaning by using disguise. If my points are correct, then doubletalk can hardly be a characteristic of legal language, as Marmor would need to claim.

Be that as it may, I hope to have demonstrated in this section that even if doubletalk occurs frequently in law, there is a way to determine its unique content. And this is all that needs to be shown to refute Marmor's argument from doubletalk.

Conclusion

My central conclusion is that Marmor's argument from doubletalk is not successful, because its central claim, according to which in cases of legislative doubletalk no unique content of statutes can be determined, is false. I have tried to show that even if cases of doubletalk in statutory language occurred – which still remains to be shown – they do not lead to indeterminacy of the respective statutes, because Clark's analysis of disguise provides a way to determine which content is communicated in such cases. It is the content that is reflected by the qualified interpretation given to the law by jurists. Because Marmor's argument is unsuccessful, it also does not lend any support to Marmor's more general position that legal communication is less cooperative than ordinary discourse and that implicated content in the law is indeterminate. Although doubletalk is not the only element of legal communication that Marmor claims to be strategic, I think that my argument at least constitutes an important contribution in refuting his general claim. However, more work remains to be done here.

On the basis of my investigation I would like to suggest that future research in this direction and research that is generally concerned with the pragmatics of legal language should take neo-Gricean developments in pragmatics

stronger into account. The confusions about doubletalk in Marmor's account could have been prevented if he did not only focus on Grice's classical work, but also considered Clark's account, and possibly others. In particular, I would like to suggest that future investigations should especially consider research on the notion of common ground that has played a major role in recent theoretical developments in pragmatics but which is still largely ignored by legal theorists. These investigations are likely to lead to a better understanding of the contextual frame in which the law must be understood and thereby inform methods of statutory interpretation.

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