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Speaking Imperfectly: Law, Language, and History

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Introduction	349
I. The Mixed Jury	354
II. Chicago Husband Killing	357
III. Law As Language	361
Conclusion.....	364

INTRODUCTION

Legal histories, like other histories, must contend, whether tacitly or explicitly, with issues about the sorts of “events” with which they are concerned. In addition, legal historians must consider to some degree what their ostensible subject matter, “law,” is. In what follows, I suggest a contrast between “sociolegal” approaches to legal history, which fundamentally associate law with causal power and interests, and “humanistic” approaches that attend to law as language and allow the historian to treat as a matter of history the very questions of what count as events and as law. The contrast is no doubt overdrawn. Commitment to the so-called humanities must itself be interrogated at some point. And all legal historians, like legal practitioners, to some degree privilege writings and documents and attend to language in some form as source and evidence of law (even if only to claim, in the manner of sociolegal scholars, that “law” is observed in the breach or in the so-called gap between law-in-action and law-on-the-books¹). My commitment to the term “humanities” will be considered at another time, however. My point here, in keeping with the problematization of the “and” in “law *and* society” that the University of

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1. The distinction between law-in-action and law-on-the-books is associated with early twentieth-century legal realism. For contemporary discussion of “gap studies,” see Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, ANN. REV. L. & SOC. SCI., Dec. 2012, at 323.

California, Irvine School of Law “Law As . . .” symposia invite us to take up, is that attending to law *as* language can be said to move legal history from the so-called social sciences to the so-called humanities. The social scientific commitment to proper “method” and to studying law and social control has an analog, in other words, in the contrasting way that humanists today turn questions about their method into reflections on theory and on law and language.

A legal historian working with the methods of social science asks: What are the appropriate sources for the study? How reliable are they? To what degree can they support particular inferences made in, and the generalizations to be suggested by, the account? By contrast, a legal historian focused on language will ask: How have particular sorts of evidence become privileged as sources? What produces standards of reliability? To what extent can these matters be related to the particular story being told? How can an instance stand for more than itself and what does its story show? These two approaches, of which there are admittedly many admixtures and variations, configure the events and law of legal history in different ways. In the case of sociolegal studies, they reinforce accounts of law as power;² in the case of studies of law as language, they—do what exactly?

What *do* humanistic legal histories do? How do they treat law and event? And what about it? These are the questions with which I am concerned. I ultimately suggest that what I am for convenience dubbing “humanistic” legal histories allow one to hear claims of and about law in different ways. In my introduction so far, of course, I have been working with some general claims about *two* kinds of legal histories. If I were a good sociolegal scholar and a better-informed legal historian, I would gather and select an appropriate sample of legal historical works to test whether my generalizations are borne out. I would articulate something more about what it takes to be legal history, what the population of legal historical studies includes, how representative the studies I focus on are, and how one can go about assessing their approaches to method and theory. I leave this somewhat methodical and nevertheless rhetorical—or language-oriented—task to others.³

I turn, instead, to two particular phenomena whose histories highlight the ways that what count as legal events change. The first is the practice of mixed, or half-

2. Marianne Constable, *Response*, 33 POLAR 148 (Supp. 2010) (responding to John M. Conley, Book Review, 33 POLAR 143 (Supp. 2010) (reviewing MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* (2005))).

3. Unlike sociologists doing legal history, legal historians writing explicitly about method have tended not to focus on the issue this way. Rather, they offer essays reflecting on and/or critiquing the use of legal sources and representations of law in doing legal history. *See, e.g.*, D.J. Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424 (1941); John V. Orth, *Doing Legal History*, IRISH JURIST, 1979, at 114; *see also, e.g.*, Symposium, “Law As . . .”: *Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011); Symposium, “Law As . . .” II, *History As Interface for the Interdisciplinary Study of Law*, 4 U.C. IRVINE L. REV. 1 (2014). Strong examples of legal histories that do what I consider humanistic legal history are KUNAL PARKER, *COMMON LAW, HISTORY AND DEMOCRACY IN AMERICA, 1790–1910* (2011); CORNELIA VISMANN, *FILES: LAW AND MEDIA TECHNOLOGY* (2008).

alien/half-native, juries in England.⁴ The other involves the exoneration, under what was dubbed “the new unwritten law,” of women who killed their husbands in Chicago at the turn of the nineteenth to twentieth centuries.⁵ These examples, and my treatments of them, raise questions about how particular events come to count as law and, more specifically, how particular sorts of procedures, such as jury selection, and of evidence, such as writings, contribute to those events and become privileged or authoritative sources in law and for its history.

The story of the mixed jury, from its prestatutory practice to its statutory abolition in 1870, as I argued in my 1994 book, *The Law of the Other*, and as is summarized in Part I below, tells of the emergence of a world in which customary law gives way and the law of officials assumes exclusive standing as law, in which the territorial jurisdiction of a state replaces the principle of personality of law (that one lives and is judged according to one’s own law), in which social science transforms the practices of a people into propositional knowledge of norms, and in which law becomes an instrument of social policy directed toward the management of a population.⁶ It is, in microcosm, a history of the rise of positive law. (“Positive law” refers, in legal philosophy, to the man-made law that exists, which, legal positivists claim, has no necessary connection to justice.⁷ In the context of social science, positive law often refers to what is taken to be the empirical reality of state law.⁸) In this history, changes in conceptions of law themselves emerge as events from out of the most positivist of sources, written records.

