

**Applications of John Austin's Speech-Act Theory to Chinese and American Contexts**

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## **Applications of John Austin's Speech-Act Theory to Chinese and American Contexts**

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### **Introduction**

The speech-act theory introduced by British philosopher John Austin has been an influential philosophical view since the second half of the last century. The basic theme of the speech-act theory is simple, yet it has important ethical and legal implications. The objective of this article is to explain how the speech-act theory can be applied to the analysis of current Chinese and American legal/political disputes.

It is a widespread argument among Chinese advocates for free speech that there is a sharp distinction between expression and action; condemning a person by his/her speech alone is unethical, and freedom of speech must be protected by all means and at all cost. Unfortunately, the Chinese are mistaken. Based on Austin's speech-act theory, this argument is flawed, for speech is a form of act which carries moral and legal consequences. I propose that the argument for the freedom of speech should not be based on a dichotomous view of speech and act. Instead, a demarcation should be about what kinds of speech-acts are acceptable in an open society and which kinds are not.

The same misconception can be found among Americans. Many Americans interpret the First Amendment as a warranty of unlimited free speech based on their belief that speech is protected while acts are not. Although some legal scholars accept the integration of speech-act, hate speech is considered an illocutionary act rather than a perlocutionary act, and thus limiting the rights mandated by the First Amendment is

unjustified. Moreover, some believed that speech with terrorist orientation is not legally liable to the perlocutionary effect.

In the following I will give a brief overview of Austin's speech-act theory. Next, I will discuss the endeavors of making the speech-act distinction among Chinese people. Then the speech-act controversy in America will also be discussed.

### **Speech-act theory**

In the first half of the last century, British analytical philosophers focused on logical analysis, in which meaningful statements must be verifiable as either true or false. Under this assumption, language is descriptive in nature; to say something is simply to state some factual information. On the contrary, according to Austin (1962/1975), to say something is to do something. In other words, saying is an act of utterance. His lecture series entitled "How to Do Things with Words" implies that we do things, not only say things, with words. One can tell whether a statement, if viewed as an act, is successful or not with reference to the speaker's intention and the fulfillment of certain criteria such as conventional procedures, rather than simply deciding whether it is true or false. For instance, in a wedding when a man says, "I do," he is not only describing his mental state that he is willing to marry the woman. Rather, at that moment, his speech is an act of taking the woman as his wife. In addition, in the American law of evidence, a report of what someone said is admitted as evidence if what he had said is an utterance of performance. For example, if a witness testifies, "I am positive that I saw the defendant stabbed his wife," the witness has made an act of condemning the defendant.

Austin further elaborated on his theory by pointing out that there are at least three

components in a speech-act:

(1) Locutionary act: This is equivalent to uttering a certain sentence with a certain sense and reference; it is also equivalent to meaning in the traditional sense.

(2) Illocutionary act: This is a kind of utterance with a certain force such as informing, ordering, warning, and undertaking.

(3) Perlocutionary act: This is an act of bringing about or achieving some consequence by saying something, such as convincing, persuading, deterring, surprising, or misleading. However, the consequence may not be what the speaker intends. This simple yet elegant speech-act synthesis sheds light on the controversy of the speech-act distinction among the Chinese, which will be discussed next.

### **Speech-act distinction and freedom of speech**

During the last three thousand years of imperial rule, it was a common practice that the emperor could sentence one to death due to one's speech alone. This horror continued during the rule of Chairman Mao after the Communist takeover in 1949. For example, in the 1957 "Anti-rightist campaign," many intellectuals were encouraged by Chairman Mao to criticize the government. But after the intellectuals spoke or wrote their concerns bluntly, all were sentenced to jail because Chairman Mao charged that what they said and wrote threatened the stability of the country. Chairman Mao called this crackdown the "bright conspiracy." During the Cultural Revolution from 1966 to 1977, anyone could be accused of "saying" something in an "anti-revolutionary" manner. It is estimated that thirty to fifty million Chinese died due to political persecution during the Cultural Revolution. In 1979, when Beijing students posted their oppositions to certain government practices on the "Shi

Dan democracy wall,” many of them were arrested and again Chairman Deng considered this kind of speech an act of attacking the Socialist rule. After the June Four incident in 1989, many Chinese students fled overseas and continued fighting for freedom of speech. Their argument for freedom of speech was that one must distinguish speech from act; speaking or writing alone should not be equated to physically attacking a government, and it does not carry the effect of destabilizing a society. On the other hand, the Chinese government insisted that speech is a form of action that must be treated as seriously as speech in a legal sense. In other words, both “illegal” speeches and actions are punishable by the Chinese laws.

