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Law and Language: An Historical and Critical Introduction[†]

PETER GOODRICH*

I. INTRODUCTION

Despite the glaringly obvious fact that both legal theory and legal practice are, and have always been, heavily dependent upon the tools of rhetorical and linguistic analysis, no coherent or systematic account of the relationship of law to language has ever been achieved. Even worse, the occasional exercises that modern jurisprudence has conducted in the direction of normative linguistics, in studying the "grammar" of law, or the philosophy of ordinary language, in outlining the semantics of rule application, have been exercises aimed at asserting or defending the positivistic view that law is an internally defined "system" of notional meanings or legal values, that it is a technical language and is by and large, unproblematically, univocal in its application. Despite the linguistically dubious nature of the assumptions regularly made by formalistic theories of adjudication, lawyers and legal theorists have successfully maintained a superb oblivion to the historical and social features of legal language and, rather than studying the actual development of legal linguistic practice, have asserted deductive models of law application in which language is the neutral instrument of purposes peculiar to the internal development of legal regulation and legal discipline. What has been consistently excluded from the ambit of legal studies has been the possibility of analysing law as a specific stratification or "register" of an actually existent language system, together with the correlative denial of the heuristic value of analysing legal texts themselves as historical products organised according to rhetorical criteria. Despite the common social experience of legal regulation as a profoundly alien linguistic practice, as control by means of an archaic, obscure, professionalised and impenetrable language, no recognition has been provided of the peculiar and distinctive character of law as a specific, sociolinguistically defined speech community and usage. The critical aims of the present introductory article will be those of endeavouring to develop an awareness of the

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linguistic problems inherent in viewing law as a system of communication and of non-communication, as the rhetoric of a particular group or class, and as a specific exercise of power and power over meaning. In view of such aims, I will assume that legal language, like any other language usage, is a social practice and that its texts will bear the imprint of such practice or organisational background, and further, that as a discourse or genre, legal discourse, is inevitably answerable to or responsible for its place and role within the political and sexual commitments of its times.

That there is as yet no sub-division of the legal genre that studies law and language in a manner comparable to the jurisprudential and socio-legal disciplines devoted to law "and" economics, anthropology, sociology, psychology and so on¹ does not, of course, mean that language has been wholly ignored. Even within contemporary traditions of legal analysis, circumstantial, anecdotal, intuitive and arbitrary observations and remarks upon the character of legal language are common. These have generally taken the form of comments upon the vocabulary and the syntax of text-book and case-book law, and have also, increasingly, noted the peculiarities of legislative drafting.² At their most extravagant, disaffected lawyers have broadened the scope of these perceptions into critiques of the verbal nature of legal disputes, but the significance of the linguistic element in this confrontation has been ignored: the historical task of systematically relating linguistics to legal theory, and conceptions of language use to legal practice, remains almost entirely in the future. For the purposes of suggesting that this nascent conjunction of law and language is both an obvious and a necessary project, I shall outline the interrelations of law and language according to a very broad, historical schema. The point is not simply one of style or presentation. At the level of theory it bears a certain polemical connotation. Both traditional linguistics and conventional jurisprudence have viewed their objects of study as being the "systems" or "codes" that govern, respectively, language usage and law application as potentialities rather than empirical actualities. In both disciplines, it is the abstract imperatives of a notional system that forms the object of synchronic (static) scientific study; actual meaning, actual usage and the diachronic (historical) dimension generally, are largely ignored. Even the simplest of historical surveys, however, will clearly indicate that formalist accounts of language and of legal language are historically and geographically specific and limited. More particularly, viewed historically as a rhetoric or as a discourse — as linguistic practice first and foremost — the analysis of law as a unitary, formal language is but one — tendentious and motivated — possible account of legal communication. I shall argue throughout that if linguistics is to be of use to legal studies, it will be as a sophisticated and to some degree scientific method available for analysing the historical semantics of legal texts. Law, as a linguistic register or as a literary genre, can be described linguistically or discursively in terms of its systematic appropriation and privileging of legally recognised meanings, accents and connotations (modes of inclusion), and its simultaneous rejection of alternative

and competing meanings and accents, forms of utterance and discourse generally, as extrinsic, unauthorised or threatening (modes of exclusion). To understand the coherence of this process of linguistic and semantic inclusion and exclusion is to introduce the problem of the relationship of law to power and to some extent to explain the characteristic modes of legal utterance as social discourse — as a hierarchical (stratified), authoritarian (distanced), monologic (uniaccentual) and alien (reified) use of language.

II. ORIGINS: RHETORIC AND EXEGESIS³

If the price of specialisation is often sterility, it is refreshing to recall that the earliest tradition of legal criticism, forensic rhetoric, made no distinction between the study of law and that of the general forms of language use as persuasion and inducement to action. The overwhelmingly distinctive characteristic of classical rhetoric, that of Greece and of the first Roman Empire,⁴ was the extraordinary breadth of the discipline and of its subject matter. Rhetoric was the study of all forms of public speech and, at its best, it was a highly elaborate analysis of the appropriateness of language to its context (audience) and its functions (practice — political, legal, ideological). Thus, for Aristotle, “rhetoric may be defined as the faculty of discovering all the available means of persuasion in any subject; . . . and accordingly we hold that the rules of the rhetorical art are not limited in their application to any certain special definite class of subjects.” Rhetoric, in other words, is universal, and a few sentences subsequent, we are informed that “it is . . . a branch . . . of the science dealing with behaviour, which it is right to call political.”⁵ For Cicero as well, rhetoric is the study of useful speech, speech adapted to the context of its audience and their likely beliefs (topics), speech likely to persuade by virtue of its relevance to practice (*res publica*) and the immediate needs of the community that the rhetorician serves. For the early rhetoricians, in short, rhetoric was to study speech as action, namely speech that would persuade by virtue of the systematic use of the linguistic and argumentative devices that render discourse relevant and effective, “eloquence . . . bringing (the hearer) not merely to know what should be done, but to do what they know should be done.”⁶

