

Law as Language

Marianne Constable*

Abstract

This paper proposes understanding law as language. Doing so offers an alternative both to jurisprudential accounts of law as a system of rules and to sociological accounts of law as effective (or ineffective) social power. Part II shows how approaching law as language takes doctrine and legal texts seriously, as speech acts of claiming that do things, rather than as nounlike rules or their application. Such an approach recognizes that legal actions or events of claiming are “imperfect” in a grammatical sense: practical knowledge of law is incomplete, continual and interruptible, while legal acts occur more and less well under particular conditions. Understanding law this way, part III shows, also enables one to critique narrow approaches to law as “policy” or as exclusively a problem-solving tool or instrument. The paper not only argues that law may be thought of as language then. It ultimately suggests another law: that we are creatures of language.

“The imperfect is our paradise.”
Wallace Stevens

I. Introduction

Jurisprudence, legal history, and other humanistic disciplines have over the centuries offered a range of insights into the perennial questions of what to do or how best to live, how we know, and who we are. In so doing, philosophy (Plato), rhetoric (Vico), and social theory (Montesquieu), as well as history and literature, have often questioned the justice of law. That they have done so suggests that law has been taken—or has offered itself—as a site of justice or at least as a site in which issues of justice can be addressed.

Today, as professional law schools turn increasingly to economics and the empirical social sciences to deal with social problems that they would solve through what they call “policy,” the relation of law as policy-making to traditional humanistic accounts of justice and how it is addressed becomes an issue, even as the relevance of the humanities and of humanistic studies to professional legal study is brought into question. The rise of

* Professor and Chair, Department of Rhetoric; Zaffaroni Family Professor in Undergraduate Education; UC Berkeley. Aspects of this article were presented as a brief position paper on “Teaching Law and Humanities,” at Princeton University, February 2013. The author thanks participants there, as well as those in the Berkeley Law and Humanities group, for their comments. She thanks Juliana Stivanicevic for research assistance. The article synthesizes one argument from *Our Word Is Our Bond: How Legal Speech Acts*, forthcoming from Stanford University Press, 2014, with some points from *Just Silences: The Limits and Possibilities of Modern Law* (2005). A section of the former was originally discussed at a CAL Workshop at the University of Toronto Law School in 2012; many thanks are owed to Markus Dubber and especially to Simon Stern for very helpful suggestions.

law and economics, combined with the marginalization of critical studies and even social theory in professional law schools in the U.S., means that law seeks to become ever more “rational,” while sociolegal research becomes increasingly bound to the methodological requirements and outcomes of statistical empirical research. Policy-makers today address questions about what to do through problem-solving approaches that rely on economic and statistical methods and frameworks and tacitly foreclose particular sorts of answers—and even questions.

Some legal scholars still turn explicitly to humanities over social sciences to improve law in a particular way. They sometimes suggest that law “needs” the humanities, that the humanities are the conscience of law, that the humanities can make law—or that humanists can teach law to be—more honest and good. The humanities are not a religion, though. Humanists are not moralists, priests, nor even judges to be turned to for guidance, absolutism, or pronouncements of justice. So what do the humanities offer law?

This paper proposes that if we continue insisting on “the humanities” (itself a question), then the humanities can be said to be characterized by a sensitivity to language, broadly understood, in readings (or interpretations or analyses) of texts and images and other cultural and historical artifacts. The attention paid to language in basic legal education itself suggests that law already belongs in the domain of the humanities. Thinking about law as language need not be identified with a particular field nor even with a set of approaches dubbed “law and humanities,” however. Furthermore, that humanists interpret does not mean that they do not make arguments. Indeed, the argument pursued here is that modern law is fundamentally a matter of language and that there are some things one cannot understand about law if one does not understand language—and the limits of speech.

