# Obama's Oaths

> The role of ordinary language in relation to the imperative of expression, is that it is less in need of weeding than of nourishment.
>
> —Stanley Cavell, "Passionate and Performative Utterances," in *Philosophy the Day after Tomorrow*, p. 188

What is law? How is it related to language? For many, it is a truism that law is a matter of language that cannot be captured by rules. For some, it is equally obvious that law may be unspoken and unwritten, that modern law is a matter of useless language or that attending mainly to words misses the violent reality of law.[1] For others, by contrast, law is a matter of more or less effective if-then statements; for many students, despite what some of their professors say, law is precisely a matter of rules.[2]

This book investigates modern law's relation to language in the context of such divergent views. To those who ask, "What is law?" the book argues that answers today lie in exploring further law's relations to claiming and hearing. Claims assert truths and demand recognition. Law, like language, may deceive or lie or go wrong in its claims. Further, law may mishear and be misheard. Modern law nevertheless shows great care for language. From the care that law accords to language, this book shows, one learns about speech; reciprocally, through language and speech, one learns about law. Both language and law bind us; they entangle and obligate us to one another and reveal the world to be one in which "our word is our bond."

Obama's flubbed presidential oath shows some of the entanglements of language and the care that law takes around language. On January 20, 2009, Barack Hussain 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 Hussain Obama, do solemnly swear that I

will *execute* the office of the President of the United States *faithfully*. I will to the best of my ability, preserve, protect and defend the Constitution. So help me God" (emphasis added).[3] A flurry of Internet activity about "oafs of office" followed the inauguration ceremony. 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 . . ." (emphasis added).[4] A January 21 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] The White House's "abundance of caution" over "one word out of sequence" in an oath that it nevertheless believed had been "administered effectively" enough that the President had been "sworn in appropriately" reveals the importance to lawyers—and Obama is nothing if not a lawyer's lawyer—of words.

The common or ordinary response, though, to the difference in wording between Obama's first and second oaths was that it did not matter. This response, as we shall see, reveals a carelessness about words. One can question whether the difference in wording actually warranted the retaking of the oath, and one can quibble about definitions of and distinctions among "legal," "ordinary," and "political" speech. (What indeed *is* the character of Obama's oath?) The point is that, despite the claims we often hear about the deplorable state of public discourse, language and speech are taken very seriously in some domains. Law appears to be such a domain. Is law distinct this way? One difficulty in addressing this question is that neither law nor language is straightforwardly and simply physical or mental or ideal. Law and language alike "straddl[e] the material and ideational divide" (in Justin Richland's words)[6] or are, like music, "ontological mutants" (in Jack Sammons's quotation of Lydia Goehr).[7]

One of the aims of this book, then, is to show that *law exists rhetorically*: Its claims often happen through words. What words are and how they claim—how they assert truth and demand recognition—is itself not easily said. The discussion of Obama's oath in this Introduction sets the stage by reminding readers of some of the ways that language ordinarily matters in modern law and legal action. The chapters that follow then draw on the work of many thinkers on language, including J. L. Austin, Stanley Cavell, Adolf Reinach, and Friedrich Nietzsche, to explore what words do, how claims work, and what law is.

One familiar way of thinking about how words matter in law involves the grammar and vocabulary of texts and utterances. Legal practice attends to matters of meaning, interpretation, and translation, and legal education grants prominence to issues of reading and writing. A second approach to thinking about how words matter in law focuses on the forms and conditions of utterance that are prescribed for inaugurations or for other legal acts such as marriages or criminal proceedings. As the chapters explain, what is commonly known as speech act theory maintains that law transforms states of affairs through ostensibly conventional performative acts involving utterances such as oaths and declarations. Unless particular forms, which may themselves be articulated in law, are met, acts such as inaugurations and marriages, or indictments, pleas, and convictions, are in some way flawed; they do not properly transform the states of affairs with which they are concerned. Third, language matters in and to law because it specifies and enables commitments and obligations. As later chapters show, such bonds depend on language, although not quite in the ways one might expect. They depend on the "we" that is revealed in the turn taking interactions of "I" and "you" in dialogue. Without the "we" to whom language and law appeal in their judgments and names for states of affairs in the world, judgments are unshared and obligations meaningless.

