Steven D. Smith

LAW'S QUANDARY

Steven D. Smith

Law's Quandary

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts, and London, England 2004

Preface

A preface typically tries to say what a book is about; sometimes it also serves to express acknowledgments. In my case, these purposes converge.

What is the book about? Well, I suppose I could describe it as an inquiry into the recurring complaint that provides the title for the first chapter—the complaint that accuses the vast, solemn outpourings of lawyers and judges of being "just words." But that sort of preview would be opaque—and potentially embarrassing. ("You actually wrote a book—a whole book—about whether law is just a lot of words? Have you no sense of irony? Nothing more worthwhile to do with your time?") Desperate to give the book greater dignity, I might overcorrect and say that it's about the metaphysics of law, or about how our understanding of law has deteriorated due to our wanton neglect (or, rather, our systematic suppression) of its ontological dimensions. But that sort of theme, baldly stated and standing alone, would be merely misleading and also, in the current climate of opinion, alienating. Who today has any use for "metaphysics" or "ontology"? Who has any clear notion of what, if anything, those terms even mean?

So for now, I can better express what this book is trying to do more obliquely, by offering two sets of acknowledgments. The first is to several generations of mentors who lived and wrote just a little before my time and, probably, yours. (I once met Lon Fuller, actually, but he was well past his prime.) A half-century or a century ago, it was possible to write about jurisprudence in a way that even the most celebrated legal thinkers of our own era—Ronald Dworkin, for example, or Richard Posner—no longer manage, and probably no longer aspire to. I have in mind three particular works: Oliver Wendell Holmes's essay "The Path of the Law," Karl Llewellyn's *The Bramble Bush*, and Lon Fuller's *The Law in Quest of Itself*. Given the choice be-

tween any of these writings and, say, a good novel, I suppose that even hardened professors of jurisprudence would choose the novel. So would I, probably. Even so, these writings manage to convey arresting insights in a way that is accessible, enjoyable, and even enriching in a general sense.

These writings are not "academic" in either the honorific or pejorative sense of the term. Perhaps because the writings began as public lectures, their authors present themselves as actual *persons;* they do not hide behind the numbing, homogenized, pseudo-objectivism that academic conventions often insist on. Their diction can be idiosyncratic, can sometimes even border on barbarous (especially in Llewellyn's case). In discussing a thinker or theory, they may resort to simplifying caricatures—caricatures that distort but that can also illumine the essence of a thinker or theory in a way that more ponderous description cannot.

Most importantly, Holmes, Llewellyn, and Fuller work on the assumption—one that today might seem close to preposterous—that, as Fuller puts it, "[jurisprudential q]uestions . . . affect the fundamental bent of our lives." Thus, Llewellyn explains that his lectures seek to be at once a primer on law—useful for beginning law students—and an expression of "some of the more passionate convictions which motivate his living." And in the last sentence of "Path," Holmes describes (with perhaps a touch of grandiloquence) his aspiration to "connect [the] subject with the universe and catch an echo of the divine."

To put the point a bit differently, these writings of the early twentieth century have a kind of multiple *openness*—openness to readers both specialists and laypersons, openness in revealing the authors' personal commitments and not merely their professional positions and, even more important, openness to the connections between law and the larger issues of life.

With few exceptions, such openness is scarcely discernible in even the best jurisprudential writing in recent decades. Indeed, I suspect that most legal scholars today would be embarrassed if these qualities were detectable in their work—as if they had been caught in the performance of some private function. Jurisprudential thinking in this respect has followed a familiar course. In many disciplines, it seems, periods of zestful, insightful innocence give way to periods . . . not so much of decline, exactly, as of professional virtuosity. Of scholasticism. Eminences of the later period—the virtuosos, the scholastics—may look back on their predecessors with a mixture of respect and condescension: they may view those predecessors as gifted novices. In this spirit, contemporary legal philosophizing is no doubt more sophis-

ticated—more methodical, more technically proficient—than Holmes's, Llewellyn's, and Fuller's writings were. And yet . . . these jurisprudential virtuosos and their productions may prompt the same reaction that *Paradise Lost* provoked in Samuel Johnson: it is "one of those books which the reader admires, lays down and forgets to take up again. Its perusal is a duty rather than a pleasure."

