

Law as Claim to Justice: Legal History and Legal Speech Acts

Marianne Constable*

| | |
|------------------------------------|-----|
| I. Law as Speech Act..... | 632 |
| II. Law as Event in Time | 637 |
| III. Law as Claim to Justice | 640 |

In *Just Silences*, I wrote that justice today lies—in various ways—in the silences of legal texts.¹ I suggested that different disciplines take different approaches not only to law, but also to silence and to justice. I criticized approaches that disregarded, downplayed, or otherwise dismissed the need to attend to silence and to justice in studying law.

In what follows, I suggest further that taking seriously the difficult claim that justice lies in the silences of legal texts leads one to value precisely the kind of scholarship that recognizes the importance and limitations of texts, as artifacts and as utterances, with differing provenance, context, and meanings. Legal history strikes me as such an area of scholarship. Engagements with law and with its modern silences already happen in legal history. My task today is thus to exhort legal historians to continue to confront, even more tellingly than they already do, issues of justice and silence that other areas of legal scholarship ignore or simplify at their peril. In this spirit, I draw attention to how a rhetorically inflected legal history provokes reflection on justice in law.

The study of law as a series of speech acts that I consider below reorients current tired debates in the legal scholarship of several fields (Part I). It emphasizes—as in some sense does all history—the temporal aspect of law as an event, belonging to a tradition which is itself contested over time (Part II). Yet it also draws attention to how law differs from the subject matter of other sorts of

* Professor of Rhetoric and Zaffaroni Family Chair in Undergraduate Education at the University of California at Berkeley.

1. See generally MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* (2005); see also Marianne Constable, *Speech—Not God or Morality—Connects Our Law to Justice*, BELIEVER (Oct. 2010), http://www.believmag.com/issues/201010/?read=interview_constable.

histories, insofar as law—as rhetorical phenomenon and event—appeals to justice (Part III). My points together offer, if not quite a “theory and method” for legal history, certainly a defense of some of its insights into legal texts and a challenge to those who fail to perceive the relevance of “law on the books” for understanding claims to justice.

I. LAW AS SPEECH ACT

Let me begin, in keeping with the terms of the original call for this conference, with a challenge to legal realism. Although more sophisticated scholars of law now widely disclaim the strict legal realist distinction between “law in action” and “law-on-the-books,” the distinction still holds in much of legal research and legal education. Legal realists and others—including historians—of the “law and . . .” persuasion who turn to the empirical study of law are indeed correct that formal rules do not describe legal behavior. They are correct that legal reasoning bereft of any correspondence with actuality is vacuous. But in distinguishing law-on-the-books from law-in-action and rejecting legal texts as *simply* law-on-the-books, realists—no less than theorists who would reduce law to statements of rules, as we shall see—move too quickly away from the ways that speech and writings happen and matter.

Law-and-society scholarship, ostensibly in opposition to the professional legal academy, has long shown how law acts. The works of members of the Amherst reading group from the 1980s and 1990s and now those of the New Legal Realism emphasize how law acts from the bottom up as well as from the top down.² In the bottom-up formulation, attention to legal ideology, legal consciousness, and law in everyday life does much to fill the old realist “gap” between action and books, or behavior and doctrine, but that filling is not as satisfying as it could be. Law-and-society scholarship, including that of linguists and anthropologists, continues to emphasize legal actions over legal speech and to focus on power, domination, and control in and of law.

Law-and-society thereby shows its limitations. Actions may indeed speak louder than words, in law as elsewhere, as most of law-and-society claims. But using words—speaking or writing—is also action. And—what many who do not have ears behind their ears (as Nietzsche put it)³ do not understand: loudness may not always be what is most at issue. In the context of legal history’s reliance on textual materials (both law and history rely largely on written texts and their authority), a revitalized and explicitly rhetorically informed legal history hastens

2. See work of John Brigham, Sally Merry, Christine Harrington, Austin Sarat, Susan Silbey, and others for examples of scholarship from Amherst reading group participants. For examples of New Legal Realism, see the Wisconsin Law Review’s 2005 issue, “New Legal Realism Symposium: Is it Time for a New Legal Realism?”, 2005 WIS. L. REV. 335–745 (2005).

3. FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS 3 (Wordsworth Editions Limited 2007) (1889).

the death throes of the law-in-action/law-on-the-books distinction, insofar as it shows how law-on-the-books—whether legal doctrines or other sorts of utterances or written productions—are themselves acts, produced and circulated by different sorts of agents over time.

Informed by an understanding of legal writing and speaking as practices, legal history reorients common misunderstandings of legal texts as static (and in Peter Goodrich's work in this volume and elsewhere, of law as image-free).⁴ Cornelia Vismann's incredibly rich *Files: Law and Media Technology*, for instance, shows how different recording practices have shaped particular forms of law.⁵ Practices and materials of documents and files have affected Western notions of truth, concepts of the state, and constructions of the subject.⁶ Vismann recounts with impressive detail how shifts from translating to legislating in Rome, from documents to records in the Middle Ages, from chancery to administrative government in the eighteenth and nineteenth centuries, and from administration to office techniques in the twentieth, correspond to changes in manner of rule. Particular ways of circulating, depositing, hoarding, copying, pasting, deleting, notarizing, storing, compiling, and indexing documents characterize different possibilities and actualities of law. The updating of the codices of imperial Rome, for example, differed from a local town crier's transmission of news. The move from papyrus to parchment offers different concepts of time and of law,⁷ enables compilation,⁸ and corresponds to the rise of an administration that links the official character of its acts to their recording.⁹ Keeping files in public places, rather than in personal notebooks, allows copies to be made to prove legal claims.¹⁰ Emphasis on the evidence of law, rather than its transmission as news, takes reality to be what is found in the file. Formal public announcements also differ from dispatched letters. The silent reader of a sealed letter takes its content—and not the exact wording that is inseparable from the act of announcing—as imperial command. The appearance of certificates to represent an issuer's authority means that format—seals and signatures, writing surface, and letter shape, which had been administrative practicalities during the Roman Empire—vouches for authenticity. It also makes forgery possible.¹¹ Files today are not only used to administer, but are themselves administered. With the “self-processing” files of the twentieth-century office, in contrast to chancery style and

4. Peter Goodrich, *Specters of Law: Why the History of the Legal Spectacle Has Not Been Written*, 1 U.C. IRVINE L. REV. 773 (2011).

5. See generally CORNELIA VISMANN, *FILES: LAW AND MEDIA TECHNOLOGY* (Geoffrey Winthrop-Young trans. 2008).

6. *Id.* at 7.

7. *Id.* at 43.

8. *Id.* at 44.

9. *Id.* at 49.

10. *Id.* at 52.

11. *Id.* at 72–73.

accumulations in secretive state archives, censorship occurs before things are put on record.¹² And, as the materiality of files becomes invisible and the physical file obsolete, data protection concerns the handling of only “the informational substrate of files” on computers. The disappearance of physical files thus simultaneously draws attention to the role files have played as technologies that have shaped Western legal institutions.¹³

In addition to complicating the law-and-society distinction between an ineffective law on the books and a powerful (if also increasingly out-of-control) law in action, legal history’s presentation of texts wreaks havoc with philosophical legal positivism. Legal history in effect shows that context grants “legal” character to a text (or an action). Thus, in legal history, more is required for there to be law than a powerful agent or a simplistic positivism’s commanding authority. The much-maligned John Austin himself recognized the importance of context when he defined law not simply as command, but as the command of a sovereign, backed by threats that subjects are in the habit of obeying.¹⁴