This is not to say, of course, that "we" are ever in perfect agreement with one another! Nor do the most perfect agreements accord perfectly with the world. Neither coherence nor correspondence theories capture what language—or law, for that matter—is. Rather, the book argues, imperfection and incompleteness are key to understanding law and language. A second aim of this book, then, is not only to show that words do things but to consider the implications of how *words go wrong*. On the one hand, words promise truth. They ostensibly show us the world as it is. On the other hand, they can be misspoken, misheard, misunderstood. They can be inappropriate or misappropriated, inaccurate or wrong, even downright dangerous. So too can law and legal claims. Taking language seriously thus highlights pathologies and promises of modern law that scholars who would give language short shrift may overlook. Modern Western law is increasingly formulated as "policy" that falls within the jurisdiction of empirical and/or rationalist social sciences. Expressed in particular sorts of disciplinary language, these knowledges largely take law to be a kind of problem solving that can be assessed in terms of its empirical impact and that is articulable in generalizable statements or rules. Rule following corresponds to the instrumental

rule making that accompanies policy expertise. Policy claims, like other legal claims, though, are already embedded in particular practices of language that are necessarily imperfect or incomplete.[8] To use policy language to formulate ideal standards or rules against which to measure the empirical reality or adequacy of law is to take the power of such language for granted and to ignore the disciplinary constraints and background of practical knowledge that make all of the speech acts and events of law—including applications of rules—both possible and imperfect.

Attending carefully to language is important in law and for understanding law, but it is also crucial for another reason. Neglect or carelessness about language poses a worse danger to speech—whether one is concerned with political, democratic, or ordinary discourse—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 lose their ability to show us our world. A third ambition of the book then is to suggest ways that we can *be more careful with speech*. Neither legal speech nor the attention paid to language in the humanities guarantees 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 then allows one to be strategic—and even dishonest—in its use. The sort of carefulness that law displays around language use and speech can also help practitioners and critics of language and of law to contest opacity and dishonesty, however, as well as to challenge injustice.

*Our Word Is Our Bond* thus aims to refine the ways in which we think and talk about law and justice and also, in the name of law and justice, to enhance the appreciation with which we approach language and speech. It does not offer a theory of justice nor a "concept" of law as such. It shows, rather, how modern law is a matter of language and ultimately argues that justice today, however impossible to define and difficult to determine, depends on the relations we have with one another through language or on how legal speech—as claims and responses made in the name of the law—acts.

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Let us return to the seemingly trivial incident of Obama's retaking the oath. Many claim that the words of the oath 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. In any case, Obama retook the oath as it is articulated in the Constitution. For most, the story ends there. 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. Were it not for the second oath, might there have been grounds for claiming that President Obama had not been sworn in "appropriately," as the White House put it? That Chief Justice Roberts had not administered the oath "effectively"? That Obama was not actually President? Or that he need not "faithfully execute the office"?

The words as Obama first uttered them thus open up matters that are far from trivial.[9] They 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 do words raise, address, and resolve grand issues of responsibility? How do words do what they do? How do oaths and other examples of legal speech act? What are their implications for understanding how words and laws may or may not bind any one of us?

Media commentary following Obama's January 20 oath began with questions of *meaning*. Did word order make any difference to the substance of what Obama had said? Did the placement of "faithfully" *after* "will execute the oath of office 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. Some turned explicitly to rules of English grammar and usage. As English language and grammar textbooks and websites explain, 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 Roberts and Obama had done, was preferable because it followed a rule against split infinitives, others pointed out—correctly—that "will" is a modal verb. No infinitive is split in the "will faithfully execute" language of the U.S. Constitution. At this point, discussion turned away from grammar and meaning and toward the issue of whether the precise language of Article II had to be followed.

No one pointed out that there is indeed 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."[10] Both phrases—"will execute . . . faithfully" and "will faithfully execute"—do 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 manner 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 some*thing* 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 some*one* "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 (if you will excuse the split infinitive) is for the person to act disloyally or faith*less*ly—and perhaps not even to carry out the act at all. (Someone) faithlessly executing is distinguishable from executing (something) unfaithfully.

