

Fall 2021

From Promise to Threat in Language and Law

Marianne Constable

Follow this and additional works at: <https://scholar.law.colorado.edu/lawreview>



Part of the [Public Law and Legal Theory Commons](#)

Recommended Citation

Marianne Constable, *From Promise to Threat in Language and Law*, 92 U. COLO. L. REV. 1027 (2021).
Available at: <https://scholar.law.colorado.edu/lawreview/vol92/iss4/7>

This Article is brought to you for free and open access by the Law School Journals at Colorado Law Scholarly Commons. It has been accepted for inclusion in University of Colorado Law Review by an authorized editor of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

FROM PROMISE TO THREAT IN LANGUAGE AND LAW

MARIANNE CONSTABLE*

An art of speaking which does not seize hold of truth, does not exist and never will.

– Phaedrus (260e)

I feel I have slipped into this Symposium Issue to address its original question, “What should critical legal theory become?” under false pretenses, because I have no idea what critical legal theory should become, nor would I presume to tell those who write in its name what to do. I am grateful for the invitation from the University of Colorado’s new Center for Critical Thought to think about some of the questions that its circular raises about current crises in the United States and law, however. In the Essay that follows, I reflect—critically, I hope—on a particular danger to U.S. law. Insofar as law is in large part a matter of language, the issues raised in the Center’s circular, particularly those relating to public speech, very much implicate the future of law and are worthy of further thought.¹

The “profession of words”² that is law, I argue, relies on a particular promise of language. The transformation of language from promise to threat in recent years, I show, thus holds grave implications for law as well as politics, insofar as law constitutes the walls of the *polis* or of a public space within which politics or the exchange of opinions occurs.³ In what follows, I weave several threads about language and politics together from the works of such notable thinkers as J. L. Austin and Hannah Arendt. Most of this Essay was written in the days before the 2020 U.S.

*Professor Marianne Constable, Professor of Rhetoric, University of California, Berkeley. Heartfelt thanks to Matthew Stewart for his perspicuity and patience; to his fellow editors for their helpful comments; and to Kris Kneeland and UC Berkeley students for their discussion of these ideas.

1. Symposium, *The Stakes for Critical Legal Theory*, 92 U. COLO. L. REV. 945 (2021) (originally titled *What Should Critical Legal Theory Become*).

2. DAVID MELLINKOFF, *THE LANGUAGE OF LAW* vii (1963).

3. HANNAH ARENDT, *THE PROMISE OF POLITICS* 16 (2005).

election. That election has passed and a new president holds office. Those concerned with the future of the public sphere and with thinking about law nevertheless still must contend, one way or another, with the difference between promises and threats in language and in law.

Part I explains the importance of the promise of words. It describes speech as an activity that is key to politics and law. Four years ago, in the days following the 2016 election, I argued that the then-incoming Administration's lies about words portended the loss of the promise of truth that accompanies language.⁴ Words bind their interlocutors to one another and to the world, I claimed, insofar as words convey—through their promise of truth—a world that interlocutors hold in common. As others have also now noted, the immediate upshot of Administration officials' explicit disregard of what is and of what is said, and in particular that it is said, is mistrust in the possibility of genuine public exchange, on which politics depends. When language or words are bereft of their promise this way, listeners and speakers can no longer share ideas or opinions through speech. Both agreement and disagreement through words become impossible. The malaise that accompanied the 2016 election, I argued, corresponded with the dismantling of the public sphere as a place of discussion and exchange.

Words are still uttered, of course. But, as Part II argues, speech has been transformed during the last four years. The admittedly often-unfulfilled promise of language—to reveal or uncover, to those who engage in its practices, their common world, its truth or its reality—has given way to a growing culture of threats and verbal offenses that make a mockery of truth. Without a political sphere grounded in interlocutors' sense that their words reveal the truths of their opinions, words become weapons. The promise of language to show truth has given way to threats of harm and even, as the storming of the Capitol in Washington D.C. on January 6, 2021, attests, to actual violence.