In 1997 the British government withdrew from Hong Kong, and China resumed her sovereignty over this island lost to England in 1842. Taking national security into consideration, the Chinese central government urged the Hong Kong government to revise certain laws on seditious and subversive speech. As a result, the debate on speech-act became a hot topic among different parties in Hong Kong. In 2002 the Hong Kong government announced its desire to enact a set of new laws, “Article 23,” aimed at criminalizing sedition, subversion, and treason in terms of both speech and action. The issue has provoked a number of puzzled and outraged responses from many activist, legal, and journalistic sectors in Hong Kong and around the Asian region.

One of the proposed terms in the new law is that if one keeps writing seditious and subversive articles repeatedly within a short period of time, one could be prosecuted according to Article 23. There has been a widespread reaction against this proposal. The common argument is, again, the speech-act distinction. A representation of this view was

expressed by Tzetu Wah, a well-known Hong Kong educator: “Speech is speech and act is act. You cannot make a speech become an act by saying it repeatedly” (cited in Epochtimes, 2002). In a similar vein, Leung Kar-kit, the Chairman of the Hong Kong Attorney Association, firmly stated, “A speech is not an act” (cited in Hong Kong Economic Daily, 2002). To be specific, no matter how many times one talks or writes about Taiwan’s independence and human rights in Tibet, it should not be treated as a subversive act, like physical involvement in the Taiwan and Tibet independence movements.

According to Austin’s theory, the preceding argument appealing to the speech-act distinction is flawed. Although speech has both constative and performative elements, there is no dichotomy. For example, if President Chen in Taiwan wants to establish Formosa as an independent nation, what does he need? When he verbally announces the declaration of independence in public, he has committed the attempt of making Taiwan independent even without physically starting a civil war. When the Dali Lama devoted efforts to preserve the rights of Tibet, he started with promoting Tibetan religious ideas; all subsequent actions must start with religious and political words.

### **The doctrine of infelicities**

The notion that speech is not an act, regardless of how many times one repeats the same content, is flawed because when even one single word is given at the right moment in the right place by the right person, a consequence will follow (e.g., saying “I do” in a wedding). In this sense, the approach to analyzing a speech-act is to examine whether it leads to certain consequences with reference to the speaker’s intention and the appropriateness of the circumstance and procedures. Austin called this “the doctrine of

infelicities.” According to Austin, a speech-act can go wrong when it cannot fulfill certain criteria of felicities:

(A.1) There must be an accepted conventional procedure. Take Taiwan’s independence as an example again. If President Chen would like to formalize Taiwan’s independence, he must perform the speech-act in the congress as well as the General Assembly of the United Nations. However, this may be problematic because in the mainland Chinese view there is no formal procedure for a province of a nation to break away from the larger body.

(A.2) The particular persons and circumstances must be proper. In the case of Taiwan, Chen must be a legal representative of the Taiwanese people. Again, this may be problematic since in the mainland Chinese view Chen does not represent the will of all Chinese people.

(B.1) The procedure must be executed by all participants correctly and (B.2) completely. In the case of independence, the question of who the relevant parties are is controversial. The mainland Chinese government insists that the Taiwan problem is an internal affair, and thus the United Nations and the United States have no right to interfere. Also, the mainland Chinese government asserts that the Communist Party is the only legitimate government in China, and thus whatever Chen says is hollow and empty.

(Gamma.1) The involved parties must have certain thoughts or feelings. (Gamma.2) Also, they must actually so conduct themselves subsequently. If Chen announces Taiwan’s independence, he must firmly believe that Taiwan is not a part of China and then carry on by developing local political and cultural awareness.

