

Language and Law

A resource book for students

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Chapter C7

Spoken and Written Performatives

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Activity 

- ❑ How closely does the approach adopted by the judge at first instance (Mann, J) reflect your understanding of approaches to legal interpretation as outlined in Units A6 and B6?
- ❑ Is using ‘ordinary’ or ‘normal’ meaning helpful as a starting point in deciding what a word means, if whatever is decided as that meaning will then be modified to fit the requirements of a piece of legislation being applied?
- ❑ How successful do you consider the multifactorial test for *sculpture* approved by the Supreme Court? Is using some such test essential if problems of ‘the elephant in the room test’ or the ‘What is Art?’ question are to be avoided?
- ❑ Finally, one school of legal theory, known as **legal realism**, has seriously queried the sorts of reasoning judges engage in. It suggests that such approaches to interpretation serve merely as a vehicle for decisions that are ultimately made on other grounds. Do you consider this to be a risk with the kinds of semantic argument put forward by the courts in interpreting a statutory word such as *sculpture*?

SPOKEN AND WRITTEN PERFORMATIVES

C7

In this unit, we look at how performative speech acts take place in three different mediums: in speech, in writing, and in electronic communication. We consider the history of performativity in changing linguistic and social relations brought about by the shift from orality to literacy, and speculate about challenges facing performatives that have accompanied the rise of electronic means of communication and increased frequency of legal transactions and interactions at a distance.

Identifying legal speech acts

Consider the following excerpt from the will made by the American actress Marilyn Monroe (1926–1962):

Last Will and Testament of Marilyn Monroe

I, MARILYN MONROE, do make, publish and declare this to be my Last Will and Testament.

FIRST: I hereby revoke all former Wills and Codicils by me made.

SECOND: I direct my Executor, hereinafter named, to pay all of my just debts, funeral expenses and testamentary charges as soon after my death as can conveniently be done.

THIRD: I direct that all succession, estate or inheritance taxes which may be levied against my estate and/or against any legacies and/or devises hereinafter set forth shall be paid out of my residuary estate.

FOURTH: (a) I give and bequeath to BERNICE MIRACLE, should she survive me, the sum of \$10,000.00.

- (b) I give and bequeath to MAY REIS, should she survive me, the sum of \$10,000.00.
- (c) I give and bequeath to NORMAN and HEDDA ROSTEN, or to the survivor of them, or if they should both predecease me, then to their daughter, PATRICIA ROSTEN, the sum of \$5,000.00, it being my wish that such sum be used for the education of PATRICIA ROSTEN.
- (d) I give and bequeath all of my personal effects and clothing to LEE STRASBERG, or if he should predecease me, then to my Executor hereinafter named, it being my desire that he distribute these, in his sole discretion, among my friends, colleagues and those to whom I am devoted.

★ Activity

- 1 Identify the explicit performative acts in this excerpt, and list the performative verbs that realise them. You should end up with a (fairly elaborate) representation based on repeated application of Searle's formula $F(p)$.
- 2 What kinds of linguistic expression guide you in identifying phrases or sentences that constitute performative acts? You might, for example, consider *deictics* such as personal pronouns (e.g. *I*), use of simple present tense, use of modality, use of temporal adverbs such as *now*, etc.
- 3 Only performative verbs, Austin suggests, co-occur with the adverb *hereby* between first-person subject and verb. Inserting *hereby* at appropriate points in sentences throughout the document accordingly gives you one test of whether your list of performative verbs fits or conflicts with Austin's stipulation.
- 4 How much of the document is *not* performative in the sense you have followed in responding to the previous questions? This final question may expose difficulties in thinking about the scope of the content that falls within any given performative act.

Conditions on the effectiveness of legal enactments

Felicity conditions are requirements that need to be fulfilled for a speech act to achieve its conventional effect. With **institutional speech acts**, the kinds of condition in question may include whether procedural conventions are followed, whether the performative act is uttered by an appropriate person, in appropriate circumstances, and whether the act is completed without errors. Felicity conditions are usually understood implicitly. Searle's descriptions show how detailed an analysis must be if it is to specify the intuitive felicity conditions that satisfy the requirements of a particular speech act, such as *bequeath*.

In a chapter on what he calls ‘reversible performatives’, Kurzon examines *bequeath*, which he describes as a ‘ceremonial performative’ (Kurzon 1986: 41–2). For legal speech acts, Kurzon emphasises, felicity conditions are not intuitive, but are explicitly laid down in the applicable law or laws. We can explore this statement further by staying with wills but changing jurisdiction: here are some selected provisions in the Wills Act 1837 (UK, as amended). For some provisions, only a section heading is shown.