While Parts I and II focus on the promise and the threat of words respectively, Part III turns to law. It suggests that when words become threats, the very future of law and its capacity to

4. Marianne Constable, *When Words Cease to Matter*, MEDIUM: THE HANNAH ARENDT CTR. (Nov. 19, 2016), <https://medium.com/amor-mundi/draft-c-when-words-cease-to-matter-fe71c3637099#.2zakj3xpr/> [<https://perma.cc/U2PQ-MGMC>], reprinted in 5 J. HANNAH ARENDT CTR. FOR POL. & HUMANITIES AT BARD COLL. 98 (2017).

insist on justice is at stake. Appeals to political community and unity or renewed commitments or qualifications to the First Amendment are insufficient to remedy the problem that the weaponization of language poses for a law and a politics grounded in language. Despite the best arguments of legal positivism, this Part argues, United States law has never fundamentally been a system of rules; its rule-like qualities stem from the commitment of its officials to their offices and from their non-mechanical understandings of words and practices and of the contexts in which statements of rules apply—to themselves as to the citizenry. When, as now, the unspoken norms and expectations of office have been breached, the pressure to rearticulate constraints on legal and political power, through increasingly explicit statements, risks producing a formalist system in which words proliferate, while force and compulsion run amok.

To think critically about law in these times requires attending to the unsettling fragility of the bonds of language and law.

I. THE PROMISE OF SPEECH

To understand the recent transformation from promise to threat that language has undergone, one must first recognize that speaking and writing are activities. Any particular utterance, spoken or written, can be described as an act in many different ways, as J. L. Austin explained in his twelve lectures on speech acts in *How to Do Things with Words*.⁵ Austin used masses of references to law to explain that propositional sentences and some other utterances may be true or false, but that the propositional value of what words say is not all that matters.⁶ Truth is not the only issue by which to judge the success of an utterance. In addition to *saying* something or *what* they say, utterances *do* something *in* being said: they state, question, warn, promise, describe, threaten, and so forth.⁷ Lawyers and judges constantly engage in legal speech acts—they accuse, defend, agree, advise, appoint, object, rule, sentence, convict, and appeal—as matters of course.

5. See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975).

6. See *id. passim*.

7. *Id.* at 6.

If utterances are doings or acts, then they are susceptible to failure not only by being false or through *what* they say propositionally, Austin points out, but also in other ways.⁸ First, they go wrong the way other acts do. Just as acts may occur accidentally or unintentionally, so too slips of the tongue occur. In law (and in legal theory), one recognizes that when someone is compelled or coerced to do something, that person's "act" is in some sense lacking as an act, insofar as the person was not "free" to do otherwise. Likewise, when someone is compelled to utter something or coerced into saying it, one recognizes that attributing their words to them without qualification is suspect. Second, utterances are susceptible to failure not only as acts but also as speech: they may go unheard or be misunderstood. Third and finally, insofar as utterances are jointly acts and speech, or speech acts, particular "infelicities" bedevil them. As lawyers know, some speech acts do not apply in certain situations, they may be incomplete or unauthoritative, they may be insincere or lack uptake. One fills out the wrong form, for instance, or fills it out incorrectly, or the wrong person does so. Someone makes a promise without intending to keep it. Although insincere, it is still a promise, according to Austin, although an "unhappy" one and an example of an "infelicitous" speech act.

Law recognizes that utterances are speech acts. Evidentiary rules, for instance, exclude hearsay (for the purpose of proving the truth of the matter asserted), yet make an exception to allow testimony as to verbal acts. Evidence law thus distinguishes two aspects of utterances: utterances as verbal acts that do things and utterances as having content that is propositionally true or false. Along with copyright law, and the criminalization of perjury and of hate speech, hearsay rules also show that law's treatment of language extends far beyond the First Amendment.

