

This is the author's accepted manuscript of a book review published in *Feminist Legal Studies* vol 24

Doi: 10.1007/s10691-016-9315-y

Book Review

Marianne Constable: *Our Word Is Our Bond: How Legal Speech Acts*

Stanford University Press, Stanford, 2014, 232 pp, price: \$27.95 (PB), ISBN:

9780804774949

Marianne Constable's erudite book *Our Word Is Our Bond: How Legal Speech Acts* opens with an examination of President Barack Obama's infamous inaugural oath of 20th January 2009 (Constable 2014, pp. 1–2, 5–8, 145). She recalls that commentary on the event focused on the significance of the grammar and meaning which could be gleaned from Obama's ill-fated oath: 'I, Barack Hussein Obama, do solemnly swear that I will execute the office of President of the United States faithfully'. When reviewing Obama's televised oath it is clear to see that the blame for his error lies with Chief Justice John Roberts because his dictation of the oath as set out in Article Two, Section One, Clause Eight of the United States Constitution, was incorrect. Roberts failed to position the word 'faithfully' before the word 'execute' and it has been rumoured (by those concerned with the significance of grammar and meaning) that this dictation to Obama "unilaterally

amended the Constitution” because Roberts was “a famous stickler for grammar” and accordingly could not bear to abide the split verb as penned in the Constitution (Pinker 2014, 228).¹ There was even comment that this “split-verb superstition” led “to a crisis of governance” because the legal legitimacy of Obama’s inauguration was called into question (Pinker 2014, 228).

Yet Constable notes that because “‘will’ is a model verb” there is in fact no split verb in the Constitutional oath and that arguments to the contrary are incorrect (Constable 2014, 5). But this is not Constable’s concern and neither are the differences which result from *something* being “executed faithfully” or *someone* “faithfully executing” a task; for as she comments the White House was clear that these are “distinctions without a difference” (Constable 2014, 6).

However what is of concern to Constable is why it was deemed necessary that Obama should take a second oath. If the incorrect wording did not concern the White House then why repeat the inaugural oath? Here the subject matter of Constable’s book becomes clear: for just as a marriage ceremony has ritualistic words necessary for a legal change in a state of affairs, so too does the inauguration of the President. Thus it is performative legal speech acts which Constable’s book examines: “how uttering

¹ Of note here (perhaps) is that neither Pinker’s book on writing, nor Constable’s book on legal speech, refers to the other regarding this important subject. Perhaps this is explained by the fact that the books were published simultaneously in 2014. Or perhaps the answer lies in Pinker’s argument that the significance of specific words and utterances within legal discourse, thus precisely the subject of Constable’s book, is a superfluous relic of a “turbid professional style” which is akin to a “medieval scribe on crack” (Pinker 2014, 53, 64).

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 law” (Constable 2014, 8).

Constable pits her examination of performative legal speech acts against the “usual positivist” and dominant methodological approach (Constable 2014, 10) which she has elsewhere identified as “sociolegal positivism” (Constable 2005, 10). This combination of sociolegal studies and a type of legal positivism asserts that “the connection between law and morality is an empirically contingent matter of social factors” (Constable 2005, 29) and that because law is “a humanly made creation of society” it tends towards being described as “ahistorical” and is instrumentalised “within a field of social power” (Constable 2005, 10, 11). Opposing this dominant methodology Constable seeks to revisit what she claims “legal education, sociolegal study, and philosophy of law threaten to forget: that ‘our word is our bond’” (Constable 2014, 10).

She does this at a time in which European Critical Legal Studies, for example, has identified itself as firmly in “the age of politics and resistance”, having moved beyond a time of aesthetic judgments based upon “rhetoric, hermeneutics, deconstruction, semiotics and psychoanalysis” (Douzinas 2014, 190, 191). Thus it could appear that Constable is returning to a traditional examination of law which is guilty of a profound depoliticization of legal studies. Here a comparison may be made with H. L. A. Hart’s telling remark that his legal positivism –which was arguably grounded on the understanding of language, practice, and speech in law – was concerned with “the

clarification of the general framework of legal thought, rather than with the criticism of law or legal policy” (Hart 1994, v).

