Language and Law

A resource book for students

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Chapter B7

Legal Speech Acts

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including legal rules, can after all be unwritten, tacit or implied (a theme explored in Twining and Miers 2010). It might therefore be the rule, rather than the language in which a rule is expressed, that should be examined for meaning. Greenberg argues that **communication theories of law** (i.e. frameworks for interpreting legal texts based on likeness to principles underlying general communication, especially personal communication) cannot provide a satisfactory account of how statutes contribute to law's content or effects.

Legislative systems, Greenberg argues, have aims that are not reducible to their communicative content as analysed according to linguistic (including pragmatic) standards and principles. Rather, what is distinctive about laws may be precisely that they use linguistic means for unique, normative and symbolic purposes. Those purposes, Greenberg notes, range from specifying conceptual rules and ensuring that legal standards will be enforced and complied with, through to advancing justice, fostering the legitimacy of the legal system, preserving the status quo, and promoting a particular ideology. Because laws operate in these combined ways, he concludes, the legal 'meaning' of statutes and other legal instruments is only partly communicated by the words in which they are expressed; legal meaning is not reducible to those words – or to our customary ways of understanding most other kinds of language use. We pursue these fundamental questions in Unit D6, as well as more generally in Thread 8.

LEGAL SPEECH ACTS

B7

Unit A7 examines the vocabulary used in describing the relationship among law, power and order. We note there that language can *describe* power (e.g. a textbook may begin, 'Power consists of . . .'); or it can *reflect* power (e.g. the sociolect used by a judge might signify a powerful social class). We can also say that patterns in language use may *correlate* with power (e.g. the status of participants in a legal interaction may match their speaking skills). But can we say that legal discourse actually exercises or *performs* power? In this unit, we look at linguistic approaches based on speech act theory that suggest that it does. In particular, we look at linguistic 'performatives', as enablers of action, before addressing the question of how performative speech acts relate to the wider practice of devising and following legal 'rules'.

How to do things with words: linguistic performatives

First, it is necessary to provide a context for the linguistic concepts we will draw on. Although there were earlier, analogous approaches in rhetoric, the idea that language can be used in a **performative** way is usually associated with a pioneering work by the Oxford philosopher J. L. Austin (1911–1960), *How to Do Things with Words* (1962), compiled from a series of lectures he had delivered at Harvard in the 1950s. Austin noted various utterances that he felt functioned in interesting and unexamined ways, including examples such as: *I name this ship* Queen Elizabeth, *I promise* and *I do* [take

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this woman to be my lawful wedded wife, as stated in a marriage ceremony]. Such utterances, Austin argued, contrast with statements that describe states of affairs, which are either true or false. These different uses he had identified, Austin felt, form a class that he called **explicit performatives** (having rejected an earlier preference for *operative* rather than *performative* because of the polysemy of *operative*). Austin observed that you can insert *hereby* into first-person performative expressions in a way that is anomalous in statements; and he suggested this was a useful test of whether utterances are functioning as the actions they are talking about, rather than merely describing those actions.

In *How to Do Things with Words*, Austin describes the conditions for what he called 'happy' performance of such verbal actions. He also explores situations in which they fail (**misfire**) and abuses of requirements that surround them. Austin's discussion led to an analysis of three levels within any given utterance: **locutionary acts** (acts of saying something); **illocutionary acts** (use of such acts to convey a particular force); and **perlocutionary acts** (the experience or uptake of such acts by the recipient).

Alongside explicit first-person performatives (which satisfy the 'hereby test'), Austin recognised that performatives can also be realised indirectly. *There is a bull in that field* could be a warning or promise, depending on context. Contractions and ellipses in the verbal form of performatives are also possible; and intonation and use of **deontic modals** such as permissive *may* and directive *shall* or *should* can act as **force-indicating devices**.

There was, however, a twist in Austin's influential work, late in the book: the author concludes that in fact all utterances are performative in one way or another: 'surely to state is every bit as much to perform an illocutionary act as, say, to warn or to pronounce' (Austin 1962: 134).

Speech acts

The name **speech acts** for such verbal acts was not Austin's idea. This general term was introduced by the philosopher John Searle, who has built substantially on Austin's insights. In a series of works, Searle develops Austin's distinction between the illocutionary force of an utterance and its propositional content, a distinction Searle symbolises by the general formula **F(p)**, in which p represents a proposition and F a force-indicating device that signals what the proposition is being used to do.

Much of Searle's work explores conditions under which an utterance can function as a particular speech act; and he produces a taxonomy of criteria for classifying illocutionary acts. Among Searle's 12 criteria, some of the more significant as regards legal uses of language are:

- the purpose or point of the type of act (what is the act attempting to get the hearer to do?);
- differences in the force or strength with which the illocutionary point is presented (e.g. *suggest* as compared with *insist*);
- differences in the status or position of the speaker and hearer; and
- differences between acts that require extralinguistic institutions for their performance and ones that do not (as Austin had noted, to *declare* war requires a

speaker of a particular political status; to *excommunicate* someone requires the existence of a church system with associated rules and procedures).