Austin and others often take promising to epitomize speech acts.⁹ A promise commits its speaker to granting something that is presumed to be good for its beneficiary. Promises also instantiate the way that "our word is our bond."¹⁰ Words promise truth. Without a prior commitment to the truth of our words, we cannot promise. Without the aspiration of words to truth, promises and oaths, or commitments in words, cannot happen. But

8. *Id.* at 12–52.

9. *Id.* at 9.

10. MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS (2014).

not only would promises be impossible if words did not ever actually show “reality,” so too would other acts done through speech—descriptions, arguments, claims, warnings, agreements, concessions, appeals, bets—become impossible without the promise or commitment of words to show truth. If no uncovering of truth or of actuality or reality were possible through words, then persons would not be able to speak with one another or in *any* meaningful sense.

This is not to say that language is truth nor that all words speak truth, any more than it is to claim that all promises are kept. Far from it. As pointed out above, utterances—including promises—go wrong in all sorts of different ways. Like their human speakers and listeners, utterances deceive, they obfuscate, they err, they offend. They are also temporal; they are incomplete; however adequately they may do in a particular situation, they are imperfect. (Perhaps it is helpful to think of our own overlapping practices and knowledges of language as akin to the grammatical “imperfect aspect” of a verb: routine, habitual, continuous, and yet interruptible.)

So long as words promise truth though, the different kinds of failures of utterances may be addressed, although such responses, insofar as they too are utterances, may of course also go wrong in various ways. Falsehood and deception can be called out as illusion; they can be challenged in the name of what actually appears to be. Ignorance can be met with education. Even insults can be challenged, acknowledged, recanted, or more. In response to the ways that its own speech acts may go wrong, law includes elaborate processes of examination, objection, appeal, remand, and pardon, for instance, to address potential infelicities or failure. Proper forms may be found, filled in, and filed.

Today, the situation surrounding public speech is different. The 2016 election shows how words, on which productive debate depends, have been cast adrift. Former President Donald J. Trump’s factual misstatements were legion, as fact-checkers have indeed been quick to point out. But the difficulties with Trump’s utterances involve more than the occasional lie. Hannah Arendt reminds us that lies are no stranger to politics: lying is a form of action and politics is the realm of speech and action.¹¹ Catastrophe comes when lying becomes so routine that

11. Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. REV. BOOKS (Nov. 18, 1971), <https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/> [<https://perma.cc/3WQ6-27M9>].

one can no longer distinguish fact from falsehood. When this happens, what words say no longer matters and speech acts can no longer do what they did in the same way as when their truth mattered.

Trump has a track record of utterances that he claims he “never said,” both from before his election¹² and since. His denials include tangled claims about right-wing racism¹³ and statements about the coronavirus.¹⁴ Even as the most charitable accounts of Trump’s 2016 platform understood it as an “opening bid” for negotiations, one was left wondering just what this bid was. The inconsistencies in his many arguably premature or thoughtless public announcements during that campaign—on Obama’s nationality, immigration, government reform, gun laws, and the Middle East—now pale in comparison with his speech while in office. He has lied about public health, the pandemic, and the 2020 election and insulted those who question, disagree, or are not like him. Even more egregious is the disconnection from the world that comes with denial of his words.

12. Linda Qiu, *17 Times Donald Trump Said One Thing and Then Denied It*, POLITIFACT (July 6, 2016), <https://www.politifact.com/article/2016/jul/06/17-things-donald-trump-said-and-then-denied-saying/> [<https://perma.cc/9ZHW-33RG>].