This argument challenges the claims of legal philosophers and social scientists that law is fundamentally a matter of coercion or of social power. The point that law is a matter of language is not a return to the privileging of doctrine, however. It also goes beyond simply claiming that to engage in the practice of U.S. or Canadian law at this time, one must have some facility in reading, writing, and speaking the English language. It emphasizes in part what legal practitioners certainly know: that words do a lot of different things that are generally described philosophically as “speech acts.”¹ Practitioners develop, to varying degrees, the skills required to carry out legal acts which, to be successful, must fulfill particular conditions. Legal practitioners also know, as well as humanists, that language, however beloved or despised, is always susceptible to going wrong. As practitioners of language, practitioners of law must become adept at using words and at judging what words say. The imperfections of law correspond at least in part to the imperfections of language. Words promise truth. They ostensibly show us the world as it is. Words can be misspoken, misheard, and misunderstood, though. Words can be inappropriate or misappropriated, deceptive, inaccurate, or wrong, even downright dangerous. So too can law and legal claims.

¹ J.L. Austin, *How to Do Things with Words* (1962).

The first section (part II) shows how law corresponds with various aspects of language. One distinguishes particular utterances or speech acts from practical knowledge of language. Such knowledge is, in a grammatical sense, “imperfect.” The imperfect names the incomplete, continuous, ongoing, routine, habitual, interruptible aspect of action, as in, “She *is running* every day, except when it rains” or “We *were speaking* English when we made the agreement.” The “perfect” refers to a completed act: “She ran” or “It rained” or “We spoke” or “We agreed.” As in language, so too in law, one can distinguish perfected or completed legal acts or events from an “imperfect” or ongoing tradition of background practical knowledge.

The second section (part III) shows how the language of modern law reveals insights into who we—as problem-solvers—are and what we know, as well as into what we do. Attending to law as language, the paper concludes, may provide entry into fresh questions about the nature of modern law and justice, an issue that far too many contemporary philosophers and scholars of law take for granted.

II. Law as Language that Acts

Despite the ostensible crisis that today is contributing to discussion of curricular reform in U.S. law schools, professional legal education still emphasizes reading and writing in its classrooms, showing law to be a matter of language.² Students in legal writing courses learn that “good legal writing should not differ, without good reason, from ordinary well-written English.”³ They learn the basic tenets of a plain style and to “prefer the active voice,” for instance.⁴ Such elements of style reinforce the grammatical division of the world into the subjects and predicates required by “complete” sentences. In this world of “doers and deeds,” as Nietzsche puts it, subjects control and are held responsible for the acts or deeds they predicate. “I fear we are not getting rid of God,” the ultimate Subject-Creator, he writes, “because we still believe in [the] grammar” of subjects that predicate.⁵ In law, the attribution of responsibility for a criminal act requires, as the U.S. Supreme Court put it, “concurrence of an evil-meaning mind with an evil-doing hand” or of *mens rea* with *actus reus*; it requires a subject whose mind or soul is joined through adverbial intention or will to an act as predicate or verb.⁶ The rule of law may establish “no punishment without a crime, no crime without a law”; the rule of grammar mandates that there be no sentence without the conviction of a subject who predicates.

² For a study of the teaching of first year contracts, see Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* (2007). As to the crisis, proposals for developing core competencies and for reducing time to degree abound. Even the skills that clinical classes and experiential education aim to promote require hearing, speaking, reading, and writing.

³ Richard Wydick, *Plain English for Lawyers* (5th ed. 2005).

⁴ *Id.* at 5.

⁵ Friedrich Nietzsche, *Twilight of the Idols* § 5, in *Twilight of the Idols and The Anti-Christ* (R.J. Hollingdale trans., 1968).

⁶ *Morissette v. United States*, 342 U.S. 246 (1952).

This is not to say that law or language is reducible to statements of rules, much less to formal grammars or models of rationality. Neither law nor language consists of the sort of discrete or exhaustive system of rules that some take law to be, insofar as rules—whether of law or of language—never completely determine what to do or to say. In English, poets break rules; expert writers dispense with them; breaches of grammar become conventional figures of speech. At best, semantic and syntactic rules serve as pedagogical aids. Likewise, in law, statements of rules alone cannot tell one what to do. As a blogger on the new legal realism website puts it, citing the University of Wisconsin Law School website, “Knowing the rules is like learning to play scales when you study a musical instrument. Playing scales is essential, but it isn’t music. And knowing the rules is essential, but it isn’t being a lawyer.”⁷

