Democratic Citizenship and Civil Political Conversation: What's Law Got to Do with It?

by Marianne Constable*

I have been asked to talk about democratic citizenship and civil conversation and what law has to do with it. I have been asked in particular: How are legal traditions and legal conversations implicated in our common life as citizens and, I presume, as residents, and in our political conversation? What can law contribute toward a restoration of the virtues required for democratic citizenship and civil conversation? At first, I thought about this second question as a question about the resources of law for repairing or mending political conversation.

Put this way though, the question is too easy to set aside. For while law is a matter of language and speech, legal language and conversations are not strictly "resources" to be put to use this way. Rather, I would argue, in answer to the question of how law is implicated in our common life, as did Hannah Arendt in *The Human Condition*,[1] that laws are the walls of the city or polis. And language is the medium of law. It is more than a tool or resource; it constitutes the shelter from which we know the world and act in it. As a matter of language or speech, law is susceptible to the many difficulties of other sorts of speech, including that of politics and of ordinary conversation. That law is a matter of language reinforces the significance of the issue raised by this symposium; unfortunately, it does not contribute the resources that would solve it. Let me suggest another way of getting at the issue of law and the current state of political speech.

We often hear, as we have at this symposium, that our political discourse is in bad shape. For this reason, many worry about democra-

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1. *See* HANNAH ARENDT, THE HUMAN CONDITION (1958).

cy. If public or political discourse is in such bad shape though, why are we worried about democracy as such? We should worry first about discourse, or about language and speech. In the longer work from which this lecture is drawn, I suggest that there are at least two discourses, which overlap with political discourse, that indeed attend very carefully to language. These are the discourses of law and of the humanities. (I leave it to this audience to consider the place of theology.) They indeed have their own pathologies, but though these discourses may lie or deceive or go wrong in other ways, they are not careless in the ways that ordinary and political speech may be. In what follows, I will first refer to the episode of President Obama's 2009 inaugural oath to get at some distinctions between careful and careless speech. I will then take a quick and dirty look at how our law treats language.

Carefulness about language is crucial because carelessness poses a worse danger to speech–whether political, democratic, or ordinary–and to the ways words bind us than do ignorance and lies. Falsehoods and deception, even ignorance, can be called out, challenged, and addressed, as indeed they often are in law and in education. But when speakers and hearers fail to notice what is being said and how, words threaten to lose their ability to shelter us and to show us our world.

I. OBAMA'S OATHS

On January 20, 2009, Barack Hussein Obama was sworn into office as President of the United States. Or was he? Before Chief Justice Roberts, who himself had stumbled slightly over his words, Obama swore that "I, Barack Hussein Obama, do solemnly swear . . . [t]hat I will execute . . . the office of President of the United States faithfully . . . . I will to the best of my ability . . . [p]reserve, protect and defend the constitution of the United States . . . . So help me God."[2] A flurry

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2. The transcript of Obama's Oath is available at the Blog of the Linquistics Graduate Student Association (LGSA), "*Constitution vs. Cooperation*." *The Case of Syntax and Oath of Office*, LGSA FLEDGELINGS BLOG (Jan. 20, 2009), http://fledgelings.blogspot.com/2009/01/constitution-vs-cooperation-case-of.html.

1. Roberts: I, Barack Hussein Obama [do solemnly swear]
2. Obama: [I, Barack]
3. Obama: I, Barack Hussein Obama, do solemly swear.
4. Roberts: That I will . . . execute the office of President **to** the United States faithfully.
5. Obama: That I will execute . . . (nods to Roberts)
6. Roberts: the off-faithfully the Pres–office of President [of the United States.]
7. Obama: [the office of President] of the United States faithfully.
8. Roberts: And will to the best of my ability.
9. Obama: I will to the best of my ability.

of Internet activity about "oafs of office" followed the inauguration ceremony.[3] On Wednesday, January 21, Obama again took the oath: "I do solemnly swear that I will *faithfully execute* the office of President of the United States . . . ."[4] A January 21st White House press release briefly explained:

> We believe that the oath of office was administered effectively and that the President was sworn in appropriately yesterday. But the oath appears in the Constitution itself. And out of an abundance of caution, because there was one word out of sequence, Chief Justice Roberts administered the oath a second time.[5]

Today, the incident appears trivial. Many claim that the words were an empty formality: Obama had become President at noon on January 20 anyway, they claim, even before his first oath, when George W. Bush left office.[6] But it is one thing for schoolchildren to repeat their lessons properly; it is another for one of the most powerful men in the world to do so. The White House's "abundance of caution" over "one word out of sequence" in an oath that it nevertheless believed was "administered effectively" enough that the President had been "sworn in appropriately" reveals the importance of language to lawyers–and Obama is nothing if not a lawyer's lawyer.[7] Were it not for the second oath, might there have been grounds for claiming that President Obama had not been sworn in "appropriately"? that Judge Roberts had not administered the

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10. Roberts: Preserve, protect, and defend, the constitution of the United States.
11. Obama: Preserve, protect, and defend, the constitution of the United States.
12. Roberts: So help you God?
13. Obama: So help me God.
14. Roberts: Congratulations Mr. President.

*Brackets "[]" represent overlapping speech. Parentheses represent paralinguistic cues. Periods "." represent pauses. Hyphens "-" represent truncated speech. Text in **bold** represents a change made to the transcription (after the original post time stamp).

Id.

3. *See*, *e.g.*, Steven Pinker, *Oaf of Office*, N.Y. TIMES, Jan. 21, 2009, http://www.nytimes.com/2009/01/22/opinion/22pinker.html; Maggie Haberman, *Roberts is the Oaf of Office*, N.Y. POST, Jan. 21, 2009, http://www.nypost.com/p/news/politics/item_UlPvnxqumx9f0OzdV3pjwL.

4. *See* Press Release, Office of the Press Secretary, THE WHITE HOUSE (Jan. 21, 2009), http://www.whitehouse.gov/the-press-office/statement-white-house-counsel; *see also* U.S. CONST. art. II, § 1.

5. Press Release, *supra* note 4.

6. *See*, *e.g.*, Jeffrey Toobin, *Supreme Flub*, THE NEW YORKER BLOG (Jan. 20, 2009), http://www.newyorker.com/online/blogs/thy/2009/01/supreme-flub.html.

7. *See* Press Release, *supra* note 4.

oath "effectively"? that Obama was not actually President? or that he need not "faithfully execute the office"?

The seemingly trivial incident of Obama's retaking the oath opens up matters that, as we shall see, are far from trivial. The words as Obama first uttered them raise potential issues of appropriateness, of legitimacy, of obligation–grand matters usually associated with moral, political, and legal responsibility. Obama's repetition of the words in a different order in the second oath ostensibly resolves those issues. How could his words do these things? How can words raise, address, and resolve grand issues of responsibility? My work explores such questions in the context of the United States legal system today. It asks how language and law relate and bind us to matters of responsibility. In focusing on law and language, I offer a way of thinking about law as neither fundamentally a matter of rules nor fundamentally a matter of power. Before elaborating, however, let us see what the responses to Obama's oath tell us about the usual ways of thinking about language.

The media commentary following Obama's January 20 oath began with questions of meaning. Did word order make any difference to the content of what Obama had said? Did the placement of "faithfully" *after* "will execute the Office of President of the United States" rather than *between* "will" and "execute" change the meaning of the words? Most, if not all, agreed that it did not.[8] Some turned explicitly to rules of English grammar and usage. The placement of an "adverb of manner" may occur either before the verb or at the end of the phrase it modifies. Although some commentators claimed that keeping "will execute" together, as did both Roberts and Obama, was preferable because it followed a rule against split infinitives, others pointed out–correctly–that "will" is a modal verb.[9] No infinitive is split in the "will faithfully execute" language of Article II of the U.S. Constitution.[10] Discussion turned to whether the precise language of Article II had to be followed.