In synoptic terms, the great synthetic studies of rhetoric ranged in scope over a wide variety of disciplines which were later to be treated as discrete. The rhetorician would study philosophy (dialectic, argumentation and proof), politics, law, language and the social psychology of possible audiences. In each of these spheres, their interests were pragmatic and functional: in the context of the restricted republicanism and the various assemblies and tribunals of the city state, language *was* power for those who had access to the realm of public discourse.⁷ Meaning, for the rhetorician, was determined by the actual social potentialities of communication and

dialogue, meaning was linked not only to truth (verisimilitude/probability) but also, and just as directly, to the collective actions of the political assembly, the legal judgment and the ceremonial occasion. In brief, rhetoric studied the availability of arguments to particular contexts (*inventio*/general and specific topics), the manner of their arrangement (*dispositio*) and the requisite style of their presentation (*elocutio*). The study of law was but one subdivision of the rhetorical discipline, and legal arguments were not to be differentiated or privileged as against other arguments — the requirements of adversary justice and of legal judgment alike were to be studied upon the same basis as the other political and philosophical social practices. The rhetorical study of linguistic devices and methods of argumentation, applied just as much to the legal speech as to any other: all discourses were equal and their organisation was to be judged by similar criteria of what was essentially an historical and political form of criticism.⁸ For Cicero especially, rhetoric was the instrument of practice and of practitioners, it was the art and criticism of public speech conceived not as truth (*stasis*) but as the active and “topical” argumentation necessary for the determination of the needs and choices of the historical and political community. In short, history and labour were the source of speech and of its argumentative topics, while rhetoric was the analysis of the propriety or appropriateness of the language and arguments used to the institutional and political goals of the community as a whole.

Despite the great merits and the obvious attractions of rhetoric; its ability to study the determination of human behaviour and speech in terms of the contingent and topical, the social and historical, facets of public dialogue, as well as its conception of language as communication within a context and by means of the inherently figurative and ambiguous semantics of actual usage; it was historically and geographically short-lived. As a methodology for the study of language and of law, it was indeed exceptional to the dominant tendencies within the development of the European languages and early jurisprudence. Even the greatest practitioners of rhetoric admitted that it was dangerous,⁹ that probability was not truth, that persuasion was not conviction and that analogy (metaphor) was not essence (necessity/uniqueness).¹⁰ Suffice it to say that the subject matter of rhetoric was too broad¹¹ and the discipline did not long outlive the decline of the republican and democratic institutions to whose practice it was tied.¹² From Aristotle onwards the overwhelmingly dominant tendency in the study of language was the endeavour to subjugate linguistics to logic and to displace the study of speech as discourse or social utterance with the analysis of language as analytics (the rules of demonstration based upon univocal and necessary meanings)¹³ and a corresponding concentration upon the written text.¹⁴ The democratic republican ethos of early classical rhetoric was thoroughly exceptional to the dominant, centripetal or unifying tendencies within the European languages, and the correlative centralisation or unification of the official discourses of an essentially hierarchial development of European linguistic culture. Latin became the

official language of medieval Europe and philology — the study of dead languages which, by virtue of that very fact, were “unities” — became the predominant method of language study within the culture of the various attempts to formulate a “universal grammar” or language of truth.¹⁵ As against the rhetorical conception of language as action and of meaning as the effect of rhetorical practice, language was to be studied as “given”, as static and written; language and meaning were always already produced or “there”, and merely awaiting the patient and passive understanding of the philologist or exegete to recover the true meaning of the text, itself conceived as a unique and intentional, precedent, state of affairs. It remains to be observed that the rise of the European rationalist philosophies in the 16th and 17th centuries coincided with the lowest ebb of the rhetorical discipline¹⁶ — it became the study of taxonomies of word based figures, the analysis of style, of the superficial, aesthetic and inessential features of language use. Rhetoric was displaced by philosophy and by philology, by the study of authoritative, monologic and univocal discourses in which meaning was conceived as structural and necessary, given from above and emanating towards a point below.¹⁷

While it is obviously impossible to generalise the restricted status of rhetoric for the entire period in question, and even more invidious to attempt to characterise its role within the differing institutional practices and disciplines of post-classical European culture, it may nonetheless be asserted that the central theme within the decline of rhetoric was its increasing subordination to logic. The rhetorical was to be ever more vehemently stigmatised as a second order of language — as the word dwelling in a “borrowed home” — at one remove from the normative linguistics, and corresponding philosophy of knowledge, which postulated a primary order of language in which the meaning of words was singular and real. That meaning came to be conceived by the exegetical tradition as given or monologic implies that it has a source, an authority or singular authorship that originally sets out the meaning and whose “will” may be analytically or exegetically recovered. The paradigm forms of such meaning are, of course, those contained in religious and legal texts.¹⁸ By way of an introduction to an analysis of the dominant paradigm of linguistic analysis within contemporary positivist jurisprudence, it may be observed that the major historical legal systems have, in their ascendancy, resorted increasingly to the written text, and ostensibly to the exegetical or interpretative control of their social practice by reference to such texts. The reception of Roman law in medieval Europe in the 11th and 12th centuries, which, in many respects, lies at the basis of the contemporary legal tradition, was an exemplary textual enterprise. The first law school, founded at Bologna, was established precisely to study manuscripts, the newly discovered *Corpus Iuris Civilis*. The techniques of legal science developed by the glossators in relation to the Justinian Codes were philological in the extreme, they were techniques which presupposed the absolute, Biblical, authority of the texts of the Civil law. In short, the first law to be studied

and taught in the West was not vernacular but oracular, it was contained in a series of texts which were to be comprehended as containing a complete and integrated body of doctrine, as the embodiment of reason and as the "source of all deductions".¹⁹ While noting that periods of dogmatic crisis or of radical legal change, have frequently been accompanied by the increasing irrelevance, or in legal terms desuetude, of the written law — by virtue of contrary informal practices the code becomes a relic — it is nevertheless interesting to note the continuity of the problem of textual interpretation. The code, or more informally, the written law, has invariably, though with varying degrees of practical or actual relevance, been the object of an élitist, revelatory or hierophantic, culture of interpretation. An intricate and exclusive system of disciplinary or dogmatic tools, the various forms of traditional exegesis and of traditional and indeed contemporary hermeneutics, were developed early and precisely, I would argue, to the effect of safeguarding and preserving the sanctity and general impenetrability of the written word as a system of social control: "One doesn't carry on a dialogue with the law, one makes it speak."²⁰