Here is an instance: I recall how, the first time I taught a jurisprudence class at the University of Colorado, I assigned the students to read H. L. A. Hart's *The Concept of Law.* I later asked the class what they had thought of the book. One student (who seemed bright but, obviously, not duly acculturated) spat out his answer as if reacting to a piece of rotten meat. "I think it's pathetic," he said, "that an intelligent person would spend his life writing stuff as obscure and pointless, and *dead,* as this." Taken aback, I explained that Hart's book is widely regarded as a classic and a model of clear thinking and writing. What I said about the book was—is—true. Still, I have to admit that I can understand—maybe even sympathize with—the student's reaction. And if this stinging criticism can be made of Hart—well, there is an *a fortiori* lurking in the vicinity. So it is hardly surprising if, as I am told, student interest in jurisprudence is on the wane. Nor is the decline limited to students; it includes professors—even, I strongly suspect, professors of jurisprudence.

So then, is it possible to resist the flow of history, and thus to write about law with the same sort of openness sometimes achieved in an earlier period? To talk about law in a way that speaks to both specialists and the laity, and that "connects the subject to the universe and catches an echo of the divine"? I'm not sure, but this book is an effort to do that. So I have tried to take "Path" and *Bramble Bush* and *Quest*—not *The Concept of Law* and its ever more meticulously ponderous successors—as models. (I have fallen short, of course, in a whole variety of ways and for a whole variety of reasons.)

I should note one crucial qualification to what I have just been saying. Although I have taken Holmes and Llewellyn and Fuller as mentors in what you might call their "open" or "human" orientation to the subject, I have not followed their substantive teachings on the nature of law. On the contrary. On the level of jurisprudential substance, these predecessors are more nearly opponents than mentors, or perhaps mentors from whom I—and, I believe, *we*—need to break away. Holmes and his successors operated in an era that was determined to purge itself of "metaphysics" (whatever that is). And they thought that in doing this they were acknowledging, and advanc-

ing, a sort of inexorable movement of history. Holmes and Llewellyn were zealous for the movement; Fuller acquiesced in it. Everything these men and their contemporaries say about law is tinged with, if not permeated by, this anti-metaphysical animus.

A similar attitude still dominates the legal academy—and still, in my view, paralyzes our efforts to understand law. But the older assumptions about the inevitable course of history have by now been largely falsified, and it may be possible to take a fresh look at the world—and at law, and at how law relates to and reflects the world. Possible and also urgently *necessary,* because the "Path" that Holmes pointed to and that generations of his dutiful followers have trod, have trod, have trod has led to a jurisprudential dead end. That is why, I believe, the quality of openness sometimes apparent in our predecessors is now more opportune than the currently prevailing virtuosity that seeks mainly to restate, analyze, criticize, and extend their various claims with methodical care and ever greater sophistication. We need to emulate our distinguished predecessors' *qualities of mind* precisely so that we can get beyond their *substantive philosophies.*

This observation leads to a second, briefer set of acknowledgments, which I owe to a remarkable group of former colleagues at the University of Colorado. When I moved to Colorado in 1987, Bob Nagel was already there, and the next year Pierre Schlag arrived, and later Paul Campos and Richard Delgado and Jean Stefancic and Rebecca French and Curt Bradley joined the collection. ("Family" would emphatically not be the right word.) "Crits" all—in a catholic and nonpolitical sense of the term. (I hope that none of them is offended by the description.) Though these people differed tremendously from each other in their philosophies, politics, interests, temperaments, and life situations, they were all intellectually engaged and also iconoclastic in one way or another that made for endless and interesting conversations. Perhaps the Colorado environment—its mountains, its frontier innocence and remoteness from the sophisticated centers of high civilization, maybe even its peculiar politics incongruously situating "the People's Republic of Boulder" in the state that became famous for the anti-gay rights "Amendment 2"—contributed to the distinctive atmosphere. In any case, it seemed possible there to raise questions—*really* to raise them, all sorts of questions, about law and the Supreme Court and the legal academy and the modern Western worldview—that somehow could not be taken as seriously at other more self-consciously respectable institutions where I have studied or taught.

