

A Hard Science Linguistics Look at Performative Utterances

Bernard Paul Sypniewski
Rowan University - Camden, NJ (USA) Campus

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Introduction

In Austin 1975, J. L. Austin described a “performative utterance” as speech that affects or performs “extra linguistic” behavior. His twelve lectures, given in 1955, form a prolonged attempt to delimit the linguistic features that definitively distinguish performative utterances from other types of language. By the end of the last lecture, Austin realized that his efforts did not achieve the results that he wanted. By recognizing the importance of context, Austin came tantalizingly close to some of the key insights of hard science linguistics (HSL), Yngve 1996. Austin’s project produced limited results because, he insisted on seeing performative utterances as completely understandable within the scope of other traditional linguistics. Austin’s project produced limited results because he tried to completely understand performative utterances within the limits of language.

We wish to know whether performative utterance can be profitably reconstituted on the new hard-science foundation for linguistics. Since a consideration of all of Austin’s performative utterance types will unnecessarily enlarge this paper, we will only discuss the type of performative utterance that Austin calls a “verdictive”. Austin never defines verdictives except by example. The closest he comes is this: “...verdictives... are typified by the giving of a verdict, as the name implies, by a jury, arbitrator, or umpire. But they need not be final...” (Austin 1975:151). A little later, he says: “Verdictives consist in the delivering 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...” (Austin 1975:153).

Austin considered mid-twentieth century British law in his examples. I will use examples from contemporary New Jersey criminal law. In order to understand verdictives, I examine both a jury’s finding of guilt and a defendant’s entry of a guilty plea. In the last third of the twentieth century, the guilty plea hearing has taken on a significant role in American criminal jurisprudence, becoming the resolution method of choice in the vast majority of criminal cases. A jury verdict is an obvious example of one of Austin’s verdictives, but guilty plea hearings raise some interesting problems for Austin’s theory. Comparing jury verdicts that find a defendant guilty of some crime to hearings in which a defendant enters a guilty plea will show us some details of performative utterances that might otherwise be obscured. Although different types of communicative behavior occur in jury verdicts and guilty pleas, and the assemblages are somewhat different, the result is the same: a defendant is found guilty of one or more crimes.

An Informal Description of a Jury Verdict, a Guilty Plea and Sentencing Hearing

In American jurisprudence, the purpose of a criminal trial is to determine whether the State's charges against an indicted defendant are justified. The indictment is a formal document containing a summary of charges against the defendant. Each charge is contained in a separate, numbered "count". A defendant can be found guilty in either of two ways. A defendant may be found guilty of one or more counts of the indictment by a jury after a trial or the defendant may plead guilty to one or more of the counts of the indictment at a separate plea hearing. Other than these two methods, a defendant may not legally be found guilty of a crime. The next two sections give a description of typical verdicts, guilty plea hearings and sentencing hearings in only enough detail for us to examine the performative utterances in each situation.

A Jury Verdict

We say that "a jury finds the defendant guilty of count x but not guilty of count y" when we mean that, after a trial, the jury unanimously decides that the defendant performed the acts described in the count number x but not the acts described in the count number y of the indictment. The jury foreman announces the decision of the jury in a courtroom with the judge, prosecutor, defense attorney, defendant, court reporter, and other jurors present. Other persons may also be present but, for our discussion, their presence is irrelevant. This announcement ceremony is known as "returning a verdict".

A jury, through its foreman, returns its verdict at the very end of a trial. The judge sits at his desk; the jury foreman stands in front of his seat in the jury box; the defendant and his attorney stand at the defense table. The judge asks the jury foreman if the jury has reached a unanimous verdict. The jury foreman acknowledges that they have. The jury foreman, at the judge's prompting, reads the verdict from a completed verdict form "onto the record", meaning that the decision of the jury becomes publicly known and recorded by the court reporter. The jury verdict form is a document prepared by the court for the jury to unambiguously record their decision. It contains the name of the case, a short description of each count of the indictment, and a place to check off either "Guilty" or "Not Guilty" after the description of each count.