The above analysis demonstrates that words can be effective based upon their fulfillment of criteria. However, how can the effect derived from words and the legitimacy of words be settled when some criteria seem to be ambiguous? Interestingly enough, the criteria for evaluating the felicities of words are made by words, too. For example, to have formalized a commonly agreed procedure of accepting words for independence, a government must have discussed the issue in the congress and public forums to determine the proper voting procedures, which were spelled out in legal documents, as the Quebec issue was handled by the Canadian government. To decide whether some people have the authority to negotiate about independence, a government must have discussed the proper title of certain political groups. For example, when the British government called the Sinn Fein “terrorists,” it denied their legitimacy. The use of the word “terrorist” instead of “political party” makes a big difference! All these criteria are to be determined with words. If we cannot condemn others by words alone, then it is doubtful whether we could construct anything from words.

In the context of “Article 23,” could “demanding Taiwan independence” be considered a subversive act? Again, we have to take the doctrine of infelicities as a reference:

(A.1) Is the speech performed under conventional procedures which carries legal weight? Writing “Taiwan demands independence” in a student’s term paper is different from sending a letter demanding Taiwan’s independence to the United Nations.

(A.2) Does the person who gives the speech have the legal authority? If a Taiwan high school student goes to the headquarters of the United Nations and announces, “Now

Taiwan is independent,” it is definite that no member of the United Nations would take it seriously.

(B.1 & B.2) Is the procedure executed by all participants completely? If the speaker is not even considered a relevant party, whether the procedure is completed may not apply. For instance, if a freelance writer, who does not belong to or communicate with any political group, talks about Taiwan’s independence, it is likely that he could not go any further to execute his plan of fighting for independence.

(Gamma.1 & 2) Does the writer/speaker possess certain thoughts or feelings and conduct himself/herself according to his/her speech subsequently? If the speaker/writer is a scholar who conducts research on Taiwan but his/her research findings favor the independence of Taiwan, can his/her academic-oriented thoughts be treated equally to those of political activists?

In the above analyses, speech promoting Taiwan’s independence is examined as to whether it is successful and relevant in terms of the position and the intention of the speaker, the circumstances, and other related criteria. Following the speech-act approach, the actual concerns about “Article 23” should be what kind of speech is acceptable in an open society, and what criteria such as procedures and circumstances should be used for evaluation of the nature of certain words. Denying a speech as an act is hardly justifiable.

### **Roots of speech-act theory in ancient Chinese philosophy**

In the view of those Chinese who promote freedom of speech, Austin’s approach may be counterintuitive. As a matter of fact, the speech-act theory and the associated doctrine of infelicities have their counterparts in traditional Chinese philosophy. In the

Chinese tradition, naming is the primary job of establishing codes of ethics and the political system. Confucius preached a doctrine of "right naming" ("Cheng Ming"): "If the name is not right, your speech will not be respected and your mission will not be accomplished" (cited in Chou, 1979, p.61). "Cheng Ming" had both ethical and logical applications. Its original intent was ethical, based on the belief that names have firm meanings and they will almost magically serve as effective standards of conduct (Munro, 1969).

Hsun Tzu, whose philosophy is considered an offshoot of Confucius-Mencius orthodoxy, even declared that one of a ruler's main responsibilities is to maintain the standardization of names by seeing that no unauthorized distinctions between words are made, and that no new words are created. The Legal school, a branch of ancient Chinese philosophy, concurred with this, and also with Hsun Tzu's plea for the use of direct, unadorned language by officials in discussing rules of conduct (Munro, 1969).

The doctrine of "Cheng Ming" has dominated Chinese thought for more than two thousand years. In the Han period, Tung Chung-sue, the academic advisor of the Emperor Han Mui, expanded the doctrine to "Kwong Shan Ming Cau," which aimed to establish a comprehensive social and political order through correct naming. In the Sung and Ming dynasties, this notion was further extended. In these periods, the definition of morality was that behaviors must fit the right names.

The preceding efforts of establishing naming conventions resemble the development of criteria for the doctrine of infelicities. Looking at how the British people debated about the proper words ("terrorist" or "political party") for Sinn Fein, it is not surprising that the ancient Chinese philosophers paid so much attention to words. In brief,

ancient Chinese philosophers recognized the power of words. If the proper words were said by the proper person in the right place and at the right time, a political ideal or social order could be established. In this sense, the Chinese thinkers agreed that we could do things with words.