Focusing as it does on writings about an “unwritten law” that has now largely been forgotten and, indeed, seems never to have existed as formal law, the second example, discussed in Part II, likewise highlights the rise of sociolegal and legal positivist understandings of law. (The sociolegal positivism that characterizes much contemporary “law and . . .” scholarship about law, as I have explained elsewhere, views law as exclusively social. First, it relegates connections between law and justice, if any, to empirically contingent social realities. Second, it presumes that positive law is humanly articulable power in at least one of two senses: as the declarations of officials or in scholars’ descriptions—conceptual or empirical—of the order and dynamics of human social systems. Third, it maintains that there exists

4. See generally MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994).

5. The “new unwritten law” was first brought to my attention in a conference presentation by Jeffrey S. Adler, in what was published as Jeffrey S. Adler, “I Loved Joe, but I had to Shoot Him”: *Homicide by Women in Turn-of-the-Century Chicago*, 92 J. CRIM. L. & CRIMINOLOGY 867 (2002). My preliminary ideas about the new unwritten law appear in Marianne Constable, *Chicago Husband-Killing and the New “Unwritten Law,”* 124 TRIQUARTERLY 85 (2006). I am currently preparing a book-length manuscript on material that I have gathered since.

6. See CONSTABLE, *supra* note 4; Lewis H. LaRue, *A Jury of One’s Peers*, 33 WASH. & LEE L. REV. 841 (1976).

7. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., 1995); H.L.A. HART, *THE CONCEPT OF LAW* (1961).

8. See MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 25–28, 45–73 (2005).

no law outside of that recognized by human positive law and that anything recognized as law is positive law. It turns nonpositivist conceptions of law into nonlaw: custom, for instance, becomes part of the prehistory of law-proper; religious law is conceived as a function of social forces and interests.)⁹

Tracing the history of an ostensibly new unwritten law through writings, that is, draws attention to relations between language and event in law and history. Late twentieth-century conventional wisdom maintained that women were disproportionately convicted and punished in the United States.¹⁰ During the last three decades of the nineteenth century and the first three of the twentieth, however, police and coroners' records, trial and appellate files, newspaper reports, prison photos, tall tales, screenplays, and blockbuster musicals and films, offer evidence that all-male coroners' juries, grand juries, and petit or trial juries actually exonerated most women who killed their husbands in Chicago.¹¹ Newspapers decried the use in these cases of a "new unwritten law" that some claimed was not even law "at all."¹² Over the course of the period, documents attest to formal acts or events of law—not only exonerations, but also indictments, dismissals, objections, acquittals, convictions, sentences, pardons, appeals, reversals, and so forth—in 250-plus cases of women in Cook County who killed their partners. Such documents also show the development of knowledges and practices of psychology and statistics. Tracing the emergence of sociolegal knowledge and legal positivism through the acts and events of ostensibly new unwritten law that are recorded and reported in writings on whose authority one relies, invites us to think further about the authority of writings. It invites us to think, with legal anthropology in some sense, about possibilities of unwritten law or at least of law that comes before or goes beyond

9. See *id.* at 9–11, 28–34, 43–44, 74–92.

10. This view has been challenged during the twenty-first century. See, e.g., ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 159–77 (1987); ANN JONES, *WOMEN WHO KILL* 1–4, 236–37 (1980); Robert M. Ireland, *Frenzied and Fallen Females: Woman and Sexual Dishonor in the Nineteenth-Century United States*, *J. WOMEN'S HIST.*, Winter 1992, at 95, 102; Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 *WOMEN'S RTS. L. REP.* 149 (1978), reprinted in ELIZABETH BOCHNAK, *WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE*, 1, 7, 9, 31 (1981). But see Anne M. Coughlin, *Excusing Women*, 82 *CALIF. L. REV.* 1, 3 n.4 (1994); Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 *U. COLO. L. REV.* 101 (2006); Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 *J. CRIM. L. & CRIMINOLOGY* 33 (2010).

11. My first run on compiling these cases came from data now available online, thanks to Leigh Beinen and the Chicago Historical Homicide Database. I owe thanks to Sara Kendall and others for helping me compile from this data a preliminary list of Chicago women accused of killing their husbands. For records and material on the treatment of these and additional cases, I consulted works at the Circuit Court of Cook County, Illinois Regional Archive Depository, Illinois State Library, Chicago History Museum, Chicago Public Library, and Newberry Library, among others. I am indebted to the University of California, the Institute for Advanced Study, the Newberry Library, and the American Philosophical Society for enabling this research.

12. See generally Adler, *supra* note 5; Constable, *supra* note 5; *Can the Plea of Unwritten Law Ever Justify Murder?*, *INTER OCEAN*, Dec. 16, 1906, at 27–28 [hereinafter *Plea of Unwritten Law*]; *Killing Husbands*, *CHI. DAILY TRIB.*, Apr. 28, 1919, at 8; *Taunted Wife Shoots Husband In Courtroom: "Hope He's Dead,"* *CHI. DAILY TRIB.*, Apr. 26, 1919, at 1 [hereinafter *Taunted Wife*].

the positivist writings of conventional doctrine and of empirical studies of law-in-action.

