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PERFORMATIVES IN ARGENTINE SUPREME COURT DISSENTS: A JURILINGUISTIC PROPOSAL FOR CIVILIAN CHANGE BASED ON THE AMERICAN COMMON LAW

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ABSTRACT

This article explores a linguistic defect in how Argentine Supreme Court dissents are written. The reader of these dissents has a hard time distinguishing between a majority opinion and a dissenting opinion, because dissents are written "as if" they were deciding the case. The confusion results from the use of performative language in dissents when adherence to reality and a plain-language approach require modal verbs reflecting the language of suggestion. This is actually the way dissents are expressed in the United States, the jurisdiction from which the Argentine Supreme Court copied its constitutional design. To make the case against the use of alleed performative language in Argentine Supreme Court dissents, the article explores the differences in how the civil law and the

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common law have traditionally treated dissents, introduces the basic elements of British philosopher J. L. Austin's speech act theory, applies Austin's concept of performatives to dissents, shows examples from the supreme courts of both Argentina and the United States, and finally makes the plain-language case as another compelling argument for clarity in dissents to propose the abandonment of a practice that is not truthful to reality and seriously limits the understanding of the Argentine Supreme Court decisions. The whole discussion is presented as a jurilinguistic exercise, combining law and language analysis.

Keywords: dissents, performatives, speech-act theory, judicial discourse, law and language, jurilinguistics, plain language, genre analysis, Supreme Court, Argentina

I. INTRODUCTION

Argentina is a civil-law country, but it has imported a considerable part of its constitutional design and some of its constitutional doctrines from the United States.[1] This influence has been so significant that Argentina has been described as a "civil law nation with a common law touch."[2] One aspect in which Argentina sets itself apart from its civil-law counterparts is Supreme Court opinions. While decisions issued by the highest courts in other civil-law countries usually do not state the names and the specific opinions of each justice,[3] Argentina has chosen to follow the American common-law

1. *See*, *e.g.*, MANUEL JOSÉ GARCÍA MANSILLA & RICARDO RAMÍREZ CALVO, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL. LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO ARGENTINO (LexisNexis 2006); and MANUEL JOSÉ GARCÍA MANSILLA & RICARDO RAMÍREZ CALVO, LA CONSTITUCIÓN NACIONAL Y LA OBSESIÓN ANTINORTEAMERICANA (Virtudes 2009).

2. *See* Santiago Legarre & Christopher R. Handy, *A Civil Law State in a Common Law Nation, a Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina*, 95 TUL. L. REV. 445 (2021), and Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 258, 269 (2019).

3. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 37 (2d ed., Stan. U. Press 1984):

> [T]he tendency is for the decisions of higher courts in civil law jurisdictions to be strongly collegial in nature. They are announced as the

model, in which the names and opinions of individual justices are known. The judgments issued by the Argentine Supreme Court indicate the name of the justices and their individual opinions, if any. Justices may join the majority or plurality, may concur, or may dissent. One of the consequences of this system is that justices may express their disagreement from the majority by writing a dissent, which in Argentina takes the form of an alternative disposition of the case. Dissents are unheard of in many other civil-law countries, such as France[4] or Italy,[5] though dissent writing is a widespread practice in other civilian jurisdictions, such as Spain, Colombia, Brazil, or Chile.

While Argentina has imported from the American common law the tradition of publishing dissents, if any, together with majority opinions (or plurality opinions, for that matter) in cases decided by the Supreme Court, it has copied the tradition with a defect. Dissents issued by Argentine Supreme Court justices use performative language as if they were actually deciding a case, and that is simply not true. As such, Argentine Supreme Court dissenting justices are liars,[6] in linguistic terms. In the end, a dissent is nothing but an alternative view of how a case should have been decided. Conversely, in the United States dissenting judges express their opposition to the main opinion with the language of suggestion, using modal verbs such as "would" or "should."

This remark may seem trivial at first sight, but considering that citizens at large are usually interested in the Supreme Court decisions given the transcendental role of the highest judicial body in the

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decision of the court, without enumeration of votes pro and con among the judges. In most jurisdictions separate concurring opinions and dissenting opinions are not written or published, nor are dissenting votes noted. The tendency is to look at the court as a faceless unit.

4. *See* DAVID POLLARD, SOURCEBOOK ON FRENCH LAW XXVII (CAVENDISH PUBL'G 1998).

5. *See* JEFFREY S. LENA & UGO MATTEI, INTRODUCTION TO ITALIAN LAW 111 (KLUWER 2002).

6. Martin Shapiro, *Judges As Liars*, 17 HARV. J. L. & PUB. POLICY 155 (1994) (the epithet is actually used here for the reluctance of judges to recognize that they actually create the law and not that they merely apply it).

nation, justices should do away with this tradition and be clearer in how they express themselves. Also, being clearer in dissenting also favors experts who read Supreme Court opinions on a daily basis as part of their work. Writing dissents using performative language as if they were actually the law only infuses confusion in the reader. This article will analyze the concept of dissents and their place in the civil law and the common law, will explain what performatives are in the theory of British philosopher J. L. Austin and how this linguistic concept is relevant to the notion of dissents, will include examples of parts of American and Argentine dissents for comparative linguistic analysis, and will finally make a proposal for change that is in line with the linguistic theory underlying performatives and modern plain-language approaches.