III. THE DOMINANT PARADIGM; LINGUISTICS, LEGAL SCIENCE, LEGAL SEMIOTICS²¹

In the space available, I can offer no more than a series of suggestions as to the historical and sociological significance of the linguistic assumptions and potential semiotics²² of contemporary traditions of "legal science" or positivistic jurisprudence. The contemporary status of structural linguistics, the degree to which "pure" or positivistic theories of law are scientific, and the utility of semiotic explanations of legal logic are all eminently contestable and controversial issues. Having acknowledged such a state of affairs, I shall attempt to evade the full heat of such controversy by examining the historical interrelations and interconnections of linguistics and legal science and by adverting briefly to the problems of such applications as have been made of a structural legal linguistics, in the context of a descriptive overview.

The most striking and significant feature common to contemporary linguistics and legal science is historical. They share both the time and the place of their inception as sciences. The time was the last quarter of the 19th century and the place, and theoretical context, was that of central European neo-Kantianism or philosophical positivism.²³ The result was a common development and systematisation of language and of law according to a philological model of normative science in which the object of study was to be the systemic determination of ideal rather than actual speech and behaviour. The problem, in essence, is that of the birth of structuralism²⁴, that of an objective idealism, which I will analyse first in its linguistic manifestation.

The inception of linguistics as a science took the form of a resolution to

conflicting tendencies within the preceding schools of language study. The polemical context of Saussure's work was that of a series of "creationist" or subjectivist theories of language developed, during the second half of the 19th century and with considerable success, by various schools of romantically inspired linguistics.²⁵ Their concern was to attack the scientific status of the dominant linguistics of the century, the work of the grammarians and the studies of philology and of Indo-European phonetics, which asserted, unequivocally, the uniformity of linguistic laws and the regularity of language development in terms of a proto-language underlying and explaining the individual variations of existent languages. As against the grammarians' view that there could be and were universals governing language forms, the creationist view of linguistics asserted that language changed and developed by virtue of individual, subjective, innovations — by virtue of transformations brought about by speakers themselves — and consequently that the appropriate mode of linguistic study was psychological, sociological and historical.

To some degree appalled by the subjectivist strains within language study, Saussure returned to and drew upon the dominant, philological and exegetical, conception of language. Inspired by the model of phonetic laws of sound changes. Saussure posed the question of the possibility of a "science of language" in the neo-Kantian terms of a transcendental logical assumption as to what language *must* be like for a scientific linguistics to be possible. His conclusion was that the scope of linguistics must be defined, *a priori*, as the study of "the forces that are permanently and universally at work in all languages."²⁶ As the foundation of linguistics, Saussure inserted the distinction between language-system (*langue*) and language use (*parole*)²⁷ and argued that the status of linguistics as a science was dependent upon its restriction to the study of the laws of the language system as a normative ideal or synchronic (static) systematicity — as a set of logical universals, internally defined in a language totality conceived as a "state of affairs" existing (notionally) outside of society and outside history.

The unity of language as an object of study is the limited and highly abstract sense in which it constitutes a "self-contained whole and principle of classification."²⁸ The overriding concerns of the science of language were to be syntactic, morphological and phonetic. It would study language in terms of its most basic units — signs or words — and these it would analyse in their relation to the abstract system or whole that determined their lexical or dictionary definition and their possible combinations at or below the level of the sentence. Linguistic validity, or grammaticality, was rule-governed; it did not concern actual usage but rather stated the laws and limits of possible usage in relation to the very broad contours of linguistic structure. Thus, for Saussure, signs were not meanings but rather, were to be conceived as elements of a code which determined their signifying function: each sign is the combination of a material signifier and its signified (its lexical meaning), which is in turn arbitrarily or conventionally given within the code, the system of signs as a unitary set of norms.

What a sign signifies is consequently largely irrelevant: its combination (syntagmatisation) is rule-governed, in that certain combinations are impossible or nonsensical within a given code, but beyond the highly vague requirements of intelligibility determined by syntax, the actual combinations, utterances and meanings (*parole*) achieved within any specific context are deemed wholly unpredictable and unamenable to any form of scientific study. In summary, the meaning or semantics of actual linguistic practice were the “other” or opposite of science — the language system was to be studied precisely to the exclusion of its realisation or application within the actual life of language — and for this reason linguistics has generally concentrated upon the unit of the sign at the level of the word — as a form and not a content — as an equivalent (exchange value) in a system of signification (circulation), set free of the process and context in which it came into being or was produced.²⁹ *Langue* becomes the opposite of *parole*: the former was conceived of as rational, objective and norm governed, the latter as irrational, subjective and historical.

