

by Mary Jane Morrison

Technical Language

(and the law)

PART I. TECHNICAL LANGUAGE

1. There are two ways in which we can speak technically. We can make a technical use of language, or we can use a technical language. The two descriptions are not interchangeable. A technical use of language, for example, is the issue central to Frigoliment Importing Co., for 'chicken' has all the meanings plaintiffs and defendants there ascribe to it, those meanings are also ordinary language meanings of the term, and the problem is whether, among those many ordinary language meanings, the trade usage is sufficiently standard to distinguish broilers and fryers from stewers. If it is, then 'chicken' becomes a term for which there is a technical use among persons in the trade. An argument between two physicists over unified field theory, on the other hand, is made with use of the technical language of physics as well as a technical use of language, and the technical terms the physicists employ are from the general and special theories of relativity, the theory of gravitational fields, and so on.

Describing what happens when a technical language is used is easier than describing what a technical language is, but even this is none too easy. What happens is that certain groups of people converse with each other in ways not easily understood by persons outside that group, where the defining characteristics of the group have nothing to do with its temporal or geographical properties, but do have to do with what the group talks about. When the members of such a group speak to each other about some of these things, they speak a technical language. Thus, physicists speak a technical language of physics when they converse with each other about physics. But the hill people of Tennessee do not speak a technical language. They may speak a dialect, of course, but this differs from a technical language in that the language they speak is not intimately connected with some special purpose identifiable with the group. What they say is accessible to anyone who speaks English and takes the time to learn the different pronunciations and the few different idioms.

In the case of the hill people, learning the dialect is something children do as a matter of course in that area, and is something anyone coming into the area may do simply by listening long enough. We call such a language a 'natural' or 'ordinary' language. We need not learn some special theory, some special facts, in order to learn the dialect of the hill people, any more than we learn any special theory or facts in learning our version of English. But to learn the language of physics, we must first know an ordinary, everyday language such as English or German, and then we must learn some special theory and facts. We do not just "grow up" with the language of physics. We learn that language by learning the laws and theories of

physics. This learning process is a part-and-parcel one, for we learn the language while learning the theories, and vice versa.

A technical language differs from an ordinary language in several ways: it "piggybacks" on an ordinary language not only by being learned after ordinary language learning is well underway, but also by the fact that most of the words of the technical language are also words of ordinary language. A technical language is not completely separate from an ordinary language, for most of the words of sentences of the one are words of sentences of the other. Moreover, these words are used in the same way in technical and ordinary languages, and the syntax of a technical language is the same as that of ordinary language.

What makes technical language different from ordinary language, and thus a technical language at all, is that some terms in use in the technical language are not at all in ordinary use, or have a different ordinary use, or have a different emphasis or deployment in ordinary language. When there are many of these terms and many speakers who use these terms, we have a technical language. This language may concern a small part of the world, as does the language of baseball, or a large part of the world, as does the language of chemistry. To the extent that the language is associated with matters of wide-spread concern to our daily lives, the technical terms of that language will gain currency among ordinary language speakers. That is, just as ordinary language terms occur in the technical language, so too some technical terms spill over into ordinary language. Sometimes the results of this spill-over are disastrous: for example, when people go around calling every minor eccentricity or problem a 'neurosis', psychologists and psychiatrists find the term no longer technically useful.

Consider the languages of the medical community. These form a family of languages, just as the people themselves form a community. The specialized languages of the surgeon, the internist, the nurse, the orderly, the dietitian, and even the janitor, are all understood to large extent by the others, for major portions of these languages are part of ordinary language. Even as to the technical portions, however, the various groups usually understand one another. Were this not so, hospitals would not run as smoothly as they do. Even the patients understand some of the technical portions of the language of the most specialized surgeon. The patient learns these technical terms in order better to understand what the surgeon says. Of course, the surgeon attempts to avoid the most technical terms when she is explaining surgery to the patient; but part of what the surgeon does in explaining surgery is to introduce the patient to some of these technical terms. The surgeon teaches the language. She does this by teaching the medical facts. I come back, then, to my initial point about technical languages: it is

specially learned, and learned in connection with some theory or facts.

2. Not all technical terms within a discipline are alike. There are some technical terms that are stipulative. They are wholly invented to serve a particular technical purpose. These are the most technical of the technical terms, because they are the furthest removed from ordinary language and cover highly theoretical concepts peculiar to a narrowly definable discipline. 'Meson' of physics is such a term. A second group of technical terms is comprised of terms that have two (or more) meanings, which are cognitively connected with one another, but one of which is its ordinary language meaning and the other of which is its technical language meaning. 'Ring', 'field' and 'set' are such terms, for the mathematician's technical terms here are cognitively related to the bride's ring, the farmer's field, and anyone's set of anything in ordinary language.

