

## SPEECH ACTS AND THE LAW

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It goes without saying that J. L. Austin has had a great impact on recent work in philosophy and linguistics. (For references see Eaton 1974 and Verschueren 1976.) It is almost as obvious that for the structure and details of his theory Austin was heavily indebted to concepts and practices of the English common law. In fact, it can be objected that as a general theory of language Austin's theory suffers from just this partiality; that for a general theory it is too much in the thrall of the law.

Stanley Fish made such an objection during a recent panel discussion of the topic 'Speech acts and literature'. 'Speech-act theory is an ideology', he said:

it's an ideology to which we might in some moods even want to put the word 'bourgeoise'. That is, when Austin says on page 10 of *How to do things with words*, 'a man's word is his bond', you can see that legal jurisdictional contract morality clamping down with a vengeance.

For Searle too, as well as for Austin, he went on, 'man is a legal animal' (Fish 1975:143, 144).

And yet the Austin-Searle theory of language use has been almost completely ignored by lawyers and jurists. And for their part, linguists and philosophers seem not to have inherited much of Austin's specific curiosity about how the law does things with words, and about what implications that behavior might have for a general theory of speech acts. I want in this paper to identify a few points at which speech-act theory and legal practice appear to meet, to speculate about the significance of these connections, and to recommend this general topic as one worth further study.

First, the matter of 'uptake'. Austin (1962:22, 116) specifies that one of the prerequisites for an illocutionary act to be

'felicitous', to come off, is that it must 'secure uptake'--that is, the intended audience for the speech act must both hear and grasp the point of what is said. He cites 'the serving of writs or summonses' in the law to back his point. And the law does hold that writs, to take effect, must be served personally upon the recipient; that is, uptake must be secured. Otherwise the court may resort to one or another legal fiction to repair the default of actual uptake.

Now a similar requirement of uptake is basic to the law of defamation. A defamatory speech act must be heard and understood (by a third party) to become a basis for litigation. Where there is no uptake, there is no defamation. A nice illustration of this can be found in the current draft of the restatement of the law of torts (American Law Institute 1974: 96):

[Case 1] A, a Lithuanian, engages in a violent quarrel with B on the streets in the foreign section of Chicago. In his native tongue, A accuses B of murder. No one but B understands him. A has not published a slander.

[Case 2] The same facts as in [Case 1], except that A is overheard by several of his countrymen. A has published a slander.

Furthermore, it is the 'intent to communicate' which is essential to defamation, and not the intent to defame. The speaker of any utterance will normally speak with the following intentions:

1. to speak (that is, to execute an 'utterance act' (Searle 1969:24));
2. to invoke for the spoken words a certain sense and reference (that is, to execute a 'propositional act'); for example, to refer to one person rather than to another;
3. to inform those same words with a certain illocutionary force (that is, to execute an 'illocutionary act');
4. to be heard and understood by the person(s) addressed (that is, to secure uptake);
5. to accomplish certain ends by saying those words (that is, to execute a 'perlocutionary act'); for example, to harm the reputation of a person.

In cases of defamation the propositional, illocutionary, and perlocutionary intentions of the defendant do not matter; they can be perfectly innocent intentions, and yet the defendant may be guilty. The defendant may have meant his words to refer to John Smith the tinker and not to the plaintiff, John Smith the tailor; or he may not have meant his words to do Smith any harm. But he will still be guilty if he had what one

treatise calls the 'intent to communicate' (Hanson 1969:58). Such intent to communicate can be analyzed as roughly equivalent to intent to perform an utterance act plus intent to secure uptake. (But this analysis fits only in a loose sense of the word 'uptake'; for Austin ties 'uptake' to the notion of understanding--that is, correct understanding; and *misunderstanding* (for example, misunderstanding the identity of a referent) is understanding enough for the purposes of this law.)

Finally, where uptake occurs unintentionally (and also non-negligently) there is no defamation:

A writes a letter to B containing defamatory statements about C. He puts the letter in his desk and locks it up. A thief breaks open the desk and reads the letter. A has not published a libel (American Law Institute 1974:101).

Similar to the requirement of uptake in these cases of writs and of defamation, is the requirement regarding gifts in the law of property. A purported gift is no gift unless it has been accepted by the donee--unless, that is, uptake has been secured. As in the case of writs and summonses, there are modifications of this principle: acceptance can be either 'express or implied'; and it may even be presumed by the court 'where the gift is beneficial to the donee' (38 C.J.S., Gifts §§29, 65); but these modifications leave the basic point intact.

But the place of uptake is quite different in two other areas of the law, the law of statutes and the law of notice.

