

# Law as Language?

by Steven D. Smith\*

It is an honor for me to be able to participate in this Symposium with such distinguished company, and I want to thank the Mercer Law Review and the symposium organizers for inviting me. I do feel a bit awkward, though, commenting on Professor Marianne Constable's paper.<sup>1</sup> As it happens, I agree with most of the sentences in the paper, taken one-by-one, but I am not sure that I catch the larger vision that the paper seeks to convey, and I am also unsure how Professor Constable's astute observations about law and language respond to the overall theme of this symposium—namely, “Citizenship and Civility in a Divided Democracy.”<sup>2</sup> So here I will try to discharge the duties of commentator by attempting to explain my difficulty with the paper and offering some very tentative observations about points Professor Constable may be making.

Professor Constable's paper is devoted to describing various ways in which law is bound up with, or *is*, language. Lawyers and judges work in and through language. Contracts consist of written or spoken language. Perjury laws punish particular forbidden uses of language. The First Amendment<sup>3</sup> protects various kinds of uses of language against government regulation. “[L]anguage is the medium of law,” Professor Constable explains.<sup>4</sup> “It is more than a tool or resource; it

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1. Marianne Constable, *Democratic Citizenship and Civil Political Conversation: What's Law Got to Do with It?*, 63 MERCER L. REV. 877 (2012).

2. See *Purpose Statement, Mercer University Law Review Symposium 2011, Citizenship and Civility in a Divided Democracy: Political, Religious, and Legal Concerns*, MERCER LAW (Oct. 7, 2011), <http://www.law.mercer.edu/content/law-review-symposium-2011>.

3. See U.S. CONST. amend. I.

4. Constable, *supra* note 1, at 877.

constitutes the shelter from which we know the world and act in it . . . . Our claims of law happen through our words in the world."<sup>5</sup>

All this seems to me perfectly true—too true, maybe. That is because on first reading or hearing (and maybe on second reading as well, but possibly not on third hearing?), Professor Constable's insistence that law works pervasively through language seems to have all of the virtues, but also all of the limitations, of an obvious truism.

Imagine a group of portrait painters who are discussing different techniques for using light and color and perspective to convey a subject's character. Now suppose someone joins the conversation and soberly remarks, "In reality, you know, the essence of portrait painting consists of the careful, artful use of paint. It is all about putting the paint on the canvas in the proper form." Or suppose a group of builders is comparing different ways of constructing houses—different architectural strategies, different construction methods, and so forth—and someone sidles up and says, "With all due respect, the truth is that houses are made of wood and brick and concrete and plaster, and the real art of building houses lies in putting the materials together in an efficacious way."

In each case these observations would be perplexing, not because they are not true, but because they state what everyone already knows, in a way that is not helpfully responsive to the questions being addressed, but with a revelatory air suggesting that some important insight has been delivered or some telling criticism has been laid down. The portrait painters and the builders might be tempted to dismiss these observations as the product of some sort of peculiar category mistake. And yet . . . it is possible that a hasty dismissal might miss some insight of real significance.

So, what might be the deeper significance of Professor Constable's seemingly truistic observations about the linguistic character of law? Here, I need to be tentative. But in part Professor Constable evidently intends her emphasis on language to present an alternative to a more obsessively rule-oriented understanding of what law is or how it works. And in this respect, I think she has a valid point.

For generations, of course, law teachers have routinely tried to make a similar point to first-year students who come to law school expecting to memorize codes of rules.<sup>6</sup> This past semester, I made something like this point to my Torts students dozens of times, to the extent that they became thoroughly weary of hearing the point (which is not to say that they accepted or absorbed it). But it seems that Professor Constable has something a little different in mind. Often, the law professors' homilies

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5. *Id.* at 889.

6. *See, e.g.*, KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930).

to first-year law students about how law is more than “just rules” seem calculated mostly to redirect the students’ attention to something more “meta,” so to speak—something like “policies,” or “principles,” or the will to power, or embedded social prejudices, or whatever. The focus is not on the language of law itself, but rather on something that the language serves as a window into, or maybe a window shade to block out.

That does not seem to be Professor Constable’s purpose. Her contention that law is language may reflect a more Wittgensteinian perspective—one that aspires to be more attentive to the subtle, mysterious workings of language itself. Wittgenstein, after describing a straightforwardly referential account of language—*this* word refers to *that* object, and so forth—suggested that this simple referential account leaves out a good deal in the language. He famously offered a different analogy: “Our language can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular streets and uniform houses.”<sup>7</sup>

Wittgenstein’s analogy seems to me wonderfully apt for describing legal discourse, which is a marvelous composite of old and new—of ancient phrases and fictions and forms that “rule us from [the grave],”<sup>8</sup> constantly jostling and joining with newer notions and categories and terms. Students and professors today might prefer to dwell exclusively in the more familiar “new boroughs with straight regular streets and uniform houses,”<sup>9</sup> but they will thereby miss much of what makes the law what it is.

