

## Book Review

Marianne Constable: *Our Word is Our Bond. How Legal Speech Acts*. Stanford University Press, Stanford 2014.

Julen Etxabe\*

Marianne Constable's *Our Word is Our Bond* is a rhetorical and jurisprudential investigation into modern law's embeddedness in language and its relation to justice, an alternative to those who would define law as a system of rules, as a regulatory science, a problem-solving technique, or as an instrument of power. At the most basic level, *Our Word is Our Bond* argues that modern law (mostly of the Anglo-American variety, but not only<sup>1</sup>) exists rhetorically, in the sense that legal institutions and claims such as promises, oaths, pleas, contracts, marriages, torts, criminal indictments, and judgments come to fruition through acts of language—which include symbols, gestures, and silences. To say that language is central to law, to be sure, is not to say that language is all there is to law, or that all law is reducible to language; in fact, 'law cannot be *reduced* to anything' (Constable 2014, 132), which could be taken as the central programmatic statement of the book.

In contrast to the eternal and immutable truths of Philosophy, rhetoric seeks the contextual and contingent 'appropriate saying', relative to particular speakers, situations, and contexts. Consistently, the book offers neither a *theory* of justice nor a *concept* of law as such. It shows, rather, how modern law is a matter of language and that justice, however impossible to define and difficult to determine, depends on the relationships we have with one another (Constable 2014, 4). Thus, to those who ask 'What is law?', the book suggests that the answer lies in further investigating law's relations to the rhetorical activities of *claiming* and *hearing* (Ibid., 1). In so

---

\* University Researcher, Helsinki Collegium for Advanced Studies.

<sup>1</sup> Constable's examples are drawn from the Anglo-American legal tradition, but claiming and hearing are common to a plurality of legal contexts and geographies.

saying, the book targets contemporary legal education that teaches law as a system of rules; sociolegal scholarship which, by sharply dividing speech and action, dismisses and fails to understand how speech acts<sup>2</sup>; and the dominant legal positivism, which rejects the necessary connection between law and justice.

For a long time, rhetoric has suffered from a bad reputation of using language to persuade by whatever means necessary, a sort of verbal manipulation unconcerned with sincerity or honesty and used merely to equivocate or conceal. It is also viewed as purely ornamental, and thus believed to be superfluous and dispensable: an outward layer to peel off in order to reach the 'real substance' of things. As a form of discourse, rhetoric is often equated with the kind of epistemic relativism where 'anything goes' as long as presented in a nice 'package'. Finally, 'rhetorical' questions are the kind that are not meant to be answered, for the answers are already implied in the question. Thus rhetorical questions elide the figure and autonomy of the listener, who is there only to assent to the conclusion already reached by the questioner.

Adopting none of these views, the book's claim that law is rhetorical alludes firstly to the *languagefulness* of law—its necessary dependence and reliance upon language. Dishonest, cynical and manipulative speech is certainly a reality of legal discourse, but attention to it allows one also to contest such (ab)uses. To those who would dismiss rhetoric as a cover up, Constable responds that language reveals more than what it says explicitly, and that close attention to it allows one to uncover what the law discloses, as well as what it hides, omits, represses, or suppresses (Constable 2014, 137).

More generally, the book's rhetorical approach opposes the dominant scientific paradigm applied to law (and concomitant ideals of objectivity, detachment, and fact/value distinction), replacing it with a richer and more personal understanding and participation in the object of study. Therefore, a rhetorical investigation into the claims of law and justice is *not a nihilistic disavowal of them* (Constable 2014, 9). As Constable argues, while rhetoric points out that language is not truth, it also recognizes that words, in particular contexts, may be true or false; similarly, it is argued that even though law is not justice, legal claims in particular contexts may be just or unjust (Ibid., 9). The book then seeks to explore what these claims are, how they assert truth and demand recognition, and in what way they bind us.