These distinctions in meaning, which depend on emphasizing a grammatical subject or object, indeed hold in the case of Obama's oaths, unrecognized though they may have been. 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."

These are distinctions without a difference, however, if we rely on the blogosphere and even the White House. 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* loyally and steadfastly to 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?

The answer appears to be that if the grammar and meaning of Obama's first oath—or what linguists call its "syntax" and "semantics"—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),[11] the U.S. Constitution requires that a President take the oath before executing the office; hence, 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 nonlawyers, outside as well as inside the White House, recognize that properly carrying out particular procedures—often involving the utterance 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 public school may be stymied when particular procedural requirements are not met.

If requirements of form, whether these be conventional or articulated in written law, explain Obama's swearing of the second oath, though, form still does not explain why Presidents—or others—take oaths *at all*, a matter (like meaning) that remained unaddressed in public commentary. Suppose Obama had indeed become President at noon, irrespective of the language of Article II requiring him to take the oath "before" entering office and in the silence before the swearing of any oath. The swearing of the oath *still* does something. In solemnly swearing, President Obama explicitly commits himself to a particular way of executing the office and preserving and so forth 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 at the moment that he swore the oath, rather than having them implicitly attributable to him on the basis of various 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. Sworn to before the Chief Justice, the oath obligated or bound him in a particular way. It created a claim that he fulfill those obligations and, should he fail, a claim against him. Obama's oath thus attests to something often taken for granted: that

one's word is one's bond. In giving his word, Obama both committed himself to others in a particular way and became President in a constitutionally established manner or form.

In other words, whether or not Americans perceived the difference in *meaning* between the first and second oaths (and it seems few did), Obama's swearing the oath a second time inaugurated him according to *form* or 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. The proper oath can be said to have *initiated* a state of affairs in which Obama was now indubitably President of the United States of America with all the obligations and responsibilities of office. Such transformation occurred in the name of the law: It was faithful to the language of law, it followed the procedures of Article II, and it appealed to and was warranted by the Constitution of the people whose President Obama had become.

Online discussion of Obama's oaths soon ended. Attention had focused on the sequence of words in the first oath in relation to the form of the oath that was mandated by constitutional law, rather than on the words' meaning or the oath's mattering. The flawed first oath raised potentially serious matters of politics—and of law and language. But perhaps due to the haste with which "out of an abundance of caution" the oath was readministered by the Chief Justice the next day (unrecorded this time by television cameras), public discussion never reached the more difficult question of how uttering sentences in the vocabulary and grammar of the English language according to conventional forms *matters*—how such utterances can initiate and transform states of affairs in the name of the law. Drawing on insights from both analytic and Continental philosophy of language and on particular works of literature, this book takes on precisely that question, locating it in the context of an exploration of words and law and how they bind us.

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This book draws its examples primarily from contemporary U.S. law and reflects on ordinary English usages of "law," accepting all the qualifications that these parameters imply. The book's use of "law" is not limited to positive law or to the law of the state. Nor does it consist in a return or appeal to a natural law or justice

that exists independently of human beings and their institutions and practices. The U.S. legal tradition and scholarship about it highlights the way that law is an idiom in which many different kinds of claims of justice and injustice have been made and may yet be made. Indeed, the book's own claims are actually compatible, in particular contexts, with all of the claims mentioned in this Introduction's first paragraph. The issue of course is: in what contexts? The contexts of claims matter. Particular claims are "suitable to some contexts and not to others," as Austin puts it:[12]

> It is essential to realize that "true" and "false," like "free" and "unfree," do not stand for anything simple at all; but only for a general dimension of being a right or proper thing to say as opposed to a wrong thing, in these circumstances, to this audience, for these purposes and with these intentions. (145)

For sociologists, the context of law and of claims about it is society; for political scientists, the state. Sociolegal work asks for whom laws are made and what interests they serve. Rhetoric asks analogous questions: to whom law appeals, what law says and how. But rhetoric also asks to whom sociolegal claims appeal, what they say and how. And when philosophy inquires into the foundations of law, rhetoric asks to whom foundations appeal and how.

