theories and methodologies

The Facts of Law

MARIANNE CONSTABLE

Confusion of tongues of good and evil: this sign I give you as the sign of the state.
—Friedrich Nietzsche, *Thus Spoke Zarathustra*

IN *CRIPPLED AMERICA: HOW TO MAKE AMERICA GREAT AGAIN* (2015), DONALD J. TRUMP WRITES, "THE MOST IMPORTANT LESSON IS THIS—*Stand behind your word, and make sure your word stands up*." His next paragraph begins, "I don't make promises I can't keep." Trump seems to align his word with his promises here, but he immediately follows "I don't make promises I can't keep" with "I don't make threats without following through. Don't ever make the mistake of thinking you can bully me. My business partners and employees know that my word is as good as any contract—and that better go for the other side's word as well" (138). The "word" that "stands up" and "behind" which Trump stands is a weapon of defense against bullying. It is a threat by "me" (Trump) against "you" should your word turn out not to be, like Trump's word, "as good as any contract." Even if Trump does not explicitly invoke the slang usage of "contract" (i.e., hiring an assassin to kill someone), he "follow[s] through" on his threats against "the other side," whose word had "better" be as good as his.

Now that he is president of the United States, Trump often tries to make good his threats through the law that, in his oath of office, he swore to uphold.[1] "SEE YOU IN COURT," Trump famously tweeted in only the second of his all-caps utterances, on 9 February 2017, ostensibly addressing the judge of the appellate court that had upheld an injunction against his infamous "Muslim ban." When words become weapons and facts become fake, as they do for President Trump, where does this leave law? Are its words weapons? Are its facts fake? Is law anything other than a threat or its execution? How do distinctions between fact and interpretation, fact and fiction, or even fact and law, matter?

In Anglo-American legal practice, one often distinguishes questions of fact from questions of law. As Robert Burns argues, the

MARIANNE CONSTABLE is professor of rhetoric at the University of California, Berkeley. She has published extensively in interdisciplinary legal studies and is working on a book about women who killed their husbands and got away with it under what was dubbed, at the turn of the twentieth century, "the new unwritten law."

© 2019 MARIANNE CONSTABLE
PMLA 134.5 (2019), published by the Modern Language Association of America

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

"received view" that considers legal judgment to consist of the application of a rule-like statement of law to particular facts is not wrong as far as it goes (11). It fails, however, to account for the ways in which, at a criminal trial, for instance, evidence is needed to support facts, facts may be disputed and require interpretation, the selection of a relevant rule depends on that interpretation, and rules themselves do not fully circumscribe the possibilities of legitimate judgments. Not only rules and their context, then, but also evidence and facts require interpretation, argues Burns. The interpretation that goes on at trial is a matter of performance, he argues, a performance that may be carried out in more-or-less skilled ways.

What then are the "facts of law"? Here it may be helpful to offer another preliminary distinction: that between facts as they appear in law and the facts referred to by the existence of law. In the first sense of the phrase "facts of law," "facts" belongs to the possessive subject "law"; these are the facts Burns discusses that must be established within law, or that belong to the realm of legal practice in which claims are made. In the second sense of the phrase, "law" is the object of the possessive subject "facts." These are the facts constituted by law's existence, the facts *about* law's institutions, procedures, and behaviors that lie within the social scientist's or sociolegal scholar's empirical domain.

This essay shifts attention from both kinds of facts—those within law and those about law—to the *factum*, or act or doing of law through language or claims. Facts about law and facts within law inform us about the behavior of the state and its officials and the positive, or human-made, formal law that exists. To bind oneself to only such facts as these is to limit one's knowledge and experience of law, however. Turning to speech acts of law accommodates both the meaningfulness of facts within legal practice and the truths of empirical findings about law and government, while also highlighting ways in which law is, in fact and in deed, a matter of working with language that exceeds official rules and behavior. As in literature, so too in law: one may study the facts within a text and the facts about a text, yet there remains the all-important issue of language and questions about what words are doing and how. As we shall see, the words of law are not simply threats. As a matter of fact, law is susceptible to all the subtleties and graces, as well as the pitfalls and failures, of language.