That freedom did not lead to uniform conclusions, of course. Quite the reverse. For example, I am sure that Pierre Schlag influenced me (or "corrupted" me, as a conservative friend wistfully told me) far more than I influenced him, such that many of my views (including many expressed in this book) by now probably owe much to Pierre even when I am no longer conscious of the debt. But in the end our outlooks were fundamentally different. Pierre seemed constitutionally incapable of viewing what I will simply call "faith" as a live option; and so for him critical openness was always a path to despair. (Or at least to what in my view amounted to despair; but Pierre did not see it this way.) For me, conversely, and for better or worse, it seems that faith was and is inescapable, even though it is an ongoing and at times frustrating struggle—for me as for many others—to articulate the basis and content of that faith. Nor can this struggle be divorced from the effort to understand law: hence this book.

These collegial differences made the exchanges all the more valuable, for me at least. In any case, this book is an expression of years of such discussions with Bob, Pierre, Paul, Richard, Jean, Rebecca, and Curt, to all of whom I am deeply indebted. We have all moved on; but the book seemed worth doing, among other reasons, as a sort of memoir of a decade of cordially combative conversations.

Others have helped me with the book in more direct and usual ways. A number of friends and associates generously read and commented on all or part of the book: Brian Bix, George Wright, Chris Eberle, Larry Solum, Gail Heriot, Paul Campos, John Garvey, David Brink, Richard Delgado, Laurie Claus, Emily Sherwin, Mike Ramsey, Patrick Brennan, Mike Rappaport, Sai Prakash, Tom Smith, Dan Rodriguez, Rick Garnett, Chris Wonnell, Richard Posner, and Maimon Schwarzchild. Larry Alexander and Michael Perry deserve my special thanks for giving both substantial comments and also encouragement and moral support along the way; such friends are one of life's larger blessings. Another good friend, Joe Vining, returned the manuscript with a barrage of marginal comments that, alas, I was unable on the whole to assimilate adequately into the book; but the comments were so perceptive and provocative that I almost wish they could have been printed along with the book. I also benefited from questions and challenges in presentations of parts of the book to the law faculties at Arizona State University, Emory University, and the University of San Diego. Much of the book was written while I was on the faculty of Notre Dame Law School, and I appreciate the support of the dean and faculty there. As always, I especially appreciate the

moral support of my wife, Merina, and my children. And I owe a small debt of gratitude to the Peace Corps: thanks to its administrative ineptitude my daughter Rachel, who knows more philosophy than I do, was unexpectedly able to spend several months with us in South Bend, and thus to read and comment on an early draft before traveling to her assignment in Uzbekistan. And Rosemary Getty provided invaluable assistance in preparing the manuscript for submission.

Although none of the chapters here have previously been published, I have in places borrowed and adapted passages and sections of three articles with the permission of the original journals: "Believing Like a Lawyer," 40 *B.C. L. Rev.* 1041 (1999); Copyright © 1999 Boston College Law School; "Expressivist Jurisprudence and the Depletion of Meaning," 60 *Md. L. Rev.* 506 (2001), used with the permission of the Maryland Law Review; "Nonsense and Natural Law," 4 *S. Cal. Interdisc. L.J.* 583 (1995), used with the permission of the Southern California Interdisciplinary Law Journal.

I also thank the Princeton University Press for permission to quote from Joseph Vining, *From Newton's Sleep* (1994).

LAW'S QUANDARY

Contents

PART I

Law and Metaphysics?

Jurisprudentially speaking, the twentieth century was a tremendously fertile—and tremendously futile—era. In a lecture given on the eve of the new century and destined to become the most celebrated and cited law review article ever published, Oliver Wendell Holmes foresaw exciting, even revolutionary developments in law and legal thought. In the not so distant future, he predicted, law would leave behind the sterile parsing of precedents, the haggling over rules and doctrines and, above all, the reverently moralistic application of legal tradition that from medieval times had composed the lawyer's daily duties. Instead, the practice of law was destined to become, and soon, a more rational and scientific enterprise—one that would make heavy use of statistics and economics and "theory." These changes were "the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth."[1]

His descendants routinely pay tribute to Holmes's prescience. His "article is a prophecy," Richard Posner enthuses, "and it is coming true."[2] "A century later," Mary Ann Glendon remarks (though not as happily), "lawyers all over the world are marching to the measure of [Holmes's] thought."[3] The conspicuous growth of law and economics is perhaps only the most obvious fulfillment of Holmes's predictions.