In any number of venues, formal legal officials and others complain, rebut, demur, swear, testify, instruct, hold, appeal, object, overrule, sustain, enact, appoint, find, dismiss, amend, approve, reject, deny, declare, agree, offer, accept, promise, qualify, hold, dissent, remand, sentence, wed, bequeath, annul, and so on. Like these speech acts done in the name of law, statements of (defeasible and indefeasible) legal rules make claims; they assert truths and they demand recognition. To be successful, they must fulfill particular conditions. As J.L. Austin puts it, performative utterances (which he later identifies with illocutionary speech acts) must be uttered (or written) by an appropriate party, in appropriate circumstances; they must be carried out correctly and completely; and they must be heard.⁸

If statements of rules do not exhaust legal speech acts, neither are legal speech acts simply applications of rules. The language of “appropriateness” suggests that the conditions of success for legal acts such as those above may be met more or less well, by more and less skilled parties, in circumstances that the act may fit more or less closely. A man cannot marry a monkey, as J.L. Austin writes, but whether two men can wed today depends on the jurisdiction.⁹ A legal act that is not signed may be invalid, but whether a particular signatory actually has power of attorney on a given date may be at issue. A particular judgment may be authoritative and correct, but the reasoning presenting it weak;

⁷ Bill Clune, *Law in Action and Law on the Books: A Primer* (June 12, 2013) (<http://newlegalrealism.wordpress.com/2013/06/12/law-in-action-and-law-on-the-books-a-primer/>). Wisconsin was a key hub for the development of sociolegal scholarship. The New Legal Realism aims to develop better “translations” between law and social science. See *New Legal Realism: Empirical Law and Society* (<http://www.newlegalrealism.org/about.html>).

⁸ Even so-called “constative” utterances that “state” something are performative, Austin ultimately argues. He describes the requirements for the success of “performatives” as their “felicity conditions,” in Lectures 2 and 3 of *How to Do Things with Words*. Adolf Reinach, writing half a century before Austin, discusses the requirement that what he calls “social acts” must be heard. *The A Priori Foundations of Civil Law* (John Crosby trans., 1983) (1913). For fuller discussion of social acts and the ways that they can go wrong, see Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* chs. 3 & 4 (forthcoming 2014). For a genealogical account of the way that ostensibly neutral or impersonal judicial statements are themselves performative, see Caleb Smith, *The Oracle and the Curse: A Poetics of Justice from the Revolution to the Civil War* (2013).

⁹ Austin, *supra* note 1, at 24.

conversely a questionable result or losing claim may be skillfully presented. Although rules often circumscribe the circumstances in which a particular act is appropriate (acceptance occurs once an offer has been made) and conventions may make some responses more likely than others, neither rules nor conventions completely determine or circumscribe what actually occurs, as sociolegal scholars are quick to remind us.

Taking up the early twentieth-century legal realist distinction between “law-on-the-books” and “law-in-action,” that is, law-and-society scholarship rejects the rules that it associates with law-on-the-books, in favor of studying legal behavior or “the way the legal system works and how it works” in a “so-called real world.” Identifying with a “social science perspective” that makes “claims about facts”,¹⁰ law-and-society’s emphasis on institutions and behavior contrasts, according to Lawrence Friedman, to non-law-and-society scholars’ understanding of law as “norms, or language, or ideology, or rhetoric or ‘consciousness,’ or discourse—anything but behavior.”¹¹ Law and society compares its own empirical study of the effects of law to the “insider” view of law of lawyers, judges, and a Mr. and Mrs. Public concerned “not so much with empirical reality, with what is going on in the world, as . . . with what is correct, or what ought to be.”¹² Law has too much of an impact, law-and-society scholarship claims, to be left to insiders who identify law with rule-formulations that are taken to articulate what should be and, hence, often and mistakenly, what law is.

Legal speech acts are indeed social acts, although not exactly in the way that sociolegal realists would have it. As social acts that must be heard, legal acts complicate any strong realist distinction between “law-on-the-books” and “law-in-action.” Claims made in the name of the law act in asserting and demanding. That legal speech acts involve speakers and hearers means that they are dialogic. Even today’s impersonal codes and neutral acts of law addressed “to whom it may concern” are “mandates” or “imperatives” in a grammatical sense, asking for recognition of their claims from hearers, who may retrospectively constitute themselves as the addressees “to whom it may concern.” In responding to the “I” who speaks in the name of the law, that is, hearers—even those who object—become “you” who share, with those who speak, a common language. The “name” of law to which speaker and hearer appeal functions as a third-party proxy representing what “I” take “you” to understand “our” shared law to be. Like all third parties, such law may be misrepresented. “You” may choose to ignore “me” or to challenge “it” as what “we” do. The point is that fluid and practical knowledge of “jurisdiction,” or of the saying of law, constitutes speaker and hearer together as “we” who are speaking with one another and recognize the same language and law, however contestable and imperfectly articulable.