So if Professor Constable’s emphasis on language is intended to convey this sort of Wittgensteinian insight, then I believe she is right, and profoundly so. But Professor Constable is not merely offering a perspective that will enhance our *understanding* of what law is and how it works, as if we were merely curious visitors from another planet trying to figure out what is going on. She clearly intends her contention that law is language to have normative significance as well. So, what sorts of normative implications flow from the contention, or the truism, that law works through and is to some extent constituted by language?

One normative lesson that Professor Constable plainly wants to underscore is that language can be misused in harmful or destructive

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7. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 18, at 8e (G.E.M. Anscombe trans., 3d ed. 1958).

8. See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 1* (A.H. Chaytor & W.J. Whittaker eds., 1968) (“The forms of action we have buried, but they still rule us from our graves.”).

9. WITTGENSTEIN, *supra* note 7.

ways. And here again, I think she is surely right, although I want to be cautious in my agreement for a couple of reasons. For one thing, there is some risk of a possible misdescription here. Misuses of law will no doubt be *reflected in* the law's language, but it does not follow that these problems are most cogently understood as *misuses of language*. Suppose that on a dark street, a bellicose young man accosts a frail elderly gentleman and growls, "Give me your wallet, or I'll kill you." The young man has behaved badly, to be sure, but it would seem a little odd to say that his badness consists of a misuse of language. ("The young man misspoke. In this situation the proper thing to say is 'Good evening, sir,' not 'I'm going to kill you.'")

But probably Professor Constable means something different and, again, possibly something more Wittgensteinian. Wittgenstein emphasized how our language can confuse us and create traps for our thinking. In a similar vein, Professor Constable refers to the ways in which "law is susceptible to infelicities and incapacities of speech that it cannot escape."<sup>10</sup> And she deplores "carefully uttered euphemisms, formalisms, and obfuscations—traditional pathologies of law."<sup>11</sup>

I think this is a valid concern, and if there were more time, it would be possible to give supporting illustrations; my illustrations would include *United Zinc & Chemical Co. v. Britt*<sup>12</sup> and Justice Breyer's opinion for the Court in *Stenberg v. Carhart*.<sup>13</sup> But I would hasten to add that, at least in the common law tradition, it is partly through the slippery use of language—through obfuscation and equivocation—that the law has been able to adapt to changing conditions and conflicting interests. Legal fictions, as Sir Henry Maine explained (albeit with apparent disdain), have been a principal mechanism through which law has grown.<sup>14</sup> The eminent legal historian S.F.C. Milsom remarked that "[t]he life of the common law has been in the unceasing abuse of its elementary ideas."<sup>15</sup> If he had heard Professor Constable's presentation, he might have rephrased to say that "the life of the law has been in the unceasing abuse of its elementary vocabulary, or of its language." That unceasing abuse, in Milsom's view, is a useful or at least necessary thing; it is what sustains "the life of the law."

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10. Constable, *supra* note 1, at 888.

11. *Id.* at 889.

12. 258 U.S. 268 (1922).

13. 530 U.S. 914, 920-46 (2000).

14. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 24-27 (Charles Scribner 1864).

15. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* xi (1969).

This point is relevant, I think, to the topic of this conference. In our divided democracy, one thing that holds us together is the (seemingly) shared understanding that we are all subject to and governed by something we call "the Constitution," which continues to enjoy considerable prestige and perhaps even reverence. But as I have argued elsewhere, the Constitution seems to be a fiction, and the name or term is a fertile source of equivocation.<sup>16</sup> True, there is a document—in the Library of Congress, I think, though it does not really matter—that we say is the Constitution. But that antique document does not itself govern us, and if we check more closely, we find, I believe, that when people refer to the Constitution they mean very different things.

Some people mean the *words* of the document as those words were understood at the time of enactment. Other people mean the subjective *intentions* of the people who wrote and enacted those words. Still others mean something more sociological, evolving and elusive: the "traditions and collective conscience of our people,"<sup>17</sup> maybe, or something more ethereal and Platonic, such as ideal justice.<sup>18</sup> Or they may believe that the Constitution is whatever the United States Supreme Court says it is, and they may *like* this state of affairs: distant, robed masters in marble halls are preferable, they may think, to stammering, sweaty politicians in back rooms and town halls (among other reasons, perhaps, because the robed masters are more refined or magisterial in their uses of language).

So when we refer to the Constitution, we refer to different sorts of things. In practice, it seems, the Constitution is a euphemistic fiction that performs a function of diplomatic obfuscation. And it is arguably the capacity of language, and of a common term, to beguile us into thinking that we are committed to a common object—the Constitution—that helps us get along as well as we do, or to create and maintain an "imagined community,"<sup>19</sup> as they say. Indeed, some might expand this suggestion to argue that the term "the law" itself is little more than

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16. Steven D. Smith, *What Does Constitutional Interpretation Interpret?*, in *EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY* 21, 34-37 (Grant Huscroft ed., 2008).

17. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (punctuation omitted) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

18. See, e.g., LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

19. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2006).

a fertile, obfuscating, and thereby (to some degree) sustaining euphemism.<sup>20</sup>

So I am not sure either that lawyers *are* in practice more careful about language than other disciplines or citizens—lawyers *can* be careful about language, even hairsplittingly or nitpickily careful,<sup>21</sup> of course, when it serves their purposes, as some of Professor Constable's examples reflect<sup>22</sup>—or that more attentive and precise use of language is likely to be of much help in addressing the civic disagreements that are the subject of this conference. There are lots of possible accounts of the causes of the cultural conflict and incivility we experience today. But I doubt that an account offering “careless use of language” as a principal cause will rise to the top of the list.

I should also point out that an undue emphasis on the linguistic character of law can actually lead us to miss or misunderstand the nature and reality of law. Robert Cover pointed out one way this can happen years ago in a memorable essay, *Violence and the Word*.<sup>23</sup> Criticizing what he perceived as a growing obsession among legal scholars on how legal language should be interpreted, Cover replied that

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20. Cf. A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 10 (1995).

For lawyers, to quote E.P. Thompson, writing in 1975 of what he calls “the greatest of all legal fictions,” “the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity. . . .” There is, of course, a sense in which nobody really believes this any more, but it remains the case that much legal behaviour proceeds on the assumption that the law is like that. For example, all legal argument in court makes this assumption.

*Id.*

21. Professor Constable seems to acknowledge the point. “Indeed, one could argue that ‘legalism’ names precisely an overabundance of attention to language.” Constable, *supra* note 1, at 889.

22. However, I am not sure that Professor Constable's most extended example—the curious and amusing incident of President Obama and the oath—tells us much of general significance about law or lawyers, or even that it is actually an example of concern about or close attention to *language* as such. *See id.* at 878-83. Indeed, Professor Constable admits that nobody seems to have noticed—or, it would seem to follow, cared about—the kinds of *linguistic* nuances that she reflects on at such length. *See id.* at 880-83. Instead, if there is somewhere a coterie of extreme formalists who believe that Obama could not validly become President without reciting the oath with perfect precision, these are presumably people who view the oath as something like the password one has to type in exactly in order to access one's email account. But in this view, the oath or password are serving more as arbitrary gatekeeping requirements—it is not their character as *words*, or as conveyers of *meanings*, that is important—and it hardly matters whether these requirements take the form of words, numbers, figures, physical gestures (like giving the secret handshake), or even physical objects (like the correct key that opens the lock).

23. Robert Cover, *Violence and the Word*, reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203 (Martha Minow et al. eds., 1992).

“[l]egal interpretation takes place in a field of pain and death.”<sup>24</sup> Cover wanted his academic readers to understand that the law is a lot more than words.

In a different way, an excessive focus on law’s linguistic character can distort the nature of law, and indeed of legal *language*, by denying or at least overlooking the fact that law’s language is always *about* and always looking to something *outside* the language—not only to particular facts outside the law and its language (the “facts of the case”) but to criteria of justice or morality that are assumed to be independent of what lawyers and judges say *about* those realities. Lawyers’ and judges’ talk about justice makes no sense except on the presupposition that there is such a thing as justice that would be justice even if lawyers and judges said otherwise. I have written elsewhere that “[i]n focusing on the discourse while declining to recognize or affirm what the discourse refers to, discourse theorists are like the baby who, when his mother points at a bird or a flower and says ‘Look!’, stares intently at his mother’s finger.”<sup>25</sup>

Does this criticism apply to Professor Constable? I am not sure: while an earlier version of her paper seemed more committed to claiming that law is language *and not* natural justice, public policy, or a system of rules,<sup>26</sup> in the current version these more exclusionary “and not” claims (reflecting, it seemed to me, dubious dichotomies) have receded. In the current version of the essay, perhaps the most pertinent passage is this one:

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.<sup>27</sup>

These are profound, poetic, and possibly beguiling claims. But if I try to practice the careful attention to language that Professor Constable prescribes, then I have to say that (a) I am not sure what these sentences mean, but (b) to the extent I can make out what they *seem to* be saying, I cannot sincerely concur. Despite their eloquence, the sentences do not describe what I understand truth or justice to be.

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24. *Id.* at 203 (footnote omitted).

25. STEVEN D. SMITH, *LAW’S QUANDARY* 73 (2004).

26. Marianne Constable, *What’s Law Got to Do With It? Legal Language and Political Discourse* (2012) (unpublished) (on file with author).

27. Constable, *supra* note 1, at 889.

So in the end, it seems to me, the emphasis on law as language offers a valuable but limited and potentially distorting perspective. Professor Constable is right, I think, that a close attention to law's linguistic character and workings can provide valuable insights into one crucial and fascinating dimension of the convoluted and elusive enterprise we call "law." But law cannot, any more than life itself can, be reduced down to a matter of language.