A similar dualism can be discerned in the birth of positivistic legal science. Allowing for disciplinary differences, its polemical and pragmatic context was essentially comparable. At the level of theory it is indeed easy to see that legal analysis has always faced a problem analogous to that of the distinction between language system and actual utterance, between concepts of the code and the meaning created in its application or realisation. It has been variously formulated as an opposition between legal system and adjudication, legal validity and legal meaning, norm and its volitional or discretionary application in legal judgment or practice. The one is purportedly objective (deductive), the other subjective and frequently discretionary. The more specific, historical, context of the Pure Theory of law³⁰ is equally analogous to that of structural linguistics. In the context of legal studies, the threat to the dogmatic and exegetical tradition of jurisprudential analysis took the form of a wide variety of historically inspired, loosely creationist, theories of law.³¹ Kelsen’s earlier writings clearly evidence profound anxiety as to the inroads that social and historical (or broadly rhetorical) studies of law were making upon the scientific status of legal dogmatics.³² His solution to the threat, as is well known, was the reassertion of the scientific status of jurisprudence upon the basis of a Kantian conception of normative analysis. Legal science was to study the law in its “systematic” context, as a grammar and hierarchy of norms, as a structure: “the law is an order, and therefore all legal problems must be set and solved as order problems. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments.”³³ The condition of legal analysis as normative science is, for Kelsen, to be the transcendental logical presupposition of any legal system, the basic norm — the Kantian “idea” which founds the unity and form of the whole.³⁴ Suffice it to say that the specific system of laws or norms is to be studied as a logical, internally defined, normative unity. The legal details of such a science are adequately described elsewhere³⁵, the question

of significance to the study of law and language is that of the nature of this legal grammar or syntax proposed by the Pure Theory of law and to all intents and purposes carried over into the later Anglo-American jurisprudential positivisms.³⁶

The grammar of law is predominantly a grammar of written law, and an analysis of the formal limitations — the underlying, governing, structure — of legal meaning. Meaning is to be conceived in objectivist, logical, terms as a syntax or hierarchy of authorisation in which the validly constituted norm or “ought” statement provides the objective, externally given, meaning of human behaviour.³⁷ Recalling the Saussurian distinction between *langue* (real) and *parole* (fortuitous), it may be observed that Kelsen elaborates an essentially similar distinction between legal validity (real) and legal volition (fortuitous) or between positive law and the judicial application of legal norms.³⁸ The Saussurian conception of language system — the code or semiotic of linguistic laws — can be matched, detail for detail, to the Kelsenian grammar of legal structure — analogously, the code or semiotic of legal communication conceived as the objective direction of human behaviour according to a syntax of specifically legal meanings, or “pure” legal “signs”. The linguistic problem of the grammaticality of an utterance becomes that of the validity of a legal statement analysed according to an objective syntax of “concretisation” or “nomo-dynamics”.³⁹ In summary, the study of both linguistic and legal structure as systems or codes, carries with it the attraction of clarity and abstract verifiability in terms of propositional logic and presupposition. These rather crude, early semiotics can provide a descriptive overview of linguistic and legal rationality and certainty which is not only comforting to those within the legal institution who have a professional interest in the belief or mythology of legal determinancy, but also the intuitive appeal of describing “the common sense position prevalent amongst most lawyers, judges and legal scholars today.”⁴⁰

The study of language or of law in terms of the notional code or underlying rules that govern the grammaticality or the legality of an utterance, is of undoubted interest in that it can scientifically describe the minimum normative requirements whereby linguistic or legal communication — as intelligibility, signification or syntax — is possible. Intelligibility, of course, is not meaning, it is merely the normative context within which meanings are realised. Semiotics, in other words, is not semantics, it does not and cannot study meaning as actually realised or manifested in text or utterance as historical and local events. Semiotics studies the *internal* coherence of the object utterance, or the *immanent* logic of the text and adds to an essentially descriptive concept of the utterance or the text, the categories of a preferred metalanguage or theory. The predominant characteristic of post-Saussurian semiotics has indeed been precisely the development of numerous and diffuse metalanguages or second order descriptive theories of semiotic systems. The analysis of sign and code has become increasingly refined within the various and

increasingly extensive contexts of its application. Literature, cinema, psychoanalysis, law, anthropology, theology and aphasic disturbance are but some of the fields and disciplines to which semiotics has made a contribution.⁴¹

Within the domain of legal semiotics the major treatises have been produced on the continent.⁴² While it would clearly be impossible to describe the full spectrum of legal applications of semiotics, it is, I believe, possible to comment upon certain shared generic features to those studies, and to exemplify these I will subsequently briefly analyse one reasonably typical analysis, that of A. J. Greimas. First, in annotated form, the development of semiotics has generally been in terms of the elaboration of various binary structural oppositions, within the linguistic system of signification. The principal advances have concerned the oppositions of paradigm (selection) and syntagm (combination),⁴³ denotation (reference) and connotation (field of application),⁴⁴ metaphor (similarity) and metonymy (contiguity).⁴⁵ The oppositions are general ones, they refine and enhance the study of the sign in terms of the manner and rules governing its operation within any given signifying system (set), be it language, literature, the unconscious or law. Very loosely, different signifying systems may be distinguished and defined upon the basis of their characteristic modes of signification. Thus, for instance, for Barthes the ideological language — or more accurately, the ideological dimension of a language — is predominantly connotative, that is, non-referential or wholly symbolic in its application. Jakobson, whose work in linguistics was a significant influence upon the work of both Levi-Strauss and Barthes, made various applications of the metaphor/metonymy distinction to argue that, for example, epic and narrative literary genres are predominantly metonymic in their semiotic functioning, whereas romantic and poetic genres are largely metaphorical. Other studies have suggested that legal discourse, viewed in terms of its contemporary, positivistic, self-definition, is predominantly a denotative and metonymic signifying system.⁴⁶