¹⁰ *Law & Society: Readings on the Social Study of Law*, at xxx, 2, 6 (Stewart Macaulay et al. eds., 1995) [hereinafter *Law & Society*].

¹¹ Lawrence M. Friedman, *The Law and Society Movement*, 38 *Stan. L. Rev.* 763, 775 (1986).

¹² *Law & Society*, supra note 10, at 3.

The strange retrospective temporality involved in recognizing oneself as having been the addressee of law that is articulated in a common tongue suggests that legal acts are neither strictly causal nor chronological, as empirical studies would have it. Rather, discrete legal speech acts have the structure of the future perfect, as Derrida writes of the American “Declaration of Independence.” Derrida refers to the signing of the Declaration by the people’s representatives as a paradoxical moment of founding that establishes “we, the people.” To sign the document as representatives of the people, the representatives must already have been authorized to do so in the name of the people. At the moment of the signing, however, the people is not yet in existence.¹³ Likewise, the retrieval of dicta and the use of common-law precedent—the binding of oneself in a present to what will in the future be a newly discovered past—reveals the peculiar temporality of the future perfect tense. As Mark Currie puts it in his study of reading and life, “[I]f a narrative is a story we tell about the past, the present must also be a story about the past that we will tell in the future. Questions of retrospection and anticipation are in fact inseparable if we consider that we experience the present as the object of a future memory, or live the present in a mode of anticipation of the story we will tell about it.”¹⁴

At the same time as speech acts of law, like other speech acts or speech events, require as their temporal condition the future perfect to be complete, the unpredictability of speech and of the world suggests another aspect of law: an ongoing instability or imperfection that cannot be ignored. In grammar, the “imperfect” aspect of a verb normally indicates incomplete, ongoing, continuous, routine, habitual, or interruptible action: we were speaking English, when someone knocked, for instance; or we were speaking together, when the (future) perfect legal act of declaration occurred. In law, some have taken imperfection to refer to the “gap” between law-in-action and law-on-the-books; others take it as the inadequacy of legal utterances or speech acts and events to measure up to a more perfect or even unreachable justice. In the context of law as language, however, the imperfect aspect or incompleteness of law suggests that just as language is never exhausted by the sum of its utterances or by what is said, nor even by all that will have been said, so too law is more than the sum of its present and future perfect legal acts. It is an ongoing, continuous, routine, and habitual practice. Utterances as acts of language emerge from language. Legal speech acts or events, too, emerge from and interrupt law as a background of practical knowledge of what to do, or as an idiom—imperfect and incompletely articulable, but not itself inaccessible—of justice. Legal speech acts may stand out as events against this background or may merge back into it as that against which other less routine legal acts or events can stand out.

In this context of law as imperfect practice or tradition, subjects’ knowledge is also imperfect. Practical knowledge of speech and of language varies by speaker and group. Knowledge of language serves as the grammatically-imperfect background (“we were speaking English”) that differentiates communities of speakers (“they were speaking

¹³ Jacques Derrida, *Declarations of Independence*, 7 *New Political Sci.* 7 (1986).

¹⁴ Mark Currie, *The Expansion of Tense*, 17 *Narrative* 353, 356 (2009).

Spanish”), against which discrete speech acts can occur (“when she promised the land,” in some presumably common tongue) more or less skillfully (“in vague terms” or “unwillingly” or “fully aware of what she was doing”). So too, imperfectly shared knowledge of law serves as the ongoing background against which discrete legal acts (of promise, of agreement, of complaint, and so forth) occur, in more and less imperfect or routine ways.