In England, 'Statutes take effect without promulgation or other proclamation ... as soon as Parliament has concluded anything, the law presumes that every person has notice of it at once' (Langan 1969:14). Various American jurisdictions may require publication to give a statute legal effect, but from then on the presumption of knowledge of the statute is the same. This presumption that a person knows a statute even if the legislature has not 'secured uptake' for it, is a special instance of the operation of the old maxim 'Ignorantia juris non excusat'--ignorance of the law is no defense. (This general principle is essential to functioning of the law. Without it, in the words of Lord Ellenborough (1750-1818), 'there is no saying to what extent the excuse of ignorance might not be carried; it would be urged in almost every case' (Broom 1939:171).)

This legal presumption that a person knows the law, could be described as an instance of the general doctrine of 'constructive notice'--which is the legal fiction or presumption, in certain circumstances, that someone has received information that p even if he has not actually received such information (though I have not seen it described that way).

'Record notice' is a good example of 'constructive notice'. Record notice is the legal fiction or presumption, where authorized by statute, that a person has received information

of the contents of a document by virtue of that document's having been recorded in a designated public office.

Similarly, a legally mandated official notice published in a newspaper or posted in a public place may constitute constructive notice to all persons addressed even if none saw the notice. (This trick does not usually work, though, for private persons, for it is not a common law device, but the creature of statutes and ordinances.)

One way to generalize from these examples of the role of uptake in the law is to notice that the first three classes of examples--that is, those involving writs and summonses, defamation, and the giving of a gift--all typically involve a definite audience at a definite time (published libel is a partial exception here); but that the last two classes of cases, involving statutory law and other forms of constructive notice, address an audience indefinitely large, and at no time in particular. Actual uptake can conveniently be required of those legal or legally actionable speech acts that, like their everyday counterparts, are addressed to a definite audience; but in the case of an indefinite audience the requirement may be waived for practical reasons.<sup>1</sup>

But this whole discussion of uptake as one example of a speech-act concept important to the law is weakened by the fact that 'uptake' is, after all, no very special transformation of the ordinary notion 'understanding', which, indeed, it includes. True, 'uptake' does have a rather more definite ring to it than vague 'understanding'; and Austin's crisp way of putting it may encourage us to take a sharper look into that mist, as I have tried to do here. Still, what I have said so far is not the best that can be said to point up the relevance of speech-act theory to the law.

A somewhat better example concerns the second of the two preparatory rules that Searle (1969:66) has specified for the illocutionary act of 'asserting', 'stating (that)', or 'affirming'. That rule runs as follows: 'It is not obvious to both S [speaker] and H [hearer] that H knows (does not need to be reminded of, etc.) p'. Or, to put it colloquially, 'don't say anything that goes without saying'. A parallel convention in the law of evidence, called 'judicial notice', recognizes that there is no need to go to the trouble of proving by display of evidence a fact that the judge and/or jury know to be a fact already--or, if they do not actually know, may be deemed to know. Some things go without proving, like the fact that 'yield of grain crops in Iowa is profoundly influenced by lack of proper rainfall' (31 C.J.S., Evidence §29), or 'the fact that the tide ebbs and flows at New Orleans' (29 Am. Jur. 2d, Evidence §68). Such facts may, of course, be said for the record (usually by the judge, at the request of counsel); but sometimes they may even go without saying.

Some [matters of common knowledge] are noticed without comment; for example, if the fact is relevant, both judge and jurors will assume that rain falls; for there are numerous matters which are silently noticed by any judicial tribunal. In other cases, notice may be taken expressly (Nokes 1967:62).

Precisely which matters are open to judicial notice is a question for which there is no strict general answer. Much as in the case of Searle's second preparatory rule on assertions, it all depends upon the particular facts in question. Rather less than as in the case of that rule does it depend upon what the hearer actually and personally happens to know; for the standard of judicial noticeability for both judge and jury is common knowledge, what is generally known by competent adults in that particular jurisdiction, and not just what this particular judge or these particular jurymen happen to know. That is, to invoke an old political distinction, they are 'hearers' of evidence in an official capacity, and not individually or privately the way we are ordinarily as we 'hear' assertions put to us (and find them in or out of keeping with Searle's preparatory rules). But allowing for this necessary difference, the structure of the situation is much the same; and in this case the legal convention strengthens the authority of the speech-act rule as Searle formulates it.

The law of evidence provides another, somewhat more complicated example, the example of hearsay. Hearsay evidence can be most broadly defined as testimony of 'what another person was heard to say' (Nokes 1967:268). 'Literally, it is what the witness says he heard another person say' (Black 1951:852). Under this broad definition hearsay evidence is, in effect, reported speech, or reported discourse.