The Entry of a Plea

A defendant may, if he chooses, plead guilty before or sometimes during a trial to one or more counts of the indictment. A guilty plea occurs at a hearing before a judge without a jury, with the prosecutor, defense attorney, defendant, and court reporter present. Others are present as well but are irrelevant for our discussion. The defendant's attorney and the prosecutor describe any inducements (plea agreement) that encouraged the defendant to plead guilty. The judge briefly reviews the indictment, any plea agreement that has been entered into, and the defendant's description of the acts that the defendant claims makes him guilty of a crime. If the judge finds these elements to be acceptable, the judge accepts the defendant's plea. The reader should be careful to distinguish between a guilty plea, which is a statement of certain facts, and a

plea agreement, which is a binding agreement between the State and the defendant for each party that creates expectations about the occurrence of certain communicative behavior at a sentencing hearing.

A Sentencing Hearing

A sentencing hearing takes place either after a trial that results in a guilty verdict or after the entry of a guilty plea by a defendant. In between the entry of the verdict or guilty plea and the sentencing hearing, a presentence report is prepared for the sentencing judge to review. The contents of the presentence report need not concern us here. After reviewing the presentence report, the judge will take one of two courses of action depending on whether the sentencing results from a jury verdict or a guilty plea. If a jury verdict was entered, the judge sentences the defendant according to law. If the defendant previously entered a guilty plea, the judge must decide whether to accept the plea agreement before he sentences the defendant. If the judge rejects the plea agreement, he gives the defendant the option of retracting his guilty plea and going to trial or to accept sentencing in a manner that the judge thinks fit regardless of the plea agreement. We need not concern ourselves here with how or why a judge sentences a defendant in a particular way or why a judge might reject a particular plea. We are interested only in what the acceptance or rejection of a plea tells us about performative utterances.

The judge asks the foreman of the jury whether the jury has reached a unanimous verdict on all counts of the indictment. The jury foreman says that they have. The judge asks the jury foreman for the jury's verdict on each count of the indictment. The jury foreman reads the verdict from the jury verdict form. The verdict as to each count is either "guilty" or "not guilty". A jury may not return any other verdict. While more happens in court after the jury returns its verdict, this is all that is relevant here.

Question to Answer

1. How can Austin's theory of performative utterances be reconstituted in hard-science linguistics?

We now turn to a description of the assemblages, Yngve 1996:86, for a jury verdict, a guilty plea hearing, and a sentencing hearing. Each of these will be followed by a description of the linkage for each assemblage.

The Jury Verdict Assemblage

The return of a verdict is a simple process. The return of a verdict is always made in a courtroom. While other persons are present, the following persons must be present and are the only persons relevant to our discussion: the trial judge, the prosecutor, defense attorney, the defendant, a court reporter, and the jury. The indictment is present in court as a matter of custom.

The jury foreman has the jury verdict form in his possession and reads from it. The verdict is not returned until the necessary persons are all present together in the courtroom.

A Model of a Jury's Verdict of Guilty

In order to model that isolated portion of a trial in which the jury foreman reports the jury's verdict, we set up a linkage called [verdict], with one task, <return the verdict>, and several role parts: judge, [judge], jury foreman, [jury foreman], juror, [juror], court reporter, [reporter], prosecutor, [prosecutor], defendant's attorney, [defense attorney], and defendant, [defendant]. We will refer to [jury foreman], who is also [juror]₁, and [juror]₂ through [juror]₁₂ collectively as "the jury". The attorneys, court reporter, and jurors, except for [jury foreman], are observers for this portion of a trial and are, for the purposes of this paper, only important because of their presence in the courtroom. The two prop parts are indictment, [indictment], and jury verdict form, [form].

The [defendant] has two properties that must be modeled. The defendant has a <guilt> property for each count of [indictment], subscripted with the count number, <cn>, with binary values g or -g (guilty or not guilty). Up until [jury foreman] reads the verdict, all <guilt> have the value -g. The [defendant], [judge], [prosecutor], [defense attorney], [reporter], [jury foreman], and [juror] each have a <present> property with binary properties p/-p (present or not present) which we use to track whether these constituents are present in the courtroom.