In sum, this section has proposed attending to law as language that acts. Such attention addresses concerns of both the law school professoriate and sociolegal scholars. It also values the experiences of practitioners and other who engage with and know law. On the one hand, it takes doctrine and legal texts seriously, as speech acts of claiming that do things, rather than as nounlike rules or their application; on the other, it focuses on legal action and events by recognizing that claiming is an imperfect activity occurring more and less well under particular conditions. In this context, visual studies of law, unspoken traditions of law, and even silences of law can no longer be relegated to the periphery of legal studies.¹⁵ They become relevant to properly understanding the imperfect aspect of law—the incomplete, continuous, and interruptible knowledges and practices that constitute law as language. Not only as utterances and acts that emerge from language and silence, but also as an imperfect tradition of practical knowledge, law is a matter of language. It reveals who we are and what we do, as the next section shows.

III. Modern Legal Language

The previous section argued that law corresponds to language in various ways. Legal acts occur in a particular grammar and vocabulary; as speech acts, they involve more than statements or applications of rules; as social acts, they make claims of others in dialogic exchanges that must appeal to imperfect, shared practical knowledge. This section considers further how understanding law as language can contribute to legal study, focusing briefly on policy as a manifestation of modern law.

The account of law as language above suggests, first, that the communities in which we participate and to which we belong correspond to law and language as practices or forms of knowledge. We do not need to agree to share language or law. As Wittgenstein put it, “What human beings say is true or false; they agree in their language (*der Sprache*). That is not agreement in meanings [about which human beings may dispute, as in his previous section], but in lifeform.”¹⁶ To think law as language thus draws attention

¹⁵ Visual studies of law represent a burgeoning field. See Peter Goodrich, *Legal Emblems and the Art of Law* (2013); Judith Resnik & Dennis Curtis, *Representing Justice* (2011); Richard Sherwin, *Visualizing Law in the Age of the Digital Baroque* (2011). For accounts of law that grapple with traditions that are what I call grammatically imperfect, see Martin Krygier, *Thinking Like a Lawyer*, in *Ethical Dimensions of Legal Theory* 67 (Wojciech Sadurski ed., 1991); Martin Krygier, *Law as Tradition*, 5 *Law & Phil.* 237 (1986); and numerous studies of the laws of First Nations and indigenous peoples.

¹⁶ I have adjusted the standard translation in keeping with the emphasis in the original, which is found in German on the facing page of Ludwig Wittgenstein, *Philosophical Investigations* § 241 (G.E.M. Anscombe trans., 3d ed. 1958). The Anscombe translation is: “It is what human beings say that is true and false, and they agree in the *language* they use. That is not agreement in opinions but in form of life.”

to the many different overlapping jurisdictions to which persons belong.¹⁷ Many kinds of legal and linguistic non-state communities exist, as conflicts of law attests.¹⁸

Thinking law as language moreover highlights the relevance of such matters as translation, bilingualism, interpretation, education, and other issues of language and speech, to who “we” variously are or become as we engage with others in public. The existence of language tests for state citizenship confirms that even in the context of positive law, law and membership are bound to practices of speech.

Finally, thinking about law as language in the context of the state also contributes to understanding the limitations of state-centered sociolegal positivism. Much work in anthropology, history, and religion already points to the inadequacy of taking the state and its law as a universal model of law. Sociolegal positivism identifies a cluster of characteristics around which sociology and legal positivism converge.¹⁹ Legal positivism, the dominant philosophical view of law today, views law as a system of man-made rules whose existence is supported by social pressure and maintains that there is no necessary connection between law and morality.²⁰ Positive law often refers to the bodies of doctrine taught in professional law schools or to domestic or international law that officials will enforce. Like legal positivism, sociolegal positivism relegates connections between law and justice to empirically contingent social realities. Sociolegal positivism presumes that law is humanly articulable either as the declarations of officials or in scholars’ descriptions of human social systems. It posits the exclusivity of positive or manmade law as law and views law as an instrument or strategy in a field or fields of social power. Even officials of positive law, however, appeal to language when, however crudely and wordlessly, they insist that they carry out their duties in the “name” of law. As an account of law, sociolegal positivism appears most compatible then with understanding law as the codification and articulation, in the broadest sense, of state power.

