Strategic Speech in the Law*

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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 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).[1] 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 is 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.[2] 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

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1 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 Meir Dan-Cohen's work on acoustic separation in criminal law (2002) at pp. 37–93. I have tried to explain the linguistic relevance of such double-talk: Marmor (2008) at p. 423.

2 There is nothing new in this idea; it has been noted by numerous writers.

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, namely both X and Y intending—or hoping, or expecting—their intentions to prevail. In some cases, this may not be problematic: it is certainly possible that both X and Y 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 that 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 at 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—eg the initiators of the bill, the less-than-enthusiastic supporters, those who voted against?[3] 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 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

3 For an excellent analysis of the political dynamics of legislation and the differences between various groups of legislators, see Rodriguez and Weingast (2003).

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 that 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, and what kind of skills and abilities one would need to exhibit 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 that 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 allowed to use physical intimidation as part of their tactics in the game.[4] 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 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 partly depends on one's views about the legitimacy of such authorities, and their moral-political rationale.[5] 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

4 An actual case of this kind is nicely discussed by R. Dworkin (1977) at ch 3.

5 I have explained this in much greater detail in Marmor (2005) at ch 8.

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 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.[6] 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 cancelable; 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.[7] In such cases, the courts are hearing, 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.

6 In the United States, 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 100, often come into conflict, and thus the courts often get to pick and chose which one prevails under the circumstances.

7 A famous case in point is *Holy Trinity Church v United States* 143 US 457 (1892).

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 (U) '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 (U) 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 is willing to add this information to her background knowledge in this conversation.

In the legal case, however, accommodation does not always work so smoothly, and for understandable reasons. Let me illustrate this kind of accommodation failure with the famous case of *TVA v Hill*.[8] 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.[9] As it turned out, however, after the environmental issues had 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.[10] Nevertheless, the Supreme Court decided that these appropriation bills could not 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.[11] 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

8 437 US (1978) 153.

9 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.

10 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.

11 For more details on this case, see McCubbins and Rodriguez (2005) at p. 699. (I do not quite share the authors' negative view about the court's 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.)

construction of the dam (or explicitly overruling the Fish and Wildlife Service's (FWS) 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 divergence 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 the speaker's intended implications and the 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.[12] In fact, the *TVA* 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 largely 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, and they need less strategic flexibility and more clarity. Therefore, in the case of agency regulations, we should expect greater alignment between the speaker's pragmatic commitments and the 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 the speakers strive to implicate and what the hearer's 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.[13]

12 The US Supreme Court explicitly recognizes greater deference to expert agency regulations. This is called the *Chevron* doctrine, based on the decision in *Chevron USA*, *Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984). As commentators have noted, however, the *Chevron* doctrine is itself discriminately applied, depending on the level of confidence that courts have in the relative expertise of the agency in question.

13 I am grateful to Scott Altman, Marshall Cohen, Joseph Raz, and Scott Soames, for helpful comments on a draft of this chapter.