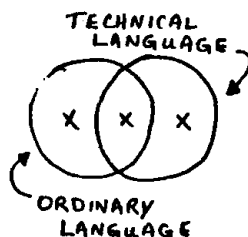
A third kind of technical term does not involve a difference in meaning from its ordinary meaning. These are terms such as 'solid', for what counts as solid for the physicist *qua* physicist is not the same as what counts as solid for the ordinary speaker of English. But this is not because of a difference in meaning. One of the things the physicist, for example, means when he says as a physicist something is not solid is that it has holes in it. A child might use 'solid' in just this way as well. What separates the physicist's use of 'solid' from the child's is not a difference in meaning, but a difference in emphasis. Minute holes count for the physicist, but not for the child; so the physicist says 'not solid' when the child would say 'solid', even when they are talking about the same rock or table.

If we were compiling a dictionary of technical terms of some discipline, we would not include such words as 'on', 'only', 'as', 'are', 'event', 'such', or 'see'. This is because these words are not technical, but are ordinary language words. (Of course, this varies with the discipline to some minor extent. A list of technical terms of a particular philosophy might include 'event' and 'see'. But that is something peculiar about philosophy: it is theory incarnate, and about almost anything under the sun.)

In legal language, there are a great number of technical terms. 'Speech', for example, is a technical term; but 'promise' is not. 'Speech' is technical in much the same way that 'ring' is. 'Promise' is not even technical in the sort of way 'solid' is. What is interesting is just why this is true, and what it shows about the law and about technical and ordinary languages. That is the topic of Part IV. In Part II my rational reconstruction of the Court's use of 'speech' is laid against a background understanding of our ordinary language concept of speech. In Part III my remarks about promises are worked against the background of contract law. This is another way of

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saying both sections are incomplete, and that I present those parts of my theory I am inclined to think are more controversial. The theory is part of an on-going project concerning technical languages in general and technical legal terms in particular. I hope to raise more problems than I solve.



PART II. SPEECH

1. Were we to ask the proverbial man in the street what speech is, he would reply that it is talking. With some prompting, he would stretch 'speech' to writing as well. This man might be willing to prohibit such uses of speech as perjury, betting, or obscenity. He would be likely to think, however, that lawyers have to do headstands to reconcile such prohibitions with the first amendment. What the man in the street does not know is that the word 'speech' is a technical term in constitutional analysis. This is not to say the lawyer is not doing headstands. The lawyer's verbal gymnastics, however, is of the same general sort as that of the physicist who says tables are not solid, or of the mathematician who presents a formula and says it is a ring.

The legal use of 'speech' covers some but not all of, and perhaps more than, the ordinary use of that term. Thus, for example, perjury is speech in an ordinary language sense—the act of perjuring is a speech act, an act done through speech—but not in a legal sense: and armband wearing is speech in the first amendment sense, but not obviously in an ordinary language sense. The legal use here constricts and perhaps expands the ordinary concept of speech, although the legal use is grounded in the ordinary use.

First amendment analysis usually comports with our ordinary notions of what speech is, and therefore with a non-theory laden answer to questions about whether a particular speech act is covered by

the first amendment. But at some point in first amendment analysis, our ordinary language notions of what speech is give out, or are ignored. At that point, to the extent we go on to talk about a particular act as first amendment speech, we get a technical notion of speech. Similarly, we get a technical notion of speech insofar as something is not speech under the first amendment, but is speech in our ordinary parlance.

The usual way to discover the meanings of terms is to look at their uses. When the inquiry is about the meaning of a term in the Constitution, the Supreme Court's use is important. (Rather, old top.) The Constitution says Congress shall make no law abridging freedom of speech; yet clearly we do allow laws that at least appear to abridge freedom of speech. In order to justify such laws we have to have a developed theory that says these laws do not conflict with the first amendment because the laws do not abridge freedom, or do not concern speech, and so on. Which analysis should we adopt, and why?

When first amendment defenses are raised, the Court says it is faced with two questions: Is it speech? Is it protected speech? The Court sometimes has opted for saying the prohibited act is not speech, the law does not concern speech, and therefore there is no first amendment defense. That this sometimes is the Court's answer is not always clear, even to the Court. (Witness the Court's alternating between saying obscenity is not protected speech and saying it is not speech.) Insofar as the Court's answer to the first of these two questions departs from the ordinary language answer, it has had to develop a test for deciding when certain kinds of acts are speech rather than mere conduct (to put the matter in current terminology). The test the Court has come up with is not the right one, but it very nearly is. (I refer to the test set out in *O'Brien*.)