Lastly, Constable places emphasis on the figure and responsibility of the listener, arguing convincingly that law requires to be *heard* before it can be properly followed, and that the hearer is as responsible for the continued existence of law as the official is said to be. *Our Word is Our Bond* serves as a corrective to the Hartian emphasis on officials, and the hierarchical relationship between 'authorities' and citizens.

Before laying out the rest of the argument, it may be helpful to clarify three key terms: With respect to *language*, the book adopts a non-representational and non-propositional view, for 'language is not like a window through which we

---

<sup>2</sup> Likewise, Constable challenges the pernicious grip of policy talk in contemporary societies, as well as discourses that make law into a set of optimal solutions where the imperfect aspects of law are its ineffectiveness and inefficiency (Constable 2014, 136-137).

look to an outside of which we are not part. Our speech is rather akin rather to the paths we walk as we make our world through the wider world' (Constable 2014, 15).<sup>3</sup> Thus, *truth* refers not to the mere accuracy of propositions, or to the correspondence of propositional statements to external realities. Nor does it refer to the coherence of language-use among subjects speaking the same tongue. 'At issue in the truth of language,' writes Constable, 'is the showing or revealing of a world that is not completely of human making, through a human capacity to speak that is not completely within human control' (Constable 2014, 109). In turn, *justice* does not mark a return to the metaphysical certainties of natural law—a world before Nietzsche—but comes closer to the Heideggerian act of clearing, whereby the world discloses itself through language (which is never purely subjective or human-centric). In a world where traditional natural law commitments appear increasingly unavailable, the empiricism of social sciences demands a measurable justice, and as for the opposite movement of deconstruction, where justice is an inaccessible horizon of possibility, Constable maintains that justice is partial and incomplete, but it may be done (Ibid., 132)—sometimes, even, without being said (Ibid., 138).<sup>4</sup>

The overall arch of the book argues that we are bound to law, and law binds us, through shared language. These bonds manifest themselves through dialogic acts or interactions in which we make claims, however imperfectly, of one another. At the same time, the dialogic social acts of law bind us not only into imperfect communities, but also to a larger world that exceeds conventional morality and the articulations of positive law. The argument is grounded on several building blocks: First, the book relies on J.L. Austin's performative speech-acts (promising, warning, declaring, appointing, dissenting...), which succeed or fail in part on the basis of something other than the truth or falsity of what they state, namely a set of conventional elements that Austin calls the 'felicity conditions'<sup>5</sup> of the utterance. The utterance's *locutionary* content (saying something), *illocutionary* force (doing something *in* being said) and *perlocutionary* effect (doing something *by* being said) together draw attention to the act-like character of legal speech, which is ignored by too sharp a separation between 'law-on-the-books' and 'law-in-action'.<sup>6</sup>

It is worth pointing out that the *languagefulness* of speech acts does not diminish their potentially violent content, where Constable recalls the famous final scene of Virgil's *Aeneid*: "So saying" [*dicens*], Virgil's *Aeneid* concludes, "Aeneas buried

---

3 Relying on Nietzsche's critique of grammar as metaphysics, the book suggests that both 'law and language are sites of judgment and of ascriptions of responsibility' (Constable 2014, 11). At the same time Constable argues in Heideggerian vein that, though humanly related, language need not be human-centric or conform to human will (Constable 2014, 128).

4 For the argument that justice today lies in the silences of positive law, see Constable 2005.

5 These include, first, an accepted procedure for the act (a.1) and their application to particular persons and situations (a.2). Secondly, the utterance must be carried out correctly (b.1) and completely (b.2). And when the procedure designs for persons to have certain intentions, they must have those intentions (c1); if subsequent conduct is part of the procedure, those persons must conduct themselves accordingly (c.2).

6 'Despite some strands of legal realism that would dismiss legal language in the name of a radical distinction between "law-in-action" and "law-on-the-books"', writes Constable, 'sociolegal studies cannot completely disregard language nor unmoor it from their own claims about the law' (Constable 2014, 43).

his sword into his (opponent's) chest"—thereby founding Rome' (Constable 2014, 105). In this example, the saying of Aeneas coincides with the action of burying his sword into Turnus' chest, which in turn is a direct and violent rejoinder to Turnus' previous act of supplication. All these speech acts merge further into a moral register coincident with the founding of Rome, which is ultimately for the reader to judge.