II. DISSENTS IN COMMON-LAW AND CIVIL-LAW SYSTEMS

As dissents are typically described as a distinctive feature of common-law opinion writing, we need to bring the common law into the conversation and compare its approach with that of the civil law. The focus, however, will be mainly on the American common law. One of the many differences of the approach to the law between the common law and the civil law is the treatment of published dissents. To put it simply, published dissents are commonplace in the common law, but a rarity in the civil law, at least theoretically. This sharp distinction is not so clear-cut in every single case, as some higher courts in civil-law systems regularly publish dissents, such as the case of the Argentine Supreme Court being analyzed here.[7]

Michael Kirby provides a good account of the features of dissents in the common law or, in other words, the reasons why dissents

7. For another example of a civilian jurisdiction whose highest court publishes dissents, *see* Stanisław Goźdź-Roszkowski, *Communicating Dissent in Judicial Opinions: A Comparative, Genre-Based Analysis*, 33 INT. J. SEMIOT. LAW 381 (2020) (discussing the differences and similarities in how dissents are expressed in the United States Supreme Court and the Poland Constitutional Tribunal).

are commonplace in common-law court decisions.[8] The first of these reasons is the oral tradition.[9] Common-law judges usually heard cases in the courtroom and decided on the spot. Such exposure to public criticism led judges to express their views before their audience, and that view could be the majority view or a dissenting opinion. The second reason is the judges' background.[10] In the common law, judges are appointed (and, in the United States, sometimes elected) after having been distinguished practitioners for several years. Thus, a judge tends to consider the judiciary as a continuation of his or her legal career. And that career consists in exercising independent judgment to solve legal conflicts. The idea is that judges come to the bench with, and because of, their intellectual individuality. Common-law judges rarely see themselves as part of the government bureaucracy tasked with solving conflicts. The third reason is the notion of what the role of courts is.[11] Due to their training as lawyers, common-law judges have a knack for providing sound arguments; at times they might even improve the arguments of the parties. As their opinions are authoritative beyond the case at hand, they strive to make the best arguments possible so that their reasoning may endure. Also, stating their arguments in the most persuasive way is what they did when they practiced the profession.

Another feature that factors in is the model of courts in terms of judicial review. In the United States, as the courts are entitled to quash laws on grounds of their inconsistency with the constitution, judges are expected to be prudent in their exercise of such a broad power. The provision of convincing reasons, based on the law, has proven to be essential to exercise this power. These courts require the exposition of all views, even when they might differ and occasionally clash. Yet another feature for Kirby is that common-law judges are expected to render dissenting opinions, when they deem

8. Michael Kirby, *Judicial Dissent — Common Law and Civil Law Traditions*, 123 L. Q. REV. 379 (2007).
9. *Id.* at 384.
10. *Id.* at 387.
11. *Id.* at 388.

it appropriate, as one further step in the process of governmental transparency.[12] When it started hearing and deciding cases and for the first decade of its existence, the United States Supreme Court announced its decisions following the practice of the King's Bench, i.e., through seriatim opinions of its members.[13] Afterward, Justice Marshall, who was concerned about the Court speaking with one voice to strengthen the constitutional structure of the nation, adopted the practice of announcing the decision of the Court in a single opinion to which the majority assented.[14] The United States Supreme Court was established in 1789 and published its first dissent in 1806.[15] After this date, the publication of dissents became standard practice in the United States Supreme Court.

Common-law judges, according to Kirby,[16] are also prone to dissenting when they deem it appropriate because they expect that dissents may cast light on a certain issue which will be decided properly in the future. It is not uncommon that the view reflected in a dissent is ultimately reflected in a statute or in a subsequent majority opinion. Courts also have an important pedagogical function in the common law: law professors teach based on cases. Judges are aware of this reality and many dissents result from the feeling of a judge who believed that law students (and the academic community at large) should pay attention to a given issue from a different perspective.[17]

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12. *Id.* at 392 (drawing a comparison with the civil law: "The assertive, seemingly dogmatic, style of judicial reasoning in the traditional civil law countries is rather unsatisfying, even dismaying, to those brought up in the more transparent and discursive approach of the reasoning of common law courts.").

13. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1958-1959) (containing a detailed analysis of the evolution of the practice of opinion writing in the United States Supreme Court). Seriatim opinions are individual opinions by the judges deciding the same matter, instead of a single opinion for the whole court.

14. *Id.* at 193.

15. *See* Simms & Wise v. Slacum, 3 Cranch 300, 2 L.Ed. 446 (1806). *See also* ZoBell, *supra* note 13, at 195.

16. Kirby, *supra* note 8.

17. Justice Antonin Scalia, a renowned dissenter, was famous for saying that he wrote his dissents for law students. *See* ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 271 (Christopher J. Scalia & Edward Whelan eds., Crown Forum 2017).

Other authors have said that dissents have an important and long-lasting influence after the case has been decided, "in shaping and sometimes in altering the course of the law,"[18] that they are "an appeal to the intellect of tomorrow,"[19] and that they show "that the case was well considered."[20] As a matter of fact, dissents may subsequently become binding after an overruling.[21] In the common law, dissents serve the very important function of subjecting established rules to the process of evolution.[22] As common law is, in essence, judge-made law, how a judge dissents in a case may be a good basis for a majority decision in the future and a draft dissent may even be useful in reaching consensus in a court.[23] Multi-judge courts with an odd number of members are a sign that judges are expected to disagree.[24] While some negative views have been expressed,[25] dissents are a reality in legal practice.