Rhetorical questions of course need not be answered. They may sometimes be empty; they may also be obvious. Legal, sociolegal, and philosophical claims about law and claims to justice may also sometimes be taken for granted. A rhetorical investigation of those claims need not be a nihilistic disavowal of them, however. It may instead explore, as does this book, what claims are, how they assert truths and demand recognition, and in what ways they bind us. Rhetoric indeed point outs that language is not truth, but it recognizes that words, in particular contexts, may be true or false. So too, as this book's final chapter argues, law is not justice, but legal claims in particular contexts may be just or unjust. Further, just as particular utterances can be judged to be true or false only because language in some sense promises truth or to truly reveal the world, particular laws can be (judged to be) just or unjust only because law also in some sense claims justice. Even as legal positivism, the dominant scholarly account of law, disclaims or disavows the necessary justice of law, officials of positive law nevertheless insist—often crudely and through their actions—that they are carrying out their "duties," or obligations to which they are bound, in the *name* of law.

This book thus challenges the usual positivist approaches to law of law schools, sociolegal scholarship, and philosophy of law. (Elsewhere I refer to this as sociolegal positivism.)[13] All three latter fields in different ways minimize or circumscribe the possibilities of legal speech and its relation to rules, action, community, and justice. Contemporary professional education acknowledges the primacy of reading and writing while often wrongly suggesting that law is a system of rules. Sociolegal research that makes a strong distinction between what it calls law-in-action and law-on-the-books fails to understand how legal speech acts. And the dominant philosophical view of law, which maintains that there is no necessary connection between law and justice, largely neglects the embeddedness of claims of law in shared practical knowledge of language. As we shall see, understanding claims of law to be performative and passionate utterances, or social acts that appeal implicitly to justice and that occur within the horizon of a world that is shown and yet not exhausted by our saying, offers an alternative to grasping law as a system of rules, as policy making or problem solving, in terms of empirical impact, as state authority or power, or even as fundamentally violent.

Underscoring law as language highlights what legal education, sociolegal study, and philosophy of law threaten to forget: that "our word is our bond." Through admittedly imperfect words or speech, and even when its explicit claims fail, law relates us to issues of justice. Through the gentle law of our language, this book shows, we know ourselves to be in a greater world of which we, however imperfectly, claim justice. Not every reader will need every lesson in this book, and language does not convey the complete story of law. But if this book accentuates aspects of law that are in some ways obvious and in other ways incomplete, it also does what we ask of language: It supplements accounts of law that are less obvious—and, one suspects, less true!

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Chapter One shows that the White House's abundance of caution over one word out of sequence shares in current U.S. law's broader respect for and wariness about the potency of speech. Through statutory interpretation, First Amendment jurisprudence, intellectual property law, and criminal law, the United States does its best to master meanings and events of speech, in contexts ranging from obscenity and *Miranda* rights to evidence and perjury. Law structures what can be said in court and elsewhere, safeguarding some statements from particular interpretations and prohibiting others from being repeated or even presented.

Though all's well that ends well in Obama's reswearing of the oath, words cannot always be so easily taken back or redone. After reviewing some of the ways that U.S. law treats language and introducing J. L. Austin's account of speech acts, Chapter One argues that insofar as legal claims aim to persuade others, they are not only conventional or performative utterances, but also what Stanley Cavell calls "passionate utterances."[14] Despite the best efforts of legal actors and of law, unruly speech happens, even within law and as law sometimes acknowledges. Its own speech escapes its control in unpredictable ways as, for instance, when dicta become doctrine or mantras. In trying to master speech acts and events and in occasionally recognizing its inability to do so, U.S. law appears doubly indebted—or bound—to language. It manifests itself through speech, even as complete mastery of language exceeds its power.