Implicit in the above comments is a further distinction of considerable importance, that between semiotics and semantics as it affects the opposition of language system and discourse. The distinction between linguistics and discourse analysis was originally elaborated in the work of the French linguist E. Benveniste and will be returned to in the next section.⁴⁷ Within the context of semiotics, the introduction of a semantics of discourse is of a restricted significance, in so far as the dominant tendency has been that of incorporating both categories into the overall, semiotic and synchronic conception of language system. The semiotician has not generally been concerned with the subjective, historical, social or diachronic dimensions or implications of the categories of meaning and discourse. Thus, when A. J. Greimas comes to analyse the semiotics — the syntax, narrative grammar and deep semantic structure — of particular discourses, his overriding concern has consistently been that of elaborating binary oppositions⁴⁸ within the semiotic, notional, systems of signification, narrative and mean-

ing. The legal text, for Greimas, is to be studied as an instance and exemplification of a precedent model of structural codes.⁴⁹ To this end, the analysis distinguishes — upon the basis of a wholly immanent study of the text in question — the levels of linguistic code (legal language is a variant of natural language), legal code (the norms and interpretative procedures of the legal system viewed as a grammar) and legal judgment (the language of “verification” and of legal validity).⁵⁰ In brief, Greimas adopts a view of legal grammar and of the determinacy of legal language as a logic, which refines but in no way challenges the earlier Kelsenian depiction of legal syntax. Thus, the possibility of legal grammar takes the form of the transcendental logical presupposition of any legal system, in which it is stated that the legal code, “the ensemble of juridical enunciations, could not exist except by virtue of an original performative act”⁵¹ or implicit constitutional promulgation. As to the description of legal practice — “the production of law, of novel legal rules and significations”⁵² — this is to be understood in terms of a language of verification which takes the practical form of existent jurisprudence and the procedures of valid concretisation. There are, of course, numerous linguistic subtleties to the presentation of the analysis which have here been overlooked. In the end, the point is that Greimas’ analysis adds nothing of substance to the commonplaces of legal positivism — it adds linguistic refinement and precision. In a sense it represents the apotheosis of positivism in the addition of a further layer of descriptive metalanguage superimposed upon the dominant belief in the univocality of legal language. The peculiar feature of legal discourse (its specificity) is resident in its ability to “transform” and “translate” (correct and verify) ordinary language and ordinary meaning into the closed code of the legally relevant and legally valid.⁵³ So far so good — lawyers always claimed this as their role — but the interesting question of how this process takes place, with what content and to what substantive effect, it left unasked and unanswered.

IV. ALTERNATIVE APPROACHES; SOCIOLINGUISTICS, SOCIAL DISCOURSE, LAW AS SOCIAL DISCOURSE⁵⁴

Insofar as the study of the relationship between language and society has managed to transcend the structural analyses reviewed in the previous section, and has gone beyond the philological and normative specification of social relations and legal order, it has done so in terms of recourse to rhetorical conceptions of language and of institutional discursive practice.⁵⁵ The concept of rhetoric is, of course, very broad and protean. In the present context, I take it to mean the study of language in terms of semantics and in reliance upon the view that social and institutional as well as linguistic contexts of utterance are determinative of both the form and the content of communicational practice. Of its cultural sources, Nietzsche’s reaction against rationalist philosophy, Christian theories of natural

law, and the denigration of rhetoric generally, is an obvious and important landmark.⁵⁶ Of greater linguistic significance, however, was the contemporary reaction against the neo-Kantianism of Saussurian linguistics, developed in the work of V. N. Volosinov, and taken up in the more recent works of sociolinguistics which have explicitly argued for functional and material concepts of language use.⁵⁷ Three central themes constantly cross-cut the distinction between discourse analysis — the study of utterances in terms of their rhetorical and communicative organisation⁵⁸ — and sociolinguistics — the study of language in relation to a wide variety of social, anthropological, ethnographic, psychological and other contexts — and may be summarised as follows.

First, a critical and negative point. The concept of discourse as introduced into linguistics in the work of Benveniste and Harris has always rested unhappily beside the concept of language system as an autonomous or virtual entity. While the study of language could not conceivably deny the relative value and status of structural linguistic laws — the general principles of lexicon and grammar — the critics of Saussurianism and of later applications of semiotic theory have argued that the concept of a “unitary” language and the categories of law-governed conceptions of signification and meaning are one-sided and inadequate. Bakhtin is most forceful on the point:

these norms do not constitute an abstract imperative; they are rather the generative forces of linguistic life, forces that struggle to overcome the heteroglossia of language, forces that unite and centralise verbal-ideological thought, creating within a hetroglot national language the firm and stable linguistic nucleus of an officially recognised language, or else defending an already formed language from the pressure of growing heteroglossia.⁵⁹

Second, in pursuance of this initial point, the object of study in linguistics moves from system to practice, from potential meaning to the determination and realisation of meaning within the concrete and hierarchical organisational forms of social interaction.⁶⁰ The object of study becomes the “actually existent” language system in its historical and social development; the study of the “internal stratification” of the national language, according to “social dialects, professional jargons, generic languages, languages of generations and age groups, tendentious languages, languages of the authorities, of various circles and passing fashions, languages that serve the specific socio-political purposes of the day, even of the hour. . .”⁶¹ The third and most contentious point concerns meaning and control over meaning, the power to define. The semantics implied by the concepts of heteroglossia and of linguistic stratification is dialogic and wholly rhetorical: meaning is never to be treated as “given” in advance as an object of passive philological comprehension but must rather be approached in the active and critical framework of its social, institutional and hierarchical discursive context: “Every discourse has its own selfish and biased proprietor; there are no words with meanings shared by all, no words belonging to no-one . . . who speaks and under what conditions they speak, this is what deter-

mines the word's actual meaning. All direct meanings and direct expressions are false."⁶² The question, in short, is that of the social authorisation — the objective as opposed to the subjective motivation — of utterance meaning; the description and analysis of the significance of the syntax and semantics of utterance forms according to the broad framework of the social and institutional order of discourse, the attribution of value to specific meanings and discourses. In brief, the argument concerns the appropriation and institutionalisation of meaning and discourse, the process of selection whereby a particular set of socially orientated interests and usages gain control of a discourse and define the social accenting and paradigm forms of meaning that are to prevail and to win credibility. In more general terms, the question is that of the social legitimacy of specific linguistic practices, the question of the social production and control of meaning in the form of an order of discourse which determines what can and should be said — in the form, for example, of a speech, a judgment, a sermon, a pamphlet, a report, a programme and so on. The question is that of who is speaking? "Who has the right to speak? Who is qualified to do so? Who derives from it their own special quality, their prestige, and from whom, in return, do they receive if not the assurance, at least the presumption that what they say is true? What is the status of the individuals who — alone — have the right sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?" In more formal terms, Foucault argues elsewhere that:

Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means whereby each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.⁶³

Prior to outlining the specific linguistic framework within which legal language can be studied as a social discourse, I shall briefly comment upon such studies as have in part attempted to recognise the social context of legal linguistic practice.