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18. Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUD. SOC. 78 (1942).

19. Robert G. Simmons, *The Use and Abuse of Dissenting Opinions*, 16 LA. L. REV. 497 (1956).

20. Miami Corp. v. State, 186 La. 784, 173 So. 315, 333 (1936).

21. Pintip Hompluem Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 523–524 (2003):

> The act of overruling can transform the statements written in a dissenting opinion into an authoritative source. . . . By quoting from the dissent, the Court incorporates the dissent's language into the majority opinion. The very act of writing these words, in the proper context with the proper authority, transforms such words into an authoritative source on which future judges can rely.

22. Simmons, *supra* note 19, at 498.

23. *See* Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010) (discussing the practice of Justice Brandeis, who used to write dissents and bury them "if the majority made ameliorating alterations or, even when he gained no accommodations, if he thought the Court's opinion was of limited application and unlikely to cause real harm in future cases."). A book was even published with all the dissents Justice Brandeis decided not to publish; *see* ALEXANDER M. BICKEL, UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK (Harvard U. Press 1957).

24. Joe W. Sanders, *The Role of Dissenting Opinions in Louisiana*, 23 LA. L. REV. 673 (1963).

25. *See* William A. Bowen, *quoted in* Sanders, *supra* note 24 ("the Dissenting Opinion is of all judicial mistakes the most injurious"). *See also* article 19, Canons of Judicial Ethics, American Bar Association ("Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."). Speech given by Judge Learned Hand at Harvard Law School on Feb. 6, 1958, *quoted in* Michael A. Musmanno, *The Value of*

Europe shows a surprising approach toward dissents. While the European Court of Justice does not permit dissents,[26] the European Court of Human Rights allows for that possibility. Judges appointed to the European Court of Human Rights have a tendency to show their independence and integrity, and oftentimes their opinions are contrary to their countries of nationality.[27] At the same time, in the different individual countries that are part of the European Union, two models of opinion-writing coexist: France[28] and Italy[29] follow the traditional civil-law model, and do not publish any dissents, while countries such as Germany and Spain have built on the American model and do publish individual votes and dissents. These different approaches to opinion-writing are also reflected on other features of the opinions: French and Italian decisions are relatively short and declare the law, while German and Spanish decisions are longer, more wide-ranging, and even have a literary taste.[30]

Dissents have been traditionally considered a rarity in the civil law, especially in light of French judicial practices, which were in force before the codification movement.[31] In many civil-law

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Dissenting Opinions 29 PA. BAR ASSOC. Q. 268 (1958) (a dissent "cancels the monolithic solidarity on which the authority of a bench of judges so largely depends.").

26. *See* Statute of the Court of Justice of the European Union, OJC 115, 9.5.2008, p. 210–229, tit. III, art. 35 ("The deliberations of the Court shall be and shall remain secret.") and art. 36 ("Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.").

27. Kirby, *supra* note 8, at 33.

28. POLLARD, *supra* note 4 ("In France, the decision is that of the court, rather than a collective decision of individual judges. The court is a collegiate body and there is no place for dissenting judgments.").

29. LENA & MATTEI, *supra* note 5 ("[C]ontrary to the practice in common law countries, separate opinions — whether dissenting or concurring — are not announced. In other words, appellate decisions appear as unanimous and anonymous decisions of the Court.").

30. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 145 (Oxford U. Press 2000).

31. ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM 59 (Butterworths 1998):

> Despite the fact that in all higher courts there is a plurality of judges, there is only one judgment, and no dissenting opinions are expressed. This results from the theory of unity; on the basis that the written law is one (*la loi est une*) a judgment made in application of the law can only

jurisdictions, the decisions of higher courts are published without specifying how each individual judge voted. There is a deeper sense, it is alleged, of collegiality, and the aim is trying to send the message that what is important is the final decision of the court as a whole, regardless of the particularities of individual judges. As Merryman put it, "the tendency is to think of the court as a faceless unit."[32] Some have even said that dissents are incompatible with the continental European legal tradition, that they are tantamount to adopting foreign law, and that they may result in an academic exercise without any legal consequences.[33]

Anyway, whether one is for or against dissents, the reality is that the Argentine Supreme Court has departed from the general civil-law convention[34] and it is not unusual at all that decisions on important matters where one or more judges disagree contain something else than a collegial, majority decision. The Argentine Supreme Court issues (a) unanimous opinions; (b) majority opinions; (c) plurality opinions; (d) concurring opinions; and (e) dissenting opinions.[35] This article only discusses and criticizes the way dissents are written at the highest court in Argentina.

III. DOING THINGS WITH WORDS: PERFORMATIVE USE OF LANGUAGE

The whole point of this article is based on a simple idea: Argentine Supreme Court dissents should not be written with performative

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be expressed in the form of a single majority decision. The practice originated in the *Ancien Régime,* in which the written law was one, as being the expression of the king as sole legislator; the judgments of the *Parlements* were therefore expressed in the same form.