No one seems to have pointed out that there may indeed have been a way in which the position of the adverb affected "the sense of the expression, i.e. the way in which it modifies that verb."[11] Both phrases–"will execute . . . faithfully" and "will faithfully execute"–indeed

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8. *See, e.g.,* Toobin, *supra* note 6.

9. *See*, *e.g.*, Pinker, *supra* note 3.

10. U.S. CONST. art. II, § 1, states: "Before he [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation:–'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"

11. J.L. Austin, *A Plea for Excuses*, *in* PHILOSOPHICAL PAPERS 175, 198-99 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

indicate that an executing act–drawing, for instance–is done in a manner in keeping with what the task (of drawing) ordinarily calls for. The adverb points to a style or way of executing that relates the actual act of execution (drawing) to some prior understanding of what that act is. But that *someone* executes *something* allows one to distinguish two possible adverbial meanings. To say that *something* is "executed faithfully" implies that the thing executed–an artwork, perhaps–is a close copy. The adverb after the verb here focuses on the *object* of execution. Not executing something faithfully is to execute it, but not well; it is to do so *un*faithfully. By contrast, to say that *someone* "faithfully executes" something implies that the person executing does so with a particular sort of steadfastness or loyalty or commitment to the act. The focus is now on the attitude or manner of the *subject* doing the executing. To fail to faithfully execute something is for the person to act disloyally or faithlessly–and perhaps not even to carry out the act at all. Someone faithlessly executing is distinguishable from executing something unfaithfully.

These distinctions indeed hold–unrecognized as they may have been–in the context of Obama's oaths. It makes sense to distinguish "executing an office faithfully/unfaithfully" from "faithfully/faithlessly executing an office." To execute an office is to perform a function; in so doing, one fulfills a post and carries out its duties. And one may both carry out one's duties (fulfill one's post, perform the functions of office) faithfully or to the letter AND one may faithfully or loyally carry out one's duties (fulfill one's post, perform the functions of office). Loyally and to the letter. "Faithfully execute" and "execute faithfully."

This is a distinction without a difference, however, if we are to attend to the blogosphere[12] and even to the White House press release.[13] Such ostensibly grammatical niceties (like distinctions between content and form, it seems, or between the spirit and the letter of the law) fall away–whether for good or for ill–in practice. Americans expect their President *both* to loyally and steadfastly do his job *and* to do that job as specified by the letter of the Constitution.

And yet, if the words of the first oath mean the same as the words required by the Constitution or at least appear to do so to the American people, why did Obama take the second oath? If the issue of the difference in meaning between the two oaths is for all intents and purposes moot, then what is at stake in "one word out of sequence" that could justify readministering the oath?[14]

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12. *See*, *e.g.*, Toobin, *supra* note 6.
13. *See* Press Release, *supra* note 4.
14. *Id.*

The answer appears to be that, if the grammar and meaning of Obama's first oath were unobjectionable, then the form of the utterance nevertheless was lacking. The very conventions or procedures that constitute the ceremony of inauguration as U.S. President were at stake. Even if previous Presidents had not always followed correct procedure (and it seems they did not),[15] the U.S. Constitution requires that a President take the oath before executing the office–hence, the discussion of Article II. Being President, like having an agreement or being married, is a state of affairs brought about and warranted through legal procedures and legally-articulated provisions. Lawyers and non-lawyers, outside as well as inside the White House, recognize that properly carrying out particular procedures–often involving the uttering of certain words in a particular way and in a particular context–brings about certain states of affairs. Conventions matter. Anyone who has encountered the requirements of modern law–deadlines, signatures, forms, and formats–has experienced the ways that getting married, renewing a passport, registering a car, receiving mortgage authorization, or enrolling in a public school, may be stymied when particular requirements are not met to the letter.