That the Court needs a test for deciding whether some act is speech in the first amendment sense when that sense departs from the ordinary language notion of speech is an indication that there is a theory lurking in the background, and that 'speech' is taking on a technical form. This is equally apparent when the Court turns to the second question. Even after the Court has determined that something is speech, it goes on to inquire whether it is protected speech. At this point the Court has a multitude of tests for deciding whether and to what extent the speech is protected, and several rationales for why it is protected (or unprotected). Actually, although the Court says the inquiry is one of protection, the real second question is better formulated in terms of whether a law prohibiting this first amendment speech is an abridgement of freedom. This indicates how technically the whole first amendment is read, although for the purposes at hand, given the Court's penchant for couching its inquiry in terms of 'protected speech', it also indicates how 'speech' is further technical.

On the second question there are various theories informing the Court's analyses: Mill's marketplace

of ideas, Melickjohn's informed electorate, Schauer's governmental inaptness, Scanlon's personal autonomy, Rawls's veil-of-ignorance contract, and, of course, Emerson's action-speech distinction. Each of these theories is devoted to the questions of why speech should be protected, what speech should be protected, and how speech should be protected. But at the threshold level, although only Emerson's clearly addresses the issue, each of these theories embodies a theory of what speech is, of what counts as speech, for first amendment purposes. Because 'speech' gets its meaning against—or from—the background of such theories, it is a technical term.

An analysis of how the Court treats performative verb speech acts will go a long way towards explaining just how technical 'speech' is in constitutional analysis, and what some of this technical notion is. This analysis will also set up part of the discussion of the word 'promise' for Part III.

2. No performative verb speech acts are speech in the first amendment sense. Austin defines a performative verb as one that, when used in the non-habitual, non-continuous, first person singular present tense, in saying 'I (verb) the speaker (verbe)'. Thus, a person who says 'I bet \$5 on red 21', 'I order you to shoot', 'I demand my money back', 'I name thee HMS Queen Elizabeth', 'I declare war on the U.S.S.R.', 'I promise to pay for those widgets', 'I swear allegiance', does in fact thereby bet, order, demand, name, declare, promise, swear. (Not so with 'I did bet', 'I will bet', 'He bet', and so on—saying does not make a bet here, but only describes, truly or falsely, what has happened or will happen.) Many of the speech acts performed via these verbs never implicate first amendment analysis, and those that seem to, turn out not to be speech under that analysis.

If a dispute arises concerning a lieutenant's ordering his troops to fire or the President's declaring war, the issue is not a first amendment issue, but is one of the speaker's authority to order shooting or declare war. Similarly, a dispute involving someone's saying 'I promise that so-and-so' is analyzed in terms of the speaker's capacity to promise, the legality of the promise, and so on, not in terms of whether saying 'I promise' is exercising free speech.

(There is some problem with the Court's current treatment of the loyalty oath cases. Here the performative verb is 'swear' or 'affirm'. The Court analyzes these cases under first amendment freedom of speech theory. Should the proper analysis be one of freedom of belief?)

The performative verb speech act is important in understanding more than merely why betting is not covered by the first amendment concept of speech. It will also explain why armband wearing is covered and protected. (I think the obscenity cases could also be explained along something like the following lines, but I do not here pursue that issue.)

The non-verbal act elements usually accompany-

"Even if it were possible to frame an exact definition of a legal concept, the definition would not be of great practical value. A definition cannot properly be used as though it were a major premise so that rules governing conduct can be deduced from it. Our law, at least, has not grown in that way. When the rules have been arrived at from other sources, it may be possible to attempt to frame a definition. But the definition results from the rules, and not the rules from the definition."

ing performative speech acts in general are not requisite for the completed act, but in general could be complete replacements for the speech act. (Austin would deny this latter point.) Thus, we may usually put money on the table when we bet, but under normal circumstances we could say simply 'I bet \$5 on red 21' at the gaming house. Conversely, without saying anything at all we can bet \$5 on red 21 by putting money in a certain place on the Las Vegas table. 'I order you to drink a glass of water' can be accompanied by pointing to or handing over a glass of water. Or we can just grab the person (but not the horse) by the ear, lead him to water, and force him to drink. The words, then, sometimes are inessential to the act—not to the speech act, but to the act the speech act can be used to perform.