First, at the level of legal theory, some mention should be made of the theory of communication, or hermeneutic, contained in the work of H. L. A. Hart.⁶⁴ In the present context, I shall do so by way of two related problems concerning the legal utterance's context, rather than by way of attempting any extensive account of Hart's well known and highly eclectic remarks upon the philosophy of language. In appearance at least, the adoption of the slogan "meaning equals use"⁶⁵ or the comparable view that the meaning of a word is to be discovered by reference to the role which it plays within a "form of life",⁶⁶ has considerable sociolinguistic significance. Closer examination of these theories reveals inadequacies both of methodology and of substance.⁶⁷ The linguistic methodology of Hart's concept of law has to be recovered analytically in view of the unsystematic character of his predilection for making passing comments upon the nature of language and its relevance to legal decision making.⁶⁸ Without

rehearsing the analyses made in, terms of the “peculiar” nature of legal language (it has no extra-legal referent) and of “core” and “penumbral” meanings, it is sufficient to observe his utilisation of a general linguistic methodology which opposes linguistic/legal system (code) to individual utterance or realisation in application. On the one hand, legal meanings are “clear”, “peculiar”, conventional or institutional, while on the other hand their application is, in the last analysis, frequently entirely intentional, and explicable only in terms of individual psychology. The residues of meaning which fall outside the deductive application of general language must be explained in the subjectivist terms of “illocutionary force”,⁶⁹ in terms that is of authorial intention and the generally unknowable content of the “other mind”.

In methodological terms the problem with Hart’s positivist semantics is its naivety in postulating an unmediated relation of individual utterance to formal system or monologic whole. It is related to a problem of substance, the overwhelming tendency of positivistic jurisprudence straightforwardly to assert the existence of a social consensus as to meaning.⁷⁰ What it is crucial to realise in relation to this semantics of consensus is that its reference to law as “social fact” or to meaning as institutionally and conventionally given, is “artistic” or technical rather than actual or empirical. The societal facts and categories normatively invoked by positivism are of no greater empirical standing than that of passing references to the unargued assumption or presupposition that law, as a form, and legal relations generally, both represent an agreed moral order and are exercised within a static or synchronically conceived social structure, itself based upon a consensus, ideal cohesion, or, to use the wholly appropriate 17th century terminology, a social contract. Far from raising questions as to the actual social and historical form of life which law represents and perpetuates,⁷¹ the theories act rather as rationalisations of a belief in a conception of “man” and of social and moral order or codes, embedded in classical liberal philosophy. The development of a sociolinguistics of legal language has an important role to play in subverting the social amnesia of the legal institution precisely by evidencing the linguistic mechanisms and conflictual social reality of the production of meaning and the construction and manipulation of consensus which forms the object of positivistic rhetorics.

To some extent, the major works to be published so far in the sociology of legal language, those of P. Carlen and of W. O’Barr, do indeed suggest the falsification of the systemic view of “given” legal meanings. In the context of studies of the linguistics of courtroom interaction they reintroduce the rhetorical concepts of linguistic stratification, audience and dialogue into the description of the social and theatrical reality of legal control.⁷² What is at issue in these studies of spoken legal language is the linguistics and stylistics of credibility or meaning effects. The social status of a group-class-or gender-specific linguistic practice⁷³ can be analysed in terms of the hierarchical organisation of legal communication and can be

classified according to the schemata of lexical, syntactic, semantic and discursive choices regularly employed in the use of one language (legal) to control, appropriate or exclude other meanings and languages. There are two implications to these studies which deserve detailed attention. They necessitate, first, a topology of utterance forms within which legal discourse would be one of many classifications of social speech variant or genre, and, second, a concrete linguistic analysis of the languages, codes and contexts of the legal audience. These two requirements may be summarised as follows.

As a rhetorical genre (discursive formation), the specific character of legal language is, historically, that of a predominantly written language. Its origins are religious and hieratic⁷⁴ and its modes of self-presentation are exegetical (scriptural) and philological. The unity of legal language as developed by tradition and history is based upon an epistemology of legal sources; the "law-giver", the "sovereign" or the legislature is always pre-existent, and is to be treated according to the elaborate etymologies and semantics of recollection in and through the text — restricted commentary, citation, quotation, usage and the paraphernalia of repetition generally are the typical modes of legal education and dissemination. In short, legal language is a unity to be understood as the social image of the argot or language of élite or professionalised power; it is the language of authority, which takes the discursive form of monologue, distance (temporal and hierarchical), and specialisation. To comprehend the social and sociolinguistic implications of such a linguistic practice requires the classification of the manner in which the social significance and status of the legal institution is reflected and reified in the organisation of the legal text itself. The levels of such an analysis are those, as I have suggested, of lexicon, syntax, semantics and ideology. Each category is to be comprehended in its discursive context, and I will briefly outline in what follows one possible classification of the distinctive features of legal discourse as social discourse, in terms of a series of introductory observations. At each level, the question to be raised is sociolinguistic and rhetorical — in its broadest formulation it is that of who is speaking, to whom and under what circumstances?