Searle's criteria expose difficulties with Austin's earlier classification into five classes, which had contained several legally suggestive categories: verdictives (containing verdicts, judgments, appraisals and findings); exercitives (involving the exercise of powers, such as appointing and ordering); and commissives (e.g. the act of promising). While acknowledging Austin's achievement, Searle claims that Austin's classification shows confusion between verbs and acts; too much overlap between categories; and too much variation within categories. His own classification proposes the following alternatives:

- **Assertives** (statements of belief, including verbs such as *conclude* and *deduce*).
- **Directives** (including verbs such as *order*, *command*, *plead* and *permit*).
- **Commissives** (which commit the speaker to some course of action, e.g. *promise*).
- **Expressives** (e.g. *congratulate*, *apologise*).
- **Declarations** (including verbs such as *resign*, *fire* and *excommunicate*).

The first of our two extracts in Unit D7, from Brenda Danet, works through Searle's classification offering illustrations that foreground connections with legal categories and events.

Speech acts in law

Speech act theory has been very influential in linguistics (Levinson 1983). Its insights have also been applied in analysing language in law. Tiersma (1990), for instance, uses speech act theory in analysing perjury, as well as the language of defamation (in discussing the latter, he emphasises the act of 'accusing' rather than examining meaning then relating meaning to an effect of falsely tarnishing reputation). Below, we illustrate the use of speech act theory in discussing law through Dennis Kurzon's account of the performative character of statutes, and Sanford Shane's analyses of contracts and hearsay evidence. Other law-related uses of speech act categories have also been made; we consider such work in units where it relates closely to topics under discussion (e.g. Greenawalt's analysis of boundaries to freedom of expression in Unit A8, and Shuy's forensic linguistic analysis of criminal speech acts such as bribes or solicitation in Thread 9).

Kurzon: it is hereby performed

Kurzon's short book *It is Hereby Performed: Explorations in Legal Speech Acts* (1986) pioneered how speech act theory might illuminate the functioning of statutes, private law documents and court judgments.

Kurzon's analysis of statutes examines the role of the **enacting formula** found at the beginning of each statute (see Unit C3). He considers 'enacting' to be performative both in form and function, and to be a member of Austin's category of exercitive acts that indicate a decision that something is to be so, as distinct from a report that something already is so. The consequences of enactment, he states, include that others are compelled, permitted or prohibited to do certain acts.

Enacting formulae appear specific to common-law countries, by comparison with statements of 'having decided to pass a law' contained in many civil law jurisdictions. They also vary between jurisdictions, and have been altered as a result of pressures created by language change as described in Unit A2. In the United States, the enacting formula takes the form:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

The UK enacting formula shows some similarity, but the present form dates from a modernising statute of 1850 concerned to simplify the language used in legislation at that time. Even in this nineteenth-century, modernised form, however, the language is archaic, including in the use at the beginning of an almost unique form of passive imperative:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

In this formulation, apart from the grammatical difficulty presented by the passive imperative, the subject referred to by 'it' is extraposed to the end of the sentence and is effectively the entire text of the statute (i.e. all ensuing provisions). Kurzon's main claim about statutes follows from that extraposition. The enacting formula, he contends, establishes the illocutionary force of the whole text, as a kind of **master speech act** under which all other verbal acts contained in the statute are embedded. A hierarchical relationship therefore exists, he argues, between the speech act of enactment and the many constituent sentences that take the form of speech acts of permitting (*may* . . .), ordering (*shall* . . .) and prohibiting (*shall not* . . .). The master speech act controls those other speech acts: they may permit or forbid specific things, but their authority in doing so derives from a superordinate speech act of enactment that governs them all.

Sanford Schane: speech act explanation of legal data

We have referred elsewhere to Sanford Schane's *Language and the Law* (2006). Two chapters in this book are concerned with speech act analysis, each examining a substantive area of law. In one, Schane tests how far it is possible to elucidate aspects of the law of **contract** by deploying speech act concepts developed to account for general uses of language. A valid legal agreement or contract, Schane informs readers, has three essential requirements: an offer, an acceptance and consideration. He then compares these requirements with the necessity that some speech acts, if they are to take effect, must be performed by particular individuals under appropriate circumstances (e.g. with specific uptake or acceptance). Schane shows that criteria for promising, with minor adjustment, can accommodate the specialised requirements that underpin legal offers. However, although speech act theory can accommodate such details, Schane concludes that this still leaves an underlying question: how precise or even predictive are linguistic accounts of general usage, when invoked to explain specialised legal distinctions or procedures?