In other words, as legal anthropologists recognize, law refers both to particular acts and to background practices or knowledges of what to do and how.¹³ The stories of the mixed jury and of the new unwritten law highlight and explore the relations of formal legal speech acts, such as enactments and verdicts that are recorded in writings, to a practical knowledge of (in this case, new unwritten) law that very much resembles knowledge of language. The incompletely articulable, or at least unarticulated, practical knowledge of what to do that is a shared background among participants in legal acts is sometimes associated with “custom” or “tradition” or even “convention.” It need not be limited to that, however. Just as a language is more than a set of all of its possible utterances, so too law is more than a set of statements (or applications) of rules. Speaking appeals to a background of practical knowledge that may be characterized in different ways, and so too the background knowledge that is law is characterized various ways. Natural law, for instance, the erstwhile challenger to legal positivism, claims to provide knowledge of law.¹⁴ The “moral law” too claims to be practical reason.¹⁵ These characterizations of shared knowledge of law are incomplete. Even the “system of rules” that is the law of contemporary legal positivism offers a once-again incomplete account of shared knowledge, that which a given state, its members, and its officials formally recognize as law.¹⁶

None of these accounts of law—as custom, morality, natural law, positive law—exhaust what law is. They are neither seamless nor universal accounts. Rather, each represents, in its own way, an attempt to formulate what is involved in shared practical knowledge of law and/or the relation of that background knowledge to particular instances or acts of law. Acts of law are not limited to judgments. They include the particular speech acts mentioned above—and more. They make claims in the name of law. (Even the wordless acts of state officials are done “in the name of” law.) Claims assert truth and demand recognition, and, like other uses of

13. See generally E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* (1954); JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIAL COURT* (2008); Sally Falk Moore, *Treating Law As Knowledge: Telling Colonial Officers What to Say to Africans About Running “Their Own” Native Courts*, 26 *LAW & SOC’Y REV.* 11 (1992). Much of the discussion in anthropology about what culture means concerns the relations of acts to background practices.

14. In addition to classical accounts by Augustine and Aquinas, see *THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY* (Frederick F. Schauer & Walter Sinnott-Armstrong eds., 1996); and *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* (Martin P. Golding & William A. Edmundson eds., 2005). See also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 103–242 (Robert P. George ed., 1992).

15. See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (H.J. Paton trans., Harper & Row 1964) (1785); see also *FOUNDATIONS OF THE METAPHYSICS OF MORALS WITH CRITICAL ESSAYS* (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).

16. See HART, *supra* note 7, at 77–96.

language, may be wrong or unsuccessful. They are dependent on shared and incomplete practical knowledge. Like the shared knowledge of law of any particular community that has law, that is, general accounts of, or formulations as to, what law is, are, in a grammatical sense, “imperfect.”¹⁷

The *imperfect* aspect of a verb indicates incomplete, ongoing, continuous, routine, habitual, or interruptible action or activity, in the context of which other acts or events occur: “We *were speaking* English while we made the agreement,” for instance, or “they *were speaking* in tongues every Sunday, until the cleric intervened.” “Male jurors were generally *exonerating* women who killed their spouses, when the new unwritten law became an issue.” Or even: “I *was writing* about the new unwritten law when other projects interrupted me.” Grammatically, the imperfect refers to a continuous or repetitive activity that establishes a time frame within which another action is or was done.

Practices or knowledges of law are imperfect in the sense of being ongoing, habitual, and routine; they are also interruptible. Particular legal acts or claims of law, such as a verdict or an act of exoneration, are possible only on the basis of such shared practical knowledge. Such acts sometimes stand out as interruptions or notable events. Alternatively, they may become integrated into the imperfect background of law. They may be disregarded for long periods—as were mixed juries or coroners’ exonerations of women who killed—or they may be retrieved as events by legal historians or others. In attending to the ways that legal acts appear against and disappear into the background of practices that authorize them, legal histories interrupt the linear or chronological temporality that many sociolegal scholars and historians associate with the passage of legal events. Such histories open up questions of event, record, and memory, issues of temporality that social scientific methods and models of law are hard-pressed to address or explain.¹⁸

I. THE MIXED JURY

The history of the mixed jury is the story of a practice whereby aliens were allowed to serve on juries from the Middle Ages to the nineteenth century in England.¹⁹ Thirteenth- and fourteenth-century sources tell of a previously unarticulated practice—or at least of a practice that left no earlier records—of personal law in England.²⁰ According to this practice, aliens could have juries made

17. Here, as in the following paragraph, I refer to the “imperfect” of English-language grammar, which is different from the simple past tense that the imperfect refers to in some other grammars. The relevance of the imperfect to law is developed further in MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* 101–05 (2014). The imperfect aspect of law qualifies what I now find to be unsatisfactory aspects of the argument I had made at an earlier “Law As . . .” symposium, published as Marianne Constable, *Law As Claim to Justice: Legal History and Legal Speech Acts*, 1 U.C. IRVINE L. REV. 631 (2011).

18. Here I pick up on a discussion coming out of the conclusion of Christopher Tomlins, *How Autonomous is Law?*, ANN. REV. L. & SOC. SCI., Dec. 2007, at 45, 64–65.