Curiously, though, from a different and perhaps more discerning perspective, it seems that nothing much has changed: the radical advances in law anticipated by Holmes and repeatedly proclaimed by his followers look to be a thing of the surface. The ways in which lawyers and judges (and even most legal scholars) actually practice and talk about law are not so different than they were a century ago—or even five centuries ago. Thus, the distinguished historian and law professor Norman Cantor asserts that "[a] London barrister of 1540, quick-frozen and revived in New York today, would need only a

year's brush-up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-law firm."[4] In his less sanguine moments, Judge Posner (who comes as close as anyone to being a reincarnation of Holmes, or at least of Holmes's more cerebral side) admits as much. "The traditional conception of law is as orthodox today," he laments, "as it was a century ago."[5]

Few lawyers or judges today, Posner concedes, would admit to embracing the formalistic legal methods and assumptions that Holmes deprecated. "Yet most lawyers, judges, and law professors," he observes glumly, "still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found—and it is imperative that they be found—by reasoning from authoritative texts, either legislative enactments (including constitutions) or judicial decisions, and therefore without recourse to the theories, data, insights, or empirical methods of the social sciences."[6]

How to account for this gaping discrepancy between what was *supposed to* happen and what by and large *has* happened (or, more accurately, has *not* happened)? Some observers point to attitudinal and institutional factors. Perhaps lawyers are traditionalist and conservative by nature—or maybe just intellectually lazy? Or law schools have not adapted to the modern world by teaching future lawyers the empirical and theoretical skills needed to implement the newer visions of law. Other critics may attribute the failures of modern law to other sorts of factors—Weberian bureaucratic rationality, or capitalist ideology, or the cartel structure of the profession, or an absence of the courage to face up to fears of "illegitimacy" or even "nihilism."

This book is devoted to advancing a very different (though not necessarily incompatible) sort of explanation. The malaise of modern law and legal thought, I hope to show, is a manifestation of what is at bottom a *metaphysical* predicament. And the way out of the malaise—if there is one (a question about which I have no confident opinion)—will require us to "take metaphysics seriously," so to speak.

This claim will surely be met with incredulity, so I hasten to point out that I am not the only observer of the law to offer some such diagnosis. I will try to enlist a few allies (including some less than eager ones) as the discussion proceeds. Still, there is no denying that this is not the usual explanation. Indeed, the dominant view has been exactly to the contrary. It would not be much of a stretch, as we will see in Chapter 4, to say that the central effort of legal thinkers from Holmes through the Legal Realists through the modern

proponents of "policy science" has been precisely to improve law by ridding it of the curse of metaphysics.[7]

In this vein, although Morris and Felix Cohen devoted a chapter in their jurisprudence reader to "Law and Metaphysics" (which they defined, in rather docile terms, as "the bringing to consciousness of what is assumed in all legal argument"), they also anticipated skepticism—a skepticism that Felix Cohen's own writings surely helped to fuel. So the Cohens acknowledged that metaphysics is often viewed as "the effort of a blind man in a dark room to find a black cat that isn't there."[8] This aversion to metaphysics has become almost axiomatic in many quarters. Brian Bix observes that mainstream legal thinkers like H. L. A. Hart have seen the "primary purpose [of jurisprudence] as a kind of therapy: a way of overcoming the temptation to ask metaphysical questions ('what is Law?' or 'do norms exist')."[9]

Indeed, law has sometimes seemed an attractive field precisely because in its nitty gritty practicality it has appeared to offer a refuge from metaphysical questions. Many lawyers and law professors (like many people generally) are constitutionally averse to philosophy, and Michael Moore suggests that even "many philosophers became *legal and political* philosophers in part to avoid metaphysical questions."[10] Moore himself is an exception; he is among the handful of legal theorists—totaling, maybe, a half-dozen or so?—who occupy themselves with metaphysical issues. But at the conclusion of a lengthy, learned article on the subject even he seems to concede that his analysis has little or no practical payoff. The metaphysics of law, rather, is just an abstruse subject that a few unusually constituted people happen to find interesting: God knows why. (This is just a figure of speech, reflective of my own perversity: Moore peremptorily assures us in the article, with no hint of doubt or qualification, that God does not exist.)[11]

The preceding paragraphs mislead, though, if they suggest that contempt for metaphysics is limited to the field of law. Charles Larmore notes more generally that "'metaphysics,' . . . today functions mostly as a term of abuse."[12] When it occasionally comes up in actual conversation, the term is nearly always dismissive: "metaphysical" conjures up a hazy, generally unappealing image of things musty, abstruse, unfathomable—"academic" in the pejorative sense that connotes sterile quibbling about matters that have no possible relevance to actual life and that consist mainly of abstract word puzzles. (Except, that is, when "metaphysics" is taken as a code word for the paranormal or exotic, as in the shelf label for a large section of literature in a New Age bookstore I recall visiting in San Francisco.) Voltaire's famous portrayal in *Candide* of the metaphysician Dr. Pangloss sponsors a different but

equally unalluring image—of a pathetic and borderline-delusional thinker who concocts airy and fantastic theories to escape from the messiness and unpleasantness of the real world.