Factum: The Act of Law

A long time ago, *factum*, from the Latin *facere*, to do or to make, referred to a doing, to a deed or an act. The fact of law is, in this sense, the doing of law.[2] How is law done? Law in United States practice and in the Anglo-American legal academy today is done largely through words—through speech and text. As a practice of language, law requires persons—speakers and writers, hearers and readers—who, in doing things with words, act. In federal, state, and local courts, assemblies, agencies, and offices, as well as outside them, persons plead, complain, answer, accuse, defend, object, sustain, overrule, convict, sentence, appeal, argue, prove, refute, rebut, enact, amend, appoint, swear, declare, authorize, and notarize—to name only a few legal speech acts.

These acts exemplify what J. L. Austin called performative utterances (nouns) and, later, drawing attention to their verb-like character, "illocutionary" speech acts. (Fifty years earlier, a young German philosopher, Adolph Reinach, had already called what would come to be known as performative speech acts "social acts." He did so because he recognized that such acts require the apprehending or hearing of words by someone other than their speaker or writer, and so they are properly considered jointly committed acts.) Austin's point was that there are

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

many kinds of utterances that make sense but are not propositionally true or false (what he called "constative" statements), such as "I promise to do it tomorrow" and "I bet you a nickel it will rain next week." Something happens in the activity or making of such performative utterances as promising, betting, warning, threatening, and the legal speech acts mentioned above, that cannot be captured simply through an assessment of truth value. A promise, that is, makes sense even if it cannot strictly be assessed as a true or false proposition (or as a constative utterance).[3]

As illocutionary acts, performative utterances transform states of affairs. They often appear routine. My mundane speech act of inviting you for dinner Tuesday, for instance, places you in a new, yet unexceptional, position of having to respond to me, most likely through speech acts of your own accepting, declining, or renegotiating the invitation. (You may also do nothing about the invitation, but the state of affairs is nevertheless different than it was before I invited you.) In law, too, a properly offered objection at trial, for instance, changes a state of affairs, making it the judge's turn to speak: to overrule the objection, to sustain it, or to ask for clarification.

Despite their apparent conventionality, speech acts involve powerful and sometimes strange transformations. In law as in fairy tales, properly spoken words—declarations and oaths, for instance—turn you, as of this moment, into someone or something else: a homeowner, a wife, a president. A properly announced verdict turns you into a convict. Through proclamations, rocks become monuments and deserts become parks, as they did when President Obama declared Bears Ears, Utah, to be a national monument (Obama). Through the set of speech acts that constitute a marriage ceremony, two persons become one according to the older common law doctrine of coverture.[4] Personhood may be conferred on nonanimate beings, such as corporations, while otherwise animate beings may be struck dumb and rivers and trees called on to speak.[5] Mysterious disappearances and vanishing acts may also accompany the nonlinear time of linguistic legal events: annulments of marriage and nullifications of grants made "in perpetuity" do not track the undoing of a marriage or grant so much as proclaim that henceforth they never happened.

One can consider legal education in the United States to be a matter of learning an elaborate set of arrangements for transforming situations through legal speech acts. How are claims (the speech act par excellence in courts of law) best made? What are the conditions in which certain claims (of fact and of law) and not others are justified or warranted? Law governs speech in many ways: most obviously through First Amendment law, but it also does so, for instance, through laws of contract and of intellectual property and through the establishment of crimes, such as perjury and fraud. It also specializes in articulating its own conditions of speech: it mandates that particular utterances be understood in certain ways; it takes back or transforms utterances through such speech acts as revocations, amendments, and pardons. It hears selectively, establishing procedural rules about "standing" and evidentiary rules regarding what can be said.[6] It expunges records and depublicizes opinions, in effect claiming that some speech acts never happened. Even as they focus on judicial speech acts, law students learn more broadly who is authorized to say what on behalf of whom. They learn what support is needed for particular claims and what forms legal speech must and can take.