32. MERRYMAN, *supra* note 3, at 38.

33. Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT'L 163 (2003).

34. The Argentine Supreme Court started hearing cases in 1863 and the first published dissent in the Argentine Supreme Court dates back to 1877, written by Justice Saturnino M. Laspiur in the case XL "D. Lino de la Torre sobre recurso de habeas corpus," *Fallos* 10:231 (1877).

35. For an explanation of how cases are distributed for decision among justices in the Argentine Supreme Court, *see* Genaro R. Carrió, *Don Quijote en el Palacio de Justicia (La Corte Suprema y sus problemas)*, LA LEY 1131 (1989).

language. To get there, we first need to revisit the concept of "performative utterances" or "performatives." British philosopher J. L. Austin is to be given credit for coining these terms and describing what lies underneath them.[36] He was convinced that the phenomenon described was widespread and obvious, and yet not much attention had been paid to it. This theoretical framework to understand how language is used came to be known as "speech-act theory."[37]

Philosophers had assumed that statements could only *describe* a state of affairs or *state* some fact, and any such statement could be true or false. But, Austin said, there are utterances which are not verifiable and are, instead, part of doing an action.[38] For example, saying "I name this ship *Queen Elizabeth*," while smashing a bottle against the hull of a ship, or saying "I bet you 10 dollars the LSU Tigers will win the game." None of these utterances is true or false, nor do they describe anything; these utterances do what they predicate. As they perform an action, Austin proposed the term "performatives."[39]

But uttering words that spark a change in the reality is not an act of magic. It is always necessary that the circumstances surrounding the words uttered be appropriate. It is necessary that the speaker or somebody else also perform other actions or even utter other words. In the example given above, the person naming the ship must have adequate authority to do so. If, let us suppose, the board of directors of the company owning the ship had decided that the person who would throw the bottle at the ship to name her will be the president of the company, it is not possible for the chief financial officer to

36. JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 1 (2d ed., James O. Urmson & Marina Sbisà eds., Harvard U. Press 1975).

37. For an explanation of the theory as applied to judicial opinions, overrulings in particular, *see* Dunn, *supra* note 21.

38. AUSTIN, *supra* note 36, at 6.

39. *Id.* at 7. Austin justified the choice of this term as being the most overarching term for all utterances that qualify as performatives. He even mentioned that H. L. A. Hart told him that lawyers use the term "operative" for the clauses of an instrument that serve to effect the transaction; that is the main object of the instrument, while the rest "recites" the context in which the transaction takes place.

conduct such task.[40] As we will see below, this consideration is of the utmost importance in the law. As for the substance of this study, while a dissenting judge has the authority to issue a dissent and express his or her judicial opinion on how the case should be resolved, the single opinion of that judge will have no performative value unless he or she has the support of the required number of fellow judges (and in that case, it follows, we would not be talking about a dissent anymore).

In Austin's terms, a dissent using performative language would be an example of an *unhappy* performative utterance. Let us see why. Austin has described the requirements for a performative utterance to function smoothly or *happily*. In other words, what is required for a purposed performative to be an actual performative? The answer to this question in the context of judicial dissents, as we shall see, is the crux of this article.

Austin establishes six rules that must be met for a performative utterance to be such:

- A(1) There must be an accepted conventional procedure having a certain effect, which should include the uttering of certain words by certain persons in certain circumstances; and
- A(2) the particular persons and circumstances must be the appropriate ones to invoke the relevant procedure.
- B(1) The procedure must be executed by all participants both correctly and
- B(2) completely.
- C(1) If the procedure is designed for use by persons having certain thoughts or feelings, or to cause a certain conduct by any participant, then the person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend to so conduct themselves, and also
- C(2) must actually so conduct themselves subsequently.[41]

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40. Unless, of course, there is an authorization from the president to delegate his or her powers to the chief financial officer but let us assume that such is not the case in this example.

41. *Id.* at 14–15.

Failure to satisfy any of the six rules renders the utterance *unhappy*.[42] In *A* and *B*, if the requirements are not met, there is no performative utterance at all. In the ship-naming example, if the one crashing the bottle on the ship hull is not the president of the company but a sailor without any authorization, his or her act, even after having pronounced the correct words, produces no effect. Austin calls this infelicity effect a *misfire*.[43] In the cases of *C*, the effects of not complying with requirements 1 and 2 do not result in the voidance of the performative utterance. Instead, the act is achieved, but in insincere circumstances which render the act an abuse of the procedure. A good example of *C* is a false promise. For instance, Peter promises to convey a tract of land to Laura in exchange for $50,000, but Peter knows he will sell it for $75,000 to Covey. Peter has no intention to stand by his promise; he made a promise, but it is a false promise. This type of infelicity is an *abuse,* in Austin's terms.[44] The consequence of a misfire is that the act produced is void and of no effect; the consequence of an abuse is that the act is "hollow" or not consummated. This article does not discuss abuse; instead, we will focus on misfiring.