Discourses of the state constitute particular forms of knowledge, however, which a large historical literature—on the rise of statistics, on “imagined communities,” and on colonialism—points out are not, and have not always been, universally known. Today, state discourses of positive law have largely come to correspond with “policy.” Policy depends on language. Policies are developed and implemented as efficient and effective means to particular ends. The development of policy generally involves: articulation of a

¹⁷ On jurisdiction, see the articles in 48(2) *English Language Notes* (2010). See also Sara Kendall, *Contested Jurisdictions: Legitimacy and Governance at the Special Court for Sierra Leone* (Ph.D. dissertation, Rhetoric, University of California, 2009).

¹⁸ Symposium, *Transdisciplinary Conflict of Laws*, 71 *Law & Contemp. Probs.* 1 (2008).

¹⁹ This description has been adapted from Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* 10 (2005).

²⁰ H.L.A. Hart’s now-classic statement of Anglo-American legal positivism, *The Concept of Law* (1961), is now in its third edition (2013). Hart argues that the modern municipal legal system is a combination of primary rules that citizens generally obey and secondary rules that officials (in fact) accept. He uses John Austin’s *The Province of Jurisprudence Determined*, originally published in 1832, as his straw man. Austin argued that law is the habitually obeyed command of a sovereign backed by threats. Hans Kelsen, *Pure Theory of Law* (Max Knight trans., 1967), argues that a basic norm grounds the validity of all legal norms and acts of a system.

problem and data-gathering about it; consideration and analysis of options for addressing the problem; selection of a strategy or set of strategies; implementation of that strategy and of mechanisms for its assessment. Policy accompanies a vocabulary of administration that testifies to a proliferation of procedures of accountability and transparency rivaling any public articulations of a “people” or of an aspiring democracy committed to equality and liberty. If, as Foucault noted in *Discipline and Punish*, the “carceral archipelago” has become “a carceral continuum,” so too the jargon of bureaucracy has overflowed its institutional borders and become ubiquitous.²¹ Not only do state and international organizations adopt policies, that is, but “policy” governs in private enterprises and community groups. Although “policy” in this sense sounds incredibly broad, one can still say something about its vocabulary and grammar, its speech acts and claims, and its appeal to a particular sort of shared knowledge.

Note that the richness of the English tongue often allows one to say the same thing (or enables the presentation of identical content via employment of alternative communicative symbols) in short Anglo-Saxon words or in a polysyllabic Latinate vocabulary! Passive constructions and nominalizations allow one to make nouns, such as “employment” and “nominalization,” from verbs or other parts of speech. The passive language of spokespersons from schools to hospitals to prisons diffuses responsibility, at the same time as surveillance and control over “target populations” grow. Bureaucratise suits an institutional ethos that seeks to acknowledge that mistakes may have been made without necessarily holding anyone responsible. Generalities in institutional statements allow regulatory expansion while intricate classificatory details circumscribe inclusions and exclusions of coverage.

As a discourse of calculation, policy transforms otherwise incommensurable material goods and immaterial “values” into fungible units that can be exchanged or analyzed in terms of costs and benefits. The most basic matters—including health, happiness, pain, love—become subject to quantitative measure. For an especially egregious example, consider the Department of Justice’s cost-benefit report accompanying the promulgation of its rule for preventing, detecting, and responding to prison rape.²² Empirical research and quantitative study ostensibly combine with rational decision-making to produce efficient solutions to problems. When legal systems “depend heavily on useful numbers and calculations,” as Reid Hastie puts it, it is indeed useful to produce numerical scales for assessing the numerical judgments of legal decision-makers.²³ One must be alert to the dangers of producing numerical scales for assessing judgments expressed in non-numerical

²¹ Michel Foucault, *Discipline & Punish: The Birth of the Prison* 297-98 (Alan Sheridan trans., 1977).

²² The situation is described in Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice’s Economic Analysis of Prison Rape*, Georgetown Law Faculty Blog (June 13, 2012) (http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html). I thank Dan Farber for drawing this example to my attention. For further discussion, see Christina Reichert, *Debate over OIRA’s Virtues and Vices Continues*, Penn Program on Regulation Reg Blog (June 26, 2013) (<http://www.regblog.org/2013/06/26-reichert-oira-virtues-vices.html>).