7. No will of a person under age valid.
9. Signing and attestation of wills
 - No will shall be valid unless –
 - (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
 - (b) it appears that the testator intended by his signature to give effect to the will; and
 - (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
 - (d) each witness either –
 - (i) attests and signs the will; or
 - (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness)

but no form of attestation shall be necessary.
13. Publication of will not be requisite.
14. Will not to be void on account of incompetency of attesting witness.
17. Executor shall be admitted a witness.
18. Wills to be revoked by marriage, except in certain cases.

- ❑ Following the exposition of Kurzon we give in Unit B7, describe how the sections above (none of which contains an explicit performative verb) function as performative acts. Remember to relate the provisions as a series to the effect of the **enacting formula**.
- ❑ If we apply Searle’s (1969) model, some of the conditions that a speaker – in this case, a testator – has to fulfil are that he or she: (i) has authority (or power) to bequeath; (ii) has something to bequeath; and (iii) intends the act to be an act of bequeathing. How closely do these general felicity conditions on the speech act match the more detailed legal provisions presented here?
- ❑ Felicity conditions for conversational speech acts tell us what a particular act is. In law, such conditions work differently. They still define the constitutive issue (what is a will?); but they combine that function with specifying particular aims and protecting interests. What for example do you think s. 9(b) seeks to prevent? And what do you think the general presumption is behind s. 18?

Activity 

Performativity, orality and literacy

Gibbons (2003) and other writers have pointed out that it is possible in some written legal documents to see traces of earlier, oral common-law traditions. One such trace is arguably use of clearly identifiable, first-person explicit performatives in documents such as wills. Such written performatives are fixed in permanent form but also convey the sense of a written 'record' of a situationally specific speech event (of a kind displaced by a shift of priority between the two mediums of speech and writing; Clanchy 1993).

In her paper 'Speech, writing and performativity: an evolutionary view of the history of constitutive ritual', Brenda Danet (1997) traces this development. She examines what she sees as 'one of the most prominent, universal features of language in all societies: providing recipes for the creation of new social relationships and social arrangements, and for transformations of the status of individuals or groups' (Danet 1997: 13). The performative dimension of language and society, she argues, has a complex history running from verbal formulas in preliterate social rituals, through their development and adaptation in customary law, into more recent practices based on production, adoption and retention of written documents.

Danet describes how constitutive ceremonies of this general kind, whether written or oral, are treated by members of society as legally binding, and how respect for obligations ratified by such means is typically embedded in a shifting combination of sacred and secular rituals. In illustrating such rituals, Danet also notes how linguistic stylisation is universally found in oral ritual genres of communication, and is sometimes carried over into the high, formal registers of more recent written legal styles (see unit B2).

In the course of her paper, Danet refers to earlier research she had undertaken with Bryna Bogoch on the history of wills during the crucial period of the early rise of literacy in medieval England. Danet and Bogoch (1992) assemble a corpus of the complete set of 62 wills in Old English that survive from the Anglo-Saxon period. Taking a combined linguistic and anthropological approach, the authors analyse the language of constitutive ritual in this corpus, describing different linguistic features in three main categories they identified as being of interest:

- (i) meta-comments about writing;
- (ii) linguistic realisation of the performative act of 'bequeathing'; and
- (iii) decontextualisation.

They then compare their historical data with modern wills. Here are some rows adapted from one of their tables (Danet and Bogoch 1992: 99).

Read the table and then consider the questions that follow.

	Feature	Anglo-Saxon wills	Modern wills
1	Meta-comments about writing	Present	Absent
2	Realisation of the act of bequeathing	Linked to oral ceremony	Autonomous
3	Opening strategy	Non-standard	Standard
4	Witnesses	Reference only, or touching the document	Signature
5	Direct address	Present	Absent
6	Hedging	Present	Absent

Activity 

- 1 What historical changes reported in the table suggest movement away from features of speech towards a written genre? Are there any changes that point in the opposite direction?
- 2 Row 1 of the table appears to suggest that while modern testators take the act of writing for granted, Anglo-Saxon wills show self-consciousness in using the new medium. Danet and Bogoch's examples from their corpus include:
 - (a) I, Ealdorman Alfred, command to be written and made known in this document to King Alfred and all his councillors . . .
 - (b) Then I wish it to be given out for my soul just as I now said to my friends with whom I spoke . . .

Explain in more detail how these two comments on writing and speaking might be thought to support an inference that wills underwent a transition during the period from earlier oral forms of social relationship into a recorded, literate legal culture.