Despite Austin's contributions, Constable points out that an Austinian account that suggests that legal speech acts are more or less successful performances to be assessed by conventions for speaking does not go far enough in recognizing the role of the hearer (Constable 2014, 33). As a second step, the book incorporates Stanley Cavell's 'passionate utterances', which are neither constative nor performative but focus on the 'you'. A passionate utterance such as 'I insult you' or 'I seduce you'—or even 'I persuade you'—does not do what it says in the same way as the performative 'I promise...' does, and requires a hearer who is attuned to it in a particular way. Moreover, passionate utterances require imagination (and often considerable talent) to move 'you', in contrast to performative utterances that only require knowledge of convention. While accepting Cavell's main point, Constable rejects the strict dichotomy between convention and passion. Insofar as legal claims are persuasive acts designed to make demands on you, they are indeed 'passionate utterances', but the fact that legal claims often require thought, tact, and imagination implies that any strong distinction between a conventional 'order of law' and a passionate 'disorder of desire' does not do justice to the appeal of legal speech (Ibid., 103).

The third pillar of the argument relies on Adolf Reinach's 'social acts', which require being heard or apprehended by a second person for them to happen, for example, in an *invitation*. Social acts may instigate responses, but they necessitate no particular response in order to be completed. For example, an invitee may forget to respond, but the invitation may have been appropriately uttered and heard, so that it will have changed a state of affairs. Social acts involve a particularly human capacity for initiating new states of affairs (which Hannah Arendt called 'natality'), but the speaker can never completely determine how a social act, or the state of affairs it initiates, will be taken up—or for how long it will endure (Constable 2014, 91). Not only are there different kinds of hearing, but the dependence of an act on its being heard opens it up to unconventional interpretations and possibilities (Ibid., 33), in various changing contexts.

Offering diverse and thorough examples, Constable makes significant contributions to our understanding of legal claims, their distinct temporalities, the dialogical construction of law, and the imperfect (and sometimes tragic) world we share and within which we and the law exist. As to the nature of legal claims, Constable argues that 'many claims made in the name of the law do not necessarily *exist* as positive law at the moment they are made; neither are they necessarily effective nor produce results' (Constable 2014, 76). At the moment of their being spoken they appeal to a 'law' that they affirm as a speaker's and hearer's own, even though not all legal claims will be ultimately (re)cognizable (Ibid., 76-77). At an *ontological* level, then, we might say claims exist as potentiality, in what Robert Cover called the realm

of the ‘might be’ (see Etxabe, 2011, 122).

Moreover, speech acts made in the name of law may be spoken strategically, hypocritically, even unfairly. But insofar as claims are spoken in the name of some law, they assert the truth of which they speak and demand recognition as belonging to the shared law in the name of which the claim is made. Thus, legal claims have a necessary relation with justice—an evaluative or *axiological* dimension—whether or not they affirm or contest positive law and whether or not they are just (Constable 2014, 77-78). Concerning their *epistemic* ground, legal claims are made from within a given ‘tradition,’<sup>7</sup> although at times they may interrupt it. Knowing how to craft legal claims is a form of practical knowledge not of a Kantian moral law, but of an ongoing and never completely articulable language which, contrary to what social contract theorists from Hobbes to Locke to Rawls to Habermas suppose, we are already—or *will already have been*—imperfectly sharing.<sup>8</sup>

The latter sentence paves the way for a most innovative aspect of Constable’s argument, namely, the twofold temporal dimension of legal claims. According to Constable, legal claims (and legal acts and events more broadly) are to be understood in two different temporal registers: On the one hand, the future perfect offers a way of thinking about the way claims are made in the present but await a future, when they *will have been* retroactively settled—an argument that echoes Derrida’s ‘fabulous retroactivity’ of the Declaration of Independence. Constable offers the example of the *Palsgraf* decision authored by Benjamin Cardozo in 1928, which redefined the rules of negligence to limit liability to ‘foreseeable risks,’ while rejecting contemporary standards extending it to all harms ‘proximately caused’ by the wrongful act. In 1928 Cardozo’s holding may *become* precedent, but at the moment of the decision it is *not yet*, and indeed *may never turn out to be*, precedent. In other words, the issue can only be answered in the future, only after an appropriately related case arises, at which point *it will have become* precedent.