However one cannot unreservedly make such a crude judgment of Constable’s work, even if such a judgment may contain a trace of truth. For her work skilfully re-emphasises the point that law is composed of social actions and interactions of speech, even if Constable herself states that these are “basic insights” which “supplement” what is now the dominant methodology in legal studies (Constable 2014, 41). Nevertheless this point of methodology is important and will be returned to below.

Through reference to J. L. Austin and Adolf Reinach, Friedrich Nietzsche, Stanley Cavell, Benjamin Cardozo, Jacques Derrida, and others, Constable makes the firm point that “modern U.S. law is a matter of language. U.S. law does the things it does largely through speech. U.S. law recognizes that speech acts” (Constable 2014, 131). She utilises cases such as *Morissette v. United States*, 342 U.S. 246 (1952) (Constable 2014, 22–24) and *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 (1928) (Constable 2014, 47–72), as well as readings of both the *Miranda* rights (Constable 2014, 24–28) and marriage rites (Constable 2014, 85–88), and an analysis of Euripides’ *Hippolytus* (as referenced in J. L. Austin’s work) (Constable 2014, 107–121), in order to illustrate her points. To be commended here is Constable’s excruciating attention to detail, something which is evidenced via her exacting dissections of the examples at hand and the four appendices which close the book. Included therein are the two full judgments from the aforementioned cases, the full

transcript of Obama's ill-fated inaugural oath, and sections of the California Penal Code (Constable 2014, 145–168).

Constable's monograph is (in this author's opinion) a strong continuation of the legal scholarship and methodological development seen in her previous monograph *Just Silences: The Limits and Possibilities of Modern Law*. For there she sought to break new ground by positing a legal methodology which challenged and surpassed sociolegal positivism: "thinking more fruitfully about law and justice requires something other than the sociological and legal positivist frames and limits established through sociolegal studies' assertions" (Constable 2005, 33). Thus Constable examined how silence is implicated in various relationships between law and justice, and in *Our Word Is Our Bond* that oppositional methodology continues to develop. In this latest work she explicitly seeks to think of "law as language", how it is "said and unsaid, heard and unheard, in claims and counterclaims made by persons who participate in law" so that we may, against sociolegal positivism, "[reorient] various misunderstandings of law" (Constable 2014, 132). This is perhaps a more subtle, underlying, and nuanced politicization embedded within her work.

Accordingly this is an important project which continues Constable's Nietzschean challenge against the "history of jurisprudence, the history of metaphysics lead[ing] into sociolegal positivism" (Constable 2005, 36): "The 'real world' ... let us abolish it!" (Nietzsche 1990, 50). For in *Our Word Is Our Bond* she expertly illustrates that law's speech acts both "partake in the metaphysics that Friedrich Nietzsche identifies with 'the error' of reason" (Constable 2014, 49) and also serve "[w]ithin tradition yet potentially

breaking with it” (Constable 2014, 134). This can then lead to what Constable identifies as a profound *political* question with regards to law and language: “In speaking of the language of law, lawyers, philosophers, historians, social scientists, and others respond more freely to the assertions and demands of policy than can policy scientists and survey participants” (Constable 2014, 137–138). This guarded and subliminal thesis within Constable’s work is delicately revealed to the reader through this challenging, yet rewarding, methodologically powerful project.

References

Constable, Marianne. 2005. *Just Silences: The Limits and Possibilities of Modern Law*. Princeton and Oxford: Princeton University Press.

Constable, Marianne. 2014. *Our Word Is Our Bond: How Legal Speech Acts*. Stanford: Stanford University Press.

Douzinas, Costas. 2014. A Short History of the British Critical Legal Conference or, the Responsibility of the Critic. *Law and Critique* Vol. 25, Issue 2: 187–198.

Hart, H. L. A. 1994. *The Concept of Law (2nd Edition)*. Oxford: Oxford University Press.

Nietzsche, Friedrich. 1990. *Twilight of the Idols and The Anti-Christ*. Trans. R. J. Hollingdale. London: Penguin Books.

Pinker, Steven. 2014. *The Sense of Style: The Thinking Person's Guide to Writing in the 21st Century*. London: Allen Lane.