

Speaking of the Imperfect: Law, Language and Justice

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Even as legal positivism asserts that there is no necessary connection between law and justice, persons appeal to law when they seek justice. What is the relation between law and justice? This paper argues that the answer today to the question of the relation between law and justice lies in language. Even as sociolegal scholars study law as a matter of social power and empirical impact and dismiss 'law-on-the-books' in favor of 'law-in-action', citizens contest or affirm such power through claims made in the name of justice. What is the relation between socio-empirical reality and claims of justice? This paper argues that understanding claims of justice, as well as the reality of law for that matter, solely in terms of social power and empirical impact neglects important insights that the humanities bring to bear on law and language. The answer to the question, 'what is law?' today lies in law's relation to speech. The answer to the age-old philosophical question, 'what is justice?' lies in further exploring speech and the silences out of which speech comes.

The argument develops from *Just Silences* which suggested, in the context of U.S. law, that the justice of positive law lies in silences (Constable 2005). Positive law is not and has not been the only law. Positive law may indeed be a matter of the empirical impact of coercive or state power, of social control, or of policy-making, as sociolegal scholars and others would have it. But in the history of the West or of the global North, law has also been a matter of custom, of divine or natural law, of higher morality, and of procedural fairness. Whatever one now takes law to be, this paper argues, law today is also and perhaps more fundamentally, like justice, a matter of language.

This is not to say that law is justice, nor that either law or justice need be said explicitly. Quite the contrary, as we shall see. As legal positivism points out, the connection of law to justice is not 'necessary' in any logical or universal or empirical sense. Further, although contemporary state law indeed often presents itself in

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documents and files and professional law schools focus on reading and writing, neither is the connection of law to language a logical or empirical necessity. Rather, this paper argues, law is language in what one could call a grammatically ‘imperfect’ sense.

Grammatically, a sentence is in the imperfect when its subject is acting continuously, incompletely, habitually, routinely, indefinitely, in an ongoing manner that can be interrupted. ‘We were speaking, when we were interrupted by a large bang’, for instance. When one is said to be speaking a language like English, one might be said to be speaking imperfectly or in the imperfect. One belongs with others to an imperfect community of those who know, incompletely and to varying degrees, how to speak the language. The ‘imperfect’ does not exhaust grammatical relations to action and to temporality of course. When I declare something to you or you tell me to do something, for instance, our utterances take a present active form that can later be described in the past tense or as grammatically ‘perfect’ or complete. ‘I warn you that a big storm is coming’, for instance, or ‘Go inside!’ Such exchanges manifest themselves in a present, as interruptions to our incompletely articulated and articulable knowledge of our shared tongue or against the imperfect background of our speaking English. ‘As we were hanging out talking as we usually do, you warned me about the upcoming storm.’

As with language, so too with law. On the one hand, we share an imperfect and incompletely articulable understanding of law as our way of living. On the other hand, in the legal speech acts such as marriage, contract, and appeal that take place in a present, we—officials and others—speaking with and hearing one another, initiate and transform states of affairs. A couple is now married, obligations have been established, a conviction is challenged. The shared knowledge that enables legal acts to transform the world and to bring new names and judgements into being, is not simply causal or empirical. It belongs imperfectly to ‘we’ who share knowledge of language and who emerge from turn-taking claims of ‘you’ and ‘I’ in dialogue. ‘We’ do not always agree with one another in speech or about legal acts done through speech, but even when we disagree, we who acknowledge these acts as what they are do so against a background of our imperfect and shared knowledge of how to speak of the world with one another.