13. I am indebted to a December 2, 2020 seminar response to a version of this paper by Haley Anderson at UC Berkeley for some references regarding the August 2017 Charlottesville Unite the Right rally. After condemning violence on “many sides,” see Eric Bradner, *Trump Condemns ‘Hatred, Bigotry and Violence on Many Sides’ in Charlottesville*, CNN (Aug. 13, 2017, 8:52 AM), <https://www.cnn.com/2017/08/12/politics/trump-statement-alt-right-protests/index.html> [<https://perma.cc/YS9E-QADP>], Trump called those who committed violence in the name of racism, including neo-Nazis and white supremacists, “criminals and thugs.” Dan Merica, *Trump Calls KKK, Neo-Nazis, White Supremacists ‘Repugnant’*, CNN (Aug. 14, 2017, 1:46 PM), <https://www.cnn.com/2017/08/14/politics/trump-condemns-charlottesville-attackers/index.html> [<https://perma.cc/Y74M-KGBU>]. He then referred to there being “very fine people, on both sides,” although he later claimed he was “not talking about the neo-Nazis and the white nationalists, because they should be condemned totally.” *Read the Complete Transcript of President Trump’s Remarks at Trump Tower on Charlottesville*, L.A. TIMES (Aug. 15, 2017, 5:22 PM), <https://www.latimes.com/politics/la-na-pol-trump-charlottesville-transcript-20170815-story.html> [<https://perma.cc/U4V2-N2DH>]. He also claimed that his answers were perfect. Katie Galioto, *Trump Says He Answered Charlottesville Questions ‘Perfectly’*, POLITICO (Apr. 26, 2019, 10:27 AM), <https://www.politico.com/story/2019/04/26/trump-charlottesville-comments-1290724v> [<https://perma.cc/6FPM-FQ9M>]. See also, *President Trump Signs Veterans Health Care Bill*, CSPAN (Aug. 12, 2017), <https://www.c-span.org/video/?432523-1/president-trump-condemns-violence-charlottesville-va#> [<https://perma.cc/4ARX-AEYG>].

14. JM Rieger, *Watch Trump Deny Saying Things About the Coronavirus That He Definitely Said*, WASH. POST: THE FIX (Apr. 21, 2020, 2:39 PM), <https://www.washingtonpost.com/politics/2020/04/21/watch-trump-deny-saying-things-about-coronavirus-that-he-definitely-said/> [<https://perma.cc/SH9M-52K7>].

When he and his supporters deny the very fact that he has said things that we have heard him say, his lies about his words deny those words' reality, what has been said and done, what is, and words themselves.

The willingness of the forty-fifth President and his Administration to disregard things he has actually said thus goes beyond lying and giving offense. When Trump says "X" and later adds not only "I never meant X," but also "I never said X," his disavowal of having said "X" raises a more crucial issue than the truth of the proposition that "X was said." When what one hears is denied, and disavowals continue regardless of facts, one can no longer believe one's ears. No wonder that at least half of the country is reeling. We are on very shaky ground when we cannot rely on our hearing and speech.

In sum, in the context of denial and disregard of words, language no longer works to offer its speakers and listeners a common world in which to find their bearings. It no longer redresses errors, rights offenses, or promises truths. Without the promise or commitment of words to truth, utterances—and their speakers and listeners—cannot be called out. The public sphere is ruptured insofar as the speech acts required for dialogue and discussion, including disagreement, depend on words and on their promise.

"Your word is your bond," in other words, as so aptly and ironically put in Melania Trump's stolen words at the 2016 Republican National Convention. In words plagiarized from a talk given by Michelle Obama eight years earlier, Melania Trump claimed that her parents had "impressed on me the values that you work hard for what you want in life; that your word is your bond and you do what you say and keep your promise; that you treat people with respect." She referred only to herself and she left out two important phrases. She did not steal enough. During the 2008 Democratic National Convention, Michelle Obama had explained that "we," she and Barack, were raised with certain values: "that you work hard for what you want in life; that your word is your bond and you do what you say you're going to do; that you treat people with dignity and respect." Michelle Obama had also included, "even if you don't know them, and even if you don't agree with them."¹⁵