(i) *Institutionalisation*. The most obvious feature of legal discourse is its production within specific, highly restricted, institutional settings. In the terms of one recent study, "legality would be nothing if it were not supported by a network of institutions, a tradition of ideas which always encloses and delineates the domain within which legal discourse can exercise its textual practice."⁷⁵ The connotative, symbolic and ideological dimensions of the affinity of legal text to legal and social hierarchy — the discursive techniques and sanctions which restrict and delimit who may speak, on what topic and with what content — are of profound significance to an understanding of legal rhetoric. In one aspect, the entire process of socialisation into the legal institution, from entry into law school to membership of the profession itself, is an elaborate process of education

into the manner and techniques of deference and respect for the authority of legal sources and the procedures and languages of its hierarchical organisational forms. Together with the more obviously distinctive features of the legal sub-culture — its ritual trappings, its restricted and theatrical institutional settings, the élite character of its personnel, the extent of its power to punish — attention should also be given to the methodology of legal study as a discipline based upon a hegemonic belief in the autonomy of the legal hierarchy and the self-evidence of its authority. In short, legal discourse is socially and institutionally authorised — affirmed, legitimated and sanctioned — by a wide variety of highly visible organisational and sociolinguistic insignia of hierarchy, status, power and wealth. These insignia, the identifications of a privileged class, are what initially differentiates the legal institution and its discourse from the closely related domains of political, religious and ethical discourse.

(ii) *Lexicon and Syntax*. In many respects one of the principal features distinguishing the legal institution from other institutions, and its disciplinary methodology from those of other disciplines, is precisely its language. To learn the law is to learn an archaic and specialised vocabulary and syntax.⁷⁶ Concentration upon the derivation and etymology of a legal dictionary of meanings, together with elaborate rules and procedures of reference, delimitation and construction, facilitate the image of a context-independent lexicon of legal meanings, an elaborated code, whose syntactic and semantic limitations are systemic (connotative) and consequently intentional, insofar as the vocabulary and its manipulation are unrestricted by referential constraints. The self-contained, highly cohesive and localised character of the legal text are best analysed in terms of specialisation and the avoidance of agency — relexicalisation, nominalisation, thematisation and automatic figurative register — the syntax of impersonality and distance, producing indirect control in terms of attitude and generalisation rather than direct command or speech act.⁷⁷ Even or especially at the level of lexico-grammatical system, the specialised nature of legal rhetoric as an apparently unitary, internally shielded and valorised, system of communication is peculiarly clear. Legal discourse presents itself as a context-independent code, as the authoritative elaboration of the logical entailments of a distanced and obscure language system which operates by means of an elaborate series of textual methodologies of recollection, recovery and relexicalisation. Legal discourse is pre-eminently *prior* discourse, a discourse that is already “written” and requires only the addition of the passive philological techniques of reinvocation. Legal discourse has its primary basis in custom, and its vocabulary is correspondingly governed by doctrines of memory, recognition and usage, defined in textual terms by reference to extensive and obscure etymologies, inert and calcified meanings and procedures, and finally by an epistemology, in the last resort, of the “sources” of law in which words are transmitted by a dogmatics of quotation, reference, citation and specialised and restricted commentary — the techniques, in short, of a textual repetition which

disavows the relevance of the lives and commitments of its rhetoricians to the monologic symbolic usages which they discover and declare.

(iii) *Semantic appropriation*. If the generic character of the legal vocabulary and syntax are distinctive and important features of the language of the law, it is for the reason that they facilitate a number of significant semantic operations. Very broadly, the lexicon and syntax of the legal discipline constitute a connotative code, a code of generic legal meanings amenable to the syntax of generalisation and impersonality within which the normative reformulations, paraphrases and self-evident — context-independent — meanings of legal discourse as a genre or discursive formation are possible. The hegemony of legal meaning or the self-presentation of legal language as a unitary code is the subject-matter of the study of semantic appropriation. It is at the level of semantics that the legal construction of meaning in terms of characterisation, instancing (narrative structure), presupposition and preconstruction is to be undertaken.⁷⁸ The question here is that of the relationship between law and other discourses (interdiscourse), most obviously evident in the legal depiction of the subject matter of disputes, the characterisation of the actors and of group interaction, the relative status of conflicting languages of description and evaluation. In semantic terms, legal discourse is a site of a coherent set of synonyms, paraphrases, substitutions and equivalences generally. The legal formulation of meaning not only presupposes a variety of consensus as to already existent social values, but equally projects the image of the sovereignty of the legal characterisation of such meanings within the discrete logic of the legal text. Legal meaning arrives after the event to reconstruct the discourse of others and to rewrite the diversity of social languages in terms of the purportedly neutral or artistic significances (accents) and relevancies of juridical sovereignty applied to abstract, individualised instances of regulation or discipline. Semantic appropriation is, in brief, the power of the legal text to define its own, very narrow, conceptions of meaning, and simultaneously to exclude alternative meanings, accents and contexts.

Further, as the term appropriation implies, the primary issue in relation to the law's own definition of itself as a unitary language, is that of a rhetoric of "inclusion" or identification; that is, of a stratification of language of sufficient social power intentionally to determine the language and discourse exterior to it. By subordinating surrounding discourses to the authority of legal semantics, legal discourse must also exclude and stigmatise — define out — all such discourses as are inherently recalcitrant to the basic belief system and preconstructions of legal language as an ideology. To detail fully the semantics of appropriation within legal discourse is beyond the scope of the present study though it is possible, in view of the centrality of the issue, to outline the structure that such appropriation takes.