When legal history acknowledges both the dynamism of speech and writing and the necessity of context for grasping whether a phenomenon is law, it shares in the insights of a later Austin. Twentieth-century J.L. Austin famously argued that the success of a (non-nonsensical) utterance—the effectiveness of a command, for instance—depends on the context of its uttering or on what he called the “total speech situation.”¹⁵ For the ostensible speech act of command that is law to work, argue both Austin and Austin, supported by legal history, the circumstances must be right. Or, in J.L. Austin’s lingo, the “felicity” of what he at first calls a “performative utterance” and later an “illocutionary speech act” has certain requirements. Austin identifies “performative” utterances as utterances that do what they say *in* being said: promises, bets, warnings, commands, for instance. Over the course of his lectures, he shows that performative utterances do not require the first-person present indicative form (“I promise you that . . .”, for instance) by which he originally identified them. Both the locution, “I warn you that . . .” (which is in the form of an explicit performative), and the locution, “Look out!” for instance, warn. Austin then renames the performative function of an utterance its “illocutionary” aspect. He distinguishes the illocutionary aspect of a speech act (warning) from its locutionary aspect (He said to look out, or “Look out!”) and its contingent perlocutionary aspect, which describes the effect of what the utterance did (She was startled, or He saved her day). Sociolegal scholars tend to assess the perlocutionary effects of discourse. Legal scholars by contrast often focus on the propositional value of utterances or on what Austin called, in his

12. *Id.* at 142.

13. *Id.* at 15.

14. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 253–54 (Hackett Publ’g Co. Inc. ed. 1998) (1832).

15. *See generally* J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

early discussion, “constative” statements.

For a speech act to succeed illocutionarily, according to Austin, then: there must be a convention or procedure for the act that includes the uttering of certain words by certain persons in certain circumstances; the persons and circumstances in a given situation must be the appropriate ones; the procedure must be executed correctly and also completely; and if certain thoughts or feelings are required, a participant must have those thoughts or feelings, intend to conduct themselves in accordance with them, and so conduct themselves.¹⁶ All parties to law today know this: procedure matters. Whether filing one’s taxes, ordering a computer, buying a car, taking out or foreclosing on a mortgage, the formalities—and more—must be observed to accomplish the act. Unless forms are filled out and fields filled in, all the way, on time, scanned or sent to the right office, signed by the proper parties, stating an appropriate cause of action, for instance, a claim fails to amount to a successful legal complaint. Objection, however warranted, to a witness’s comment called out by a courtroom spectator does not constitute a legal objection. A law professor or an English major’s better-argued and better-written opinion cannot substitute for that of the judge in a case. Just any Rex, in Lon Fuller’s words, cannot make Lex.¹⁷ Context—the conventions and circumstances surrounding an utterance of law—matter to its “success” as legal act, be it command or complaint or objection or ruling or something else.,

The legal positivism that predominates in Western legal philosophy today associates law less with command, of course, than with a system of rules which, in some sense, establishes the very conditions of its own production of rules. (Here I have H.L.A. Hart in mind. His “concept of law” defines law as a system of primary and secondary rules. Hart understands primary rules to be the rules that citizens generally obey. Secondary rules, accepted by officials, designate the primary rules that bind Hartian officials as well as citizens.¹⁸) Yet despite its repudiation of law as command, today’s legal positivism continues to rehearse the old debate between legal positivism and natural law. According to legal positivism, the system of rules that is law has no necessary connection to justice. Contemporary natural law, by contrast, grounds the justice of what counts as law in morality or in “higher law.” While some claim that positivists and natural lawyers speak at cross-purposes, others deny the very salience of the debate. Positivist philosopher of law Liam Murphy, for instance, was asked following his recent Kadish Lecture at Berkeley how much the disagreement between positivism and nonpositivism as to the grounds of law matters. His answer: not much, except in “merely verbal” ways. Modern-day positivism, Murphy argues, accepts that

16. *Id.* at 14–15. The lectures that follow suggest that the requirement that there be “certain” words may be too particular.

17. LON L. FULLER, *THE MORALITY OF LAW* ch. 2 (Yale Univ. Press rev. ed. 1969). Fuller is concerned in particular with “the rule of law” as what makes law what it is.