The importance of words to law reveals itself not only in Obama's retaking the oath and in attempts to regulate language but, as Chapter Two notes, from the first day of law school. Turning to reason, writing and rhetoric, the 3 *R*s of U.S. professional legal education, Chapter Two shows how even the simplest rules of grammatical legal writing raise big philosophical questions about intention, action, cause, and responsibility that are seldom addressed directly as such in school. The chapter develops the account of speech acts presented in Chapter One and introduces Friedrich Nietzsche's critique of grammar as metaphysics to argue that law and language alike are sites of judgment and of ascriptions of responsibility.[15] The argument proceeds through a close reading of the well-known torts case, *Palsgraf v. Long Island Railroad*.[16] The statement of facts in Justice Cardozo's *Palsgraf* opinion (which Wydick, in *Plain English for Lawyers*, celebrates as an example of good legal writing[17]), together with the rest of the opinion and Justice Andrews's dissent, shows the interplay of legal judgments and grammatical attributions of causal agency and responsibility.

Recall that the world of Obama's oath is a world of grammatical subjects and objects (persons and oaths, Presidents and offices), verbing and beverbed (swearing and being sworn, executing and being executed). So, too, in the English-language world more broadly, Chapter Two shows in the context of *Palsgraf*, somebody does something in a grammar of subjects and predicates that law would be hard pressed to do without. Legal writing instructions to "prefer the active voice" or to write in complete sentences with subjects and predicates reveal a world of "doers and deeds," as Nietzsche puts it, who can be held responsible for their acts. The "good legal writing" of Cardozo's statement of facts reveals a

particular metaphysics, even as the *Palsgraf* opinions themselves are full of figures of speech and of ostensible deviations from rules. Read through Nietzsche and Austin, *Palsgraf* thus raises an issue common to both writing and law: the limits of rules. Law is no more a matter of rules than language is a matter of definitions and grammar. Stating facts, applying rules, and briefing cases may be pedagogically useful, but they far from exhaust what is involved in legal claims. Legal claims involve the shared use of words by speakers and hearers who together judge and name the happenings of their world in social acts that implicate past and future. Although occurring in the present, legal claims await their hearing and have the temporal structure of the future perfect. As Jacques Derrida points out: It *will have been* the case that a claim was made . . .[18] Once perfected or completed over time, acts or events of law and language alike become past perfect events of legal history.

Chapter Three examines the social character of skillful legal acts of speech more closely. Legal acts include not only inaugural oaths and legal opinions but also marriages, complaints, objections, appeals, and enactments. The first half of the chapter draws on Adolf Reinach's work to explain that, as social acts that must be heard by others to do what they do, legal acts are not simply causal.[19] The joint speaking and hearing, writing and reading, or expression and apprehension that occurs in a social act does not strictly cause the act; it *is* the act. Properly offered and apprehended by the judge who has the authority to sustain or overrule it, a trial lawyer's saying "I object" in court, for instance, *is* the objecting to what another has said. It does not cause the objection. Likewise, inaugurations or wedding ceremonies do not cause officeholders to take office nor cause couples to be married. They are the taking of office and the marrying. The joint expression and apprehension of particular legal/social acts transforms a state of affairs and initiates a new one: a presidency, a marriage, a need or an opportunity to respond to an objection or a complaint. Changes in states of affairs brought about *through* legal acts occur *in* the jointly performed social act of speaker and hearer and *upon* the completion of the social act. They are enabled through actors' shared knowledge.

The second half of Chapter Three shows how the shared knowledge of social acts that enables changes in states of affairs in the world belongs to "we" who partake in turn-taking claims of "I" and "you" in dialogue. You and I change places in dialogic social acts as "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. Ostensibly monological acts, such as enactments, are no exception to the dialogic character of language. Enactments that are "to be known," for instance, as "the Penal Code of California" require shared speech. Words bind those who share practical knowledge of speech, or who speak the same language or name and judge as *we* do, into various and overlapping "communities" whose members recognize and judge states of affairs through common, admittedly imperfect, practical knowledge of language. Those who speak a common tongue are bound to one another as community members speaking and living together in a manner that corresponds to grammatically "imperfect" or incomplete action. (The grammatical "aspect" of a verb refers to how a sentence expresses the temporality of a situation. An action can be viewed from outside, as a temporally completed whole or as "perfect": "*I spoke with you yesterday*" or "*Somebody sneezed*." Temporality can also be expressed as an internal relation: "*While we were speaking*, somebody sneezed." The "imperfect" identifies a situation of continuous, habitual, or incomplete action [we were speaking] in which a particular action occurs [somebody sneezed].)[20]