In short, law is done through words. It is a profession of words in three ways. First, as we have just seen, law is the work with words of trained practitioners or professionals. Second, the flow of legal words, like all conventional acts, may become empty ritual, an incantation spoken by a sorcerer's apprentice—*mere* profession. Third, a profession is also an ethical commitment: law's words are

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

binding. How can law be binding this way, given that claims of law, like all speech acts or utterances, are at best persuasive and may deceive? After all, language is not the same as truth; neither is law justice.

The Binding of Law

How is law binding? Law is bound to words and words are bound to truth. Consider that only insofar as there is some connection between language and truth do judgments about the truth of any particular utterances make sense. While utterances are not always true (and we may even be hard-pressed to argue that they should be), without the promise of language or of speaking and writing to truth, no judgments about the truth or falsity of an utterance are possible. Language promises truth, and only on this basis can judgments be made. Likewise, only insofar as law promises justice do judgments within law as to the justice of actions (and states of affairs) and judgments about legal acts make sense. Legal acts insist, however imperfectly, in and through words, that they are just and that their judgments are apt. In (speech acts) claiming justice, law insists on what Shoshana Felman describes as the "impossible promise" of truth. Felman refers to the impossibility of deciding between giving the lie to one's words and not promising. In other words, mortals will continue both to promise and to break their promises.

To maintain that law is conducted through speech acts that insist on the justice of their judgments is not to argue that law is always successful or just, any more than it is to argue that language is truth or that promises are always kept. Law and literature are replete with examples of words and deeds going wrong. Neither human law nor human language seamlessly rectifies speech acts gone awry. Against a background of imperfect speech by fallible human beings in a world that need not conform to human will, law nevertheless insists on justice. Contract law, for instance, heeding claims of injustice, responds with its own imperfect speech acts, claiming and demanding that some words be kept while allowing others to be broken when, for instance, courts mandate not performance but damages as the remedy for an unfulfilled promise. So too, criminal law adjudicates alleged deceptions and wrongdoings of all sorts, hearing parties' appeals to justice, engaging in and apprehending speech acts of accusation, confessions, and excuses for action.

Behind any legal speech act, then, lie imperfect—ongoing, habitual, incomplete, routine, and interruptible—everyday practices (and breaches) of law and of language. Such mundane speaking and law-ing, one might say, make up the context or background against which any particular verbal act or transformation stands out: *We were speaking English, when he made the promise (or when she signed the contract)*; *They were in the habit of recording permit approvals a particular way until the forms were posted online*. Appeals to justice, whether those of interested parties or those made on behalf of official law, are themselves forceful speech acts or demands for recognition that stand out from everyday practices.

"Law" refers doubly to these imperfect background practices (how things are said and done) and to the speech acts that stand out from this background, which may yet also fade back into it. From speech acts of court opinions to those of car registrations, that is, particular acts take on personal or historical momentousness at some times and not others, for some purposes and not others. Acts of law stand out as do active verbs against grammatically imperfect doings: the court held (speech act) the defendant corporation liable in a context in which courts were allowing corporations to engage freely in such behavior. Law may also appear, though, as the ongoing background of such imperfectly repeating practices, allowing corporations to engage freely in the behavior at issue, against

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

which a court's holding stands out—whether as counterinstance or as yet another instance that could become part of the background. Or consider another example: "law" may refer to a jurisdiction's everyday practices of divorce; or it may refer to a particular act or divorce decree. As law, particular decrees have different import depending on the parties and on the context of one's concern—is the person seeking a divorce Henry VIII or my neighbor? Is the proceeding seen from the perspective of Catherine of Aragon or an English legal historian?—and may or may not become absorbed into everyday legal practices of divorce.

Language and law, justice and truth, are thus bound up, imperfectly, with each other. One need not go far to see this confirmed: hearings still take place in what are called courts of justice; "justice" remains the title of the highest judges. Past law and language affirm—whether truthfully or not, successfully or not, factually or not, realistically or not—law's bond through language with justice.