18. H.L.A. HART, *THE CONCEPT OF LAW* 81 (Oxford Univ. Press 2d ed. 1994).

judges may incorporate moral reasoning into their decision making within a positivistically defined system; nonpositivism, he claims, does not generally produce different results.¹⁹

But results are not all that matters. Legal positivists and natural lawyers do indeed agree on some things. They agree that law—whether as rule or as right—somehow tells us what to do. In the “telling” of law that is acknowledged by both sides, rhetorically savvy legal history again recognizes *activities* of knowledge production, of discovery and enactment, of dissemination and receipt of law. While in principle such activities need not happen through words, today they largely involve language (and, since nineteenth-century codification movements and twentieth-century restatements, writings). The telling of law takes place today through speech acts. And when law speaks, it claims authority, however implicitly. Murphy may thus be correct that disagreement as to the grounds of law matters little; but that law speaks suggests precisely that law and its disagreements cannot be dismissed as “merely” verbal.

Law’s claims of authority are reinforced by particular institutions and carry with them particular traditions, as legal histories show.²⁰ And claims of law are manifest not only in the acts of legal officials but also in the acts of those who would challenge a so-called law in the name of justice. Think of texts about the U.S. law of slavery in the nineteenth century, about civil rights in the twentieth, about international war crimes in the twenty-first. These texts have been deposited, hoarded, copied, pasted, deleted, censored, notarized, published, stored, compiled, annotated, digitized, presented at conferences. They are more than the artifacts of particular circulatory practices, however. They are also utterances, sometimes put to use in ways their authors never imagined, articulating through their speech acts claims, not always explicit, about justice and injustice. Speech acts of claiming bind law to issues of justice. An “issue” in law is that over which parties are joined and divided. Implicit in both the rules and institutions of Western law and in the claims of those who would contest aspects of that law are appeals to justice. The most authoritative spokespersons of law are called “justices.” But claims of law and appeals to justice are made no less by those who would contest a given law. Claims on behalf of and within the “system,” as well as claims made against it, appeal however silently, however strategically, however hypocritically, to justice. Those claims bind law to justice even—or perhaps especially—when law is *unjust*. Neither a God nor a higher law, but the claiming that goes on in legal speech acts, binds us to issues of justice.

19. Liam Murphy, Herbert Peterfreund Professor of Law and Philosophy, New York University School of Law, Kadish Lecture at the University of California Berkeley School of Law (Feb. 23, 2010).

20. On ancient and Biblical law, see work by David Daube. On Western law more generally, see DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* (1990). See also ANNABEL PATTERSON, *READING HOLINSHED’S CHRONICLES* (1994).

Claiming is only one (if perhaps a privileged one?) of the speech acts of law, however. Legal sources and actors complain, rebut, instruct, appeal, threaten, testify, swear, object, overrule, enact, appoint, find, dismiss, amend, approve, deny, declare, agree, promise, qualify, hold, sentence They act or “verb” in the name of the law and of its authority (whatever its source). Insofar as legal history reads legal texts for what they *do* and how they do it (for verbs and for adverbs), rather than for the truth of their representations and their classifications of persons and things (for nouns and rules) as is done in some legal education,²¹ the doings of law, its legal speech acts, emerge as events or occurrences that happen in or take time.

II. LAW AS EVENT IN TIME

When law becomes speech act, history tells stories of law as happenings and events, verbings and doings, rather than as derivations from or instantiations of statements of rules. Take a standard case that appears in some first-year criminal law casebooks, *Morissette v. United States*.²²

The usual way of teaching students to read (and brief) the case is to ask them for its issue, rule, analysis, and conclusion (following identification of parties, procedural status, description of facts and so forth).²³ *Morissette* was convicted of conversion, for gathering from federal land spent bomb casings. Apparently thinking they were abandoned property, he sold them.