If requirements of form, whether these be conventional or articulated in written law, explain Obama's swearing of the second oath, however, form still does not explain why presidents–or others–take oaths at all. Perhaps Obama indeed became President at noon, irrespective of the language of Article II and in the silence before the swearing of any oath. The swearing of an oath still does something. In solemnly swearing, President Obama explicitly committed himself to a particular way of executing the office and preserving the Constitution. Such a commitment could, of course, also be implied by the events leading up to the inauguration, but Obama's own explicit swearing of the oath publicly affirmed his acceptance of the obligations of office. He explicitly took on those obligations through his words, rather than having them be attributable to him on the basis of events and actions surrounding his campaign and election. More than a mere expression, or even declaration, of an intention to faithfully execute the office, the oath *committed* him, like a promise, to doing so. It obligated him in a particular way and presumably created in the American people a claim that he fulfill those obligations and, should he fail, a claim against him. Obama's oath, therefore, attests to something often taken for granted: that one's word is one's bond. (This is as true of promises as it is of oaths. Obama's "So help me God," not required in Article II, marks his

15. *See generally* Robert F. Blomquist, *The Presidential Oath, the American National Interest and the Call for Presiprudence*, 73 UMKC L. REV. 1 (2004).

utterances as an oath, rather than a promise from which in principle a promissee would have the right to release him.) In giving his word, Obama both committed or bound himself in a particular way to the American people and became President in a constitutionally-established manner.

In other words, whether or not Americans perceived the difference in meaning between the first and second oaths (and it seems they did not), Obama's swearing the oath a second time inaugurated him according to the letter of the law and by its rules, while his very swearing of the oath at all produced an obligation that had previously been, at best, implicit. His uttering of the appropriate oath transformed–through his words, according to law–an earlier state of affairs in which questions could be raised as to his status and commitment as officeholder into a state of affairs in which he was now indubitably President of the United States, with all the obligations and responsibilities of the office.

The ordinary understanding that the difference in wording between Obama's first and second oaths did not matter reveals a carelessness as to the use of words and their meaning. The retaking of the oath manifests, by contrast, an "abundance of caution" as to speech on the part of the White House and the law.[16] One can quibble about definitions of and distinctions between political, legal, and ordinary speech. What indeed *is* the character of Obama's oath? The point remains though, that despite condemnations of the state of public discourse, some domains take language and speech very seriously. I turn next to the ways in which law partakes in and attends at various levels to language and speech.

II. CONTROLLING LANGUAGE

Anglo-American law recognizes that language matters in several ways. Law schools emphasize proper reading and writing, and legal disputes often turn on matters of meaning and vocabulary, or of grammar. As Ross Charnock points out in an irresistible example, United States Supreme Court Justice Gray held in 1893 that, for the purposes of the 1883 Tariff Act,[17] tomatoes are vegetables: "[I]n the common language of the people . . . all these are vegetables which are . . . like potatoes, carrots, [and] parsnips . . . usually served at dinner in, with, or after the soup, fish, or meats . . . and not, like fruits generally, as dessert."[18]

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16. *See* Press Release, *supra* note 4.

17. Act of Mar. 3, 1883, ch. 121, 22 Stat. 488.

18. Ross Charnock, Semantics and Legal Interpretation: Convergences and Divergences, Presentation at the University College of London Faculty of Laws Colloquium: Current Legal Issues Colloquium 2011-Law and Language (July 4-5, 2011) (quoting Nix v. Hedden,

Perhaps the most famous example in legal philosophy as to the meaning of terms today concerns what counts as a "vehicle" in a park. Charnock reminds us that in 1951, Chief Justice Goddard, of the King's Bench, considered a poultry shed to be a vehicle "within the meaning of s. 1 of the Road Traffic Act of 1930."[19] Twenty years earlier though, Charnock tells us, Supreme Court Justice Holmes held that an aircraft was not a vehicle.[20] These differences turn, at least in part, on the context or purpose of the statute under consideration.