This question is explored more directly in Schane's other chapter concerned with speech acts, where he examines the US **hearsay** evidence rule. Extending an insight on the topic expressed much earlier by Austin (1962: 13), Schane initially distinguishes in the American law of hearsay: (a) testimony about events directly perceived through the senses; and (b) testimony based on what a witness heard or read as words spoken or written by someone else. The latter may or may not constitute hearsay, and therefore may or may not be admissible. If the object of the evidence is to establish the truth of what is contained in the statement, then the statement is hearsay; however, the evidence will not be hearsay if its aim is not to establish the truth of what was said but rather to establish the fact that the statement was made. Prominent among four exceptions to the inadmissibility of possible hearsay material are utterances that are verbal acts, or the verbal accompaniments of physical acts that have legal significance in the case.

The theoretical question challenging Schane was this: can a linguistic generalisation capture which statements made by a testifying witness will count as inadmissible hearsay and which ones will not (and so which may be admitted into evidence)? His method for investigating this question was to collect a corpus of legal judgments from a Harvard hearsay exam, and then investigate how successfully speech act theory could account for the 'correct solution' data. His finding was that if a witness offers an out-of-court statement for its illocutionary value, its perlocutionary effects or its locutionary properties (and associated state of mind), it will not be hearsay. However, if offered solely for propositional content, then the statement will be hearsay. Speech act theory on this assessment stood up fairly well, he concludes, to the test of predicting decisions in a given area of law.

How to do things with rules

These short illustrations suggest that law's power is performed at least partly by resources available in general language: speech acts. But Austin and Searle raised other issues surrounding performatives that have received less attention, arguably because the issues in question are less obviously linguistic and more interdisciplinary (some linguists, for example, claim that **institutional speech acts** are not of interest to pragmatics; for them, it is only non-institutional speech acts such as warning, threatening and requesting that are subjects for linguistic analysis; see Sperber and Wilson 1995).

Institutional speech acts

Think of weddings, declarations of war and excommunications. Both Austin and Searle noted that speech acts such as these depend for their success on institutionalised arrangements. A particular role and authorised powers on the part of the speaker may be essential; relevant procedures may be needed; and the lack of a required uptake or compliance by the hearer may make the act void.

In law, such speech acts are complicated theoretically as well as in practice. For example, promulgating a law has both declarational status (the propositional content becomes the law) and directive status (the law is directive in its intent). Other declarations, Searle points out, overlap with assertives; and some institutional procedures, he observes, require facts not only to be ascertained, but also laid down authoritatively following completion of a fact-finding procedure. Argument in tribunals must

eventually come to an end with the issuing of a decision; so a judge (like an umpire) asserts factual claims that can be assessed in terms of whether the words accurately represent the facts. But at the same time, the judge's words also have the force of declarations, in that if a judge declares you guilty (assuming this is upheld on any appeal), then for legal purposes you are guilty.

Law is not merely command and control

Often in discussions about law, a distinction is made between narrow and contextually specific commands (with a recognisable addresser, addressee and set of referents) and more generally formulated rules (which are formulated not to be tied to a specific set of circumstances). This topic is addressed in our second extract in Unit D7, where the capability of language to make general statements is argued to be a precondition for formulating legal rules. Part of the challenge in assessing how language performs power is to explain the relationship between speech acts and legal rules.

Legal rules have certainly sometimes been conceived as a sovereign's coercive orders (a **command theory of law** associated with the nineteenth-century legal theorist John Austin (1790–1859), easily confused with the twentieth-century philosopher J. L. Austin discussed above). Influentially, however, in *The Concept of Law* and other works, the legal theorist H. L. A. Hart (1907–1992) rejects that idea, pointing out that individuated, face-to-face directions tend only to be activated in law when general rules are challenged by disobedience. Legal control is usually a matter of broadly formulated rules that apply to everyone and are followed without coercion. Such rules, Hart notes, do not only require, permit or prohibit things; they also enable people to do things (e.g. to make a will, buy a home or get married). Working before detailed publications on speech acts were available, though in informal dialogue with J. L. Austin, Hart compares laws not with commands, but with acts of promising, in that both exercise 'a power conferred by rules'.

In the title of their popular introduction to legal rule-following (a topic that for a period attracted attention especially in response to Wittgenstein's philosophical analysis of rules), it is J. L. Austin (performatives) rather than John Austin (commands) that Twining and Miers (2010) invoke: their book is called *How to Do Things with Rules*. The authors do not discuss speech acts directly, and hardly mention either of the two Austins. But they show through real and hypothetical examples how legal rules must be understood as assertions whose force can only be grasped against a background of institutionally and culturally specific pragmatic inferences. A comprehensive theory of rules, they suggest, needs to account for matters including the validity of rules, the value of adhering to rules, the relationship between rules and the exercise of power and authority, and variations in attitudes towards rules (Twining and Miers 2010: 119).

Issues concerning the relationship between speech acts and legal rules are perhaps stated most clearly, however, in a short chapter by Frederick Schauer in the collection from which our second excerpt in Unit D8 is taken. Schauer argues that in trying to understand language and law, 'the question about rules other than the rules of language, therefore, is not why the rules of language work, but whether the rules of language, which *do* work (whether we can explain why or not), enable *other* rules to work' (Schauer 1993: 316).