These unfavorable impressions will not likely be corrected—they may in fact be reinforced—if you browse through a philosophy book dealing with the subject. You will encounter alien terms like "possibilia," "substitutivity," and "exemplifications," used in connection with arguments about such less than urgent (to most of us) questions as whether and in what sense numbers are "real," or whether possible worlds that do not achieve actualization can somehow be said to exist.[13] Indeed, many leading philosophers over the last couple of centuries have themselves called for an end to metaphysical speculation, arguing that the enterprise is futile or worse. A leading contemporary philosopher, William Alston, holds a more favorable view, but he concedes that the sort of work that modern metaphysicians have turned out makes them "sensitive to charges of engaging in parlor games during working hours."[14]

How then can a subject as removed and presumptively useless, if not actually pernicious, as metaphysics be the source of—or a possible remedy for—any difficulties in law, legal discourse, or legal theory?

It is a hard question. I cannot try to answer it all at once: this is, after all, the task of the book itself. But two preliminary qualifications may calm at least some suspicions. First, my concern here is not with the whole range of issues that get put under the heading of "metaphysics" but, more specifically, with the subcategory sometimes called "ontology," which is the subset of the discipline that addresses the question of "what there is"—of "the primary constituents of this or any possible world, the very alphabet of being."[15] Second, I myself am a law professor, not a metaphysician (or even a philosopher), and I can boast of only brief skirmishes with academic metaphysics. The argument in this book turns not so much on the rarified questions that academic philosophers spend their lives pondering as on what we might call "practical metaphysics."

That term may seem oxymoronic. So the chapters in this first part attempt to explain how law might present, at its core, questions that are at once thoroughly practical and deeply metaphysical, and how neglect of those questions might render our talk about law a form of highly refined "nonsense." (Which, of course, is just what law-talk looks like to many critics, both within and outside the legal profession.)

CHAPTER 1

Just Words?

Lawyers (and judges, and law professors) are targets of derision on a variety of grounds; but some of the most familiar criticisms disparage the way they—I suppose I should say *we*—talk, or the words we use. One criticism castigates lawyers for using *too many* words. I still recall the crestfallen look on the face of Sud, the stolid old farmer who was my boss for three fruitfully destructive summers at the Bonneville County (Idaho) Weed Control, when a fellow worker told him I wouldn't be back the next year because I was going off to law school. "You're . . . gonna be one of them . . ."—he groped for words—". . . them *talkin'* bastards?" A related criticism attacks lawyers (and judges, and law professors) for using the *wrong* words—for using a vocabulary that is obscure, or dishonest, or not cogent.

Almost imperceptibly, these criticisms shade into a subtly different one. The complaint is that lawyerly discourse is empty. It is *just* words, or *merely* words, or *nothing but* words.

This last is a long-standing charge, but it is also enigmatic. What else would a discourse be if not words? What exactly are the critics complaining about? If we could answer that question, we might gain a valuable insight into the nature of law—and into the deficiencies of modern thinking *about* law.

Troubling Judgments

We might start with a recent article by Deborah Rhode, former president of the Association of American Law Schools, in which these intermingled objections are presented. Rhode's specific subject is not law-talk in general but rather legal scholarship. She begins by suggesting that a good deal of legal scholarship (including, she endearingly admits, some of her own) deserves

the description once given of Warren Harding's speeches: "an army of pompous phrases moving over the landscape in search of an idea." The work is "bloated," characterized by an "offputting length and style." In fact, there is a consensus that "too much work is trivial, ephemeral, unoriginal, insular, pretentious or simply irrelevant."[1] This harsh description is not peculiar to Rhode: she cites Richard Posner's judgment that a great deal of legal scholarship is "trivial, ephemeral, and soon forgotten," Dan Farber's description of the "intellectual aridity" of legal scholarship, and Robert Gordon's opinion that much legal scholarship is "horribly pretentious and vacuous."[2]

It is little wonder, therefore, that most law review articles go wholly uncited. The authors of these involuntarily diffident articles may console themselves—ourselves—with the thought that surely someone, somewhere, is reading our articles, but just not citing them. Sadly, the reverse is probably even more likely: "What seems substantially more plausible"—Rhode shows no pity—"is that many of the 30,000 other articles were cited but not in fact read by commentators seeking scholarly embellishment."[3] (I promise that I did read Rhode's article—or at least skimmed it.)

