THE JUDICIAL JUDGMENT AS PERFORMATIVE UTTERANCE

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The primary concern of most jurists over the judicial decision has been one of *how* the judgment is, or should be, arrived at. Some positivists tell us that in hard cases a judge uses his discretion and lays down a new rule for the case. Taking issue with this, Dworkin reports that judges do and should seek out the right answer to a case by appealing to existing legal principles and rules wherein lies the correct answer. Wasserstrom, with his normative approach, advocates a rule-utilitarian procedure for how judicial decision making ought to proceed. On the other hand, many realists set as their goal a description of how judges in fact decide cases, pointing to such factors as the judge's attitudes and psychological makeup to break down the mechanistic model of their opponents, who rigidly view the judge as simply applying laws to facts.

The literature is almost totally lacking, however, in studies of the nature of the judicial judgment itself. Austin did break some ground in this area with his recognition of the judgment as a performative utterance. In this essay, I wish to set aside the issue of how the judgment is or should be arrived at and look seriously at some features of the judgment itself by following up on Austin's lead. I take this sort of an enterprise to be one primarily of cogently and fruitfully characterizing and depicting a phenomenon rather than developing arguments to support a thesis. I do, however, ultimately argue that the judgment, as with most performative utterances, is evidence for the truth of the proposition describing the utterance and that, so conceived, we are able to perceive and explain the judgment's role and function in the legal reality in a systematic and uniform fashion.

No one has contributed more to our understanding of the performative utterance or verbal act than Austin. Such an utterance, of course, refers to some act that can be performed verbally; the saying is the doing. The usual manner in which I can engage in the act of promising to pay one five dollars, for example, is to *say*, "I promise to pay you five dollars." Austin's task, as he saw it, was to analyze the entire field of performative utterances. His general investigations led to his recognizing the judicial judgment as a performative utterance and making some specific observations about its character:

> "Verdictives consist in the delivery of a finding, official or unofficial, upon evidence or reasons as to value or fact, so far as these are distinguishable. A verdictive is a judicial act as distinct from legislative or executive acts, which are both exercitives. But some judicial acts . . . really are exercitive. . . . An exercitive is the giving of a decision in favor of or against a certain course of action, or advocacy of it. . . ."[1]

The observation, then, is not novel that a judicial judgment falls in the class of performative utterances, as philosophers might call them, or of verbal acts, as lawyers do. But Austin devotes little time, on the whole, to the analysis of the judicial judgment as a verbal act, and some further investigation is in order. Austin, of course, recognized that his work was incomplete and that further analyses would be forthcoming: "I should very much like to think that I have been sorting out a bit the way things have already begun to go and are going with increasing momentum in some parts of philosophy, rather than proclaiming an individual manifesto" (p. 163).

It is againt this backdrop that I further explore and develop aspects of Austin's perception of the judgment as verbal act. I first consider how we might further classify the judgment as verbal act in an attempt to bring out further aspects of its nature. Then, I turn to the implications (for the judicial judgment) of the observation that the verbal act itself provides evidence for the truth of the proposition describing it.

II

We can learn more about the performative utterances or verbal acts of the judge by noting that verbal acts fall into two main classes—those which begin or trigger a more or less predictable chain of social consequences and those which do not, i.e., those which have some clear institutional significance and those which usually do not. Consider the following verbal acts:

(1) "You are a swine and a lying cheat."
(2) "You are hereby put on notice that I want you off my ranch within the hour."
(3) "I now pronounce you man and wife."
(4) "Judgment for the plaintiff."
(5) "With the powers vested in me, I confer upon you the degree of Doctor of Juridicial Science."
(6) "Welcome!"
(7) "Watch out!"
(8) "You're fired."

(1), (6), and (7), at least in comparison with the others, seem to set into motion no clear chain of predictable social consequences. This is not to

deny that (1), (6), and (7) have meaning or consequences. For example, (7) may lead to the saving of a life. But the observation is that the person to whom it is addressed can ignore the statement, and the utterance can be seen as having no consequences. It makes no sense to tell the addressee that whether he likes it or not, certain rights, privileges, responsibilities have been created and that certain things may or definitely will occur. The others, on the other hand, have rather well-defined consequences within some institutional framework—social, legal, or otherwise; because of the utterance in (5), the recipient of the degree may now be addressed "Doctor"; the privilege is there, whether he likes it or not. And the spice in (3) may now file joint tax returns; the fellow in (8) is on the job market and cannot return to his job, and the defendant in (4) has, assuming plaintiff has no further recourse, been relieved of having to deal further with plaintiff's claim. And the institutional consequences in each of these cases can be developed further. The plaintiff, it can now be said, has no right to recovery; various coercive powers of the state can be called upon to enforce the judgment; and so on.

All performative utterances or verbal acts admit of one further subdivision, those in which the action itself or the consequences can be recalled, revoked, or stopped by the person who articulated it, and those in which such cannot occur. Examples of the former are (1), (2), and (5)–(8); (3) and (4) are examples of the latter. It seems clear that the awkward steak and potatoes man might shout, "Watch out!" to his date at a French restaurant upon seeing flames at the table, but quickly retract this with a "Never mind," when he realizes such is par for the course with *crepes flambé*. Now, those verbal acts where the revocation *cannot* occur admit of further classification, one based on physical impossibility, the other on institutional impossibility. As for the former, when the director of the firing squad performs that act necessary to direct his men to commence with their task, such act being the saying of "Fire!" he is physically unable, at any later time, to say "Never mind," or "Forget it." The judge, on the other hand, after saying or writing, "I find for defendant," is, under normal circumstances, estopped by the rules of the legal institution from later finding for the plaintiff, and thus we might say the revocation is institutionally impossible.