The [indictment] has two properties: <tcn> or total count number has a numerical value that represents the total number of counts in [indictment]. An [indictment] with two counts has its <tcn> = 2. Each count of [indictment] is identified by a unique <cn> or count number. These <cn> will be used as a subscript for [defendant]'s <guilt>. The jury verdict form, [form], has the same properties as [indictment]. The constituents of [verdict] are summarized in Table 1 below:

Role Part (Name)	Property	Property Values
Defendant [defendant]	<guilt>	Binary (g/-g)
	<presence>	Binary (p/-p)
Judge [judge]	<presence>	Binary (p/-p)
Defense Attorney [defense attorney]	<presence>	Binary (p/-p)
Prosecutor [prosecutor]	<presence>	Binary (p/-p)
Jury Foreman [jury foreman]	<presence>	Binary (p/-p)
Juror [juror]	<presence>	Binary (p/-p)
Court reporter [reporter]	<presence>	Binary (p/-p)
Prop Part (Name)	Property	Property Values
Indictment [indictment]	<tcn>	Integer (≥ 1)
	<cn>	Integer (1...tcn)
Jury verdict form [form]	<tcn>	Integer (≥ 1)
	<cn>	Integer (1...tcn)
Tasks and Subtasks (Name)	Type	Brief Description
<return the verdict>	Top-level	[jury foreman] communicates verdict to [judge] and other [verdict] participants

Table 1

The [verdict] constituents will be discussed in more detail later.

The Guilty Plea Assemblage

If a defendant decides to enter a guilty plea, he does so after his attorney and the prosecutor have negotiated a plea agreement, the contents of which are not relevant to this paper. The defendant is called before a judge into court to enter his guilty plea. A guilty plea may occur anywhere, such as a room in a jail or in a hospital, but usually occurs in a courtroom. After the attorneys describe the plea agreement to the judge and present him with the necessary paperwork, including a plea agreement form, the defendant tells the judge that he understands the plea agreement and what acts he performed that make him guilty of the crimes to which he pleads. The defendant's statements are known as his allocution. Once the defendant completes his allocution, the judge makes a preliminary assessment of whether the defendant's statements constitute an adequate basis for a finding of guilty on the crimes referred to in the plea agreement, whether the defendant voluntarily entered his plea, and whether there is anything obviously amiss with the plea agreement. If the judge is satisfied as to each of these elements of the plea, the judge accepts the plea, orders a presentence report, schedules a sentencing hearing, and ends the plea hearing.

A Model of a Guilty Plea Hearing

Let us call the linkage that we set up to model a guilty plea [guilty plea hearing]. The top-level task, the subtasks, and role parts sketched in this paper include only enough detail to discuss the relevance of a guilty plea to verdictives.

The relevant role parts are [judge], [defendant], [defense attorney], [prosecutor], and [court reporter], as above. There are two relevant prop parts: [indictment], as above, and the plea agreement prop part, [plea agreement]. In HSL terms, [plea agreement] describes communicative behavior that will take place during a subtask of [guilty plea hearing] if the [judge] sets a binary-valued property (*a/-a*) of [plea agreement] that we call <acceptable> to *a*.

The top-level task in the linkage is the <plea entry> task, which has several subtasks: <agreement acknowledgement>, <allocution>, <plea acceptance>, and <sentencing hearing scheduling>. A function of [defense attorney] is the communication of the contents of [plea agreement] to [judge] during <agreement acknowledgement>. During <allocution>, [defendant] describes to [judge] the acts that he performed that make [defendant] guilty of the crimes referred to in [plea agreement]. During <plea acceptance>, [judge] preliminarily decides whether the description legally suffices as proof of the crimes referred to in [plea agreement], among other things (see above). If [judge] decides that [defendant]'s statement sufficed, [judge] sets <acceptance> to *a*. If [judge] finds some reason to reject [plea agreement], [judge] sets <acceptance> to *-a*. <plea acceptance> ends and, if <acceptance> = *a*, [judge] performs those acts necessary to complete <sentencing hearing scheduling>, the final subtask of [guilty plea hearing]. If [judge] decides that [defendant]'s description was not legally sufficient, [judge] informs the parties of his decision. His announcement completes the <plea acceptance> subtask. The

parties may decide to restart the <plea entry> task, i.e., to perform the aforementioned acts once again with the contents of [defendant]'s communicative behavior during the <allocution> subtask being different.

The constituents of [guilty plea hearing] are summarized in Table 2.