15. Constable, *supra* note 4.

Donald Trump made disagreement, indeed anything other than abject loyalty, impossible. His dismissal of words and of the bond or commitment in their saying leaves us—those who would speak or listen—not only queasy but speechless. Literally. At a time when more is being said through a greater variety of media than ever before, it appears that anything can be said and everything can be unsaid. Hence, nothing that is said matters. Or perhaps it is only that one cannot tell the difference between what matters and what does not. No matter. One cannot debate opinions with someone who disregards the very fact of their own statements of opinion. One knows not what further undermining of speech awaits. In such tenuous terrain, words cannot bind. We are at sea, deprived of the capacity for political speech with those—or as those—to whom words do not matter.

II. THE THREAT OF WORDS

When words cease to matter, a change in administration alone, however joyous, cannot transform speech or recall it to its promise. The current disorientation about public speech—on all sides, and perhaps even in Trump himself—cannot be blamed entirely on Trump's Administration. Mistrust has spiraled, with goodwill and bad, as a broad swath of television, newspapers, and social media, supported by their publics, have studiously selected, relayed, and glossed Trump's own mixed messages, from the most trivial to the most egregious, including his enthusiastic and contradictory tweets for attention. More words circulate than ever before. True or false—it seems not to matter so long as words produce effects.

When utterances become simply means to ends or to effects, they resemble threats rather than promises. They risk losing their very character as acts of speech that depend on their words' promise of truth. In promising, recall, a speaker freely commits to granting something that is presumed to be good for the promise's beneficiary. A threat, by contrast, reveals a will to dominate or compel on the part of a speaker. Threats force their addressees onto the horns of a particular dilemma or *Catch-22*. Addressees must choose between two evils: undesirable cooperation with the will of another or harm. Successful threats either render their addressees impotent—they are no longer free to act (insofar as acts presume will or intention)—or injure those who fail

to obey or conform to the will of the speaker who “promises” harm. Either way, the situation devolves into relations of power.

Trump’s readiness to dismiss what his words say in favor of what they do illustrates the issue. Asked whether he regretted any of the incendiary rhetoric of his 2016 campaign, he retorted, “No, I won.” For him, utterances do not speak, much less promise truth. They produce results or effectuate ends. Unmoored from what they say, words serve as instruments of will or for getting his way. They serve, as Trump has many times made clear about law too, as weapon and as shield.

Trump’s own conflation of promise and threat was already manifest before the 2016 election. In discussing his word in *Crippled America: How to Make America Great Again* (2015), Trump writes, “The most important lesson is this—*Stand behind your word, and make sure your word stands up.*” His next paragraph begins, “I don’t make promises I can’t keep.”¹⁶ Trump seems to align his word with his “promises” here, but he immediately follows “I don’t make promises I can’t keep,” with “I don’t make threats without following through. Don’t ever make the mistake of thinking you can bully me. My business partners and employees know that my word is as good as any contract—and that better go for the other side’s word as well.”

The “word” that “stands up” and “behind” which Trump stands is a shield or weapon of defense against bullying. It is also an offensive weapon or threat by “me” (Trump) against “you,” should your word turn out not to be, like Trump’s word, “as good as any contract.” Even if Trump does not explicitly invoke the slang usage of “contract” (i.e., hiring an assassin to kill someone), he “follow[s] through” on his threats against “the other side,” whose word had “better” be as good as his.

The slippage from promise to threat here and elsewhere may explain some of the world’s confusion surrounding U.S. foreign and domestic policy: Was the President peddling in promises or in threats when he dealt with particular nations or agreements? And is there a difference? In a house divided, a U.S.-Mexico wall was a promise to some and a threat to others. Trump’s many executive orders sounded like commitments but also appeared as bullying in the face of imagined or actual slights. Trump’s performance belittling and speaking over his

16. DONALD J. TRUMP, *CRIPPLED AMERICA: HOW TO MAKE AMERICA GREAT AGAIN*, 138 (2015).

opponent, former Vice President Joe Biden, in the September 29, 2020, presidential debate, revealed his simultaneous breach of a promise—to the agreed-to terms of debate—and the ways that his words bully.