### **First Amendment and speech-act theory**

Interestingly enough, the speech-act dichotomy is not only a misconception among Chinese advocates for freedom of speech. The same phenomenon can be observed in America. Certain Americans citing the First Amendment to defend unlimited free speech implicitly or explicitly subscribe to the view that speech is not an act.

The argument of the speech-act dichotomy is formalized by the Absolutist Approach to the First Amendment. Under this approach, the US Congress should make no law curtailing the freedom of speech; “expression” is protected, but an “act” is subject to reasonable governmental regulation. In other words, the demarcation point for protection/no protection is whether the behavior in question is truly "speech" or "act" (Emerson, 1966). A similar concept of speech can also be found among traditional civil libertarians (McLeod, 2002). This school of thought considers hate speech to be a symbolic employment of speech used to express content-based ideas that elicit prescribed responses. Hate speech, in their view, is just like any other instance of speech. Hence, no action should be taken against speech. Speech can be potentially countered with more speech only.

Besides legal scholars, the same concept is popular in the American mass media. For example, ABC News correspondent John Stossel argued, “In America today, a dangerous new commandment has appeared: Thou shalt not hurt others with words. This is

a terrible idea; it's a threat to liberty and even science" (ABC News, 2000). Although Stossel did not explicitly endorse the dichotomy of speech-act, his view that it is terrible to make laws forbidding one from using words to hurt others implies that speech, unlike a physical act, cannot really hurt others.

The debate about the nature of speech has recurred in American society numerous times. For example, former New York Mayor Rudolph Giuliani went to court several times to block speech by people he and others considered racist, invasive or just plain bothersome. On some occasions the courts have overruled his requests, but on others, Giuliani has prevailed. In addition, the state of Ohio decided that condemned death-row inmates do not have the right to say a final statement because their words might do additional harm to the family of their victim. This ban was strongly opposed by inmates and lawyers (ABC News, 2000).

The speech-act dichotomy and the notion that words could not hurt others were not in the minds of the framers of the US Constitution (Valenti, 2000). The framers did not intend to make the rights to free speech absolute. Certain types of speech, particularly seditious libel against the interests of the US government, were considered a criminal act that was subject to legal prosecution. Thomas Jefferson seems to have agreed with the common theory held by his contemporaries that it could be a criminal act to publish certain materials critical of the government, the crime manifesting itself in the subversion of that government by lowering its esteem in the eyes of the citizenry.

### **Illocutionary and perlocutionary acts**

#### Hate speech

As illustrated in the section regarding the Chinese law, speech is an act, and its utterance power can be examined by certain criteria. Now, the focus of the issue of the First Amendment would be directed to the illocutionary and perlocutionary aspects of the speech-act. Both Butler (1997) and McLeod (2002) accepted the premise that a speech is an act, which could carry locutionary, illocutionary, and perlocutionary properties. To them the question of hate speech is concerned with whether the effect of hate speech is illocutionary or perlocutionary.

In Austin's theory (1962/1975), an illocutionary act is the speech-act performed in the moment of that speech. On the other hand, a perlocutionary act is a speech-act that produces certain effects as its consequence. Austin distinguished the illocutionary from the perlocutionary act using the forms of "in" and "by." An example of the former is: "In saying it I was warning him." An example of the latter is: "By saying it I convinced him." In short, an illocutionary speech-act is itself the deed that it affects while its perlocutionary counterpart leads to certain effects that are not the same as the speech act itself.

Butler asserted that even in illocutionary acts we lose the power to control language when hate speech is made. Oppressive language is capable of its own action, not merely represents another action. Words can hurt people through certain utterances and the power of interpellation. Some of this speech depends on the use of name-calling, some on symbolic speech, and other forms of the effects of words rely merely on description. These words have an effect that is caused by their being uttered. There is power in the words

themselves. In this view, regardless of what the speaker's intention is and how the listener reacts to the words, the speaker has already "empowered" the words when hate speech is made. Bombing-making can be used a metaphor to illustrate the nature of hate speech. After I assembled a powerful bomb, I have already "empowered" this device. No matter how the bomb is used, the bomb can definitely hurt people.