Within and beyond Positive Law

Through language, then, law claims and maintains, imperfectly, a relation to justice. Again, this is not to say that law is justice or that any given legal utterance or speech act is just. But neither is it to identify law simply with statements of rules or the language of doctrine. Knowing how to extract statements of rules from case opinions and understanding how rules work are aspects of legal training, but (just as Austin's true-or-false constative statements do not exhaust the category of sensible utterances) rules and the arguments one makes with them do not exhaust the category of significant legal utterances (as the many different kinds of legal speech acts mentioned above show). Rules are never enough. Even with rules for the interpretation and change of rules, statements of rules are incomplete: there is no rule for the application of rules.

To define law as a system of rules, then, is misleading; the system requires grounding outside the rules. In the work of the premier Anglo-American legal positivist philosopher, H. L. A. Hart (1907–92), this outside is supplied by the "fact" of the acceptance by officials of a (secondary) rule of recognition for identifying what counts as a rule in the system. (Legal positivism concerns itself with the facts of the humanly enacted, or formal, law that *exists*, maintaining that there is no necessary connection between law and morality.) Hart conceives of the modern municipal legal system, or the positive laws of the state, as a union of primary rules (obeyed by citizens) and secondary rules (accepted by officials [113]). The secondary rule of recognition for Hart constitutes a mark of authority (92–93). Official acceptance of this mark or rule—like the obedience of citizens to the primary rules—consists, from the external standpoint of a Hartian observer, in the fact of "social pressure" (87–89). Elsewhere I have argued, using the history of England as an example, that the force of positive law's mark of authority stands in for, or figures, relations of power exercised by conquerors and colonizers over subject people (*Law* 67–95). According to Hart, a positivist system or union of rules emerges "as a matter of history" in two steps—the writing down of hitherto unwritten rules, followed by imposition of the mark of authority (92–93). The two stages of Hart's account in effect exclude as law the practices or norms of those who do not already grasp their law as articulable rules; they exclude the inarticulable imperfect background of law.

Custom, indigenous practices, morality, religion, and all so-called laws that do not resemble those of the formal or official positive law of the modern state fail to qualify as law in Hart's legal positivism, a view that unfortunately all too often coincides with that of actual state officials. Hence, United States law fails to recognize as law the ways of native

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

peoples; within state law, those ways may exist as fact, but they do not exist as law.

In short, in the writings and texts of even an ostensibly positive state law that grounds itself in the fact of power beyond the rules, one finds more than statements of rules: one finds speech acts and deeds, and silences and judgments about justice and injustice. Strictly positivist models of systems of rules and statements of law, like representational models of language and knowledge, fail to do justice to the ways that human beings act and speak in the world. One must go behind and beyond the formal law of the state to understand how law and its language work. In the imperfect and incomplete practices of speaking and hearing that lie behind state law, as well as in the likes of nonstate law, such as contemporary international law, and in other cultures, histories, and literatures, one encounters possibilities of nonrepresentational languages and of nonpositive laws.[7]

Facts about Law

If some students naively identify law with justice, while others equate law with doctrine and rules, yet others consider law to be a form of domination and oppression. State law, as well as its language, indeed produces unhappy and even deplorable effects; some positive laws are malign, malicious, or unjust. But, the impact of law is not the same as what goes on *in* its saying. (In addition to distinguishing performative from constative utterances, Austin distinguishes what is said *in* the illocutionary saying of a speech act—the promising, betting, warning, objecting—from what is caused perlocutionarily *by* the saying; the listener may be appalled, for instance, or other consequences that are not inherent in the making of the speech act itself may follow [Austin, 101–32]). A Miranda warning, for example, notifies an accused of a danger and offers the accused a choice between remaining silent, entering more carefully into the danger (with counsel), or braving the extraordinary speech situation of in-custody interrogation alone (*Miranda v. Arizona*). To focus exclusively on the validity or soundness of the Supreme Court's argument for the warning, as did some early critics, is to treat law as a set of more-or-less-static propositions and to miss the dynamism of legal speech acts.[8] To focus on the impact of the warning on prosecution and conviction rates, by contrast, is to treat the warning as the cause of what is done (perlocutionarily) *by* warning, again missing the (illocutionary act of) warning. It is to neglect what (the Court claims) the utterance or warning is or does in the dialogue or active exchange between official and accused. Notification of danger occurs in the warning (as an aspect of uptake); it does not strictly or necessarily follow as consequence in the way that changes in prosecution and conviction rates may. So too, *in* an act of promising, one takes on a commitment to another; the commitment does not follow the promise as effect follows cause.