In both *A.1* and *A.2*, Austin identifies the infelicity of *misinvocation* of a procedure, because (a) there is no proceeding or (b) the proceeding cannot be made to apply in the way attempted.[45] When the procedure exists, but cannot be applied as purported, Austin uses the term *misapplication.*[46]

The claim in this article is that a judge writing a dissent using performative utterances falls within the infelicity described by Austin as a misinvocation. The performative utterances in a dissent are of no operative value—they do not produce any changes in the reality. This does not mean that the dissent does nothing; it surely has

42. *Id.* at 15.
43. *Id.* at 16.
44. *Id.*
45. *Id.* at 17.
46. *Id.*

argumentative or pedagogical value, but it does not produce the act of adjudicating a case.

An example adapted to the ship-naming situation will help clarify this concept. If a person is walking by the harbor and sees the ship that the president is supposed to christen, but instead of waiting for the president takes the task upon himself and smashes the bottle against the hull of the ship pronouncing the words "I hereby name this ship the Mr. Oliver Cromwell,"[47] we can all agree that the ship has not been named via that act. How so? Well, even if that person pronounced the words that are typically expected to be used when naming a ship, he had no authority to utter the performative which would change the reality in that very specific context and circumstances, i.e., giving a name to the ship.

This is very similar to what happens when a dissenting opinion uses performative language. A judge writing a dissent with performative language acts like the person walking by the harbor who took it upon himself to christen the ship in the example above. To go deeper into this consideration, we first need to explore the nature of the work of courts and judges in general.

Judges have jurisdiction, i.e., the power or authority to say or declare the law (from the Latin *juris dictio*).[48] When a judge pronounces a sentence against a defendant, whether in writing or orally, the pronunciation or the writing on paper of the sentencing words is the act of sentencing.[49] These words do not describe a previous act that took place earlier; instead, they modify the reality creating a new state of things. A free man sentenced to imprisonment changes his status right after the sentence is pronounced. Jurisdiction, however, is not without limits. A court cannot hear any case; typically,

47. Example adapted from *id.* at 23.
48. *Jurisdiction*, THE OXFORD ENGLISH DICTIONARY (Clarendon Press 1989).
49. Saying or writing "I pronounce the defendant guilty" is a type of performative termed "verdictive statement" by Austin. *See* AUSTIN, *supra* note 36, at 42–43; *see also* Dunn, *supra* note 21, at 502.

a court will be constrained by jurisdiction over the persons and over the subject matter, and venue, among other considerations.

In collegiate courts, the draft opinion that gets the greatest number of votes is the one that decides the case. If a case has been decided by an absolute majority, the resulting opinion is a majority opinion. For example, if a case pending before the Supreme Court of the United States results in a division of justices on two sides and five justices vote one way, and the other four do not agree, the prevailing view will be that of the majority opinion, that is, the opinion written by the five justices. If an opinion, however, has the support of four justices, and two others issue concurring opinion in a given sense, and the remaining three issue another concurring opinion, the prevailing opinion is that voted on by the four initial justices. Although that plurality opinion will decide the case, the force of the decision is somehow reduced, because it did not have the support of the court's absolute majority. Whether an opinion has the support of a majority or a plurality, that decision will control the case being decided. Concurring opinions join the majority or plurality, but with different arguments. We can say that in all of these cases, the language of the judges is performative. When a majority says "the judgment by the lower court is reversed," for example, by that very utterance the decision of the court below is quashed.

The language of dissents, however, is different.[50] A dissent does not decide the case. As a dissent is not backed by the required

50. Another peculiar case is what happens with "exhortative judgments." In the first years of the 20th century, the Argentine Supreme Court has been including exhortations to the other branches of government so that they take measures to realize what the Constitution, as interpreted by the Court itself, requires. These appeals to act are a relative innovation in the Argentine Supreme Court practice, to the extent that the Court had traditionally limited its role to decide a case at hand. These exhortations may be perceived as an overreach in the power to adjudicate cases. Their efficacy as speech acts is completed by the exhortation itself, but their legal efficacy depends on the actual reaction of the branches of power exhorted—they may ignore or observe the exhortation. *See* Martín Böhmer, *Una aproximación retórica a las sentencias exhortativas*, II JURISPRUDENCIA ARGENTINA 285 (2012) (discussing the ruling in *F., A. L. s/medida autosatisfactiva*, in which the Court "exhorted" the Executive to implement and enforce medical protocols for legally-authorized abortions and the Judiciary to refrain from hearing

number of judges, it has no authority to decide a case. A judge writing a dissent can only express his or her opinion on how the case should or could be decided, including his or her arguments. By definition, the language of a dissent cannot be performative. As we shall see below, dissents attached to opinions of the Supreme Court of the United States make it clear that they do not dispose of the case, but that is not what happens with the opinions issued by the Argentine Supreme Court.

IV. PRACTICAL APPLICATION

We should now bring all the concepts discussed in this article down to earth and see examples of the way dissents are written in the courts of last resort in Argentina and the United States. For this purpose, I will only focus on the dispositive part of opinions, without delving into the facts or issues involved in the cases cited.

This is the disposition of a case decided by the Argentine Supreme Court in 2018:

> Therefore, after the Attorney General of Argentina has issued the pertaining opinion, it is appropriate to grant certiorari, admit the extraordinary appeal filed and, based on the grounds already explained, *affirm the decision appealed against.* Be this communicated and be these proceedings sent back to be added to the main case file. Carlos Fernando Rosenkrantz (dissenting). Elena I. Highton de Nolasco. Juan Carlos Maqueda (separate opinion). Ricardo Luis Lorenzetti (separate opinion). Horacio Rosatti (emphasis added).[51]

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cases involving legally authorized abortions). *See also* Néstor P. Sagüés, *Las sentencias constitucionales exhortativas ("apelativas" o "con aviso"), y su recepción en Argentina*, LA LEY 1461 (2005) (discussing a thorough classification of the types of opinions issued by the courts).