While recognizing the destructive power of hate speech, McLeod questioned whether hate speech is illocutionary or perlocutionary. In his view, if hate speech is demonstrated to be illocutionary, it would follow that speech is itself conduct, and then the First Amendment may be circumvented as it is in cases of criminal action where one's behavior seriously damages another. However, if hate speech is demonstrated to perform in a manner that is perlocutionary, it would mean that although assaultive language affects its victims, the harm is not committed directly through the words themselves. Instead, perlocutionary speech affects the listener after the words are spoken. If hate speech is demonstrated to be perlocutionary, then to circumvent the First Amendment directly does not seem justifiable.

McLeod argued that hate speech does not seem to be illocutionary. When a judge says, "I sentence you to serve a minimum of five years in prison," the judge's words will have the effect that the defendant has been sentenced regardless of whether he/ she hears the words or how he/she takes those words. However, the same does not seem to hold true in the case of assaultive speech. Hate speech consists of words that wound only when such words are heard and the listener takes the words seriously. The harm of hate speech is therefore perlocutionary.

The preceding argument is problematic. But a common counter-argument is equally questionable: Some people asserted that hate speech is perlocutionary because in this context speech is the means by which the act is committed, but the act is the creation of a feeling of hurt, not the speech itself (cited in Johnson, 2001). In other words, saying words with racist or sexist content is illocutionary and the act of hurting people's feeling is perlocutionary. However, the speech-act theory, by definition, is an integration of speech and act. Regarding hate speech as perlocutionary by distinguishing between speech and act is contradicted with the very core idea of the theory.

In the following I will focus my argument on the convention of language. As illustrated in the section concerning the doctrine of infelicities, the effectiveness of words depends on certain conventions. Austin emphasized that an illocutionary act is a conventional act—an act conforming to a convention. On the other hand, the perlocutionary aspect of the speech-act seems not to be based upon a convention. The listener may react to the speech in a way that is different from the speaker's intention. In this sense, the speaker seems not to be responsible for a perlocutionary act. However, I argue that both illocutionary and perlocutionary acts are indeed related to conventions.

In the Chinese culture when one says "good bye" to a friend, the common ending is "come to my house for dinner when you have time." But no Chinese would take it seriously because by convention this so-called invitation for dinner is just a ritual. However, when a Chinese says this to someone from a different culture, and that person really comes the next day, the effect of this perlocutionary act results from another convention, the cultural context of the listener. No matter how unpredictable the reaction of the listener is, the

reaction must be somehow based on a certain convention, unless the listener has serious personality disorder (e.g. interpret the invitation as hostile and shoot the speaker). When a Chinese gives this “invitation” to another Chinese, the probability of unexpected results is lower for they share the same convention.

When we look at the case of hate speech, it is curious to say that hate speech is perlocutionary and thus the harm to the listener does not originate from the speaker. A racist white would not call a Chinese “n\*\*\*\*\*” because by convention this pejorative word does not apply to Chinese. He/she would call a Negro “n\*\*\*\*\*” because he/she has the knowledge that by convention it is expected that the Negro’s feeling would be hurt by this word. The perlocutionary aspect of the speech-act, also known as the natural consequence, is based on the convention (e.g. the cultural context) of the Negro. In this case the speaker has knowledge of different conventions of the listener (e.g. “n\*\*\*\*\*” applies to Blacks and “Chink” applies to Chinese), and he has the intention to apply this knowledge. In brief, based on the knowledge of convention, the perlocutionary consequence is reasonably predictable. The uttering power of words goes beyond the illocutionary aspect to the perlocutionary aspect.

#### Anti-terrorism law

The notion that the illocutionary and perlocutionary acts should be unlinked can also be found in the debate concerning terrorist-related speech-acts. In 1995, after the Oklahoma City bombing, the Senate Judiciary Subcommittee held a hearing regarding the availability of bomb-making materials on the Internet (Center for Democracy and Technology, 1995). After the hearing, the US Senate passed an Amendment to make it

illegal to distribute information about bomb-making (Hernandez, 1995). In 1999 the US Congress also passed a law making it illegal to distribute information about making a “destructive device” with the intent to commit a crime (ABC News, 2000).