19. CONSTABLE, *supra* note 4, at 1–2.

20. *Id.* at 9.

up half of aliens from their own communities who presumably shared their laws or customs.²¹ Positivist legal history, with its attribution of the mixed jury to the 1353 Statute of the Staple that ostensibly “instituted” it,²² is unable to imagine or accept the earlier practices as law. Instead, the early mixed jury appears (if at all) in positivist legal history as prelegal custom. It resembles the practices of the “primitive” communities that legal positivist H.L.A. Hart, for one, identified as a precursor to the modern municipal system of rules that epitomizes law.²³

The 1353 Statute of the Staple was the first enacted law to allow suits in England to be judged by juries composed of aliens.²⁴ Together with a 1354 statute,²⁵ it made official what had already been happening in local courts and in some cases in royal courts: aliens were entitled to be judged by juries made up half of aliens and, implicitly, to judgments informed by their own customs or laws. The Statute also established a royal system of staple (or market) courts in which the privilege was available.²⁶

Ironically, the statutory establishment of a judicial system in which mixed juries were available marks a weakening of the principle of personal law represented by earlier mixed jury practice. The 1353 and 1354 statutes transferred to royal control disputes involving aliens, away from the hands of local courts that followed local customs and practices. The law of the alien—and eventually of the jury—took on a different character. Early law did not distinguish between jurors and witnesses, who were often neighbors who could be said to know, not only the law, but also the character or reputation of the parties. In local courts, the alien’s law and the law of the local community converged in the *ver-dict*—literally the speaking of truth²⁷—or the decision of the mixed jury.²⁸ Once brought before the higher authority of the royal courts, the law of the alien, as well as the law of the community, lost its character as law. Juries testifying in royal courts and at common law could no longer be said to “know the law,” for law was now the law of the king’s justice. In the separation of the jury from its own court—the local court in which custom is law—the community’s law or custom became the “fact” that the jury was now “likely” to know. In the royal courts, the mixed jury became a “special jury” like any other special jury, likely to know facts about a particular situation, this one involving foreigners. The fourteenth-century statutes thus set the stage for the separation of matters of fact and custom from matters of law, such that the mixed jury could no longer be construed as a practice whereby a person was judged by the custom or law that attached to that person as a member of a community.

21. *Id.* at 1–2, 25.

22. *Id.* at 26.

23. See CONSTABLE, *supra* note 8, at 29.

24. See The Statute of the Staple, 1353, 27 Edw. 3, c. 8 (Eng.); CONSTABLE, *supra* note 4, at 96.

25. See The Statute of the Staple, 1354, 28 Edw. 3, c. 13 (Eng.); CONSTABLE, *supra* note 4, at 96.

26. See The Statute of the Staple, 1353, 27 Edw. 3, c. 8 (Eng.); CONSTABLE, *supra* note 4, at 96.

27. 2 BOUVIER LAW DICTIONARY 2938–39 (Stephen Michael Sheppard ed., desk ed. 2012); see also CONSTABLE, *supra* note 4, at 2, 16, 159 n.73.

28. See CONSTABLE, *supra* note 4, 7–25, 96–102.

In the sixteenth century, a new name emerged for the mixed jury; it became the jury *de medietate linguae* or “of half-tongue.”²⁹ Language served for a time as a proxy for membership, insofar as alienage was identified by language.³⁰ References to mixed juries before the sixteenth century, with one exception, do not mention juries “half of one tongue and half of another.”³¹ Instead they refer to the jurors of two communities³²—who happen to speak different languages—or to the jurors of the international merchant community who, incidental to their identity as members of the merchant class, may speak different languages, but share a common *lex mercatoria*.³³ In either case, like the early assemblies of neighbors who were the long ago precursors to the modern jury, these early mixed juries represented gatherings of members of one or two communities—who shared customs and laws with the parties or knew the parties or the situation—to speak the truth about the matter at issue.

By the end of the sixteenth century, mixed juries were continually referred to as juries *de medietate linguae* or “of a moiety of tongues.”³⁴ But the jury of half-tongue was not composed half of jurors who spoke English and half of jurors from the alien party’s country, or even speaking the alien party’s language, as the phrase *de medietate linguae* might suggest. Instead, somewhat resembling those who knew the *lex mercatoria*, the alien half of the jury could be composed of “any alien whatsoever.”³⁵ Before the sixteenth century, bonds of language, law, and community had been taken for granted and not discussed explicitly. During the sixteenth century, the relation between language, law, and community broke down. Later, when the identity of language and community was again asserted, the earlier bond among speakers paradoxically was lost.³⁶ Language might identify a claimant, but with the disappearance of the community or personal law basis for the mixed jury, it did not substitute for the former countryman bond between the alien claimant and alien jurors. Rather, as a member of a non-English-speaking country (and not simply a non-English speaker), an alien by the end of the seventeenth century could claim a mixed jury composed not of countrymen, but of “any” aliens.³⁷

The disappearance of a distinct class of merchants who could lay claim to their own law, the separation at trial of custom and fact from law, and the rise of the English-speaking nation, no doubt contributed to the decline of the principle of

29. *Id.* at 112–15, 120–25. For the definition and word origin of *medietate linguae*, see WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 599 (Philip Babcock Gove et al. eds., 2002).

30. See CONSTABLE, *supra* note 4, at 112–13, 115–20.

31. See *id.* at 114, 117 (citing An Act Against Perjury, 1495, 11. Hen. 7, c. 21 (Eng.)).

32. See *id.* at 112–13.

33. *Id.*

34. *Id.* at 113.

35. *Id.* at 120–27.

36. *Id.* at 113, 124–27.