A criminal law instructor, having established these facts, turns to the reasoning by which the Supreme Court reverses the appellate court’s affirmation of *Morissette*’s conviction. Students can then read *Morissette* for establishing *that* intention is a requisite element of criminal liability; *that* in omitting reference to intention and referring to “knowing conversion” in its statute, Congress did not intend to create a new category of crime (unwitting conversion); and *that*, where intent is an element of a crime, trial court instructions raising a presumption of intention from the evidence are in error.

If however the opinion is read instead for what it does and indeed as it is written, *Morissette* becomes the story, itself a speech act, of the series of speech acts leading up to and comprising the Supreme Court judgment, again itself a speech act. The opinion reports that: under investigation, *Morissette* “voluntarily, promptly and candidly” told his story to investigators who nevertheless indicted him under a federal statute for “unlawfully, wil[l]fully and knowingly steal[ing] and

21. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007) for the ways students are taught to read and classify according to terms of legal authority.

22. *Morissette v. United States*, 342 U.S. 246 (1952).

23. See discussion of case briefing in, for example, LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* ch. 3 (6th ed. 2007); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* ch. 4 (4th ed. 2001).

convert[ing] property of the United States.” Indictment is of course a speech act. *Morissette* testified—another speech act—that he thought the casings were abandoned and that he had taken them “with no wrongful or criminal intent.” The trial court “convicted and sentenced” (speech act) him; the Court of Appeals affirmed (speech act), one judge dissented (speech act). The Supreme Court reversed (speech act) the Court of Appeals’ decision. In its opinion, the Supreme Court deals first with the appellate court’s interpretation of the statute enacted (speech act) by Congress, then with the trial judge’s erroneous instructions (speech act) to a jury. The Supreme Court argues (speech act) that given the trial evidence, the jury could legitimately have concluded (speech act) otherwise.

First, the Supreme Court argues, the Court of Appeals “construe[d] omission” (here a speech act) of criminal intent from the Congressional statute as “dispensing with it.” But in interpreting (here again a speech act) the pronouncements (speech act) attributed to common-law commentators and state law, the Supreme Court holds (speech act) that “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas . . . [A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions . . .” The Supreme Court “finds [speech act] no grounds for inferring [speech act] any affirmative instruction [speech act] from Congress to eliminate intent from any offense with which this defendant was charged [another speech act].”

Further, the Supreme Court “read[s] the record” (again, a speech act) for a theory of the case and finds (a speech act) that the trial court “erred” (speech act) in “instructing” (speech act) the jury as to “presumptive” intent (might presuming be a speech act?) insofar as such presumption allows the jury to make assumptions (like inferring, a speech act) that conflict with the presumption of innocence . . . You get the idea! The opinion itself becomes part of a series of speech acts that make claims about the series of speech acts that claim to be, or to be in the name of, the law.

Reading *Morissette* this way reinforces two earlier points. First, the speech acts of law involve actions—indicting, testifying, convicting, sentencing, affirming, dissenting, reversing—that at minimum must meet certain contextual requirements to count as examples of the performative utterances that they are—J.L. Austin’s felicity conditions. Second, legal speech acts, as actions or verbs, happen in time. The “rules” extracted from briefing a case, by contrast, are things or nouns, to which are attributed a kind of timeless existence. (*Morissette*, with its focus on the “intention” of Congress and of *Morissette*, also draws attention to adverbs or the manner in which actors undertake or carry out actions, including speech acts. I discuss the importance of adverbs to law and to telling stories of law and legal events elsewhere. In brief: just as grammar requires a complete sentence that includes a subject and predicate or a noun that verbs, so too a legal judgment

requires a subject who predicates in a particular way. The subject of legal judgment not only causes effects, but must be capable of doing so in an “intentional” or willed manner).