²³ Reid Hastie, *The Challenge to Produce Useful “Legal” Numbers*, 8 (supp. s1) *J. Empirical Legal Stud.* 6, 6 (2011).

ways though.²⁴ As speech acts, policy statements are not themselves calculable in the way that numbers are, nor propositional in the manner of symbolic logic.²⁵ If one must be wary, as some have argued, of “gap” studies that appear to take legal rules for granted when they point to the ways that law-in-action does not live up to law-on-the-books, then one must be equally wary of policy reports that can say what they do only in particular ways.²⁶ Like the legal acts and events mentioned in part II, policy statements are claims: asserting, positing, describing, finding, proposing, recommending, demanding, and so forth. They claim and act more and less well in a manner that is not only a matter of calculation but involves a shared background and practical knowledge of language.

Training reinforces the expertise and ways of reasoning embedded in policy language. Foucault writes that particular social projects—the leper colony, the plague city, the Panopticon—carry with them their own “political dreams.”²⁷ A perfect vehicle for neo-liberal commitments, policy places calculation and risk-assessment in the service of a dream of security and welfare.²⁸ Insofar as it uses a language of management, rather than top-down control, policy appears to be an alternative to the sovereign model of law that prefers—or desires—an active voice. But if management, with its passive voice and economic calculations, is not on the surface a language of action and desire, then it too leaves much unsaid and unsayable. It too binds subjects and objects of law into particular relations, this time of service and consumption, that raise questions about who we are and what we appeal to in the name of our law.

In the context of social policies and expertise about human services, that is, all become “users.”²⁹ The user is the offspring of rational choice and marketing theory. In government and in the market alike, this figure embodies the joint hopes born from the shortcomings of both the “rational actor” and the “consumer.” While the “rational actor” assumed by law and economics is too abstract and ethereal, too ungrounded in the things of the world, to serve as a model citizen, the market “consumer” is too indiscriminating and materially oriented to be taken seriously as an expert. The “service user” of policy research and internet cookies is heir to both. The “user” combines the techniques of cost-benefit analysis and concern for economic efficiency with utilitarian calculations as to “satisfaction,” in new civic form. The user manipulates the things of this world, seemingly

²⁴ Wendy N. Espeland & Mitchell L. Stevens, *Commensuration as a Social Process*, 24 *Ann. Rev. Sociology* 313 (1998).

²⁵ Valerie P. Hans, Jeffrey J. Rachlinski & Emily G. Owens, *Editors’ Introduction*, in *Symposium, Judgment by the Numbers: Converting Qualitative to Quantitative Judgments*, 8 (supp. s1) *J. Empirical Legal Stud.* 1 (2011).

²⁶ Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 *Law & Policy* 97 (1988).

²⁷ Foucault, *supra* note 21, at 198.

²⁸ On neo-liberalism, see Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 *Theory & Event* (2003); for a more recent paper on the usefulness of the concept in law, see David Singh Grewal & Jedediah S. Purdy, *Introduction: Law and Neoliberalism* (Feb. 6, 2014) (<http://ssrn.com/abstract=2341068>).

²⁹ The description of the service-user is a slight revision of material in Constable, *supra* note 19, at 21-28; see also Marianne Constable, *On the (Legal) Study Methods of Our Time: Vico Redux*, 83 *Chi.-Kent L. Rev.* 1303 (2008).

distinguishing between needs and desires. The user draws on experience of these needs to contribute, both actively and passively, to representations of the public or publics through user surveys, satisfaction polls, and online data gathering. Data, as Cornelia Vismann puts it, are the substrate of the files that make administration possible.³⁰ As experts on their own lives, users are simultaneously data-points and informants as to administrative practices.³¹

The site of expertise changes. Even as insurance companies, health maintenance organizations and managed-care providers, charter school programs, credit-checking outfits, private security and transportation companies, private prisons, and partnerships between volunteer organizations and local governments, expand their range and jurisdiction, they are regulated in the name of deregulation. Expertise no longer belongs exclusively to their specialists or to social researchers, or even to more generic planners and efficiency experts, who formerly could be held accountable to professional norms and external goals. Rather, as state agencies, quasi-public organizations, and private parties alike adopt the techniques of management, accounting, and evaluation that characterize interdependent market enterprises, expertise belongs concurrently to the local citizen-user. Appealed to as responsible community member and local expert for input and feedback, today's citizen-user engages with others within circumscribed social structures to provide information. ("Responsible," "strategic," and "effective," are the top three words used in 2013 resumes, according to LinkedIn.)³² The citizen-user participates in a particular politics of association made all the more apparent in today's networked material world. He or she contributes at the click of a key to policies that increasingly manage what may loosely be termed the activities of everyday life: working, eating and drinking, learning, resting and recreating, traveling, reading, watching television, driving, and so forth. Formerly "invited" to "visit" websites, viewers no longer simply "like" or "friend" institutions on Facebook; they "follow" them on Twitter, as was recently pointed out on public radio, and become data-points from which to design and figure indices and values.³³ Transformations in public engagement and participation go to the heart of modern law, as service-users partner with service-providers, or the non-strictly-state institutions and organizations, including social media, that have emerged to shape the public sphere and exercise functions which, earlier in the twentieth century, had themselves come to be associated with the federal state or provinces and states.