51. *Fallos*: 341:1768 (2018):

> Recurso de hecho deducido por Batalla, Rufino en la causa Hidalgo Garzón, Carlos del Señor y otros s/ inf. art. 144 bis inc. 1 —último párrafo— según ley 14.616, privación ilegal libertad agravada (art. 142 inc. 1), privación ilegal libertad agravada (art. 142 inc. 5), inf. art. 144 ter 1° párrafo —según ley 14.616—, inf. art. 144 ter 2° párrafo —según ley 14.616-, homicidio agravado con ensañamiento - alevosía, sustracción de menores de diez años (art. 146) — texto original del C.P. ley 11.179 y supresión del est. civ. de un menor.

And this is a dissent issued by Justice Rosenkrantz in that very same case:

> Therefore, after hearing the Attorney General of Argentina, certiorari is granted, the extraordinary appeal is admitted, and articles 10, 2, and 3 of Law No. 27362 are held to be unconstitutional, and *the judgment appealed against is hereby reversed*. Be this communicated and remanded, so that the relevant court renders a new judgment consistent with this opinion.[52]

A reader who is unfamiliar with the procedure of the Argentine Supreme Court would be baffled after reading this set of contradicting dispositions. How is it possible that the same opinion *affirms* the lower's court judgment and, at the same time, *reverses* it?

Let us now take a look at how the Supreme Court of the United States deals with the same situation. This is the heading and disposition of the majority opinion in a 1991 case:

> Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Marshall, Blackmun, O'Connor, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, *post*, p. 500. . . .
> The judgment of the Court of Appeals *is reversed*, and the case is remanded for proceedings consistent with this opinion. *It is so ordered*.[53]

Original text in Spanish:

> Por ello, habiendo dictaminado la Procuración General de la Nación, corresponde hacer lugar a la queja, declarar admisible el recurso extraordinario interpuesto y, por los fundamentos expuestos, *confirmar la decisión recurrida*. Hágase saber y remítase a los fines de su agregación a los autos principales. Carlos Fernando Rosenkrantz (en disidencia). Elena I. Highton de Nolasco. Juan Carlos Maqueda (según su voto). Ricardo Luis Lorenzetti (según su voto). Horacio Rosatti. (translated into English by the author)

52. *Id.* Original text in Spanish:

> Por ello, y oída la señora Procuradora General de la Nación, se hace lugar a la queja y al recurso extraordinario, se declara la inconstitucionalidad de los artículos 10, 2° y 3° de la ley 27.362 y *se revoca la sentencia apelada*. Notifíquese y remítase a fin de que, por intermedio de quien corresponda, se dicte un nuevo fallo con arreglo al presente. (emphasis added) (translated into English by the author)

53. Owen v. Owen, 500 U.S. 305, 306 (1991).

And this is the Justice Stevens's dissent, in its pertinent part: "Justice Stevens, dissenting. . . . Thus, the priority question in this case was correctly decided by the Court of Appeals and *its judgment should be affirmed*. . . . *I would therefore affirm the judgment of the Court of Appeals*."[54]

The U.S. dissent is much clearer. Even the nonlawyer can easily understand that something has been decided with a majority vote, and that is the disposition of the case, and something else was said in the dissent. That dissent, whatever its content, does not adjudicate the case. The U.S. dissent does not use performative language, but language of suggestion. Modal verbs "would" and "should" convey the idea that whoever is writing is expressing a wish as to how things should be. Other typical ways of concluding dissents in the U.S. Supreme Court are simply "I dissent,"[55] "With all due respect, I dissent,"[56] or "I respectfully dissent."[57]

A judge writing a dissenting opinion has no authority to decide the case on his or her own. In courts with several members, as already explained, decisions are made by a majority or a plurality. The opinion of judges in collegiate bodies is only authoritative if it is backed by the sufficient number of colleagues. A dissent, therefore, has no authority to cause any changes in the reality. Dissents are the province of argumentation and are there to serve purposes of different natures, as discussed in section II of this article.

Writing a dissent with performative language leads to confusion, especially for students, who have to read piles of cases for their legal training. When reading a lengthy opinion—and important decisions rendered by the Argentine Supreme Court are usually lengthy—one can easily forget what has been said ten pages above. After reading several pages of a decision, one could be at a loss knowing if what is being read is the majority opinion, a concurrent opinion, or a

54. *Id.*
55. U.S. v. Stanley, 483 U.S. 669, 708 (1987) (Brennan, J., dissenting).
56. Simpson v. Georgia, 450 U.S. 972, 974 (1981) (White, J., dissenting).
57. Mack v. Oklahoma, 459 U.S. 900, 901 (1982) (O'Connor, J., dissenting).

dissent. Getting to the end of a dissent issued by a justice of the Argentine Supreme Court only makes things worse, as one could read the dispositive part of a dissent as if it were the majority opinion, and one could understand the case the other way around! A rewritten version of the Argentine Supreme Court example would read like this: "Therefore, after hearing the Attorney General of Argentina, certiorari should be granted, the extraordinary appeal *should* be admitted, and articles 10, 2, and 3 of Law No. 27362 *should* be held unconstitutional, and the judgment appealed against *should* be reversed (emphasis added)."