Opponents argue that information about explosives harms no one. Only people who make bombs and use them to hurt others should be prosecuted, not those who simply talk about how to make bombs. Again, it is obvious that the argument is based on the assumption of a sharp distinction between speech and act. After September 11, 2001, this controversy has caught the attention of the American public again. There are two major approaches to defend this type of “free speech”: one of them, as mentioned before, utilizes the speech-act dichotomy; the other approach is that the damage is perlocutionary. It may not be the writer’s intention to lead the reader to bomb a US target. The reader’s own interpretation and application of the bombing manual should be dissociated with the illocutionary aspects of the speech-act.

Jerry Berman, the Executive Director of the Center for Democracy and Technology, asserted that any prosecutorial or investigative activity must be predicated on speech plus a reasonable indication that the speech will lead to imminent violence. What is the meaning of “indication”? How could speech lead to violence? This implies that a speech is more than a composition of sentences alone.

Austin (1962/1975) asserted that we cannot examine statements alone because statements carry implications, presuppositions, and entailments that go beyond the statements themselves. The main point of Austin’s argument is that we must consider the total situation in which the utterance is issued. One of my friends, Sandra Woien, used the

following example to illustrate the implicative and indicative aspects of speech: The sentence “It is Wednesday” seems to be descriptive and free from any uttering power. However, when she tells her husband, “It is Wednesday,” she is urging her husband to take the trashcan outside. Austin classified performative acts into explicit and implicit performatives. In the former the speaker may say, “I order you to do take the trashcan out” or “I promise that I will bomb New York City.” In the latter, even if the speaker does not use any performative verb, the total situation could imply that the sentence is performative. A sentence could be composed of one single word but still be implicative. For example, yelling “shark” loudly on a beach is clearly an act of warning.

In the case of distributing bomb-making materials, Berman agreed that speech could indicate and lead to certain consequences. It is consistent with Austin’s theories that speech could be an implicit performative. Consider this example: A writer gave instructions for making a bomb that is powerful enough to destroy a 40-story building and to kill at least 1000 people. He wrote the instructions in a hypothetical fashion without any explicit reference to a particular building or a particular group of people. Later someone followed his instructions to blow up a 40-story building and 1000 victims were killed, but the writer maintained that the consequence was perlocutionary and it was not his intention that someone would actually make the bomb.

However, when one says, “the explosion could annihilate a 40-story building and kill 1000,” does the sentence presuppose that actually there is a 40-story building that requires such and such amount of explosive s? If there is no presupposed fact that there are tall buildings that are strong against weaker explosives, the subsequent instruction for

making a much more powerful bomb is unnecessary. Further, the sentence implies that the writer believes that if this plan were implemented, 1000 people would be killed. When the writer has the knowledge and the belief that when A happens, B follows, it is absurd to say that the speaker is not liable for the perlocutionary effect.

### **Conclusion**

Austin's speech-act synthesis sheds light on the dispute regarding free speech in both Chinese and American cultural contexts. On one hand, viewing speech as a form of act has undoubtedly been abused by oppressive regimes. However, drawing a sharp distinction between speech and act, as many Chinese do, is the wrong strategy for defending freedom of speech. The doctrine of infelicities illustrates that words can be effective in the form of actions when certain criteria, such as proper persons, proper circumstances, and proper procedures, are fulfilled. Interestingly enough, the appropriateness of circumstance and procedures, as well as the legitimacy of relevant parties, are also constructed by words. The question in the Chinese situation is not what is considered act and what is considered speech; instead, the question should be what circumstances and procedures must be taken into consideration to determine what kind of speech-act is acceptable and what is not.

The problems in America are different. The speech-act dichotomy is widely applied to promote unlimited free speech. Although some legal scholars agreed that speech and act should be treated in an integrative manner, the damaging result of speech-acts is considered perlocutionary, and thus attributing the consequence to the utterance of words has become difficult. I argue that when the speaker has knowledge about the conventions associated

with those words, and knows that his words carry presuppositions and implications, he is liable for a perlocutionary act.

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