37. *Id.* at 124–26.

personal law embodied by the early mixed jury.³⁸ In its place there arose the impartial law of a state that would make all individuals equal under the law. The state's commitment to "indifference" or impartiality at first reinforced an alien's claim to a mixed jury composed of "any aliens whatsoever," rather than of ostensibly "partial" foreigners who shared their language or law.³⁹ Eventually though, with the loss of the relevance of personal law and community membership to legal identity, the mixed jury was abolished the same year (1870) as state law declared that aliens were to be treated in the same manner as denizens.⁴⁰

The history of the mixed jury, here much abbreviated, reveals the complex interplay of the double aspect of law mentioned above: explicit legal-social acts, such as verdicts and statutory enactments, variously manifest, constitute, transform, and are enabled by shared practices or knowledge of how to judge and name happenings when parties in dispute come from different communities of language and of law. In the longer story (which I cannot completely repeat here), writings and documents play several roles. Themselves records of legal acts, they also reveal and articulate background knowledge, more or less imperfectly. They sometimes clarify or confirm a going practice at a moment when the practice is being challenged, as with the Statute of the Staple. The acts depicted in these writings also change or interrupt what is taken to be or has become routine or what is problematic. Writing practices themselves and the acts that they authorize, such as the selection and composition of mixed juries and their verdicts, are enabled or disestablished by yet other writings and by additional unarticulated taken-for-granted judgments about what counts as law, as fact, and as community membership.

The story of the practice of the mixed jury is, in short then, a story of the decline of law as practice and of the rise of a positive or state law that grounds its authority in sources external to it, whether in writings (as explained above) or in an effectivity of force or will that histories of positive law figure as conquest (as explained elsewhere).⁴¹ The story of the mixed jury shows how changes in conceptions of law correlate with changes in conceptions of membership, knowledge, and, at least implicitly, language. As law becomes written and its records become sources of law and of its history, the stories one can tell of law and what count as legal practices—and hence legal events—themselves change. Legal events become matters of record and memory lies in their interpretation.

II. CHICAGO HUSBAND KILLING

Like the story of the mixed jury, the history of the phrase "new unwritten law" in the early twentieth century to refer to the exoneration of women who killed their

38. *Id.* at 126.

39. *Id.* at 128–30, 142–43, 146. For impartiality of mixed jury in particular, see *id.* at 127–31, 141–43. For a comparison with modern jury impartiality, see *id.* at 28–30, 36, 153 n.15.

40. *Id.* at 143–45.

41. *Id.* at 67–95, 84.

husbands in Chicago involves the relation of acts of law to shared practical knowledge.⁴² The story of the new unwritten law reveals an interplay between legal-social acts and the imperfect knowledge of law that is implicit in their success. It suggests some of the ways that the unwritten becomes written, that background practices become legal acts or events—and, conversely, how acts and events of law may become routine or fade into a taken-for-granted background of legal knowledge and practices.

What exactly was the new unwritten law? Exonerations and pardons of women who killed clearly appear “on the record.”⁴³ In other words, there exist writings—or material documents and files, on paper and online—to support claims that in many cases, legal acts of exoneration or pardon of women who killed their partners occurred. A single doctrine is difficult to pin down though. In archival material related to the 250-plus instances in which women killed husbands or lovers in Chicago between 1867 and 1931, one can identify at least four possible nonexclusive, nonexhaustive interpretations of the new unwritten law: as self-defense applied to women, as battered woman syndrome defense before its time, as an analog to the male “old unwritten law,” and as jury nullification.⁴⁴ In other words, it appears that in some cases of ostensibly new unwritten law, exoneration of women who killed their partners was based on self-defense, which was sometimes called “unwritten law” in the nineteenth and early twentieth centuries. Some exonerations appear to be based on claims that although a woman’s act was not necessarily warranted (or the threat “imminent”), the woman—who was being or had been beaten in the past—believed it was so. Newspaper articles analogized the new unwritten law to the “old unwritten law” or “honor defense” in “crimes of passion” that had protected men who, finding their wives, daughters, or sisters in flagrante delicto, killed the other man, one obvious difference of course being that women defendants were killing their partners rather than their rivals.⁴⁵ Finally, in some cases of new unwritten law, a temporary insanity defense was offered, suggesting at least to some skeptics about such a state that jurors acted purely out of sympathy to female defendants, disregarding the judge’s instructions.

Various materials concerning the cases support each of these somewhat-overlapping interpretations, which will be the subject of a longer work. The more complete story of the exonerations that occurred in this complicated set of cases will contribute answers to such questions as: When did the new unwritten law begin? What was the official story? How was the new unwritten law represented and perceived? When and how did it end? The study will not only investigate possible interpretations of the new unwritten law, however. It will also reflect on what kind of history of ostensibly *un*written law is possible, given the contemporary reliance

42. See Constable, *supra* note 5, at 94–95.

43. See *id.* at 86.

44. *Id.* at 87.

45. Lawrence M. Friedman & William E. Havemann, *The Rise and Fall of the Unwritten Law: Sex, Patriarchy, and Vigilante Justice in the American Courts*, 61 *BUFF. L. REV.* 997–1056 (2013).

of law and history on writings as sources of evidence and as authority.⁴⁶ It is on the relation of law to those writings and the legal acts that they represent that I now focus.