Role Part (Name)	Property	Property Values
Defendant [defendant]	<guilt>	Binary (g/-g)
	<presence>	Binary (p/-p)
Judge [judge]	<presence>	Binary (p/-p)
Defense Attorney [defense attorney]	<presence>	Binary (p/-p)
Prosecutor [prosecutor]	<presence>	Binary (p/-p)
Prop Part (Name)	Property	Values
Indictment [indictment]	<tcn>	Integer (≥ 1)
	<cn>	Integer (1...tcn)
Plea agreement [plea agreement]	<acceptable>	Binary (a/-a)
Tasks and Subtasks (Name)	Type	Brief Description
<plea entry>	Top-level	[defendant] enters a guilty plea before [judge]
<agreement acknowledgement>	Sub-task	[defendant] communicates an understanding of the contents of <plea agreement> to [judge]
<allocution>	Sub-task	[defendant] communicates to [judge] a description of his acts which allow [judge] to set the value(s) of <guilt> to g
<plea acceptance>	Sub-task	[judge] sets <acceptability> to either a or -a. If [judge] sets <acceptability> to -a, <plea entry> terminates without a change in the values of <guilt>
<sentencing hearing scheduling>	Sub-task	If <acceptability> = a, [judge] does those acts necessary to schedule a sentencing hearing.

Table 2

A Sentencing Hearing Assemblage

A sentencing hearing usually takes place in a courtroom. The judge, the defendant, the defense attorney, the prosecutor, and the court reporter must be present. Others may be present but are irrelevant to our discussion. The communicative behavior at a sentencing hearing depends on how the defendant was found guilty. A judge who sentences a defendant who was found guilty by a jury only needs to review the presentence report (prior to the hearing) and sentence the defendant as he deems proper, after hearing any comments from the defendant, his attorney, the prosecutor, and, in some cases, the victim. The judge cannot alter a jury verdict at a sentencing hearing. A judge who sentences a defendant after a plea hearing can do one of two things. After a review of the presentence report, the judge may decide to either accept or reject the plea agreement. If the judge rejects the plea agreement, the judge gives the defendant the option of retracting his guilty plea and going to trial or allowing the judge to sentence him as the

judge thinks is proper. If the judge accepts the plea agreement, the judge will sentence the defendant according to the terms of the plea agreement.

A Model of a Sentencing Hearing

We will only model those aspects of a sentencing hearing which come into play when there is a guilty plea and which are relevant to our discussion of verdictives. We set up a linkage to model a sentencing hearing in relevant part and call it [sentencing]. Although a full model of a sentencing hearing would require more role parts and subtasks than those we describe here, we can adequately model a sentencing hearing for our discussion with only two role parts and two subtasks. [sentencing] includes three prop parts: [indictment] and [plea agreement] as above, and PSR [presentence report]. PSR is important because, prior to the sentencing hearing, [judge] reviews it to determine whether he should accept or reject [plea agreement]. A sentencing hearing cannot take place without a PSR.

<plea acceptance> is a subtask of the top-level task of [sentencing] (not discussed here). In this subtask, [judge] announces whether he has set <acceptable> to a or -a. If <acceptable> = -a, then the subtask <retract plea> occurs in which [defendant] decides whether to go to trial or continue with [sentencing]. If [defendant] wishes to go to trial, [judge] resets <guilt> to -g. <retract plea> ends. [sentencing] ends. If [defendant] does not wish to go to trial, <guilt> is not reset, <retract plea> ends, and [sentencing] continues.

The constituents of [sentencing] are summarized in Table 3.

Role Part (Name)	Property	Property Values
Defendant [defendant]	<guilt>	Binary (g/-g)
	<presence>	Binary (p/-p)
Judge [judge]	<presence>	Binary (p/-p)
Prop Part (Name)	Property	Property Values
Indictment [indictment]	<tcn>	Integer (≥ 1)
	<cn>	Integer (1...tcn)
Plea agreement [plea agreement]	<acceptable>	Binary (a/-a)
PSR [presentence report]	None relevant	
Subtask (Name)	Type	Brief Description
<agreement acceptance>	Sub-task	[judge] communicates to [defendant] whether he will alter the value of <acceptable> from a to -a.
<retract plea>	Sub-task	If [judge] set <acceptable> to -a, [defendant] may "withdraw his guilty plea". If [defendant] does so, [judge] resets the value(s) of <guilt>