Dissents are always written using performative language in the decisions of the Argentine Supreme Court. This choice is not about a personal style of judges—all justices have traditionally been writing dissents with performative language. This reality leads to think that we are faced with one of those traditions whose only reason for existence is continued and unreasoned practice.[58] Some authors have suggested that the problem with dissents goes deeper than the linguistic level. The way dissents are written actually reveals that there is no real dialog among the justices or, if there is dialog, it is below the desirable levels, as published opinions do not account for that interaction. When there is a dissent, the majority does not mention it, and the dissent does not mention the reasons in the majority. This problem has been labeled an "exchange of the deaf."[59]

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58. Argentine Supreme Court decisions have also sparked criticism for an unnecessary proliferation of individual votes when there is a fractured majority. *See* Santiago Legarre, *Mayoría fracturada y precedente horizontal*, LA LEY. SUP. PENAL (2020) (discussing the complex web of concurring and dissenting opinions in *Ramos v. Louisiana* and comparing that approach with the way the Argentine Supreme Court deals with similar situations. The American model is praised for highlighting the differences, while the Argentine approach is portrayed as causing reader confusion. Argentine justices rewrite the majority opinion almost verbatim, only changing the sections they disagree with. The whole process leads to extremely lengthy opinions whose disentangling requires highly intensive attention).

59. Alberto F. Garay, *La Corte Suprema debe sentirse obligada a fallar conforme sus propios precedentes. Aspectos elementales del objeto y de la justificación de una decisión de la Corte Suprema y su relación con el caso* "*Montalvo,*" II JURISPRUDENCIA ARGENTINA 870–892, 879:

V. THE PLAIN-LANGUAGE CASE FOR CLARITY IN DISSENTS

Another argument to advocate that dissents not be written with performative language is plain language.[60] According to the Plain Language Federation,[61] "A communication is in plain language if its wording, structure, and design are so clear that the intended readers can easily find what they need, understand what they find, and use that information."[62] A court opinion needs to be considered a type of "communication" in the wide sense of the word for these purposes. While in a court opinion there is no bilateral communication, as the court merely conveys its decision of how the case is decided, it is communication in the sense that the opinion conveys the decision to the parties.[63]

> After reading many Supreme Court decisions where there was no unanimity, one oftentimes realizes that neither the majority nor the dissent reciprocally refute their arguments. Some take a certain position and the remaining a different one, but none of them tries to prove how mistaken, inappropriate, or lacking in arguments the other position is. Both opinions may be read in isolation, as if they were independent acts, when both are actually part of the same decision. These cases, which are not few, are the archetype of what I understand is not rational debate. . . . [W]hen one side ignores what the other side said, the final product ends up looking more like what we would call an 'exchange of the deaf' rather than a rational debate about the interpretation of the Argentine Constitution (translated by the author).

60. The basic reference in this area is MARTIN CUTTS, OXFORD GUIDE TO PLAIN ENGLISH (4th ed., Oxford U. Press 2013). For a general review of the birth and development of plain language in the United States, *see* Karen A. Schriver, *Plain Language in the U.S. Gains Momentum: 1940-2015*, 60 IEEE TRANSACTIONS ON PROFESSIONAL COMMUNICATION 343 (2017).

61. This federation was founded in 2007 and is the result of the joint efforts of three preexisting organizations: Center for Plain Language (United States), Clarity International (United Kingdom), and the Plain Language Association International (Canada). Given the prestige of the entities which form the Federation and the professionals behind them, this definition has been widely accepted as authoritative in plain language studies.

62. *See* International Plain Language Federation, https://perma.cc/JJN3-AWPH.

63. *See, e.g.*, Robert Eagleson, *Judicial decisions: acts of communication*, 71 CLARITY 11 (2014) ("In giving a decision we are communicating the law. . . . [B]anding down a decision is not just an application of the law to a particular situation but also an act of communication to win acceptance from others . . ."). *See also* Francis Bennion, *Judicial Decisions: a riposte and a retort*, 71 CLARITY 14 (2014) (opposing the communicative purpose of judicial decisions: "The purpose is to resolve a dispute by applying the law to it."). *See*, finally, Robert

A comprehensive plain-language approach to opinion writing in general and dissent writing in particular requires adopting a position on who the addressees or intended readers of court opinions are. Identifying the addressees in this case, in turn, requires resorting to the concept of discursive genre in the law. The communicative situation is not the same in all legal texts—for these purposes, a statute, a legal memorandum, and a court opinion are very different, to name just a few examples. Each of these discursive genres is inserted in a specific communicative situation. The predominant view for lawyers is that the addressees of judgments are other legal professionals.[64] Legal translation scholar Susan Šarčević has suggested that a difference should be made between direct addressees (law enforcement officers and other judges) and indirect addressees (the parties) of court opinions.[65] She emphasizes that the focus on other judges as primary addressees has to do with precedents that are binding on the same or lower courts.[66] Other authors have used the term "double voice" for the multiple addressees of judicial opinions and have put the parties at the forefront.[67] In any case, as to judicial opinions, the

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Eagleson, *Judicial Decisions: A Retort*, 71 CLARITY 15 (2014) ("Because the resolution is in terms of the law, and not on any other basis, judgments set out the law. Judges . . . do not simply declare the finding, but also add their reasons, and they see it as essential that the finding emerge from the reasons.").