Second, as Austin has noted, when we use verbs performatively, we do not utter sentences with a truth value. 'I promise to pay', 'I order you to shoot', 'I demand a refund' are neither true nor false, although that I promised or ordered or demanded is true or false. Hitting someone over the head with a hammer is neither true nor false, for it is simply an act. Verbally promising to pay money is different from using a hammer only in regard to how it is done (i.e., with words), not in regard to whether 'true' or 'false' is predicable of it, nor in regard to whether the act is merely an act, conduct, behavior. (Would a full development of this point clarify the Court's "offensive speech" cases, such as Kovacs' sound truck and Pacific's broadcast?)

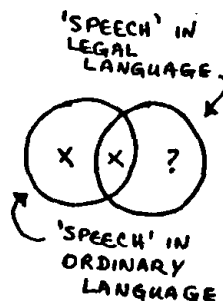
How can wearing an armband be speech. Indeed protected speech, whereas performative verb speech acts are not even speech? When Mary Beth Tinker arrives at school in the late 1960's wearing a black armband after several members of the community have announced an intention of expressing disapproval of the war in Viet Nam by wearing armbands, her physical act (donning the armband) says 'I think the war in Viet Nam is wrong' or 'We shouldn't be in Viet Nam' or 'I grieve for the stupidity of this country's involvement in Viet Nam, and for the people there senselessly slaughtered', etc. These are her sentiments or opinions, that she has these opinions is true, and more importantly, she intends to say something she thinks is true.

I have said the performative verb speech acts are such that sometimes these acts can be accomplished with the words alone, without their usual behavioral accompaniments. This needs explaining, and the explanation will then explain why Mary Beth's donning the armband said anything at all. The key to the explanation is the notion of the truth-functional nature of one of the core concepts of the first amendment concept of speech.

3. In order for a performative verb speech act to complete the act of which the verb is usually the name (promising, ordering, demanding, etc.) by words alone, there has to be a lot of stage setting. Austin calls this stage setting "accepted conventional procedures." These conventions operate to make the performative use of the verb effective to

perform the act. This also sometimes allows the non-verbal act elements usually accompanying the use of the performative verb to drop out without destroying the act itself. Absent these conventions, the use of the verb in an otherwise performative way will not have the performative effect. This is further also what sometimes allows the verbal elements of the speech act to drop out without destroying the act as a speech act. Absent these conventions, the remainder without the verbal element is mere conduct, behavior, not speech of any sort, even in an ordinary language sense.

Some of the acts done using performative verbs can be done only by using some form of that verb. Others of these acts can be done not only without any form of that verb, but also without any verbalization at all. Thus, to propose that the city council adopt this budget, as opposed to assuming or considering the possibility or hypothesizing the council will, I must somewhere in the proposal say that this is a proposal. The least ambiguous way of doing this is to say performatively 'I propose the



council adopt this budget', or write 'Proposed Budget' across the top of the submitted budget. But to deny what someone else has said I need not say performatively 'I deny that' or even 'That's not true'. Shaking my head rather vigorously is sufficient.

The more highly particularized the potentially performative speech act, the greater the need for some form of the performative verb. At the lowest end of the spectrum, the potential speech act is so non-specific that no words are needed, including any word for the name of that act, to make clear what the actor is doing—for example, denial (shake head), assent (nod head), question (raise eyebrows). Then come those speech acts that require certain behavior (or special intent?) in addition to the words. For example, in christening a ship, we not only say the words; we also smash a champagne bottle against the hull, and knock off the chocks. The christening seems not complete with the words alone.

At the furthest reach of the spectrum are those speech acts in which performative verbs are given their fullest effect, for here the act cannot be performed without the performative verb, and need not be accompanied by other outward behavior. This is where the legally operative performative verbs are—for example, 'I devise to Smith' (but not 'I give to Smith' except when this is in a will, where it has the same meaning), 'I pronounce you guilty', 'I sentence you to 20 years', 'I adjudge him insane', 'I object, your honor', and so on. (I suppose there is a slight possibility some judges get away with ending a case saying 'Guilty. Twenty years. Next case.' Compare a sergeant's saying 'Fire!' to his troops in battle. We expect the shortened version in the one case, not in the other: we do not want ellipsis from the judge.)

Where along the spectrum a potentially performative speech act falls depends upon the conventions surrounding it. If we were Moslems, a husband could divorce his wife by saying 'I divorce you' three times. If we were a dueling society, a person could provoke a duel by slapping another in a highly ceremonial way. Eventually such a society might make 'I insult you' or even 'I slap you in the face' performatively operative to this same effect. This would be to substitute one ceremony for another, and to surround a certain speech act with a stage setting, an accepted conventional procedure.