Table 3

Discussion

In another paper in this volume, I argue that when we set up a linkage to model a criminal trial, [trial], the defendant role part, [defendant], has a guilt property, <guilt>, with binary values (g/-g) for each charge leveled against him in [indictment]. The indictment prop part, [indictment], has a total number of counts property, <tcn>, where $\text{tcn} \geq 1$. Since each charge in [indictment]

has a unique count number, a property of [indictment] that we call <cn>, we use <cn> as the subscript of <guilt> associated with count <cn>: <guilt>_{<cn>}. During the history of [trial], the value of each guilt property is -g (not guilty) because of the presumption of innocence unless the value changes at the end of some subtask due to appropriate communicative behavior. The purpose of a criminal trial, restated in HSL terms, is to determine whether, after certain communicative behavior occurs in [trial], any or all <guilt> change value from -g to g.

Assume <tcn> = 2. Say that the jury decides to alter the value of <guilt>₁ from -g to g but to leave that of <guilt>₂ set at -g, i.e., the jury finds the defendant guilty on count 1 but not guilty on count 2. [jury foreman] communicates the new values of <guilt>₁ and <guilt>₂ to the other linkage participants. Although the jury decided to change the value of <guilt>₁ during its deliberations, the value of <guilt>₁ does not change until [jury foreman] communicates the values to the other participants in <return the verdict> in [verdict]. Because <guilt> are "public" properties, i.e., properties that are "visible" to participants in [trial] besides [defendant], <guilt> must be altered in a "public" manner. The [verdict] linkage is one such a public method for altering the values of <guilt>. The jury may change its decision at any time up until it is delivered in open court (in <return the verdict>) but it cannot do so once [jury foreman] has communicated the verdict.

The verdict must be communicated by [jury foreman] to [judge] while the other necessary participants in [verdict] are present in the courtroom. If [jury foreman] delivered his verdict in an empty courtroom, the values of <guilt> would not change. If someone other than [jury foreman] said the same words as [jury foreman] would say when he delivered a verdict, the values of <guilt> would not change. In an emotionally charged case, the victim's or the defendant's friends or family often attend the trial. Many times, they vocally disagree with the jury's verdict and shout out their disagreement. Members of the audience cannot alter the values of <guilt>. Even [jury foreman] cannot do so. Although one of the functions of the [jury foreman] role part is to announce the decision of the jury to participants in [verdict], he cannot unilaterally make the jury's decision.

A jury verdict is clearly one of Austin's verdictives Austin 1975:151. We should note that a jury verdict is delivered "upon evidence or reasons as to value or fact, so far as these are distinguishable" (Austin 1975:153). The communicative behavior in [trial] prior to [verdict] concerned itself with just this evidence.

At first blush [defendant] appears to alter the value of his own <guilt> in [guilty plea hearing]. A careful examination of the situation will show that [judge] rather than [defendant] alters the value of <guilt>. When [defendant] finishes his communicative behavior during the <allocation> subtask, he does not alter the value of any <guilt>. He merely states a series of "facts". [judge] does not accept or reject the agreement outlined in [plea agreement] until the sentencing hearing. [judge] alters the values of the <guilt> referred to in [plea agreement] when

he accepts the communicative behavior of [defendant] in the <allocation> subtask. Recall Austin's comment that a verdictive is based on evidence or reasons. The communicative behavior of [defendant] during <allocation> is just such evidence. We see that this is so by observing those cases in which a judge rejects the plea agreement at a sentencing hearing. By "rejecting the plea", we mean that [judge] refuses to perform those acts of communicative behavior expected of him because of [plea agreement]. He also resets the value of <acceptable> to -a. [judge] resets the value of the <guilt> referred to in [plea agreement] if [defendant] wishes to go to trial but not if [defendant] wishes to be sentenced according to [judge]'s suggestions. Although [defendant] has an option, his option determines whether [judge] resets the value of a property. We may observe additional evidence to support this claim by observing those cases in which [defendant] wants to retract his guilty plea before he is sentenced. He must ask permission to do so at a separate hearing (a motion to retract a guilty plea). The judge has the option to allow the defendant to retract the guilty plea. Usually, a judge does not exercise the option. If [defendant] were able to alter the value of <guilt> by himself, he would not need permission from [judge] to do so. If [defendant] had the ability to alter the values of <guilt> by himself, the legal system could only require some notice to retract a guilty plea to publicly announce [defendant]'s decision; [judge] could not rule on [defendant]'s decision because [judge] could not alter <guilt>. These hearings give us clear evidence to support the claim that [judge] in [guilty plea hearing] and [sentencing] controls the value of the appropriate <guilt> and not [defendant].