Speaking of purpose and vehicles, the United States Supreme Court in 2004 took up the issue of whether, pursuant to the Immigration and Nationality Act,[21] a Florida driving under the influence (DUI) offense counted as an aggravated felony for the purpose of deportation.[22] The Act defines aggravated felony as including "a crime of violence" for which the term of imprisonment is at least one year.[23] The United States Code defines a crime of violence, in part, as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[24] In *Leocal v. Ashcroft*,[25] the appellant had been convicted of two DUI offenses and was serving time in prison.[26] An Immigration Judge and the Board of Immigration Appeals ordered his deportation and the United States Court of Appeals for the Eleventh Circuit dismissed his petition for review.[27] On appeal, the United States Supreme Court pointed out that the Florida statute did not require that an offender have any particular mental state (and that other DUI statutes required only proof of negligence).[28] Insofar as "use" means "active employment," according to the Court, the Code implies that a "crime of violence" requires "active employment" of force.[29] Saying that someone "actively employs" physical force against another, reasoned the Court, would be to claim a higher degree of intent–or purpose–than the negligent or accidental conduct required for conviction of DUI offenses.[30]

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149 U.S. 304, 307 (1893)).

19. *Id.* (quoting Garner v. Burr [1951] 1 K.B. 31 (Eng.)).
20. *Id.* (citing McBoyle v. United States, 283 U.S. 25, 26-27 (1931)).
21. 8 U.S.C. §§ 1101-1550 (2006 & Supp. IV 2010).
22. Leocal v. Ashcroft, 543 U.S. 1, 3-4 (2004).
23. 8 U.S.C. § 1101(a)(43)(F) (2006).
24. 18 U.S.C. § 16(a) (2006).
25. 543 U.S. 1 (2004).
26. *Id.* at 4.
27. *Id.* at 5.
28. *Id.* at 13.
29. *Id.* at 9; *see* 18 U.S.C. § 16(a).
30. *Leocal*, 543 U.S. at 9.

In *Flores-Figueroa v. Unites States*,[31] another immigration-related case, the Supreme Court considered (as in the more canonical *Morissette v. United States*[32] case about conversion), the meaning and extensiveness of the adverb "knowingly."[33] In this case, Ignacio Flores-Figueroa had presented to his employer forged documents that bore numbers assigned to real people.[34] He was convicted not only of document fraud but of a federal felony, "aggravated identity theft," which carried with it an additional two-year sentence.[35] At issue in the case was, in part, the identity theft statute's requirement that an offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[36] Justice Breyer argued that "it seems natural to read the statute's word 'knowingly' as applying" not only to the verbs in the text, but "to all the subsequently listed elements of the crime."[37] He reasoned that "[i]f we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese."[38]

Interpretation of statutory language has indeed generated its own norms of what is "natural" and "ordinary." Words are to be given their "ordinary or natural meaning," for instance.[39] Effect should be given to every word of a statute whenever possible.[40] Like the rules of writing and of law that are the stuff of legal education, such ostensible rules of statutory interpretation may work as guidelines or rules of thumb, but almost never completely determine a decision, no matter how important the issue of interpretation to the particular case.

Legal texts and institutions also move beyond issues of meaning and grammar to recognize that speech acts. Legal practitioners contrast in this regard to sociolegal scholars. The latter often pass over what is done *in* speaking in favor of studying the effects or what is *caused by* speaking, as in impact studies of the *Miranda v. Arizona*[41] holding and

31. 129 S. Ct. 1886 (2009).
32. 342 U.S. 246 (1952).
33. *Flores-Figueroa*, 129 S. Ct. at 1888.
34. *Id.* at 1889.
35. *Id.* at 1888-89.
36. *Id.* at 1888; 18 U.S.C. § 1028(a)(7) (2006).
37. *Flores-Figueroa*, 129 S. Ct. at 1890.
38. *Id.*
39. Smith v. United States, 508 U.S. 223, 228 (1993).
40. Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)).
41. 384 U.S. 436 (1966).

Miranda warnings.[42] Nonsociolegal scholarship about law, by contrast, all too often focuses on assessment of more or less static propositions and statements of rules or principles of legal argument and reasoning that are taken to be in some sense distinct from the instances they govern.