To transform legal opinions from being static texts from which students extract noun-like rules into being part of an event in which judges actively state rules is a first step to understanding that law happens, if only as the action of stating rules. But this step is not enough. While stating rules is a speech act, to grasp law or even judicial behavior primarily as the stating of rules still accords law and judges too narrow a range of action.²⁴ As we have seen, events of law involve many more legal speech acts than stating rules or, for that matter, commanding. Legal histories describe and thereby expand the contexts of such legal events, showing not just that law has a tradition that gives meaning to events, but that law itself constitutes a contested tradition in which particular practices may take on new meanings or disappear.²⁵ (Further, as I develop elsewhere, grasping language solely as speech event or as the action of a subject also offers too narrow an understanding of language.²⁶)

While legal events can be told, their import for the tradition cannot be completely foretold. Who could have predicted that a medieval law writ by a widow who fails to win back her land could become a twenty-first-century example of “the thrill” of legal analysis?²⁷ Or that the editing out of lawyers’ names (but not those of judges) in casebooks suggests that law students are not taught how lawyers in past cases “had a sense of injustice, a sense of wrongness about the system, and then used their lawyering skills to bring about a change. And they were successful.”²⁸ As legal history moves beyond the actualities of sociolegal studies that downplay speech and writings, beyond the abstractions of mainstream legal philosophy that rejects justice, and beyond the statements of rules of professional legal education, to study events that take place over time, it shows how “justice” has been said—and unsaid—sometimes surprisingly, in texts of law. Note the course of the famous *U.S. v. Carolene Products* footnote.²⁹ Stories of how a bill gets passed—or fails to pass—of what an opinion—or a footnote or a phrase—meant and has come to mean, of how a document was lost and has

24. For an account of the “courtesy” of judges, see KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* (2010).

25. In addition to Vismann and texts mentioned in earlier notes, see for instance, ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN TRADITION* (2005); SHAI LAVI, *THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES* (2005); KARL SCHOEMAKER, *SANCTUARY AND CRIME IN THE MIDDLE AGES, 400–1500* (2011).

26. MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* (forthcoming).

27. Thomas Lund, *Medieval Law Should Be Taught*, 58 J. LEGAL EDUC. 540–44 (2008).

28. Frank Tuerkheimer, *A Short Essay on the Editing of Cases in Casebooks*, 58 J. LEGAL EDUC. 531–32 (2008).

29. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

been found—lead one to wonder about what may *yet* be said and unsaid, not only in texts of law, but also in those of history.³⁰

III. LAW AS CLAIM TO JUSTICE

When sociolegal studies emphasize action at the expense of speech and law schools reduce law to statements of rules and economic calculations, while legal philosophy exiles justice from its bailiwick, history and rhetoric take up the claims—explicit and implicit, past and present—to justice in legal speech. They reveal the particularity of law. They show how law matters in a different way than do the other phenomena that are the central concerns of most social and cultural histories.

Social and cultural histories either seek what is typical, from which to generalize (as in the empirical research of social sciences), or they explore what is presumed unique—whether spectacular or marginal—from which to glean a cultural imaginary of secret desires and suppressed anxieties. But law always matters in both ways, as that from which to generalize and as that which reveals more than itself. Legal histories show law as speech act and as event to be both typical of and unique in society. Legal histories depict law as both representative and atypical of its culture.

The history of law matters not only because what is done through law is both typical and revealing of fantasy, however. Legal history matters also insofar as it reminds us that “the name of the law” implicitly invoked in claims about a given law evokes issues of justice and injustice for those who speak or hear law. How acts or events or claims or utterances “in the name of the law” *have* mattered is the peculiar contribution of history to legal scholarship. That legal history shows that law has mattered as a name and as an act that was linked—again, however hypocritically, strategically, desperately, defensively—to issues of justice raises questions about the future.

Will the aspect of law that is bound to issues and claims of justice continue to matter? The best legal history raises just such a question about modern law. Texts of legal history recall and name, however silently, issues not only of sociolegal power, philosophical system, and academic rules, but also of justice. They draw attention to what has been and lead us to wonder what will become of the matter of law or of its claims to justice.

30. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975) (providing an unexpected endorsement of the rule of law).