However broad or narrow the definition of hearsay, it is standard to exclude hearsay testimony for one set of reasons, except for certain kinds of hearsay testimony, which are admitted for another set of reasons. Usually, the definition of hearsay is narrowed so as to exclude and admit certain classes of testimony by definition, which tends to reduce somewhat the set of apparent exceptions to the hearsay rule. The long controversy about the proper and most efficient definition of hearsay is less important to this discussion than a sense of how the hearsay rule sorts out kinds of reported speech admissible and inadmissible in evidence--a sorting-out that is itself relatively uncontroversial.

The major class of utterances that the hearsay rule exists to exclude is a subclass of what the law usually calls 'statements'. Focused definitions of hearsay usually specify that statements are involved. For example:

'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted.

In this particular case a 'statement' is defined, in turn, as

... (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion (Weinstein and Berger 1975: 5801, 1).

The major reasons given for excluding second-hand statements involve the court's need to test the truth of all assertions entered in evidence. The court normally has three means of maximizing and testing the credibility of statements made on the witness stand (Cleary 1972:582-583): (1) The oath administered to the witness is supposed to foster the truthfulness of statements that are made under the oath. (2) Direct testimony gives the court an opportunity to watch the witness for tell-tale signs of prevarication. (3) The opportunity for cross-examination affords a means of testing the truth of assertions made on the witness stand. (This factor is generally thought to be the most important guarantee of the verifiability of testimony.)

Say that John Dean should try to testify that Rosemary Woods told him that she saw Billy Graham erase the tape. The court would rather hear about it from Miss Woods herself, in person, under oath, and subject to cross-examination; it could then tell better than Dean whether or not she was telling the truth.

But the court would allow Dean to testify that Woods offered to take him on a month's vacation along the Riviera if he would erase the tape himself. The question of the 'truth' or sincerity of her offer would be beside the point. The only relevant question would be whether she made such an offer to Dean or not, and Dean could testify to that question with as much authority as she. Of course, the court would also ask Woods to testify, if she were available; the point is that in this second example Dean's testimony would not be excluded under the hearsay rule.

To put this distinction in Austin's terms, the hearsay rule typically excludes reports of 'constative utterances', but admits reports of 'performative utterances'. (Austin himself 1962:13 briefly notes the relevance of hearsay law to his performative/constative distinction.) The report of a constative utterance is but indirect and tenuous evidence of the matter in dispute; that is, of the truth of the proposition stated. But the report of a performative utterance is direct and verifiable evidence of all or part of the matter in dispute; that is, of whether or not the performer of the alleged performative utterance did engage in a certain sort of verbal behavior.

A couple of further examples are offered, one in summary and the other in detail.

1. A can give direct evidence on the question whether or not B made a contract with him (similarly as regards the repudiation of a contract) (Nokes 1967:273).
2. In *Subramaniam v. Public Prosecutor*, on a charge of possessing ammunition contrary to emergency regulations in Malaya, the defence was duress. The accused sought to support his defence by giving evidence that he had been captured by terrorists and by repeating what they had said to him. At the trial the judge excluded evidence of the conversation on the ground of hearsay, thus shutting out the defence, at least in part, and the accused was convicted. The same result might have occurred if the evidence had been admitted but disbelieved. On second appeal, the conviction was quashed by the Privy Council on the ground that the proposed evidence was not hearsay, as it was tendered to prove (presumably) the fact that *threats* [emphasis added] were made, and not to prove the truth of anything said by the terrorists (Nokes 1967:273-274).

The *threats* (a kind of performative utterance) constituted the duress alleged in defence--technically 'duress per minas'--'by threats' (Black 1951:594).

Many kinds of reported utterances that are exempt from the hearsay rule are often classed together and justified under the suggestive title 'verbal acts'. The verbal-act doctrine overlaps much of what has been said already, and it is not always resorted to per se. The doctrine lacks clear-cut definition in the legal literature, and it is easier to exemplify than to summarize. All legally actionable utterances (e.g. contracts, defamatory remarks) are admissible as verbal acts; so are utterances that disambiguate otherwise ambiguous transactions simultaneous with them (e.g. making a loan as against making a gift)--though sometimes the utterances here are justified not as 'verbal acts' but as 'verbal parts of acts'. The instructions given by the owner of a car to a driver are admissible as verbal acts implying that the driver 'was acting with owner's consent at time of accident' (Cleary 1972:589 n. 78).

In an action for damages for the killing of a pedestrian walking upon a public highway at night, testimony of a companion at the time of the accident to the effect that the deceased kept *warning* [emphasis added] the companion to keep off the paved portion of the highway is admissible as a verbal act (29 Am. Jr. 2d, Evidence § 710).