Hate speech has long been an issue. Today, all manner of speakers and hearers treat and experience words as weapons and threats. Not only persons who have historically been on the receiving end of threats, domination, and violence but also others call out microaggressions. The outcry against offensive words now joins with protest against the physical violence that images of police brutality bring to the fore. Media concerns over “cancel culture”—whether referring to the withdrawal of attention, approval, and support for celebrity figures, companies, and their messages or to broader silencing and erasures of persons and groups—recognize the harm that words can do. Now even the powerful, it seems, encounter speech not simply as their privilege and right, but as a destructive initiative launched from the mouths and pens (and posts) of others. Not only sticks and stones, but also words, “hurt” them as they do others. Words ricochet like bullets to which all are susceptible, whether masked or unmasked, online or off, in parking lot altercations and in remote-classroom-Zoom bombings.

High and low, public speech discharges its words as barbs. In a stirring speech on the opening night of the physically distanced, made-for-television, 2020 Democratic National Convention, Michelle Obama repeated, in an apparent rebuke, Donald Trump’s words about the coronavirus death toll in the United States: “It is what it is.” Again, her words are telling; they may be what they are, but speech at least is no longer what it is, nor even what it says. Words today—hers, his, those of our language—have come to matter less for the truths that they promise and the deeds that they do than the damage they cause, in this case to Trump’s reputation among voters concerned with the spread of the coronavirus.

When words become weapons, our word is no longer our bond. Or, rather, the threatening words that accompany fear and domination signify bondage, not the bond of political community. Fear “as a principle of public-political action,” Arendt points out, inspired by Montesquieu, “has a close connection with the fundamental experience of powerlessness that we all

know from situations in which, for whatever reasons, we are unable to act.”¹⁷ Those who are threatened become powerless to act insofar as acting requires freedom. When those threatened are unable to act, they cannot engage in politics proper, the realm of action-in-common.

Unable to speak and unable to act, one cannot listen. Instead, one watches with bated breath as, during the second 2020 national debate, cameras zoom in on the fly on Vice President Pence’s head! In a world where words no longer speak but only threaten harm, some gasp in horror or in amusement; others prepare for the fray.

III. LANGUAGE AND LAW: A RELATION OF UNDERSTANDING

What does all this have to do with law? Law is a “profession of words.”¹⁸ When words become threats, must law, too, become simply a tool of domination and will? Individuals and groups have admittedly always used law instrumentally or strategically to gain their own ends. But, this Part argues, such interests have never completely circumscribed the claims of U.S. law which, in the past, has appealed—at least in its language, however implicitly, falsely, or otherwise inadequately—to justice. When words no longer speak truth, must law and its ambiguous speech act, its *insistence* on what is to be done, turn from justice into brute force, from promise into threat?

Unlike the “misunderstood relation” of law and literature,¹⁹ the proper relation of language and law is one of understanding. Legal education, of course, is largely a matter of learning to read, write, speak, and hear in particular ways. In enacting laws, legislatures understand or presume that words—however contested they may turn out to be—matter; if legislation is not understandable, it cannot be followed. Courts also aim for understanding, this time in the sense of hearing, the strongest case for both sides in a trial or in litigation. Critics understand or take for granted that the *injustice* of legal acts and official actions provide bases for criticism and for the amendment, revision, or repeal of particular laws. Were an advocate to acknowledge in court the injustice of his or her argument, he or

17. ARENDT, *supra* note 3, at 68.

18. MELLINKOFF, *supra* note 2, at vii.

19. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1989).

she would not get far. Understanding law as claiming justice, in other words, not only justifies its insistence on having its way but also serves as a precondition for the meaningfulness of criticisms that particular law or laws are unjust.