Just as philosophical legal positivism offers a sophisticated view of law as a system of rules, sociolegal studies may offer students more nuanced views of law as power. In a world where power speaks, however, scholars and students ignore speech acts and the imperfect background of language and law from which legal acts emerge at their peril. The power of any so-called sovereign state and its officials is as much a matter of "juris-diction," or the saying of law, as it is a fact of power and violence, as the Supreme Court's various parsings of legal authority in *Trump v. Hawaii* attest.

Tongues of Good and Evil

To recapitulate: state law, through the acts of its officials, engages in many kinds of speech acts. Law is not a static body of doctrine; neither is it strictly a system of rules. Law may be a means of domination, but to grasp it as essentially so ignores its distinctiveness as law:

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

its (past) claims to justice. Law is not the same as justice, but the possibility of judging legal acts, or of law's judging any acts, as just or unjust depends on an ostensible bond between justice and law. That bond lies in language and in words' ever imperfect promise of truth.

When words become weapons, what becomes of law and justice? When the "state tells lies in all the tongues of good and evil," as Nietzsche's Zarathustra put it, what becomes of the facts of law (49)? Recall President Trump's threat that the words of "the other side" had "better go" his way. In Trump's conflation of promise and threat, the invocation of law becomes a mandate for the forcible execution of threats, rather than an imperfect language or promise of justice. (Law's insistence loses its character as speech.)

Only by challenging claims that the bullying by powerful state officials constitutes law tout court do we affirm the promise of language to truth that grounds the possibility of just judgment. In so doing, we affirm that the facts of state law (within state law, about state law) are not all there is to law. In questioning whether the positive law that exists is indeed determinative of the facts of law, strong distinctions between fact and law or is and ought, between fact and interpretation, between fact and fiction, and between what is outside law and what is within it fall away. Only thus do we, in our time, retain any sense of the promise—impossible to keep—that, in speaking, law does justice.

Notes

1. United States presidents swear to "faithfully execute the office of President" and to "preserve, protect, and defend the Constitution" ("Oath").

2. *Factum* is the nominative, singular neutral, perfect passive participle of *facere*, as well as its accusative, masculine and neutral, perfect passive participle ("Facere").

3. On performative speech acts, see Austin 3–10; on illocutionary speech acts, see Austin 91, 98–132, 144–51. See also my discussion of Austin on speech acts (*Our Word* 20–33, 65–66, 67–70, 80–81, 87–88, 90) and my comparison of Austin with Reinach (82–85).

4. States in the United States abolished the common law doctrine of coverture, subsuming a married woman's legal rights and obligations into those of her husband as protector of a now "covered woman," in the second half of the nineteenth century and the early twentieth century (Zaher).

5. To stand mute in court is to refuse to plead guilty or not guilty. Critiques of the personhood of corporations in United States law are legion. After a 2017 Colorado District Court decision denied the Colorado River standing to sue, interest revived in William O. Douglas's dissenting opinion in *Sierra Club v. Morton*, in which Douglas argued that the concept of community be expanded to include soils and land and that inanimate objects, such as Mineral King, an area of the Sierra Nevada, should have standing to sue. The Colorado decision responded to a suit that sought unsuccessfully to establish that the river was a person with rights. Recently, the New Zealand Parliament enacted a law making the Whanganui River a legal person and a court in India ruled that the Ganges and Yamuna Rivers "should have the same legal status as humans" (Taylor). For legal attempts to grant personhood to trees, see Stone.

6. "Standing to sue" refers to a party's right to bring suit or a person's right to be heard. The rule against the admission of hearsay to establish the truth of the matter asserted is a commonly known evidentiary rule.