In its exceptions to the exclusion of hearsay, evidence law recognizes that speech acts. It acknowledges, that is, that utterances do more than report true or false claims. Hearsay involves the report by a witness of the utterance of another.[43] Such evidence is generally not admitted to prove the truth of the matter the utterance is about.[44] Thus, a witness cannot testify that "X told me he borrowed the lawnmower" as evidence that X borrowed the lawnmower. However, the witness can testify that "X told me that he borrowed the lawnmower" as evidence that, for instance, X is capable of speech. Hearsay, therefore, can be admissible to show that speech acts occur. (The list of exceptions to the rule excluding hearsay evidence is actually quite long and intricate.[45] When, for instance, the original speaker has died, a witness's report as to what he or she read or heard may also be admissible.[46])

Many other examples exist in which law recognizes that speech does more than articulate true or false propositions. Perjury law, for instance, focuses as much on the character of speech as action as it does on its propositional adequacy. A false utterance is a criminal act, not because the falsity of the statement is evidence of a crime, but because the very act of stating the falsity (that is material to a legal proceeding and so forth) is criminal.[47]

In addition to attending to the grammar and meaning of utterances, particular areas of law thus recognize that the significance of utterances as speech lies as much in what utterances do and how they do it as in their propositional content measured against standards of accuracy. Such an Austinian account of speech acts is an improvement over accounts of language as merely propositional,[48] although it does not go far enough in formulating the social and ethical relations of law and

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42. I draw here on one version of the distinction between what J.L. Austin calls the "illocutionary" and the "perlocutionary" aspects of speech. Illocutionarily, a warning warns in its being said; perlocutionarily, it may produce any number of effects by being said. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà, eds., 2d ed. 1976); *see also* MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW ch. 7 (2005).

43. *See* FED. R. EVID. art. VIII.

44. *See* FED. R. EVID. 801(c).

45. *See* FED. R. EVID. 803-04.

46. *See* FED. R. EVID. 804.

47. *See* 18 U.S.C. § 1621 (2006).

48. *See* AUSTIN, *supra* note 42.

language. Similarly, law's relation to language involves more than attention to content and grammar and to the dynamism of speech. A third aspect of the relation of law and language (after grammar and speech acts) then emerges in the context of law's concern for the integrity of its own processes. Acts of law involve both speaking and hearing. Law takes special care around both speaking and hearing. Witnessing and notice, for instance, help guarantee that a speaking or writing has been properly apprehended.

Miranda, mentioned briefly earlier, also concerns the limits of the ability of those involved in the legal process to hear speech.[49] (Current legal developments suggest the limits of their abilities to hear silence also.[50]) The formal *Miranda* warning, however problematically it is executed and the responses to it interpreted, in effect constitutes an acknowledgment at some level of the possibility of what Stanley Cavell would call "passionate utterances" on the part of an accused that challenge the conventions and "order of law."[51] These are utterances, like the epideictic speech that we heard about at the symposium, designed to appeal in particular ways to another. The very appellation of law as a "justice" system in which final authority ostensibly rests with "Justices," suggests that parties appeal not only to formal positive law, but also to "justice" when they speak and act in the name of the law.

Such appeals are, of course, not infallible. United States law recognizes some of its limitations vis-à-vis language, even as it strives to bring the world in which speech happens under its control. If in perjury, U.S. courts restrict themselves to what they can know, and in *Miranda*, U.S. courts acknowledge that they cannot always properly understand or explain what they hear, then U.S. law also occasionally acknowledges that they cannot always say how they know ("I know it when I see it").[52] Obscenity law suggests how passionate utterances–those utterances that refuse accepted conventions and ostensibly invite improvisation into the disorders of desire, as Cavell puts it, disrupt the articulateness of law.[53] In *A Book Named "John Clelands's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*,[54] for instance, before the community standards test for obscenity came to predominate, the Supreme Court refused to lapse into

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49. *See Miranda*, 384 U.S. at 467-68.