In our society, our legal conventions are so highly specialized that a judge, sitting through to the end of a case, can say 'I sentence you to 20 years', and in saying that, without so much as pointing a finger, sentence the accused to 20 years. There are, of course, clerical entries to be made, handcuffs to be snapped, cells to be locked, as a consequence of what the judge says. But these acts are in consequence of his sentencing, not acts requisite to performing the sentencing.

Similarly in our society, wearing a black armband just above the left elbow is a way of signalling grief. It is akin to the German's hand signal that someone has a bird in his head (meaning he is crazy), or the Italian's hand signal that a husband has been cuckolded, or our most prosaic flipping-the-bird signal. This last signal, raised in the faces of the local draft board or to an army recruiting team during the 1960's says, exactly as plainly as does Cohen's jacket, what many people thought about the draft or about the war. It, however, is more purely emotive and less clearly truth-functional than are the German's and Italian's signals. The German says this person is crazy, and the Italian says the husband is cuckolded; but neither our finger signal nor Cohen's jacket says the draft is f—. What the German and Italian say may be true or may be false; not so with our sign.

*Neither our typesetters nor our publisher would set this word; but Cohen could wear his jacket abroad on Merchants Square.

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We understand black armband wearing to say 'I am mourning'. 'Someone I cared for has died', and so forth, and these are truth-functional statements, even if there are also emotive overtones. By donning the armband in the turbulent years of the Viet Nam war, in a community in which people have discussed this very act as a method of protesting the war, Mary Beth makes a more particularized statement than we normally do in wearing black armbands. The context in which she acts disambiguates her statement, crystallizes it, until what she does is this speech. But the general conventional background about wearing armbands already makes wearing one some speech.

(Compare this to O'Brien's act. There is no convention I know of for making the burning of a piece of paper a speech act of any sort, except for such legal conventions as allowing a will to be revoked by intentional burning.)

PART III. 'PROMISE'

1. In a contracts case there are always two questions: Is there a promise? Is the promise legally enforceable? What I want to know is whether a court could give a different answer to the first of these two questions than the answer the men in the street would give. That some promises are not legally enforceable has no bearing on whether there is a promise in the sense in which I pose the question.

All ordinary language promises are also legal promises, where by 'legal promise' I mean only that it is a promise so far as the law is concerned, but not necessarily that it is one the law will enforce. The word 'promise' simply is not a technical term at all, even in the sense of a term with a difference in emphasis but no difference in meaning ('solid') or with a technical use ('chicken'). There are two very different cases that seem to be counterexamples to my claim. One of them is the illegal or void promise, and the other is the behavior-equivalent-to-a-verbal promise. I shall take up these two cases later.

What is important about promises in ordinary language is that they are other-regarding, and that they are the giving of assurances. All speech is, fundamentally, other-regarding. This is particularly true of any performative verb speech act. The giving of the promise to someone else is the center of the notion of promising, and what is given is the assurance the other can rely on the speaker to keep his word, do what he says he will do. (So, promising one's self is extraordinary.) When something goes wrong, and what the speaker has assured he will do is not done, the promisor owes an apology or an explanation.

In the next section I present a number of little stories. What I am trying to make plain in telling these stories is that, however complicated a contracts case might become, it is a case grounded in ordinary non-legal life situations, and the

remedies are grounded in these same ordinary life situations. In court we talk about lost profits and damages, reformation and discharge, breach of promise and supervening events. But these are not essentially different from the ordinary language ways of describing what is happening in the non-legal context, just as the German word 'Gelt' is not essentially different from the English word 'money'.

2. The Beachcombers. Abe and Ben are on the beach. Abe has two crabs, and Ben has a load of driftwood. They trade so much driftwood for one crab; i.e., they trade five pounds for one crab. Corbin would say this is a present barter and exchange, not a contract at all. The reason there is no contract is that there is no promise, no matter what words are spoken. The reason there is no promise is that there is no possibility of driving a temporal wedge between any words and the actions. Abe misuses English if he says he promises to give Ben a crab for driftwood.

The Money Exchange. Ann and Betty are at an airport. They are strangers to each other. Betty wants change for a dollar. Ann counts the change out into her own hand; Betty holds the dollar out in plain view. The swap takes place, with each woman making sure as discreetly as possible she gets the proper equivalent. There is no promise. The element of assurance is missing. The words here would be 'Will you (Can you) give me change for a dollar?' and 'Yes' (or, 'I'll see if I have it'). Why should the 'Will you do so-and-so?' work to elicit a promise sometimes, but not others? (For example, compare 'Will you redeem your IOU at noon tomorrow?'. The reason is there is an element of assurance, a request for an assurance, in one case, but not (reasonably) in the other.