The picture is dismal: broad, winding rivers—meandering into oceans—of *words*, but very little real substance. Too many words; too little content.

Rhode is talking about legal scholarship, though: perhaps the discourse of actual lawyers and judges is different? Judicial opinions, obviously, cannot be said to be "*just* words" in the same sense that scholarship can (as a losing litigant becomes painfully aware when the sheriff executes on her car or her bank account, or when the warden locks him in jail). Nonetheless, it is doubtful (to put the point charitably) whether the actual contents of judicial opinions—the words themselves—are more cogent or robust than the contents of legal scholarship. Most legal scholarship employs pretty much the same vocabulary that judicial opinions do anyway—hopes and fears to the contrary notwithstanding, Rhode reports, most legal scholarship is still mainly "doctrinal" in nature[4]—so it would be surprising if that vocabulary were vacuous when used by scholars but rich with content and connection when uttered by lawyers and judges. Indeed, the common view has been just the reverse—that judicial opinions are *less* substantial, more merely conclusory, than legal scholarship. Insofar as some legal scholarship (law and economics scholarship, for example) adopts a more distinctive discourse, that distinctiveness largely reflects an effort to avoid the perceived emptiness of conventional law-talk.

Reading in the primary materials will do little to dispel this gloomy per-

ception. Thus, noting that Supreme Court opinions seem "increasingly arid, formalistic, and lacking in intellectual value," Dan Farber observes that these opinions "almost seem designed to wear the reader into submission as much as actually to persuade."[5] With reference to an opinion by Justice Potter Stewart that he takes to be typical of modern judicial decisions, Alexander Aleinikoff echoes the familiar charge: "Although Stewart's opinion uses all the right words, in the end they are simply that: *just words.*"[6] Michael Paulsen, in describing Supreme Court opinions as "arid, technical, unhelpful, boring, . . . unintelligible," "formulaic gobbledygook," uses adjectives only slightly less severe than those he deploys against legal scholarship (which he finds to be "incomprehensible, pretentious, pompous, turgid, revolting, jargonistic gibberish").[7]

So whether uttered by law professors or judges, it seems that law-talk is vulnerable to the same charge: it is profuse, but vacuous. *Just words.*

I have been quoting recent indictments, but in fact the criticism is a venerable one. The youthful Karl Llewellyn attacked lawyers' tendency to use "*words* that masquerade as things." A good deal of legal discourse "is in terms of *words,*" Llewellyn complained: "it centers on *words;* it has the utmost difficulty in getting beyond *words.*"[8] A few years before, Herman Oliphant had criticized legal scholars for "erect[ing] . . . a law of ruling cases composed of *word patterns* largely detached from life."[9] And two decades earlier, Roscoe Pound had said much the same thing: lawyerly argumentation, Pound thought, was pretty much just "empty words."[10]

So the criticism is a recurring one. But as noted, the criticism also presents a puzzle. No one could seriously contend, after all, that *law*—or the legal system—is "just words." Law encompasses too many muscular or at least corporeal things—lawyers and judges and litigants and sheriffs, courthouses and jails, robes and gavels—that are plainly *not* "just words." So it seems the criticism must be targeting not law or the legal system as a whole, but rather *legal discourse,* or law-talk. Thus qualified, the criticism may seem to lose its sting. How severe a charge is it to say that a form of discourse is "just words"? What else could it be?

What do the critics—the people who complain that law-talk is "just words"—want anyway? Pictures to go with the text, maybe? Fistfights to go with the legal arguments? In ordinary contexts we sometimes say that someone (a salesperson, a sweet-talking Don Juan) is guilty of uttering "just words" when she is being dishonest, or when he doesn't really mean what he says. ("You're the only one I've ever loved.") But it is hard to transfer this