Though cases of the exoneration of Chicago women who killed their husbands or lovers can be found in the nineteenth century, the phrase *new unwritten law* appears in Chicago papers in the 1910s and 1920s.⁴⁷ Until taken up by twenty-first-century historians,⁴⁸ it appears only in newspapers and, as far as I have been able to determine, not in court or in formal legal records. The new unwritten law appears not to be a formal doctrine then, although it refers us to a set of actual cases and legal phenomena—of legal acts of exoneration, acquittal, pardon, and reversal.⁴⁹ Its emergence as a phrase thus draws attention to or makes manifest various “imperfect” background accounts or knowledges of law: those of journalists and members of exonerating bodies (coroners’ juries, grand juries, trial judges and juries) as well as of the legal profession and the public. Claims made or acts done in the context of actual cases give rise to and make possible imperfect shared knowledge of a “new unwritten law” that was claimed, disseminated, and circulated not only in newspapers, but in other genres and media, including theater and film, in Chicago and further abroad.⁵⁰ Such knowledge of unwritten law was not only incomplete; by today’s standards of social scientific accuracy and definitions of positive law, its claims were not law at all.

The long history of the new unwritten law then, referring in part to actual phenomena or occurrences of acts of exoneration that constitute the events of this history and actually beginning before the appearance of the phrase “new unwritten law,” marks a time of transition. During this period, imperfect or incompletely articulated knowledges of what to do in situations in which wives killed their husbands came to articulation in the writings and records of legal speech acts in which one now finds evidence of what retrospectively came to be called a “new unwritten law.” Legal acts and the acts of the women themselves were memorialized not only in written media such as newspapers and files, as well as novellas and instructive stories, but also through public spectacles that have been passed on to

46. As an example of such reliance, consider the footnoting conventions of U.S. law reviews. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 19th ed. 2010); Herma Hill Kay, *In Defense of Footnotes*, 32 ARIZ. L. REV. 419 (1990); Fred Rodell, *Good-bye to Law Reviews*, 23 VA. L. REV. 38 (1936).

47. See, e.g., *Killing Husbands*, *supra* note 12, at 8; *Taunted Wife*, *supra* note 12, at 1, 5; *Plea of Unwritten Law*, *supra* note 12, at 27–28. I am grateful to the UC Irvine Law Review editors for finding a 1907 article in the Washington Post: *Does the New “Unwritten Law” Shelter Women Who Shed Blood?*, WASH. POST, May 12, 1907, at E10 (reprinted from the *St. Louis Post-Dispatch*).

48. See JEFFREY S. ADLER, *FIRST IN VIOLENCE, DEEPEST IN DIRT: HOMICIDE IN CHICAGO 1875–1920* (2006); Adler, *supra* note 5, at 882–88; Friedman & Havemann, *supra* note 45.

49. Records that have not been destroyed may be found in locations mentioned in *supra* note 11.

50. See Constable, *supra* note 5, at 86; see also FRED EBB & BOB FOSSE, *CHICAGO* (1976).

us.⁵¹ By our standards, these records and representations of the law of the period are wildly inaccurate. Even setting aside the tall tales and legends that made Chicago “fabulous,”⁵² more narrowly circumscribed “legal” files of the time suggest a permeability of genres that is difficult to imagine today. In the case of a convicted nineteenth-century husband-killer, for instance, a copy of a newspaper account accompanied by a judge’s signature serves in lieu of an official trial transcript in the pardon file.⁵³ My own research began with a Chicago police register that it would hardly be possible, for privacy and due process reasons among others, to access, much less maintain, today. It lists every killing in Chicago in which police were called in, along with the name of the suspect.⁵⁴

While representations and records enable retrospective knowledge of the new unwritten law, emerging sciences, such as statistics and psychology, shaped and filtered concurrent knowledge of it. Newspaper articles of the 1910s and 1920s offered running counts of the ostensibly total number of “lady killers” in Chicago who had gone free.⁵⁵ Some began their counts in 1911, others in 1905 or 1907. Most did not consider cases before 1905, although cases occurred before then.⁵⁶ The year 1905 was when a reformist Coroner insisted that his office begin keeping statistics.⁵⁷ It was also the year in which the Protective Association for Women and Children agreed to merge with the men’s Bureau of Justice to become the Legal Aid Bureau.⁵⁸ New and contested claims of psychiatry were also entering official legal accounts of women’s situations and actions, repeating, reinforcing, adapting, and challenging older assumptions about acts and intentions in criminal law.

Like the mixed jury then, the story of the exonerations of women who killed their partners in Chicago at the turn of the century shows how unwritten practices

51. ROBERT HARDY ANDREWS, *THE QUEEN OF THE DEMI MONDE: GAY LIFE IN CHICAGO* (Chicago, Garden City Book Co. 1880); EBB & FOSSE, *supra* note 50; STURLATA STILES ET AL., *STURLATA STILES TRAGEDY* (Chicago, O.E. Hammond 1883).

52. See generally EMMETT DEDMON, *FABULOUS CHICAGO* (enlarged ed. 1981) (detailing the history of people and events that have made Chicago “fabulous”).

53. File of Mary Cosgriff in the State of Illinois Archives, ID 243/202, File 3807A Joliet/Stateville Correctional Center—Penitentiary Mittimus Files, Springfield, Ill. (1857–1916) (on file with author).

54. This register is the basis for the online Chicago Historical Homicide Database.

55. See, e.g., *Free Another Woman Slayer*, CHI. TRIB., Jan. 23, 1915, <http://archives.chicagotribune.com/1915/01/23/page/1/article/free-another-woman-slayer>; *No Chicago Woman Convicted of Murder*, CHI. INTER OCEAN, June 22, 1912, at 3.