The Coke Machine. Al puts 35c into the coke machine and gets a coke. Beulah puts 35c into the machine, but no coke comes out and the money will not come back. There is a promise: there is even a remedy. First, self-help—bang on the machine; second, leave a note for the serviceman, and so on. This is not a usual or central kind of ordinary language promise, for machines such as coke machines do not speak. Their owners do, however, and were enough money involved, a court would find an enforceable promise here.

The Street Corner. Art and Bill agree to meet on the corner of Wright and Green tomorrow afternoon at 3 p.m. Art shows up, but Bill does not.

1) Bill has an awful memory. Art knows this, but the whole point of the meeting is some purpose beneficial to Bill. Bill has simply forgotten to meet Art. He owes Art an apology for having failed to keep his promise, for he has inconvenienced Art.

2) Bill has had an accident and is in the hospital, unconscious. When he can, he will give Art an explanation, but he owes no apology, although there clearly is a promise. This is similar to the supervening-events contracts case.

3) Bill has been offered an interview for employment, but he must do the interview at the time he also is appointed to meet Art. He has been unable to reach Art to postpone their meeting, and cannot keep both appointments. Bill breaks his promise to Art. He still owes an apology, but he can plead an excuse Art, as a reasonable person, will accept. This is essentially the kind of case in which we allow a buyer to breach a contract if he can find a lower price elsewhere, so long as he pays the seller's lost expectancy.

4) Bill shows up, but two minutes late. Art has gone by then. Bill does not owe an apology: if anything, Art does. I am still thinking about why. It has something to do with what counts as reasonable behavior, and what counts as the reasonable understanding of what is promised. It may also have something to do with how busy Art's schedule is, or what the weather is like that day.

5) Bill fails to show, because he thinks he is to meet Art next Tuesday, whereas Art thinks the day is to be this Tuesday. Or Bill thinks they are to meet on Daniels and Green, and so on. When Art and Bill get around to talking over the other's "broken promise" they will excuse each other on grounds of misunderstanding—or not, depending on whether the promise should have been clear to the other.

The Dinner Party. Andy invites Bret to dinner. Bret is to be the fourth of bridge, and knows this. He accepts, but does not come.

1) Is there even a promise here? I think not, although good manners dictate Bret make an apology to Andy for not coming. Accepting an invitation is not promising, is not a matter of giving one's word, for we do not surround the conventions of accepting invitations with such seriousness.

2) The other people Andy invites are important to Andy because of a business deal he is trying to arrange with them. Bret knows this, and for some reason, his presence is crucial to Andy's plans. More, then, is involved than being the fourth at bridge. If Andy has paid Bret to be there, the "invitation" is not that at all, but is a contract, perhaps even remediable at law. If Bret has assured Andy he will be there, and re-assured him, knows Andy is counting on him, knows Andy's plans go awry if he does not show up, Bret has promised to be there. Giving an assurance sometimes can be giving a promise, just as giving a promise is giving an assurance.

The Sale. Alice agrees to sell Bob a lamp, or a lot, etc., for so much money on a certain day. There is a promise in ordinary language and in legal language. This is the beginning of the clear cases, and for some purposes, these are philosophically uninteresting.

3. Compare 'I advise you, Sam, to grow seven more inches tall' with 'I advise you, Sam, to lose ten pounds'. The first is void—this is not advice at all. The second is advice, but if Sam is 6'8" and weighs

"...our common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth marking...these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any you or I are likely to think up in our arm-chairs of an afternoon—the most favored alternative method."

J. L. Austin, "A Plea for Excuses," *Proceedings of the Aristotelian Society* LVII (1957), p. 8.

ALF Rule 10b-5 money substantive estoppel
 prior STANDING LAW
 Henningsson v. Bloomfield Motors
 injunction supra
 subrogation plaintiff
 constructive trust res iudicata \$

110 pounds, I have given bad advice. If I know this is bad advice, my advice is also insincere.