As a response ‘from a law and humanities perspective’ to the topic of ‘law’s justice’ for this special issue, this paper very briefly sets out a context for approaching law as language, sketches an approach to law as language in a bit more detail, and suggests its implications for justice.¹ It speaks in the English language with an eye to U.S. law and hereby acknowledges the limitations and qualifications that must be implied in such a focus. It proceeds in three parts. Part 1 situates the current question of law’s relation to language in the history of law and justice that grows out of Friedrich Nietzsche’s question of what it means to presume that there are foundations of law at all. The turn to language arises from this question. Part 2 explains further the double

¹ The argument is being developed more fully in my forthcoming book *Our Word is Our Bond: How Legal Speech Acts* (book manuscript in progress).

aspect of law as imperfect and active that is mentioned above. Part 3 argues that although language does not strictly offer a foundation for law, both law and language serve as sites of judgement and of attributions of responsibility and go wrong in particular ways. The imperfect aspects of law and language offer an entry into the issue of justice. Just as truth or unconcealment is the promise of language, a promise that will not always be kept, that is, so too justice is the implicit appeal of law that, ever imperfectly, insists that promises must be kept.

1. Foundations?

Traditional courses in the philosophy of law are said to concern themselves with the moral, political and social foundations of law. After reading Nietzsche, one asks what it means to presume that there are foundations at all.² Although the question may be taken as a nihilistic dismissal of foundations and of past thought about law, there are also genuine questions here. How have so many come to have faith that there *are* foundations? What does it say about *us* that our philosophers and others have, for millenia, believed in foundations? And where does the questioning of foundations today lead? Let us take each of these questions in turn.

First, for Nietzsche, faith in ‘foundation’ or in ‘reason’ is an error advocated by language (Nietzsche 1968, ‘Reason in Philosophy’, par. 5). “‘Reason’ in language: oh what a deceitful old woman! I fear we are not getting rid of God because we still believe in grammar’, he writes. Language as grammar (in English and German) everywhere divides the world into doers and deeds, nouns and verbs, subjects and predicates. Complete sentences in which subjects predicate follow the illusory model of a God in charge of his creation: God creates, man acts, authors write, nouns verb! Although in actuality ‘accountability is lacking’, language attributes responsibility to subjects for what they do, according to Nietzsche (Nietzsche 1968, ‘Four Great Errors’, par. 8). The imposition of grammatical and linguistic constructions on a world of becoming secures ‘truth’ by compartmentalizing and rendering things static. Indeed, we have imagined entire true worlds—heaven, the noumenal world, the so-called ideal versus real world—in static and universal terms and have used these worlds and their truths as standards by which to judge *this* world as lacking, Nietzsche writes (Nietzsche 1968, ‘How the True World Became a Fable’). Words are unable to capture a world that is perpetually in flux. For Nietzsche, words represent only the dead leaves of his formerly ‘colored thoughts’ (Nietzsche 1967a, § 296).

Second, that we have for so long taught and believed in such successful untruths as God as first cause, the ideals of morality, and the value of reason over instinct, attests according to Nietzsche to a need or a sickness or weakness on our part (Nietzsche 1968, ‘Problem of Socrates’). The nihilistic disease that characterizes the kind of life we live, which constantly finds its values elsewhere in the more ‘real’ or ‘true’ or ideal worlds that we invent, threatens to send us spiraling downwards. To ask how untruths have come to have the hold on us that they do is a complicated task for Nietzsche

² For a first approach to this, see Constable 1994a, and 1994b; referring to Nietzsche 1968 [1888].

however. The task, to begin, is to explain through genealogy how we have become who we are and how we cannot have been otherwise (Nietzsche 1967a and 1967b). The task is also simultaneously to enable the possibility of overcoming who we are, which of course implies bringing about the impossible situation of no longer being ourselves. Nietzsche's solution to the dilemma appears in the overcoming of nihilism that he associates with strong will-to-power, the eternal return and the overman.³ As Martin Heidegger points out, the quest to secure truth that Nietzsche would criticize manifests itself here again, this time in Nietzsche's own thought (Heidegger 1979-1987). It appears in the form of the absolute mastery that is asserted in the will-to-power's insistence on overcoming the problem of nihilism and in its inability to let it be.

In the context of philosophy of law, Nietzsche becomes the thinker and prophet of a 'sociolegal positivism' in which social power threatens to become the sole or unlimited frame of reference for knowing law or determining what to do (Constable 2005, 9-11, 28-34, 43-44). Self-reinforcing social sciences and policies of 'society' that study, affirm, and impose the will of society recognize no limits to the social power to command or to determine the world. While social or societal will appears to many today to be a benign force, it precludes appeal to law or justice other than its own. Indeed in the name of social and empirical reality, current knowledges of society deny that past laws, of custom or religion for instance, have ever been anything other than 'social' interests or constructions. Any possible distinctiveness belonging to issues of law and justice is lost, as the contemporary regulations and policies that constitute 'law' also are characterized as social practices in a world of social practices.