On the other hand, Constable develops the idea of the ‘imperfect,’ which is the aspect of the verb that alludes to ongoing and habitual ways of doing things. This ongoing or continuous background of practical knowledge allows particular legal acts to be done and to be known as the acts and events that they turn out to be, even as this background knowledge, like knowledge of a given language, is imperfect, incompletely articulable, and interruptible (Constable 2014, 131). For instance, unfamiliar ways of doing things may interrupt or challenge habitual or routine ways of hearing and judging (Ibid., 135), thereby reconfiguring states of affairs in previously unthought ways (Ibid., 89). Since the ongoing practical knowledge need not coincide with the community’s articulated rules or conventions, the ‘imperfect’ may also point to a non-harmonious or consensual ethical world (that the final chapter alludes to tragedy gives credence to this interpretation).

---

7 By ‘tradition’ Constable means that speaker and hearers participate in legal and social acts and share practical knowledge of language, not that all agree (Constable 2014, 42).

8 As Constable puts it, ‘[t]he ragged commonality of knowledge does not follow from acts of agreement, but rather makes agreement possible’ (Constable 2014, 105).

For Constable both the future perfect and the imperfect are needed to understand the temporal dimension of legal claims, and challenge the idea-static universe of legal provisions and fixed meanings (Constable 2014, 134). The dual temporal aspect entails further that ‘law cannot be fully grasped as a set of events in a linear chronology of cause and effect’ (Ibid., 101). Cardozo’s ruling may have had the effect of changing the course of tort law,<sup>9</sup> but ‘if one is to understand how utterances can come to have impact or how rules emerge, then one must attend to how texts circulate, to how language is used in interactions and institutions’ (Ibid., 41).

\* \* \*

To recapitulate, Austin has helped to explain the sphere of the ‘I’ who acts through speech; Cavell the sphere of the ‘you’ who is interpellated by it; and Reinach the sphere of the ‘he/she’ who is to hear it. It is now necessary to introduce the world of law in the name of which ‘we’ make legal claims, the ‘it’ to which ‘you’ and ‘I’ appeal in order to establish common bonds. Indeed, law is the third party in whose name both official and nonofficial claimants speak; but law is a peculiar third party, in that it also functions as the first-person plural or ‘we’ to which claimants, in their desire to persuade, would recall their hearers. Making legal claims is thus an imperfect rhetorical art, designed to evoke in their respective hearers a shared sense of obligation, in the name of an ostensible third party: ‘our’ law.

And how is the ‘we’ of law disclosed? Constable develops a dialogical construction that challenges hierarchical, command theories of law.<sup>10</sup> As Constable explains it, for the *we* of ‘our word’ and ‘our bond’ to emerge *I* must become *you*, and *you, I* to one another (Constable 2014, 93). In other words, ‘I’ appeal to ‘you’ to judge not simply as ‘I’ do, but as ‘we’ do, in the name of a particular and peculiar third party: our shared law. Thus, fluid and practical (imperfect) knowledge manifests itself in the turn-taking dialogues of speakers and hearers who talk with one another and recognize the same world, despite their differences. Dialogues may also include, and often gesture toward, more than two interlocutors: The third-person grammar of *he, she, it* supplements *I, you, and we*, showing further the complexity of dialogue (Ibid., 94).