There are a number of ways promising can go wrong in ordinary language. If Sam says 'I promise to pay James' and no one, especially James, is around, Sam may have resolved to pay, but he has not promised to pay. He has not given someone his word. If he has already paid James, Sam has not promised a future act, hence has not promised, even if James hears Sam. If the act "promised" is not something Sam and James both believe is good for James, in James' interest, then Sam has not promised. Thus, to say 'I promise to hurt you/hit you/steal from you' is not to promise, although this may be to warn or threaten. To say 'I promise not to hurt you/hit you/steal from you' also is not to promise, even if it is to reassure or to swear. The reason this is not a promise is that this is a standard of conduct imposed on everyone, and is not something extraordinary. Sam cannot promise to do what he is obviously bound to do anyway, either because of pre-existing obligation or because the act is one he will do in the normal course of events. If Sam and James know Sam always eats spinach when James serves it, Sam cannot promise to eat spinach, for then there is no point to Sam's saying 'I promise'. Sam can promise to write up an idea and submit it to the *Harvard Law Review* for publication, but he cannot promise to publish it there, for he has no control over its being published by *Harvard Law Review* beyond submitting it for publication. What Sam promises to do must be within his power to effectuate; otherwise he has not promised. Further, if Sam is acting in a play and says on stage 'I promise to sell you my horse', he has not promised.

If someone promises without intending to keep his word, he is insincere, and the promise is "unhappy," to use Austin's characterization. For all that, this person has promised, so far as both ordinary language and legal language are concerned. An essential condition of promising is not that the speaker intends to give his word so much as it is that he intends to be taken as having given his word. If someone were to say to a dog 'I promise to buy you a new collar', he has not promised and he has misused English: We cannot make promises to dogs, for we cannot intend for them to take us at our word. The attempt to promise here is void; there is no promise. Sometimes we express this point by saying 'That's a void promise', but this means 'There is no promise', not 'There is a promise that has the property of being void'.

There are other ways for promises to be void. Promising takes more than merely saying the words. There is no magical incantation that amounts to a promise all on its own. There is something more needed, and this something more is the agreed-convention context. Thus, we do not, as a society, surround the conventions for the uses of 'I promise' to include 'I promise to murder Smith', just as not everyone can christen a ship, because not everyone has the proper recognized authority, not just every act can be promised. The courts say the promise of murder is not a promise because the subject-matter of the promising words is an illegal act. This is what we as society say, couched in legal-sounding terms. What makes an act illegal is our societal determination so to make it. That is, our agreed conventions make it illegal, and so also make saying 'I promise to murder Smith' ineffective as a promise. (This is for *malum in se*; I do not here inquire what

the explanation might be for *malum prohibitum* acts.) Suppose a Marine sergeant says 'I order you to shoot'. Has he issued an order? That depends on the context. Compare the following situations:

- 1) The sergeant's utterance follows the general's having just said 'Hold your fire, men!'
- 2) The sergeant's utterance is directed to a civilian
- 3) It is directed to a trooper about a tiny baby
- 4) It is directed to a trooper who has no firearms
- 5) It is directed to his troops about a dummy target, or about the enemy.

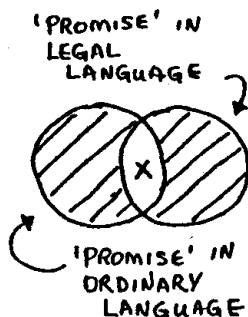
Societal conventions, including military ones, make #1 and #2 void orders. In #4 and #5 the sergeant has ordered, albeit "unhappily" in #4, so long as the sergeant does not know the trooper has no firearms. Jurisprudential and philosophical issues loom large, however, in #3; but there is solid ground for saying there is no order here. The same sort of issues are involved in holding 'I promise to murder Smith' void as an ordinary language promise. The grounds we articulate are that murder is illegal, but that should not lead us to think that the courts of law know something ordinary language speakers do not know, and say.

4. There is another difficult case for the thesis I have been maintaining, for I have claimed all legal promises are ordinary promises; but the law recognizes a promise-by-behavior and this seems not to comport with our ordinary language concept of promises.

The hard case is exemplified in *Allied Steel & Conveyors, Inc.* In 1955 Ford contracted with Allied

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to purchase some machinery that would be installed at one of Ford's plants by Ford's own employees. In 1956 Ford submitted another contract proposal to Allied to purchase more of such machinery, but with the change that this machinery would be installed by Allied's employees. Under the first contract, Allied did not indemnify Ford for acts of negligence by Ford's employees; but under the second proposed contract a broad indemnity clause would have had Allied indemnify Ford for acts of negligence by Allied's employees and by Ford's employees arising in connection with the



installation of the machinery by Allied's employees. At least two months before Allied signed this second contract, Allied began the installation called for in the contract. During that installation, and before the signing of the contract, one of Allied's employees was injured through the negligence of some of Ford's employees. The Allied employee sued Ford and won.

Ford, in the course of this suit, sought to bring Allied in as a third-party defendant, on the grounds of the broad indemnity clause of the second contract. Allied resisted, arguing that there had been no such contract at the time of the injury to the Allied employee, and that in any event both Ford and Allied had intended that the broad indemnity clause be voided before Allied signed the contract, thus leaving only the indemnity clause of the first contract to indemnify only for acts of negligence by Allied's employees.