7. "Conflict of laws" names the area of law that considers which law governs when more than one legal authority claims jurisdiction. Conflicts law or private international law has become the law of "international business transactions." It is to be distinguished from public international law and humanitarian law.

8. I discuss these early critics' responses to the Supreme Court's argument for the Miranda warning in *Just Silences* (149–74).

Works Cited

Austin, J. L. *How to Do Things with Words*. Harvard UP, 1962.

Burns, Robert P. *A Theory of the Trial*. Princeton UP, 1999.

Cavell, Stanley. *Philosophy the Day after Tomorrow*. Harvard UP, 2005.

Constable, Marianne. *Just Silences: The Limits and Possibilities of Modern Law*. Princeton UP, 2005.

———. *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge*. U of Chicago P, 1994. New Practices of Inquiry.

———. *Our Word Is Our Bond: How Legal Speech Acts*. Stanford UP, 2014. The Cultural Lives of Law.

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press

Douglas, William O. Dissenting opinion. *Sierra Club v. Morton*. *United States Reports*, vol. 405, 19 Apr. 1972, pp. 741–55. *Library of Congress*, cdn.loc.gov/service/ll/usrep/usrep405/usrep405727/usrep405727.pdf.

"Facere." *Cactus2000*, latin.cactus2000.de/showverb.en.php?verb=facere&gen=2&voc=2.

Felman, Shoshana. *The Scandal of the Speaking Body: Don Juan with J. L. Austin; or, Seduction in Two Languages*. Stanford UP, 2003.

Hart, H. L. A. *The Concept of Law*. Oxford UP, 1961.

Nietzsche, Friedrich. *Thus Spoke Zarathustra*. Translated by Walter Kaufmann, Penguin, 1978.

"Oath of Office for President of the United States." *PresidentsUSA.net*, Baaron's Hill, 2017, www.presidentsusa.net/oathofoffice.html.

Obama, Barack. "Presidential Proclamation—Establishment of the Bears Ears National Monument." *The White House*, 28 Dec. 2016, obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument.

@realDonaldTrump (Donald J. Trump). "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT RISK." *Twitter*, 9 Feb. 2017, 7:35 p.m., twitter.com/realdonaldtrump/status/829836231802515457?lang=en.

Reinach, Adolph. "The A Priori Foundations of the Civil Law." 1913. Translated by John F. Crosby. *Aletheia: An International Journal of Philosophy*, vol. 3, 1983, pp. xxxii–142.

Stone, Christopher D. "Should Trees Have Standing? Toward Legal Rights for Natural Objects." *Southern California Law Review*, vol. 45, 1972, pp. 450–501.

Taylor, Adam. "There Are Now Three Rivers That Legally Have the Same Rights As Humans." *The Washington Post*, 21 Mar. 2017, www.washingtonpost.com/news/worldviews/wp/2017/03/21/there-are-now-3-rivers-that-legally-have-the-same-rights-as-humans/.

Trump, Donald J. *Crippled America: How to Make America Great Again*. Simon and Schuster, 2015.

United States, District Court for the District of Colorado. *The Colorado River Ecosystem v. State of Colorado*. Case no. 1:17-cv-02316. *Courthouse News Service*, www.courthousenews.com/wp-content/uploads/2017/09/Colorado-River.pdf.

United States, Supreme Court. *Miranda v. Arizona*. *United States Reports*, vol. 384, 13 June 1966, pp. 436–545. *Library of Congress*, cdn.loc.gov/service/ll/usrep/usrep384/usrep384436/usrep384436.pdf.

———. *Trump v. Hawaii*. 585 U.S., 26 June 2018, www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf.

Zaher, Claudia. "When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture." *Law Library Journal*, vol. 94, no. 3, 2002, pp. 460–86. *University of Virginia*, people.virginia.edu/~jdk3t/ZaherWMS.pdf.

https://doi.org/10.1632/pmla.2019.134.5.1121 Published online by Cambridge University Press