Now the performative speech act of warning 'implies' (Austin 1962:45-46) in the speaker both a sense of danger and a desire to see danger avoided; both of these implied states make implausible any allegation of negligence against the speaker.

Similarly, instructions imply a desire to have the instructions carried out--which, in the example cited, loosely implies a consent to use the means at hand to carry out those instructions. So it is fair to conclude from all these examples that reported performative utterances are generally admissible in evidence as verbal acts, either for their own interest or for the interest of the speech-act conditions that they imply.

Of course, the major work of the end of Austin's career was to collapse his own distinction between constative and performative utterances, on which I have been leaning rather hard. 'The bit where we take it all back', he once called this effort, which succeeded in demonstrating that constatives are performatives too (Austin 1970:241). Nonetheless, constatives remain a different kind of performative; which is why they have a separate niche to themselves in Searle's recent revamping of speech-act taxonomy. In Searle's terms, the courts will usually exclude from evidence as hearsay most reported speech acts that are 'representatives' (constatives of various sorts), but they will admit 'directives' (e.g. orders, requests, warnings), 'commissives' (e.g. promises, contracts), 'expressives' (e.g. thanks, apologies), and 'declarations' (e.g. baptisms, resignations) (Searle 1975).

(One large class of exceptions to the rule against representatives concerns 'admissions' and 'confessions'. These representatives are specially excepted from the hearsay rule--for reasons, though, that remain much in dispute.)

The last example that I want to discuss here is the connection between a special case of what the law calls 'operative words', and performative utterances--particularly those performatives that Searle calls declarative utterances. Austin himself refers to the concept of 'operative words' as a way of clarifying what he means by 'performative':

Lawyers when talking about legal instruments will distinguish between the preamble, which recites the circumstances in which a transaction is effected, and on the other hand the operative part--the part of it which actually performs the legal act which it is the purpose of the instrument to perform. So the word 'operative' is very near to what we want [to identify the performative concept]. 'I give and bequeath my watch to my brother' would be an operative clause and is a performative utterance (Austin 1970:236).

I have nothing to add to this comment on the general topic of operative words other than to note, *pace* Austin (1962:33), that the law does tolerate circumlocution in operative language, very much as the conventions of ordinary speech tolerate non-'explicit' or 'primitive' (also called 'primary') forms for performative utterances. In ordinary speech it is the rare order that takes the explicit performative form, such as 'I hereby

order you to return tomorrow'; we normally get by with weaker forms, like 'You will return tomorrow' (a favorite military form), or 'Would you please return tomorrow'. Similarly, the law often allows a large degree of leeway in the formulation of an operative passage; these rules are typical: 'A conveyance must contain operative words of grant, but such words need not be in any particular clause, nor need technical words be used' (26 C.J.S., Deeds § 28). 'Any words which clearly indicate an intention on the part of the testator to pass his interest in real property are sufficient to constitute a devise of real estate' (96 C.J.S., Wills § 761).

The particular kind of operative language that I want to examine here is that part of a statute called the 'enacting clause', which is that part of the statute (if the statute has one) constituting an explicit performative utterance. (The law varies from jurisdiction to jurisdiction as regards the question whether or not an enacting clause is necessary to the validity of a statute. Where the law tolerates the lack of such a clause, a statute lacking one is, in effect, a primitive performative utterance.)

Enacting clauses usually take a passive-voice, imperative-mood construction, as shown in (1).

- (1) Be it enacted by the General Assembly of Laputa that  
P.

But the construction shown in (2) is sometimes allowed--and this formulation would seem to be the radical one.

- (2) The General Assembly of Laputa do (hereby) enact that  
P

What I find odd about enacting clauses is the logic that jurists most often use to explain their function. For example: 'The purpose of an enacting clause of a statute is to identify it as an act of legislation by expressing on its face the authority behind the act' (73 Am. Jur. 2d, Statutes § 93). Or, 'it is necessary that every law shall show on its face the authority by which it is adopted and promulgated' (82 C.J.S., Statutes § 65). Or,

Written laws, in all times and all countries, whether the edicts of absolute monarchs, decrees of Kings and Council, or the enactments of representative bodies, have almost invariably, in some form, expressed upon their face the authority by which they were promulgated or enacted ... The purpose of provisions of this character is that all statutes may bear upon their face a declaration of the sovereign authority by which they are enacted and declared to be law, and to promote and preserve uniformity in legislation. Such clauses also import a command of obedience and

clothe the statute with a certain dignity, believed in all times to command respect and aid in the enforcement of laws. These are the sole purposes of an enacting clause. It is not the essence of the law, adds nothing to its meaning, and furnishes no aid in its construction. It is a form, but one that is necessary to be used in legislation (Sands 1973:44, quoting a 1907 Tennessee decision).