Law's insistence on justice is often unspoken.²⁰ In the United States, it lies in the unarticulated norms and practices of a rule of law in which officials, no less than citizens and others, are subject to law.²¹ Law often does not and cannot explicitly proclaim the justice which it supposedly upholds and aspires to. This is in part because, as James Boyd White argues, words of law are always inadequate to reality—and to the justice that he in effect affirms is the aspiration and peculiar reality of law.²²

On the surface, this argument appears in tension with a popular conception of U.S. law that considers it to be a system of rules, in which law is not necessarily connected with justice. But understanding U.S. law as a system of rules or, rather, a system of statements of rules, is incomplete. First, to expect rules to cover every situation is to ask for the impossible. Second, using a rule is always a matter of practice. Even a system of rules depends on unspoken norms.

Unspoken norms surrounding rules of law in the United States, such as presumptions of good faith, allow one—whether official or citizen—not to have to judge anew every factor in every instance of having to decide what to do. They function as what Arendt calls prejudices or prejudgments.²³ In Linda Ross Meyer's great examples about the legal system, no rule requires that

lawyers must make legal arguments and not draw cat pictures, that courts must write reasoned opinions and not just tweet out winners, that courts must follow caselaw precedent and not folktales, that courts must not roll dice to decide who

20. MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 7 (2005).

21. *Id.* at 57.

22. JAMES BOYD WHITE, *KEEP LAW ALIVE* (2019). I am tempted to say that words (like our knowledge of them and like our utterances) are imperfect, but I suspect that it is rather the case that one cannot think about words using standards or scales of "perfection."

23. ARENDT, *supra* note 3 at 99–100, 151–52.

wins, or that Presidents must move out of the White House at the end of their Term of Office.²⁴

Understanding a rule is thus a matter of familiarity and convention and, when something new arises, of knowing how to extrapolate from the rule's usual context and purpose. Using statements of rules, in other words, involves more than rules; it involves prior knowledge and understanding when or where a rule applies, for which there is ultimately no rule. The absence of rules allows new possibilities of action and also, as we have seen in the last four years, enables expectations to be broken.

Even within a system of rules then, one takes the practices and norms surrounding a given rule—including its language—for granted until something new arises that breaches the rule or the norm or otherwise requires us to examine our prejudgments. In language, one distinguishes explicit rules of grammar and vocabulary, of syntax and semantics, from unspoken norms and expectations of speech (including writing). Figures of speech or turns of phrase at first appear to deviate from rules of ordinary usage, as Arthur Quinn argues. But over time, he continues, rules and categories may develop for the deviations themselves, and former deviations may become part of the system of usage.²⁵

In law too, formerly unspoken and unarticulated practices may likewise become explicit, as in the Restatements of the twentieth century for instance, or alternatively, they may fall by the wayside. The impetus for formulating additional statements of rules is often that an expected practice or norm has been breached; a corrective is needed. Because something expected was omitted, a rule now requires it; because a norm was breached a particular way, that aspect of the norm is made explicit.

Throughout his term as President, Trump flouted the expectations and norms of office. In the appointments that President Trump has made and unmade in the last four years, in the pardons he has granted, in the communications he has tweeted, in the executive orders he has signed, in his use of the courts, in his relations with the Justice Department and other agencies,

24. Marianne Constable & Linda Ross Meyer, *No Rule for the Application of Rules*, in *LEGAL RULES IN PRACTICE: IN THE MIDST OF LAW'S LIFE* 29–43 (Baudouin Dupret et al. eds., 2021).

25. ARTHUR QUINN, *FIGURES OF SPEECH: 60 WAYS TO TURN A PHRASE* 6, 52, 97 (1995).

and in his claims about executive privilege—not to mention in his manners and interactions with others and in his substantive policies at home and abroad—he has flouted the expectations and norms of the office of president. It is in this sense that even with a different incoming president, one cannot go back to the implicit norms or practices that used to govern. Whether or not the new president honors these norms, something is new: they are no longer implicit.