50. *See* Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

51. *See* Stanley Cavell, *Performative and Passionate Utterances*, *in* PHILOSOPHY THE DAY AFTER TOMORROW 155-91 (2005).

52. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

53. *See* CAVELL, *supra* note 51.

54. 383 U.S. 413 (1966).

silence about pornography. Instead it used an amorphous notion of "redeeming social value" as a placeholder for dealing with speech acts that it was unwilling–or recognized itself as unable–to regulate completely.[55]

Legal reasoning, early obscenity law, *Miranda*, perjury law, hearsay rules, and contracts together suggest ways that U.S. law is susceptible to infelicities and incapacities of speech that it cannot escape. Legal speech, like all speech, is susceptible to the difficulties of ordinary language in the sense that the world or venue in which it occurs does not always accord with human standards of accuracy and morality. In not only trying to master speech acts and events, but also in occasionally acknowledging its inability to do so, U.S. law reveals its struggles with justice.

Nowhere is this struggle of law more apparent perhaps than in First Amendment[56] cases, ranging from obscenity to free exercise of religion, where disjunct and overlapping communities and jurisdictions reveal their differences as to who they are and what they deem appropriate. First Amendment legal matters and claims–of speech and belief, of education and faith, of passion and reason–raise questions as to whether the locale or the nation is the site from which to determine what utterances deserve constitutional protection, what practices constitute and reinforce an "exercise" of belief, and how a group can practice "freely." In all these matters, speech is bound up with who "we" are.

The claims and acts of those who challenge law, defend themselves against it, and work to change it are passionate appeals to their hearers that invite those hearers to share in the speakers' quest for law and justice. These claims and acts are, in the language of Eugene Garver's talk at the symposium, both apodeictic and deliberative speech. And so too the utterances of legal officials, however conventional or deliberative at one level, are also claims and acts that invite hearers to accompany them–or to challenge them–in a joint quest for justice.

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I have sketched very briefly how language matters in law and legal action. First, as law acknowledges, the grammar and vocabulary of texts and utterances understood in context matter to what is being said and done. Hence, the prominence law grants to issues of interpretation and the attention drawn to translation in questions of access to justice. Second, the forms prescribed by law for such actions as marriages, inaugurations, or criminal proceedings matter. Through the use of language, law transforms states of affairs. Unless particular conventions

55. *Id.* at 418.
56. U.S. CONST. amend. I.

are met, such acts are in some way flawed and may not properly transform the states of affairs with which they are concerned. Third, language matters because it enables the possibility of what we consider obligation or the obligatoriness or bond of law. Without the sort of dialogue that occurs through speech, there is no "we." Without the "we" to whom law appeals in its judgements and names for states of affairs in the world, those judgements are unshared and meaningless.

Finally, beyond these three aspects of words–the grammar and vocabulary of language, the rules and conventions of speech acts, and the dialogue and exchange that goes on in chains of social acts–words show us the world in which law acts. Our claims of law happen through our words in the world. They involve both promise and breach. Truth is the name for the promise of words to uncover the world, a promise that is not always kept, whether by accident or through deceit. Justice is the name we give to appeals that promises be kept, that the world reveal itself to be in keeping with the judgments we make of it through our words, religious or not, despite their limitations.

Legal speech–the attention paid to speech in legal education and the attention law pays to language–does not guarantee the quality, meaningfulness, efficacy, or justice of public discourse. To every example of carefully uttered appropriate speech correspond examples of carefully uttered euphemisms, formalisms, and obfuscations–traditional pathologies of law. Indeed, one could argue that "legalism" names precisely an overabundance of attention to language.

Being careful about speech in the way that law is careful, therefore, allows one to be strategic–and even dishonest–in its use. But the sort of carefulness that law displays around language use and speech also teaches practitioners and critics of language and of law how to contest, not only opacity and dishonesty, but also injustice. Carelessness about language ultimately undermines, not only democracy and politics, but all of our relations with one another. Justice, however impossible to define and difficult to determine, relies on those relations and on the ways in which legal speech–the claims and responses that we make to one another in the name of the law–acts.