In other words, law refers, on the one hand, to completed or perfected or perfectible acts or events (Chapter Two) and, on the other hand, to imperfect practical knowledge of a community's ways of living and speaking together (Chapter Three). Our continuous, habitual, routine, and interruptible shared ways of living are characterized by incompletely articulable understandings. Such imperfect knowledge forms a backdrop or context of law against which discrete social acts of law occur. Pierre Clastres might identify imperfect background law with the law of the chief who repeats "We are living this way, we have been living this way, we shall continue living this way"; such law resembles what Martin Krygier calls "tradition" or Robert Cover calls the *nomos* or normative world.[21] Law as social acts takes place in present active moments that are enabled by and also seem to interrupt law as a continuous and habitual way of living. In their future, legal acts may themselves become integrated into the ongoing background of how we live, or they may be distinguished, identified, and highlighted as the discrete events of which histories of law and community tell.

Chapters Two and Three together show that law, like language, is neither coincident with rules (Chapter Two) nor socially efficacious in quite the way empiricists would recognize (Chapter Three). The double aspect of law, as future perfect, dynamic social acts and as the imperfect practical knowledge required for those acts, offered in these chapters suggests that one can think about modern

law in terms other than those of sociolegal studies or of legal positivism, without returning to an outmoded natural law that associates law with God or derives law from a "higher" morality.

Understanding law as both active events and practical knowledge this way does not mean that law is purely a matter of convention, though, as Chapter Four shows. Most would agree, generally speaking, to the conventional claim that promises should be kept. Criticizing Hippolytus's famous, "My tongue swore, but my mind did not," J. L. Austin for instance writes that "morality and accuracy alike are on the side of the plain saying that *our word is our bond*" (10). Yet from Euripides to Shoshana Felman, law and literature alike point out the injustice of keeping promises in a world where words and things go wrong.[22] They imply that "our word is our bond" is not as "plain" a saying as J. L. Austin suggests.

Chapter Four explores what an account of law that takes us to be speaking imperfectly with one another in joint social acts makes of "conventional" morality, such as the obligation to keep promises, the ur-example of speech act theory. The chapter ultimately shows how contract law, like tort and criminal law, responds to claims about a world, like the world presented in literature, in which not only promising, but also accident, deception, and wrongdoing, accompany our speaking and living with one another. Even as contract law fails to completely rectify breaches of promises, it nevertheless affirms, as do criminal and tort law, words that call for justice in a world that exceeds conventional claims and the mandates of our law. Law and language bind us not only through dialogic social acts and into imperfect communities (Chapter Three) but also to a larger world, Chapter Four argues, that exceeds both conventional moralities and articulations of positive law.

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Focusing on law as language allows one to see that positive law—whether taken to be official state law, social power or instrument, or system of rules—represents only one version of law, albeit the predominantly accepted scholarly one. It allows one to recognize that other conceptions of law—as custom, as tradition, as natural law, as belonging to all sorts of nonstate or nonnational collectives or groups—also offer imperfect and incomplete accounts of law.[23] It allows one to accept a critique of law as rules that is compatible with sociolegal studies (Chapter Two), while also drawing attention to the ways that sociolegal studies downplay legal speech and how it acts (Chapter Three). It allows one to see that law of

whatever sort, like its language, is imperfect and incomplete and that if laws are or are said to be unjust, this can only be in a context in which justice is expected or claimed of them (Chapter Four).

Neither law nor justice is simply what lawyers and judges say nor even what officials and scholars more broadly claim they are. This does not mean that law or justice is completely independent of language in the ways that some would take an objective world to be. However inadequate our law and language to the world, we know our world and name our ways of living and being in it through law and language. Language is not like a window through which we look to an outside of which we are not part. Our speech is akin rather to the paths we walk as we make our way through the wider world. We know our world imperfectly *and* through the pathways we take. And law? What is law? That is the question to which the following chapters turn.