- 3 In Danet and Bogoch's corpus, wills often refer explicitly to an oral ceremony that constituted the binding act of bequeathing, in advance of the written document. Performative significance was nevertheless marked in some ceremonies by witnesses touching a cross on the document with a sword or a hand (touching the cross was a medieval equivalent of a modern signature). How reasonable is it for Danet to see a link between verbal and physical aspects of this performative act?
- 4 Danet's inference is that the ritual reveals a transitional connection between physical manipulation of symbolic objects, common in oral ceremonies, and a new literacy, in that individuals are relating their movements to graphic marks on the parchment. How reasonable is this inference?
- 5 Finally, in their study Danet and Bogoch note the presence of an extra performative that has disappeared completely from modern wills. Over one-quarter of the wills in their corpus contain **curses** addressed to anyone who tampered with the will. Here is one example:

And he who shall detract from my will which I have now declared in the witness of God, may he be deprived of joy on this earth, and may [. . .] he be delivered into the abyss of hell to Satan the devil and all his accursed companions and there suffer with God's adversaries, without end, and never trouble my heirs.

In light of your thinking in response to the questions above, what would you consider an appropriate explanation of the historical disappearance of this performative?

Spoken and written contracts

Danet's arguments prompt fundamental questions about how legal performativity relates to linguistic medium. How effective, we might therefore ask, are explicit legal performatives in speech in the modern period of majority (though very uneven) literacy in most societies?

Contracts offer an interesting illustration. It is commonly assumed, but wrongly, that contracts are only enforceable if they are made in writing. Several shifts exist, historically. Before widespread literacy, in oral legal culture, spoken contracts and associated rituals were the norm (and remain so in many societies). With the rise of literacy, a gradual shift took place towards more frequent use of, and greater status accorded to, written documents, including contracts. Seventeenth-century English law required a large number of contracts to be made in writing (Baker 2002: 348–50). Today, the law generally only insists on writing where the subject matter or nature of a contract requires certain evidence, or where a cautionary element is introduced to impress on one of the parties the seriousness of the agreement being entered into (hence a requirement of writing consumer credit agreements, sales of an interest in land, and distance selling agreements).

There is still a tension in the mix of recorded written and unrecorded oral contracts, however. If a written contract was required every time someone bought a bottle of milk or loaf of bread, they would need to countersign an invoice; this would obstruct the multiplicity of transactions in modern everyday life. In most commercial dealings, written evidence is normally available in the form of electronically produced sales receipts, invoices and orders, but these are mostly not a legal requirement. In recent years, however, there has been a resurgence in what are called formality requirements (i.e. requirements of a particular form to make a contract enforceable; failure to comply can make a contract void, ineffective or without the consequences that should normally follow). This shift reflects a changing commercial environment and increased protection measures put in place for consumers.

Performativity, now and in the future

Towards the end of the article discussed above, Danet turns from the advent of literacy to the recent rapid expansion of the online world, in order to address a further question: if a shift from orality to literacy prompted fundamental change in how performativity is achieved, is an equivalent transition now likely because of our current shift towards new kinds of **mediated orality**?

Two central insights organise Danet's discussion. One is her scepticism about the conventional wisdom that the prime incentive for the invention of writing was a need for record-keeping. She does not dispute the importance of record-keeping, but claims that her study with Bogoch shows how far preoccupation with the referential function of language can lead to overlooking the cultural importance of performativity. Her other main insight is that (as she highlights in claiming that the language of Anglo-Saxon wills was more context-dependent than modern wills) the historical development of written communication has been away from a presumption that other people will know who or what is meant on the basis of shared knowledge among members of a community.

In discussing the anthropological significance of decoupling the verbal content of documents from face-to-face ceremonies, Danet weighs up the possibility that, in future, video-recorded oral ceremonies and eventually fully virtual events may replace performative documents, in the way that documents took over from oral rituals. She draws attention to current developments, including legally binding electronic signatures and other technical and legal means to guarantee the authenticity and binding quality of **virtual ceremonies**. She even speculates about the form of video wills.

In our period of rapidly changing technological capabilities and international connectedness, a number of open-ended questions arise:

- 1 What factors (technological, economic, linguistic, legal) would you expect to be taken into account in developments in this area?
- 2 To what extent do new media of electronic transmission and dissemination of texts threaten our notion of the authoritative, binding document?
- 3 How far will mediated forms of orality encourage new techniques of impersonation and fraud, potentially undermining levels of trust in rapidly changing societies?
- 4 What will the effects of such new media be on the document-based legal culture mostly discussed in this book? Is it plausible, for example, to anticipate trials taking place completely in virtual courtrooms by means of synchronous electronic interaction? International treaties negotiated and signed without the signatories ever meeting, let alone signing?

Activity 