In presenting such dialogical construction, Constable ‘does not set out to identify an “ideal speech situation” or a “discourse ethics” à la Habermas’ (Constable 2014, 133). Arguably a closer affinity can be drawn to Bakhtinian *dialogism* (Bakhtin 1981 and 1984) which does not bracket, but rather incorporates, affective, ideological,

---

9 Changing the history of accident law, Constable argues, ‘is a more or less contingent effect of what was said’ (68). This raises the difficult question of the relationship of Cardozo’s language to the change that effectively happened. Still, Constable reminds us in Austinian vein that ‘[t]he assessment of the success of an act [...] cannot be simply in terms of future impact, for the accomplishment of the act or performance can be distinguished from its fulfilment’ (Constable 2014, 75).

10 ‘Nineteenth-century legal positivism viewed subjects of law as objects of commands issued by the sovereign-subject, but the addressees of legal claims today seldom appear in this way’ (Constable 2014, 92). ‘In responding “I will do it”, the actor constitutes him- or herself not only as hearer and addressee of an imperative but also as actor and speaker’ (Ibid., 93).

and rhetorical power relations. (In addition, Bakhtin goes further than Austin in recognizing the role of the ‘other’ in the utterance.) I want briefly to flesh out this possible connection by imaginatively expanding on a short example of dialogue offered in the book:

A: I’d like pizza tonight. How would you like to go to that Italian place by the bay?

B: I guess I could have salad if you really want to go.

How to interpret this dialogue between A and B? Is B saying that she<sup>11</sup> does not mind going to the pizza place? Or is B trying to say, though politely, that she does not really want to go? But if the plan A offers does not genuinely appeal to B, why doesn’t she simply say it? Does she expect A to notice for himself? Or has B given up the hope that her wishes will be attended to by A? In turn, is A’s desire for pizza strong enough to dismiss B’s (hardly veiled) concerns about having to order a salad?

Interpreting this short dialogue entails fleshing out as many issues as the sort of people A and B are, their previous history together, the kind of plans they like to make, the kind of food they like, and, in short, the entire forms of life that are disclosed in living dialogues. This is where Mikhail Bakhtin’s theory of the utterance (Bakhtin 1986) can be enriching, as I can simply sketch here. The main thrust is to incorporate the *interactions* between speakers—and particularly the answering world—into the utterance; for an utterance does not just call into being what it performs, but it also anticipates and imagines an answering world, so that what I say is both *inviting* a future response and simultaneously *presupposing* it in the saying.

The other is introduced not as someone who exists outside, lying in wait to interpret (hear or listen) the utterance, but as part of its structure of signification. As Maurizio Lazzarato explains further, the difference with Austin, ‘the response that the [Bakhtinian] utterance awaits is an ... “active responsive attitude”, an “active responsive comprehension” of the other, unlike the [Austinian] performative where the other is neither autonomous nor free’ (Lazzarato 2009). More importantly, for Bakhtin, ‘comprehension is always taking up a position, a judgment, a response—an action inside dialogical relations’ (Ibid), while it may be argued that in eliding the listener, the Austinian performance functions like the rhetorical questions explained at the beginning. Bakhtin underlines the affective, as well as evaluative and political dimensions, of language pertaining to living dialogues. I will mention four:

1) Voice, intonation, inflexion, accent, and emphasis: For example, in the utterance ‘I’d like pizza tonight’, the word ‘like’ may be more or less stressed, while the rejoinder ‘if you really want to go’ may either stress the word ‘really’ or de-emphasize it using a softer flat tone. Thus, the tone of the question ‘How do you like...?’ may indicate whether it is a genuine invitation, or a foreclosed option, closer to a command; in turn, the answer may indicate enthusiasm, tediousness, or passivity. Intonation thus expresses the affective register and the ‘volitional orientation’ of an utterance.

---

11 For the sake of convenience, I have used the gendered nouns ‘he’ and ‘she’ to refer to A and B.

2) A second significant aspect is the speaker's relationship with his or her own language. For example, the rejoinder 'I guess...' may be employed with more or less detachment, sincerity, resignation, insolence, or defiance.