Trump's words and deeds have fed people's mistrust of and confusions about the institutions and offices of law. On the one hand, we now know that there is no rule that a losing presidential candidate must concede. On the other hand, even after courts have turned down his attempts to "stop the count," we have yet to contend with the after-effects of persistent and unsupported declarations of voter fraud. Over the course of his career, Trump has filed hundreds of petitions and been involved in over four thousand lawsuits.²⁶ During the past four years, he has appointed 229 judges to the federal judiciary, including naming three of the nine Justices on the Supreme Court, in some questionable circumstances.²⁷ Whether he wins or loses in court, his words have sown uncertainty about law.

In the context of political division and skepticism about law, mere calls for unity cannot heal the damage. In moving from promise to threat, language shows itself as the very issue that joins and divides us. Nor can elaborating and following statements of procedural rules solve substantive problems. At best, procedural safeguards, like rights, protect those in danger of not having them.

Students, teachers, and scholars of law—critical legal theorists among them—must take seriously what Socrates replied to

26. Valerie Keene, *Deep Dive: Donald Trump's Long History of Lawsuits*, CRUSH LSAT, <https://crushthelsatexam.com/deep-dive-donald-trumps-long-history-of-lawsuits/> (last updated Jan. 24, 2021) [<https://perma.cc/5ENZ-FAEM>].

27. Two hundred twenty-nine appointments in total: three to the Supreme Court, fifty-four to appellate courts, and 174 to district courts; Trump appointed and elevated Amy Coney Barrett and A. Marvin Quattlebaum Jr. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR. <https://www.fjc.gov/history/judges/search/advanced-search> [<https://perma.cc/UJ3W-5W8F>] (last visited Jan. 24, 2021); John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2020), <https://pewrsr.ch/2Zx21cQ> [<https://perma.cc/8T9A-CTVL>]. Thank you to Kris Kneeland, Undergraduate Research Apprentice, UC Berkeley, for extrapolating from the PEW report and updating numbers from the same source (FJC). In sum, Trump has appointed 30 percent of the nation's active appeals court judges. *Id.*

Phaedrus when Phaedrus characterized legal advocates as knowing only techniques for arguing opposite sides, for making weaker arguments stronger, and for tapping into the probabilities of what the masses believe. Taking language seriously, as Plato's Socrates said, requires knowing the truth of which one speaks and knowing when one does not know it.²⁸ Taking politics seriously involves finding the truths in the opinions of others.²⁹ It involves thinking beyond the limits and possibilities of First Amendment jurisprudence to many other ways in which law and language shift from promise to threat.

"The commonness of the political world," Arendt once wrote of the Greek city-state or *polis*, "was constituted only by the walls of the city and the boundaries of its laws."³⁰ The laws of the United States are constituted through very different material than that envisioned for Trump's exclusionary wall. This material is language, the grounds of both politics and law.

Pushed to address what critical legal theory should become, one adds: taking law seriously when words are adrift and politics in crisis means something different than staking out jurisdiction at the borders and margins of law, as did much twentieth-century critical socio-legal work. Thinking critically about law today involves navigating an unsettled littoral zone, in which distinctions between literal and figurative speech, between legal and literary language, between center and periphery, land and sea, slip and slide. One moves along fluctuating terrains or grounds that are sometimes underwater or soggy or dry. The speaking of law, juris-diction, shifts irregularly. Its words promise and threaten. They insist. They invite wonder at the more and less powerful ebbs and flows of speech, of its worlds and of its law.

28. Plato, *Phaedrus*, 261d–e (Greece), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0173%3Atext%3DPhaedrus%3Asection%3D261d> (last visited Feb. 9, 2021) [<https://perma.cc/C96Q-C2V9>].

29. ARENDT, *supra* note 3, at 17–18.

30. *Id.* at 16.