Today, then, the question of the foundation of law changes complexion. It no longer suffices to inquire as did Nietzsche into the conditions of faith in foundations and the possibilities and pathologies of reason as such. It is not enough to ask whether we must reject justice as a false ideal or whether we can think about law without reproducing old metaphysical truths. Over the course of history, we have grounded law's justice in the virtue of the polis, in natural law, in the categorical imperative, in principles of utility. Most recently, we have grounded it in the positive law of society that asserts its own will through social scientific power-knowledges of governmental regulation. With the recognition that with positive law, 'the power of command assumes the place of ground and source of all law [...] What indeed empowers the will to command is the will itself' (Nonet 1990, 670) the solipsistic social mastery or social regulation that is the positive law of society comes keenly into view. The issue now is to ponder such mastery. The question is how to speak of law and justice without falling under the sway of a sociolegal world-view that would treat all law and its justice in the terms of empirical, calculating, instrumental strategies and techniques that properly belong to modern regulatory society and its positive law. Are there words with which to let *other* law show itself? Can the

³ See for instance, Nietzsche 1974 [1882], §§ 245 and 381, and Nietzsche 1954 [1883-85], 'On the Vision and the Riddle.'

language of the modern positive law of state and society show anything other than itself?

2. Language

Today state law appears as positive law or as ‘the’ law, presenting itself at least in part in written texts and spoken acts. Many acts of state law—not only marriages, contracts, and appeals mentioned above, but also deeds, wills, sentences, appointments, judgements, dissents, objections, enactments—are acts of language that must be expressed by one and apprehended or heard by another to succeed. These acts of language are ‘social’ in the sense of requiring another to hear them, but they are not necessarily social in the causal and efficacious ways that sociolegal studies recognize.⁴ Even, or perhaps especially, those who would identify law with the power of a violent state admit that the formally valid speech acts or enactments of officialdom may be neither powerful nor efficacious. Legal realist scholars dismiss the language of law or downplay it as a manifestation of more telling social power.

That even acts of state law or positive law need to be heard in order to transform states of affairs suggests that law is not exclusively within the control of its speaker, much less a pure matter of command or of will.⁵ Nor is the successful legal act completely conventional in the sense of being socially agreed-upon or determined according to rules.⁶ Law is a matter of rhetoric; as speech, it appeals to an audience and is open to contestation, as well as to going wrong. In law, two or more persons engage in a dance or a dialogue of claims and counterclaims whereby first and second persons take turns as ‘I’ and ‘you,’ persuading and being persuaded by one another. Persuasion in this sense need not be manipulation. It indeed requires the skillful performance of an act before an other. But that the act must occur before an addressee who apprehends it, shows that it is not completely in the charge of the person who speaks. That its contestation may be persuasive shows that it is not completely conventional or generally agreed-to as such (Reinach 1983).⁷

Speech acts of claiming or of complaining or of objecting, for instance, do not cause claims or complaints or objections. The social act of marriage does not cause the marriage. In its joint expression and apprehension, the social act of claiming (or of marrying) *is* the claim (or the act of marriage). A felicitous claim requires expression by a speaker and apprehension by another, who may acknowledge the claim for what it is, a claim, while simultaneously disagreeing with or rejecting it. That a social act such as a claim has occurred changes a state of affairs. Although an objection to a

4 I follow Reinach in calling these ‘social acts,’ but it is important to note that they are social in the sense of involving both a speaker and hearer, rather than in the sense of being a ‘product’ of society.