64. *See*, *e.g.*, RICARDO LORENZETTI, EL ARTE DE HACER JUSTICIA 40 (Sudamericana 2014) ("[E]n la Corte planteamos que las decisiones son un producto profesional, redactado en un lenguaje judicial y dirigidas a abogados" [At the Court, we discussed that opinions are a professional product, written in judicial language and addressed to lawyers] (translated by the author)). Justice Ricardo Lorenzetti sits on the Argentine Supreme Court and was its chief justice for eleven years.

65. SUSAN ŠARČEVIĆ, NEW APPROACH TO LEGAL TRANSLATION 60 (Kluwer Law Int't 1997).

66. *Id.*

67. *See* John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447 (2001):

> An opinion's double voice often addresses itself to double or multiple hearers. An opinion speaks immediately to those interested in the resolution of the case at bar: parties, their lawyers, and lower court judges who may be called on to preside over further proceedings. At the same time, the judge speaks to those who will use the opinion to ascertain and understand the law: lawyers whose clients face legal problems arguably governed by precedent, and more broadly students, expounders and critics of the law. Usually, judicial opinions make no explicit reference to

plain-language approach focuses on the parties or citizens at large as the main and ultimate addressees of these legal instruments.[68] The focus on nonlawyers as the main intended readers shapes the strategies to be used so that the message gets across.

In the common-law world, plain language has usually been considered a must for courts to the extent that *pro se* representation is allowed.[69] But even beyond this consideration, it is possible to posit that for the plain-language approach, court decisions need to be stated in clear terms because the ultimate readers are citizens at large, especially the parties bringing the case before the court.

Based on the definition of plain language above and assuming that it is beneficial that court decisions be written in plain terms so that even nonlawyers may understand, one may ask whether or not the readers of an Argentine Supreme Court opinion can easily find the dispositive part of the majority opinion and separate it from the dissent, understand the dissent, and adequately use that information. It is possible to assume that readers, especially nonexperts, have a hard time trying to get the meaning of an Argentine Supreme Court dissent right the first time. Only after getting acquainted with the tradition that dissents by the highest court in Argentina are written "as if" they were deciding the case can they actually realize the nature and scope of the dissent. As Peter Tiersma said, "comprehension can be impaired by linguistic features that are not specifically

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these audiences, adopting somewhat the tone of a voice from the heavens, as opposed to a human speaking to humans. Occasionally, however, a judge will address more directly the bar, the scholarly community, or the general public.

68. *See*, *e.g.*, CHRISTINE MOWAT, A PLAIN-LANGUAGE HANDBOOK FOR LEGAL WRITERS 28 (2d ed., Carswell 2015):

> Much legal writing is produced with only lawyers or the courts in mind. One result is that the parties to the document become almost irrelevant, ignored as outsiders or tourists. With plain-language writing, a new focus on audience enables clients, consumers, or the public to read documents as active and knowledgeable participants—or at least to have an option to do so.

69. *See, e.g.,* Sean McLernon, *Why Courts Need to Embrace Plain Language*, 24 GEO. J. POV. L. & POLICY 381 (mainly discussing the relevance of plain English in court forms for *pro se* litigants).

legal."[70] The defect in how Argentine Supreme Court dissents are written identified in this article is precisely a linguistic feature which impairs comprehension and which is not legal in nature.

VI. CONCLUSION AND PROPOSAL

The linguistic defect studied in this article may be the reflection of a deeper, substantive problem: dissents' failure to interact with the majority opinion may reveal lack of dialog or an insufficient level of dialog among justices. It is very difficult to know if Argentine Supreme Court dissents are being written with performative language merely because of tradition or because there is lack of dialog. Justices writing dissents should be able to express their disagreement with the majority and this expression should make the other justices revisit their own arguments. If no consensus can be reached, the dissent will only serve to express the opinion of the dissenter, but it may well otherwise be a tool to improve the Court's arguments. In any case, the published dissent must accurately and truthfully account for what it really does—providing an alternative, yet nonbinding, solution to the case. Performative language has no room in dissents.

Emulating good practices from other legal traditions is not a sin. The Argentine Supreme Court has been structured after the American model, a notorious exception to which is the writing of dissents. In a way, this article proposes a return to basics, to the roots of the constitutional and judicial model Argentina decided to follow. The Argentine Supreme Court needs to follow its American model on dissent writing and get rid of performatives in dissents.

Changing the way dissents are written is in the hands of the justices themselves. Using performative language in dissent has no basis in logic, linguistics, or the law. A single judge may decide to change the style of his or her decisions and a trend may follow suit.

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70. PETER M. TIERSMA, LEGAL LANGUAGE 203 (University of Chicago Press 1999).

Discarding performatives in dissents will better reflect what judges do and will better convey to all parties interested in reading the decisions of the Court what judges do and do not do with their words.