The drift of these explanations is that the enacting clause matters mainly or only because it identifies the authoritative agent of the legislative speech act. But surely that is only half the story. Austin would have been quick to add that these performative utterances matter as much for what they do with words--that is, for the changes that they work upon the world--as for the light they shed on the identity and authority of the agent of the act. The grammatical subject of an enacting clause does matter, but so too does the predicate. Austin can explain how and why.

Let me end this prospectus by arguing for the special relevance of speech-act theory to the law, in the light of a melancholy observation that Nicole Kermish makes at the end of her recent bibliographical survey, 'Language and the law'. After cataloguing the succeeding waves in this century of different linguistic theory--general semantics, communications theory, transformational grammar in turn--she warns:

Analyses of legal language which derive their entire support from transitory academic theories are extremely susceptible to academic obsolescence. In order for writing on legal language to remain useful and to be taken seriously, it must incorporate those ideas which cut across linguistic theories (Kermish 1975:18).

She does not suggest what 'those ideas' might be; but I would argue that speech-act theory does operate at the needed level of generality, and that the kinds of application that I have been illustrating here are more durable than the earlier accounts that Kermish reviews. Speech-act theory and the law are made of much the same stuff. Pragmatic concepts such as authority, verifiability, and obligation are basic to both. Each elaborates and refines ordinary language behavior, the one descriptively and the other prescriptively. Such compatibility argues for a lasting marriage. The only hitch that I can see is the usual rule against incestuous marriage--itself a speech-act rule and a rule of law.

#### NOTE

1. In their paper read at NWAWE-V (1976), 'Jury instruction comprehension' [this volume, 214-221], Veda Charrow

and Robert Charrow report that judicial instructions to a jury are presumed to secure uptake, even when members of the jury do not understand them. Perhaps an audience of 12 persons is already 'indefinitely large'; or is this a counter-example?

#### REFERENCES

- The two standard American legal encyclopedias, *Corpus Juris Secundum* (C.J.S.) and *American Jurisprudence 2d* (Am. Jur. 2d) are cited directly in the text in standard legal form: volume number, encyclopedia abbreviation, general topic, section number.
- American Law Institute. 1974. Restatement of the law, second: Torts (tentative draft no. 20). Philadelphia: American Law Institute.
- Austin, J. L. 1962. How to do things with words. New York: Oxford University Press.
- Austin, J. L. 1970. Performative utterances. In: Philosophical papers. 2nd ed. London: Oxford University Press.
- Black, Henry Campbell. 1951. Black's law dictionary. 4th ed. St. Paul, Minn.: West.
- Broom, Herbert. 1939. A selection of legal maxims classified and illustrated. 10th ed. London: Sweet and Maxwell.
- Cleary, Edward W. 1972. McCormick's handbook of the law of evidence. 2nd ed. St. Paul, Minn.: West.
- Eaton, Marcla. 1974. Speech acts: A bibliography. Centrum 2.57-72.
- Fish, Stanley. 1975. Panel discussion (with E. D. Hirsch, Barbara H. Smith, Martin Steinmann): Speech acts and literature. Centrum 3.125-146.
- Hanson, Arthur B. 1969. Libel and related torts. Vol. 1. New York: American Newspaper Publishers Association Foundation.
- Kermish, Nicole C. 1975. Language and the law: A review of the literature. Boston. Unpublished MS.
- Langan, P. St. J. 1969. Maxwell on the interpretation of statutes. 12th ed. London: Sweet and Maxwell.
- Nokes, G. D. 1967. An introduction to evidence. 4th ed. London: Sweet and Maxwell.
- Sands, C. Dallas. 1973. Statutes and statutory construction (Revision of: Sutherland statutory construction). Vol. 1A. Chicago: Callaghan.
- Searle, John R. 1969. Speech acts: An essay in the philosophy of language. Cambridge: University Press.
- Searle, John R. 1975. A taxonomy of illocutionary acts. In: Language, mind and knowledge. Edited by Keith Gunderson. Minnesota Studies in the Philosophy of Science 7.344-369.

Verschueren, Jef. 1976. *Speech act theory: A provisional bibliography*. Bloomington: Indiana University Linguistics Club.

Weinstein, Jack B., and Margaret Berger. 1975. *Weinstein's evidence: Commentary on rules of evidence for the United States court and magistrates*. n.p., Matthew Bender.

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