The court found for Ford, on the grounds that Allied's beginning the performance called for under the second contract operated as an acceptance of Ford's offer to contract and operated as a promise to complete the performance. That is, the court found that Allied's beginning of performance was a ratification of the contract every bit as effective as

Allied's signature would have been, and that therefore Allied was bound on the contract to all the terms of the contract, including the broad indemnity clause. To the argument that Ford was not similarly bound, absent Allied's signature, the court said that Ford indeed also was bound through its acquiescence in Allied's beginning of performance. Thus, Ford would have been estopped from claiming there had been no contract absent Allied's signature, because Ford had acquiesced in Allied's performance. What happens, then, is that behavior—actually performing on Allied's side, acquiescing in that performance on Ford's side—results in a contract and promises to complete performance on either side (finish the installation, pay for the work, respectively).

I have explained that with performative verbs there usually is some behavior that can act as a complete replacement of the speech act performed via the performative verb's performative use. Now, it appears highly counterintuitive to say that there is any behavior, however finely tuned, that could amount to a promise to indemnify someone's employees for accidents on the job. If anything ever appeared to need language of the promising sort, this does, for how could any behavior be so unambiguous as to promise to indemnify for negligence of employees of both companies, but not be behavior that promises to indemnify for only one company's employees, or that promises to complete the work once underway? The answer is that it cannot. No behavior can speak as clearly as words, except when the behavior arises against a certain kind of background. That background is one of shared conventions. The conventions can be widespread throughout the country, or in the community, or between Ford and Allied.

What happens in *Allied* is that the behavior occurs against the background of an unsigned contract in which a promise is specified. Were Allied to do exactly what it did without this background, the court could never have found a promise. There might have been some way of making Allied indemnify Ford in that event, but this could not have been on the basis of Allied's behavior amounting to a promise. There would have been no promise. As it is, the contractual background makes Allied a promisor by behavior. Allied's behavior is speech, promising speech. But only because of the background. And it is speech in an ordinary language sense, just as was Mary Beth Tinker's.

Still, the question is not so much whether we can make sense of the court's reasoning in deciding that there was a promise in Allied's behavior, but whether there are any ordinary life examples in which behavior is of this promising sort. Here I come up short, for the only clear cases are also cases that have been in court, such as Allied's promise. I think the reason for that is that only in such cases is there a possibility of finding an agreed conventional procedure that turns behavior into such finely tuned speech. Or, at least, these are the only ones of which

we are likely to hear. But I think family members often over the years manage to work out such procedures among themselves; hence, I do not think such cases as *Allied* embody counterexamples to my claim that all ordinary language promises are legal promises, and vice versa.

PART IV. CONCLUSION

Contract law is behavioral law. The law reflects and embodies social and historical fact. Contract law grows organically out of our social lives. For this reason, there are no "hard cases," as Dworkin would use that term, in contract law. The reason our legal institutions do not give out on us is that ordinary language will not give out on us on the notion of promises, for the two notions are the same. Our legal institutions may strain and groan, and sometimes may break, on the issues of the enforceability of a promise, but not on the question of whether there is a promise in the first place. Contrary to what Hart would say, promising is not a legal institution. It is an ordinary life institution.

The case with speech is quite different. Here the concept of speech is part of a legal institution, and here there can indeed be hard cases. That is, here our institutions, both legal and ordinary, can give out. Because our ordinary language does give out, we end up developing a technical notion of speech, and end up making 'speech' a technical term. We do this by surrounding the word with theory.

The difficult question is why we make 'speech' a technical term. I do not know. I think the reason has to do with the fact that the questions of whether something is speech come up in the context of a written constitution, in the context of a prescriptive institution—an ideal towards which we strive. The law of contracts, on the other hand, is descriptive, not prescriptive. Or at least it is insofar as the civil law, as exemplified in the Uniform Commercial Code, has not invaded the common law of contracts. The contracts court is always in tune with the man in the street. The first amendment court is showing that man where we are going.

This paper suffers from a number of defects, not the least of which is the lack of a minimum of 150 footnotes. The barest bibliography is as follows:

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- C. E. Caton, *Introduction to PHILOSOPHY AND ORDINARY LANGUAGE* (C. E. Caton ed. 1963).
- Allied Steel & Conveyor, Inc. v. Ford Motor Co.*, 277 F.2d 907 (6th Cir. 1960).
- Cohen v. California*, 403 U.S. 15 (1971).
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