To think law as language then is in part to recognize the contemporary grip of policy and administration on law. It is to consider how policy formulations and practices

³⁰ Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young trans., 2008).

³¹ See, for instance, the discussion in Frank Pasquale, *Grand Bargains for Big Data: The Emerging Law of Health Information*, 72 *Md. L. Rev.* 682 (2013).

³² Christine Choi, *Top 10 Overused LinkedIn Profile Buzzwords of 2013* (Dec. 11, 2013) (<http://blog.linkedin.com/2013/12/11/buzzwords-2013/>).

³³ Tom Pick, *101 Vital Social Media and Digital Marketing Statistics* (Aug. 6, 2013) (<http://socialmediatoday.com/tompick/1647801/101-vital-social-media-and-digital-marketing-statistics-rest-2013>).

correspond to particular ways of life. The point of doing so is not to come up with better policies as such, but to keep open to us ways of thinking and speaking that policy discourses appear to preclude or to disfavor. It is to counter discourses that make law into a set of optimal solutions or strategies and that associate imperfection with useless, irrational, unnecessary, ineffective, or inefficient means to ends, which must be fixed. It is instead to recall the active voice, to insist that passions and desires are not necessarily calculable, and to honor the imperfect—ongoing and interruptible, incompletely articulable—aspect of other, non-efficient, non-policy traditions of law and of language.³⁴

Thinking about law as language thus goes beyond displacing dominant views of law that consider power, force, threat, or command as most fundamental to law or that define law as a system of rules. To think law as language is to think beyond the jurisdiction of an official or formally-sovereign state. Thinking law as language allows one to consider what modern law and policy says and does not say; to explore what bodies or communities of law show and do not show; to interpret what legal archives express, suppress, and repress; and to do so unconstrained by demands of policy regulation.³⁵ In doing so, one is bound neither to what has become an increasingly impossible romance with natural law nor to the ostensibly realist cynicism and skepticism of law as social domination.

One responds more freely to the assertions and demands of policy as philosopher, historian, lawyer, scholar, or other speaker or writer, than one can as a participant in the limited-option instruments of policy research. In speaking of language and of the language of law, we speak of law in a manner that is free of circumscribed demands of and for efficiency. With this freedom to speak comes our indebtedness to language, which indebtedness is neither a policy problem nor a solution. Indebtedness to language and freedom to speak implicate another law, of which we have not yet explicitly spoken. All who speak—including policy makers who, like Bartleby,³⁶ may prefer not to—are bound in the world, as if by law, to language. The law of language is a gentle law, as Heidegger writes.³⁷ Human beings speak, by law, as what they are: speaking animals.³⁸ The manifestations and materialities of language come as gifts of law revealing—ever imperfectly—who we are.

³⁴ In addition to scholarship on “other” law traditions, see discussions of “justice” in the common-law tradition, as in Markus D. Dubber: *The Sense of Justice: Empathy in Law and Punishment* (2006).

³⁵ On archives, see Jacques Derrida, *Archive Fever: A Freudian Impression* (Eric Prenowitz trans., 1995); on the manner in which files act in accord with practices of legal reasoning, see Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat* (Marina Brilman & Alain Pottage trans., 2010).

³⁶ Herman Melville, *Bartleby, the Scrivener: A Story of Wall Street* (1853).

³⁷ Martin Heidegger, *The Way to Language*, in *On the Way to Language* 111, 128-29 (Peter D. Hertz trans., 1982).

³⁸ Aristotle, *Nicomachean Ethics*, I:13, refers to man as *zōon logon echon*.