Based on this classification of performative utterances, we can now, in summary form, describe the verbal acts of the judge as being of the sort which cannot be recalled, such revocation based on a practical or institutional impossibility, and further, as having institutional consequences. Just what the precise nature of the relationship between the judgment and its institutional consequences is has yet to be made clear, and it is to that question that we can now direct our attention.

III

Once we view the judgment in a case at law as a performative utterance or a verbal act, we can further observe that it, itself, as with any other action—running, pounding a nail, digging a ditch—has no truth value, which is a property of propositions or statements. How do verbal acts like judicial judgments relate to truth functions? It seems clear that the declarative report of any act is true or false. For example, it may be true *that* John is running down the street, *that* some judge found for the plaintiff—landlord, *that* the sheriff ordered the recalcitrant tenant to vacate. And we may base the truth of such statements upon observations of the acts of running, finding, and ordering; the action provides evidence for the truth of the declarative proposition. Thus, simply put, we may take the judge's act of finding for the plaintiff as evidence that it is true that there was a judgment for plaintiff or that the judge found for plaintiff.

Further, it seems we can now see the judge's finding, in a broader context, as creating an evidentiary base upon which the truth of various propositions can be inferred and the establishment of which the legal system turns. *Because* of the judge's action of finding for the plaintiff–landlord, we may say, under the proper circumstances, that it is true that he has found for the plaintiff. And once that has been established, all of the legal implications of that proposition are established—it is true that plaintiff has a right to regain his property from the defendant; it is true that if defendant fails to vacate, the sheriff can supervise the forced vacation of the premises, and so on. And all of these propositions may be seen as detailing what we earlier identified as the institutional consequences of the judgment. The judgment, then, when viewed as evidence, may be seen not only as going to establishing the truth of the proposition describing the verbal act itself, but also to establishing the truth of those propositions describing the institutional consequences of the verbal act.

Now, one may argue that all that the judge is doing is stipulating truth conditions with his judgment and that the talk of his findings or his judgments being evidence for the truth of propositions is, accordingly, wrongheaded. On the other hand, it should be brought out that it is not simply a matter of whatever the judge says, goes. If there is strong countervailing evidence that the judge erred in his findings, appeals can be taken. In determining whether it is true that plaintiff is entitled to a judgment, one can, after the judgment, be seen as weighing various pieces of evidence, including the fact that the judge found in plaintiff's favor. And it would seem that this is how the lawyer treats the judge's finding when he advises clients. He cannot always assert that the solution to a client's problem is black and white, that what the judge says is law, that that law indicates that

the client has no case, for example, and that that is the end of the matter. While it is true that the status of an opinion has the effect of law until overturned, the lawyer would want to assess the extent to which the legal community favorably receives the opinion, whether an appeal has been taken, the likelihood of reversal. In other words, he takes the judge's finding into account, as he would other evidence, in determining how to advise his client. While the legal system may stipulate that the judge's finding has the force of law until overturned and that what he says can be taken as a rebuttable presumption that there is adequate evidence for the truth of the propositions based on his finding, it does not follow that the judge is thereby directly stipulating truth conditions. This is quite different from a clear situation where truth conditions are stipulated, namely, where the orders of, say, a dictator make true what he has said as legal propositions.

Further, it seems that our depiction of the judgment accords well with the actual workings of the American legal system. We know that, often, appellate courts are reluctant to upset the findings of lower courts unless there is some very clear and fundamental discrepancy or virtually no evidence upon which the judgment could be based. In other words, there is a presumption of correctness in some cases of the adequacy of the action of the court below. And presumptions are commonly seen as substitutes for evidence. In other words, the judge's actions, his findings, his judgments, carry an evidentiary weight, which, along with other evidence, can be seen as the ground upon which the rights of the parties are ultimately based.

Moreover, when one treats the judgment as a verbal act and as evidence, we are able to avoid the awkward position that some philosophers, like Dworkin, are faced with when the judgment is characterized as an answer. When one views the judgment primarily as an answer to the legal question of a case, he is committed to saying that answers to legal questions are continually changing whenever judgments are overturned by higher courts on appeal. By viewing the judgment as a verbal act and as evidence for the truth of various propositions, we can better capture the dynamics of what occurs on appeals that result in reversal, namely, that the actions (judgments) of earlier judges are no longer considered relevant or admissible as evidence to establish truths about the litigants' entitlements.

In the foregoing inquiry into the nature of the judicial judgment, we explored the implications of Austin's perception of it as a performative utterance. In so doing, we discovered that the judgment may be seen as having institutional consequences and that the judgment itself could be seen as evidence for the truth of the proposition describing it, as well as of the propositions detailing its institutional consequences. Further, we saw how this view of the judgment fit well with, and allowed for a uniform

account of, how lawyers deal with judgments in advising clients and of how the judgment functions in the legal system as evidence in ultimately ascertaining the entitlements of the litigants.

NOTE

1. J. L. Austin, *How to Do Things with Words* (New York: Oxford University Press, 1962), pp. 152–4. (Henceforth, citations to this work will appear in the text.)