Austin's Domain Confusion

Austin noted the importance of the assemblage. In Lecture I, he said:

"Speaking generally, it is always necessary that the circumstances in which the words are uttered should be in some way, or ways, appropriate, and it is very commonly necessary that either the speaker himself or other persons should also perform certain other actions, whether 'physical' or 'mental' or even acts of uttering further words" (Austin 1975:8).

Austin stayed within the logical domain. All twelve lectures were devoted to finding a complete theory of performative utterances in language. Austin saw but did not attach sufficient importance to the fact that merely uttering a verdictive is not enough. This is so easy to see that it is surprising that Austin did not make more of it. Suppose that the jury has notified the judge that it has reached a verdict. Because of the hour, the judge decides that the foreman will deliver the verdict after lunch. The jurors discuss the case at lunch, as they are admonished not to do but are widely suspected of doing. At lunch, the jury foreman says the exact same phrase that he will later say in the courtroom. Uttering the words at lunch does not alter the value of <guilt>. The defendant cannot be punished because of the utterance of the jury foreman in a cafeteria. If the jurors deliberate further and come to a different conclusion than they did before lunch, it is the jury's conclusion announced in court that matters. In HSL terms, sound waves are not sufficient to

alter the values of <guilt>. The appropriate sound waves must be uttered by the appropriate participant in the process of fulfilling a certain function in a specific linkage subtask.

Austin did not consider the results of a performative utterance. For him, the utterance was important, not the role of the utterance in a larger context. If we look at the effect of the utterance, we can see that the utterance, as here described in HSL terms, may have considerable importance for future communicative behavior. Examples are not too hard to find. If, as is usual, a defendant pleads guilty before trial, there is no trial. In HSL terms, the communicative behavior of [defendant] causes [judge] to set the value of some <guilt> from -g to g. The value of <guilt> determines whether the tasks and subtasks in [trial] occur. If the value is g and other conditions, not mentioned here, are met, there is no need to set up [trial]. If the values of all <guilt> are -g after the preliminary subtasks in [case] are completed, then [trial] must be set up. If, after the tasks and subtasks in [trial] are completed, the values of all <guilt> are -g, the top-level task of [case] ends. On the other hand, if the values of one or more <guilt> are g after the behaviors of [trial] are completed, [defendant] is subject to further activity in [case] (sentencing).

Conclusion

Using the observations above, we may describe a verdictive in HSL terms as follows. A verdictive is a type of performative utterance that involves at least two people. One has a property and the other sets the value of that property depending on certain communicative behavior that takes place in a task or subtask in a certain linkage. Some tasks or subtasks, e.g., [verdict], require that the communicative behavior take place in certain physical locations (a courtroom). Other tasks or subtasks do not. For example, [guilty plea hearing] may occur in a room in a jail, in effect, a temporary courtroom. All tasks and subtasks require that certain props, role parts, or participants be present while the communicative behavior takes place. I distinguish role parts and participants because it may only be necessary that, in some cases, a certain behavior occur not that a specific individual perform that behavior. A good example is [reporter]. There must be a court reporter taking down testimony but the individual court reporter may be different from one task to another. On the other hand, it is vital that the individual who fills the role part of [defendant] be the same throughout all tasks in the linkage.

While the communicative behavior of [jury foreman] rarely varies from case to case, we should not be lulled into believing that the exact words uttered by [jury foreman] are solely what changed the values of <guilt>. A thorough examination of the communicative behavior during [guilty plea hearing] is beyond the scope of this paper but an examination of that communicative behavior cause us to question whether specific language is required for a performative utterance or whether any communicative behavior causing a property change is a performative utterance.

Austin's theory of performative utterances moved linguistics a step away from its concern with the abstractions of grammar toward concerns with the real world. Austin, however, did not go far enough. Austin could not shake loose from the notion that linguistics should decontextualize

language in order to study it. HSL provides the additional theory that Austin needed to resolve many of the difficulties he experienced in his lectures.

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