5 J. L. Austin says as much about speech acts more generally in Austin 1975.

6 Here I veer from some readings of J. L. Austin. Austin himself notes that conventions may be initiated, however.

7 See Cavell 2005, distinguishing conventional performative utterances in which ‘I’ am the focus, and passionate utterances of seduction, persuasion, disappointment, for instance, in which ‘you’ are crucial to the success of the speech act.

question during cross-examination at trial for instance may be quickly sustained or overruled, the utterance that succeeds as an objection initiates or transforms a state of affairs for however short a period of time such that the questioning objected to is suspended. In the usual course of things, such an objection calls for a response from the judge. That particular responses (sustaining, overruling) are more conventional than others does not mean that the objection causes the judge's particular response. The objection may cause an observer to groan or opposing counsel to shake her head, but these responses or effects are not essential to the legal/social act of objection as such.

The felicitousness of a legal utterance as an act of *this* particular sort, in other words, does not cause a particular outcome nor imply that its hearer agrees with it, although it does initiate a new state of affairs. It does imply that the hearer understands something of the speech or language being used. The speaker's and hearer's shared knowledge of language and how it is used and is usually responded to is 'imperfect' in several senses, however. First, the knowledge of language use of two persons is seldom if ever identical. Their dialogic skills differ. So too does their knowledge of the world in which and about which they speak. Further, in addition to being an incomplete knowledge, theirs is an ongoing and continual knowledge of speaking. In a grammatical sense then, as noted in the introduction above, the knowledge that the two share can be represented as 'continuous' or as 'imperfect'. 'They were speaking English at the time that one complained', for instance. 'They were still speaking English when the other responded'. Or: 'although they both speak English, the other failed to respond. They no longer spoke'.

As these examples show, legal/social acts no less than other utterances take place as events against a backdrop of shared practical knowledge of speech. They participate in habitual or ongoing ways of speaking and living and also interrupt them. 'Law' refers not only to particular acts and events of these sorts, but also to the imperfect and incompletely articulated and articulable knowledge of how to speak and act with one another that is required for these legal/social acts and events to occur. In other words, law refers not only to particular acts, but also to what Robert Cover calls a '*nomos*' or normative world (Cover 1993) or to what Pierre Clastres associates with the 'empty words' of a chief who repeats, without any need to be listened to, that this is the way our ancestors lived and that we must follow their example (Clastres 1987, 151-154).

Identifying law with shared language this way leads to thinking about membership and belonging less in terms of state citizenship, national identity and moral or religious community, than as matters of the common though imperfect and possibly overlapping tongues through which persons understand one another. Conflicts of law cases and indigenous claims to sovereignty suggest as much.⁸ But we must not get too far ahead of ourselves. Let us stick to the current language of law. In what is commonly taken as law today, social acts of positive law such as those

⁸ See articles in special issue edited by Knop, Michaels, and Riles 2008; see also Constable 1993.

mentioned above—marriage, contract, appeal, complaint, objection, and so forth—take place in dialogue where (at least) two persons take turns speaking and hearing as ‘I’ and as ‘you’. In dialogue, the ‘I’ or speaker of law—whether claimant or official or something else—addresses another who hears, but the ‘I’ does not address ‘you’ simply. In acts done in the name of the law, the speaker speaks in the name of an ostensible third party, law. As such, the speaker aims to recall to you, who ‘we’, who share that law even as we share language, are. Enactments beginning ‘This law shall be known as [...]’ attest that even ostensibly neutral measures addressed ‘to whom it may concern’ appeal to hearers who are presumed to know and share language.

Third parties are susceptible to being misrepresented. The third party that is law is no exception. An addressee may disagree with or contest the claims that a speaker makes in the name of their shared law. In disagreeing, the former second-person ‘you’ speaks now also as ‘I’ in the name of ‘our,’ first-person plural, law. ‘Law’ again names the imperfect relation of ‘you’ and ‘I’ (or ‘we’) manifest in our usual or habitual, continual and ongoing, yet interruptable ways of living, acting, and speaking together. Even as our knowledge of language and law remains imperfect, ‘we’ are bound through imperfect and dialogic speech to one another.