56. The Interactive Database of the Chicago Historical Homicide Project shows relevant cases every year from 1898 to 1904. See *Interactive Database*, HOMICIDE IN CHICAGO 1870–1930, <https://homicide.northwestern.edu/database> (e.g., select “1898” under “Year” for “Date of offense”; then follow “Search” hyperlink) (last updated 2012).

57. Peter M. Hoffman was appointed Coroner of Cook County in December 1904. For a description of the early years of his administration, see Administration of the Office of Coroner of Cook County Illinois, Report Prepared for the Judges of the Circuit Court by the Chicago Bureau of Public Efficiency (Dec. 1911) (on file with author).

58. Gwen Hoerr Jordan, *“The Law Wimmen”: The Protective Agency for Women and Children and the Gendered Origins of Legal Aid*, in FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW 156, 168 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011).

leave traces in writings. It highlights the development of facets of law that many now take for granted: the legitimacy and authority of writings as sources of law and history; conventions of testifying to and documenting truth and reality; and the privileged ability of empirical and social sciences to access, observe, and know law. The story of the new unwritten law will show how law and history are in many ways literary artifacts, making use of annotation, enumeration, argument, and narration, albeit in somewhat different ways. Further, it shows how events and claims of written history, like those of written law, and indeed more broadly, like the oral and written utterances of the language we are speaking, are in many senses imperfect; they are incomplete, habitual, and interruptible.

III. LAW AS LANGUAGE

The stories of both phenomena discussed above draw on writings of law. They treat law not as power, but as language. Law today clearly refers at least in part to more-or-less discrete social or speech acts, such as congressional enactments, trial instruction, verdicts, exonerations, and pardons, as well as to marriages, contracts, and so forth, material evidence of which can be found in documents, files, and archives. Insofar as legal speech acts are verb-like actions or activities, and not simply the noun-like traces or results of such acts, they take place or have taken place over time. Consider dismissal, for instance. A judge (or coroners' jury or grand jury) performs the act of dismissing a husband-killing charge in speaking or writing a particular way in a given context. A judge's two-to-three second-long utterance, "Case dismissed," could be converted into what J.L. Austin calls an explicit performative grammar, or into the first-person present indicative active form, "We, the Court, hereby dismiss . . ." ⁵⁹ A dismissal (as noun) happens in the ostensible "moment" of its being uttered and heard, although such uttering (and hearing) actually takes time or happens over a course or period of time. Duration of course also characterizes activities of writing. In its issuance or at the end of its course of issuance, an oral dismissal or a written remand transforms a state of affairs. It changes the status of a pending charge or of an ostensibly "final" conviction.

Although as events, legal acts transform states of affairs, it is important to emphasize that an act of dismissal does not simply *cause* dismissal. Nor does claiming a mixed jury cause a claim. Rather, the act of dismissing or claiming, appropriately carried out, *is* the dismissal or claim. ⁶⁰ Likewise, with acts of complaint, objection, marriage, exoneration, and so forth. As Austin and, even more explicitly fifty years

59. See generally J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 56–57 (J.O. Urmson & Marina Sbisà eds., Oxford Univ. Press 2d ed. 1975) (1962).

60. That through our language, we distinguish the act from its causality is a function of grammar and the metaphysics of language. See FRIEDRICH NIETZSCHE, *The Four Great Errors, in TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST* 58, 61–63, §§ 4–5 (R.J. Hollingdale trans., Penguin Books 1968) (1889).

earlier, Adolf Reinach, point out, such acts are speech acts or social acts.⁶¹ To succeed they require another to hear (or to read or otherwise apprehend) them; as such, they occur in dialogic exchange between at least two (grammatical) subjects, speaker and hearer, with the agency or competence to apprehend what is being said and done.⁶² Further, to be apprehended as legal acts, legal claims appeal to the ostensibly common (and yet imperfect) knowledge (of law and of world) of speaker and hearer. They appeal, in effect, to a third party or to the practical knowledge of community members who—despite their differences—share language and law; legal acts make claims “in the name of” the law.⁶³

Such legal acts or claims have a complicated temporality that is unlike the linearity of cause-and-effect accounts of changes in static rules, statements, documents, files, or other noun-like entities. As Jacques Derrida points out of the U.S. Declaration of Independence, legal-social acts have the dynamic structure of the “future perfect.”⁶⁴ Derrida refers to the signing of the Declaration by the people’s representatives as a paradoxical moment of founding that establishes “the people.”⁶⁵ To sign the document as representatives of the people, the representatives must *already* have been authorized to do so “in the name of the people.”⁶⁶ At the moment of the signing however, “we” or the “good people” is not yet in existence.⁶⁷ Likewise, during the time it takes for legal acts or claims such as exoneration to take place, or while they are in process of being spoken, written, heard, and read, they are not yet complete or (in a grammatical sense) “perfected.” At the somewhat paradoxical “moment” of their so-called completion however, they *turn out* to be the act that they had not yet been, but now retrospectively already were.⁶⁸ A similar dynamic characterizes the working of precedent. And cases of the exoneration of women who killed their partners too turn out retrospectively to be instances of what comes to be called new unwritten law. That acts of speech and record may be completed or “perfected” allows them to be identified as discrete events that can be attributed or relegated to a past. This does not mean that such acts do not sometimes go wrong, precisely in ways that J.L. Austin identifies.⁶⁹ They may be said under duress, they may be misunderstood, they may be carried out improperly, and so forth.⁷⁰ That legal speech acts can go wrong suggests that they can be carried out in better or worse ways, that they can be done more or less well,

61. See AUSTIN, *supra* note 59. See generally Adolf Reinach, *The Apriori Foundations of the Civil Law*, 3 ALETHEIA 2 (1983) (emphasizing the necessity of the participation of the hearer in social acts in a manner that Austin recognizes but does not incorporate as emphatically in his account of speech acts).