3) The relationship of the utterances with prior utterances, which are expressive of complex genealogies and histories. For instance, has this scene or conversation taken place before between A and B? Is the conversation running through a known script? Are variants being introduced in this particular instance? To which genre does the conversation belong or contribute?

4) Relationship between the utterances of speakers (e.g. agreement/disagreement, conformity/disconformity; responsiveness/evasiveness). For instance, the statement 'I'd like pizza tonight' can genuinely usher the door to an endearing invitation, or else function like the conclusory premise of a plan already decided. In turn, B's rejoinder 'if you really want to go' might welcome A's initiative and wishes, or else passive-aggressively point to the need for A seriously to reconsider them. And thus, finally we might ask: Is this conversation the beginning of a beautiful night out or the prelude to a coming storm?

Dialogues such as this require subtle readings beyond the 'denotative' (i.e. descriptive) register. Legal scholarship that ignores, dismisses, or carelessly glosses over it, does so at its own peril. For example, without careful and attentive reading of the concrete rhetorical context of an utterance such as 'it is not the issue to substitute the democratically elected representatives for the judge's personal ideology', one could hardly guess whether this sentence, employed on countless occasions and in countless jurisprudential debates, is the expression of an exemplary judicial deference, the opposite attempt to delineate the limits of majoritarianism,<sup>12</sup> or an empty cliché in defense of the status quo.

\* \* \*

The concluding chapter of the book considers how the social act of claiming binds us to a world that exceeds the assertions and demands of conventional moralities and law. In closing, *Our Word is Our Bond* offers an insightful reading of Euripides' tragedy *Hippolytus* and, in particular, of the famous line 612: 'My tongue swore, my mind did not' uttered by Hippolytus, which Austin understood to imply an attempt to repudiate his promise not to reveal Phaedra's secret. Against Austin, Constable shows compellingly that Hippolytus is not trying to release himself from the obligation to keep the secret, but rather expressing his profound dismay at being bound to something that is not virtuous at all merely because he promised—a promise uttered by his tongue, but not his mind. In other words, Hippolytus means not to break his

---

12 See the majority opinion of Justice McLachlin in *Sauvé v. Canada* (Chief Electoral Officer) [2002] 3 S.C.R. 535 (arguing that striking down legislation banning prisoners from voting 'is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense').

promise as Austin thought, but to accept the consequences of having given his word, although at the same time passionately objecting to the injustice of a world that requires oaths such as his to be kept.

I find this reading of *Hippolytus* compelling, and the example of tragedy itself fitting for thinking about the world where we make legal claims. This world is at times inhospitable, cruel, and irrational beyond human control, but we hope our words will help us navigate the storm without drowning. While words alone cannot guarantee justice (140), claims of justice accord well with an imperfectly spoken claim that the ever-imperfect promise of language be kept (129). Here may be a lesson for all in this thoughtful and inspiring book.

## Bibliography

Bakhtin, Mikhail: 'Discourse in the Novel'. In *The Dialogic Imagination. Four Essays*. University of Texas Press, Austin 1981, 259-422.

Bakhtin, Mikhail: *Problems of Dostoevsky's Poetics*. Edited and translated by Caryl Emerson. University of Minnesota Press, Minneapolis 1984.

Bakhtin, Mikhail: 'The Problem of Speech Genres'. In *Speech Genres and Other Late Essays*. University of Texas Press, Austin 1986, 60-102.

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

Constable, Marianne: *Our Word is Our Bond. How Legal Speech Acts*. Stanford University Press, Stanford 2014.

Etxabe, Julen: 'The Legal Universe After Robert Cover'. 4(1) *Law and Humanities* (2010) 115-147.

Lazzarato, Maurizio: 'Mikhail Bakhtin's Theory of the Utterance'. Translated by Arianna Bove, Maastricht 2009. Available on <[http://www.generation-online.org/p/fp\\_lazzarato6.htm](http://www.generation-online.org/p/fp_lazzarato6.htm)> (last accessed June 3, 2015).