In being spoken, law is susceptible not only to misrepresentation as has just been noted, but also to other infelicities of speech and action. Legal utterances can be coerced or mistaken. They can be misheard and misunderstood. They can be spoken inappropriately, incompletely, incorrectly, insincerely. Legal claims may be deceptive, hypocritical, or strategic. (Indeed, some sociolegal scholars imply that they always are.) Law struggles to master speech, training its students and practitioners to read and write, endlessly codifying and glossing its own words. It criminalizes perjury and fraud; it regulates the time, place and manner in which things may be spoken. Even as it aims to structure its own speech and hearing through civil and criminal procedures, it also acknowledges that it cannot always hear what it’s told, as in the *Miranda* warning,⁹ or tell what it hears, as in obscenity law.¹⁰ Dicta and precedent return to haunt the common law. Law’s own speech as well as the speech of others escapes the control of positive law. Language and its use fails. In failing, it cannot provide foundations of law in any traditional sense. Yet, as Part III suggests, the language of law and its failings may yet have implications for law’s justice.

3. Justice

If as a historical movement, positive law grounds itself in its own absolute will as the will of society and thereby threatens justice (Part 1), it is nevertheless still the case that the positive law of the state today relies on and is to some degree indebted to language and speech (Part 2). Its law is not justice, as legal positivism reminds us. Neither is language truth. Words, in particular contexts, may be true or false though. So too laws, we shall see, may be just or unjust. The truths of our words are possible

⁹ *Miranda v Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); see analysis in Constable 2005, chapter 7.

¹⁰ Justice Potter Stewart: ‘I know it when I see it.’ *Jacobellis v Ohio*, 378 U.S. 184 (1964).

on the joint basis of the human capacity to speak and of the promise of language to reveal the world. Not only truths, but also concealment and untruths, accidental infelicities and deliberate deceptions, however, accompany speech (Heidegger 1997, 220).

Through contract law and criminal law, modern law addresses breaches and promises of truth. It does so imperfectly. The contract law that recognizes agreements for instance has not always and does not universally require the keeping of words or of promises; it remedies breaches of enforceable promises, often, only with monetary damages. Criminal law too, despite the dependence of its sentences on the conviction of subjects who predicate as Nietzsche points out, modulates its judgements of responsibility. Even as it holds those who act accountable, it qualifies acts or verbs through adjectives of intent, offering human beings who act ‘unknowingly’ excuses for instance. It inscribes not only the grammar of subject and predicate, but also the grammatically-inflected dualities of bodies and minds, acts and intents, *mens rea* and *actus reus*, into law.

In the same way as language, however imperfectly, reveals the world we know, law names our way of living or being with one another. Just as particular utterances can be judged to be true or false only because language promises to reveal the world truly, so too particular laws can be judged to be just or unjust only because law claims, however implicitly, justice. Where is the claim of justice to be found today? Legal positivism, recall, disclaims or disavows the justice of law, while state policies and officials present positive law as regulations grounded in the will of society. Even as they impose such a will, however, officials insist, often crudely and in behavior that is dismissive of words, that they are carrying out their duties in the name of the law. An appeal to the ‘name’ of law by the powerful social forces of the state points to the inadequacy and even deceptiveness of speech. The state, imposing itself, recognizes no other name or law than its own and takes itself to be grounded in will. Words fall short in this world of absolute positive law. The name of law to which the state appeals only conceals the state’s actual insistence on an absolute law of society that neither recognizes nor respects anything outside its own power, including language.

But for those with ears behind their ears, as Nietzsche puts it, the appeal of the state to the name of law is an act or claim of language. This claim suggests that ‘justice’ remains, at least implicitly, an issue. Justice is at issue in the false and possibly unspoken appeal by the state to law, which as a word or a name belongs, in the first-person plural, to we who speak a common language. Appeal to the name of law implicates, in a potential dialogue of admittedly imperfectly shared language, those who speak and hear such words as ‘name’ and ‘law’. ‘We’ who hear are joined and divided over issues of law through a common tongue that positive law, with its simultaneous drive to articulation and paradoxical dismissal of law-on-the-books, has not completely mastered. Speech escapes positive law. Our language recalls other laws. Our language and its—most gentle—law quietly raise issues that exceed the articulations and control of powerful states and the concerns of the most strategic and instrumental of social policies or positive law. These are the issues of justice.

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