62. AUSTIN, *supra* note 59, at 20–23. Elsewhere, I explain how even ostensibly monologic acts presume more than one speaking subject or person who knows or can practice the language.

63. CONSTABLE, *supra* note 17, at 103; Constable, *supra* note 17, at 637–38, 640.

64. Jacques Derrida, *Declaration of Independence*, 7 NEW POL. SCI. 7, 7–15 (1986).

65. *Id.*

66. *Id.*

67. *Id.*

68. See Mark Currie, *The Expansion of Tense*, 17 NARRATIVE 353, 356, 360 (2009).

69. AUSTIN, *supra* note 59, at 18–24.

70. *Id.*

and that they manifest different levels of skill on the part of both speakers and hearers. Skill involves how-to knowledge or a background of practical knowledge about what to do and how.

In the English-language legal tradition at least, such knowledge is precisely of the language of law and of how to make claims in it. Law schools teach reading and writing because claims are matters of language. Although as speech acts that assert truth and demand recognition, claims may indeed be false or unsuccessful, they nevertheless speak the idiom of justice. This does not mean that all claims are just or that law *is* justice. Language is not truth, yet what we say may be true or untrue. Likewise, legal acts and claims may be just or unjust. Language can go wrong and be used deceptively. So too law. Human beings encounter law in many ways: as social power or force, as a system of rules, as higher morality, as custom. Approaching law as a language of claiming allows one to hear claims of law, such as claims for mixed juries, or claims about law, such as those about a new unwritten law, as imperfect or incomplete accounts of law, rather than writing them off as non-law in the manner of positivist approaches. Approaching law as a language of claiming thus expands what counts as—ever-imperfect, ever-incomplete—law. It allows one to recognize and accommodate realist empirical claims of law as domination, for instance, as well as romantic, aspirational claims of law to justice, without falling prey to the absolutism of either account's claims of or as to law.

In sum, the shared imperfect knowledge of making claims that law schools seek to impart and that we call *law* makes possible the discrete legal speech acts (complaints, verdicts, exonerations, etc.) that historians and other English speakers now clearly identify as *law* or legal claims. On the one hand, these acts, like mixed jury verdicts and exonerations of women who killed their husbands, may stand out as legal-historical *events*; such events may include the ratifying of a constitution, the petition for or passage of a resolution, a declaration that racial segregation in public schools is unconstitutional, the marriage of Diana to the Prince of Wales, the first divorce in New York state. As events, these acts—again like claims to mixed juries and claims about a new unwritten law—interrupt otherwise ongoing and habitual practices or knowledge of law, even as they are warranted by them. On the other hand, when legal acts are considered to be or become routine—divorces in New York state, the exoneration of women who killed their husbands in Chicago at the turn of the century, click-wrap or shrink-wrap agreements, the adoption of constitutions or UN resolutions themselves perhaps—they contribute to or merge into the imperfect, incompletely articulable background practice of law, from which they may on occasion be recalled, as outstanding acts or events.

How do events blend into or contribute to a background or emerge from that background to stand out or interrupt it? This is a question for any history. What distinguishes uncontrovertibly “legal” acts or events from others? This is a question for legal history. Thinking about law as language offers a way of thinking about how some legal acts stand out as momentous events one day and appear to blend into routine the next, and vice versa. Events of law, such as the empaneling of a mixed

jury or claims of a new unwritten law, involve relations between, on the one hand, the completed or completable social acts or claims of which we have written records and, on the other hand, imperfect practices of claiming and hearing that inform not only those records but also the stories we tell of a law that exceeds those records.

How particular happenings emerge from a background of activity or practice to stand out for us as noteworthy acts or events depends both on the material traces that they leave (and that in part we make and keep) and also on the stories we find worth telling. How legal acts and phenomena, such as mixed juries and exonerations under new unwritten law, leave different sorts of traces, interpreted and interpretable in various ways at different times, is worth interrogating. Hence the need for histories of law to explore further how writings, on which acts and events of law and history depend, are things in the world that bind us to language, in speech and in silence.

CONCLUSION

So what do “humanistic” legal histories do? How do they treat law and event? At this twenty-first-century moment, the new unwritten law offers an incomplete story of happenings that are yet to be figured as events in a past tense, and the telling of which is far from finished or “perfect”—in grammatical and other senses! Imperfect claims of new unwritten law clearly involve something other than applications of rules or impositions and manipulations of power. Like the rest of our law, the new unwritten law is a manifestation of “imperfect”—incomplete, ongoing, and yet interruptible—practices of law-ing and speaking and writing. The writing of its history invites us to apprehend law through reading and hearing written *and* unwritten claims, an approach that is alien to the ostensibly tried-and-true empirical methods by which at least some sociolegal studies grasp law.