The rhetoric of law is at its most basic the rhetoric of sovereignty and power, of rights and duties. It is the discourse of power in a dual sense. On

the one hand it presupposes the semantic constant of the ethical and political discourse of liberal individualism, of freedom, equality and consensus as the inherent features of the unsystematised and unexamined social relations within which legal discipline operates. On the other hand these preconstructions of legal interdiscourse emerge in the legal text as powerful devices for excluding and obscuring alternative or oppositional readings and meanings of concrete decisions or instances of regulation. It is precisely the assumed universality of the rhetorical categories that implies their ethical and political desirability while at the same time allowing their highly refined manipulation within a normative justificatory argument to obscure the conditions and actual circumstances of their application. They enable the appropriation of concrete meanings, in the form of the institutionalisation of generalised control by means of attitudes and norms that never expose themselves to the threat of a detailed examination of the concrete motives and circumstances of their application.

(iv) *Ideology*. Finally, the law constitutes a concrete sociolinguistic belief system. As a professionalised stratification of the national language, and as a discourse or set of discursive processes, it functions to legitimate the “evident” or assumed meanings, accents and purposes of legal discipline and the social order upon which it is based. The textual functioning of legal ideology has generally, though not always very helpfully, been described in terms of the “subject form” of its operation as an ideology.⁷⁹ The abstract, legal and rhetorical unity of the individual subject and the coherence of its acts (deeds), works ideologically to disperse or negate alternative readings and meanings based upon historical and collective forms of social interaction and change.⁸⁰ What is at issue, specifically in relation to legal discourse, may be formulated in terms of an ideology of legal sovereignty which separates and opposes the objective unity of the legal institution and its language — that of an axiomatic and imperative normative code — to the equally abstract or notional particular instance towards which the law applying act is directed. Sovereignty and authority and the linguistic objectification which they imply are never something in themselves. They are both a relation and a process directed towards the contemporary instance of regulation, the equally notional and unitary legal subject. Objectification produces subjectification, the definition and delimitation of the object of legal regulation, the application of the norm to a dispersed field of singular legal subjectivities. Thus the subject in law is constituted as a point of abstract equivalence, and the ethical image of speaking person as a unitary and unique subjectivity comes to pervade substantive legal discourse and the numerous legally recognised forms of utterance — testimony, declarations, confessions, contracts and documentation generally. More significantly perhaps in relation to ideology, the law fixes legal meaning to individual acts, conceived in the abstract terms of intention and responsibility, and in so doing it constantly evades the question of its own material and historical genesis or basis and effects. By treating legal disputes according to the rhetoric of individual acts, the legal text reifies its

meaning and obscures or mystifies the real relations which form the context of such actions and the explanation of their motives. By means of a process of individualisation or subjectification and subsequent generalisation the categories of legal argument work to manipulate and transpose existent human beings — the diffuse, complex and changing biographical entities of motivated interaction — into the ethical and political subjects of legal rationality and formal justice. In broader terms, the legal use of language rewrites the individual, as it rewrites speech, in terms of a notional and static unity of reasoned intentions, the basic precondition of the law as the political-administrative discourse of liberal individualism.

V. CONCLUSION AND EXEMPLIFICATION

It has been my purpose throughout this paper to criticise the dominant view within both linguistics and jurisprudence, that would hold that language as well as legal communication are to be understood best as structurally determined activities, as specialised normative enterprises that can be studied scientifically according to the internal laws, or grammar, of a static, governing, code. The relevant objection to any such structural accounts of linguistics or of legal language is that it privileges the concept of a system and the desire for order, over and against the history of the system and the possibility of accounting for the actual relationships and usages that determine its realisation. It may, further, be suggested that from the viewpoint of the history of linguistics and of jurisprudence, the concepts of universal grammar and of univocal legal code, have specific political and ideological motives and affiliations, they are broadly those of the desire to present linguistic study and legal practice as specialised activities removed from the everyday commitments and discourses of social and political practice and conflict.⁸¹

It is against this background that I believe it is valuable to reassert the rhetorical, sociolinguistic and loosely pragmatic dimensions and contexts of any communicational practice. It is in many senses the defining paradox of contemporary legal culture that its ideology is one of consensus and of clarity — we are all commanded to know the law — and yet legal practice and legal language are structured so as to prevent the acquisition of such knowledge by any other than highly trained specialists in the various domains of legal study. To understand the paradox of the social discourse of the law requires an interdisciplinary approach to legal texts as well as to the informal practices of the legal institutions, and will include the study of the rhetoric of law, the analysis of the context and pragmatics⁸² of legal speaker and legal institution, the empirical examination of the functions and affinities of law viewed as communication and as function. It should be emphasised again, that these objects of study are not merely the subject matter of an internal analysis of the legal discipline and its formal self representation, they require as well the analysis of the politics of legal

language in terms of the social and intertextual character of legal communication, the principles of which are well captured in Bakhtin's view that:

Style organically contains within itself indices that reach outside itself, a correspondence of its own elements and the elements of an alien context. The *internal politics* of style (how the elements are put together) is determined by its external politics (its relationship to alien discourse). Discourse lives, as it were, on the boundary between its own context and another, alien, context.⁸³

It is the alien context, the before and after of the legal utterance, that the analysis of legal discourse as social discourse must aim to recover or recapture from the interstices of an institution and textual discipline that has all too frequently and easily defined itself by means of a near total social amnesia. By way of conclusion, however, I shall restrict myself to a somewhat simplified rhetorical analysis of the case of *Bromley London Borough Council v Greater London Council*.⁸⁴ Confining the discussion to the intratextual politics of legal signification, I shall provide a preliminary analysis of a series of discursively important features to the judgments in that case, viewed primarily in terms of semantic appropriation.

The broad contours, if not the details of the dispute can be summarised succinctly from the judgment of Lord Denning in the Court of Appeal.⁸⁵ In pursuance of an election manifesto, headed "Socialist Policy for the G.L.C.", which "promised" and "committed" the Labour Party to reduce fares on London's public transport services by 25%, the Labour Party, upon election to a "small majority" of seats, acted to implement the cuts. It did so by ordering the London Transport Executive to reduce fares by 25% and thereby, we are informed, presented the travelling public with a "gift" of "millions of pounds" but simultaneously incurred the "displeasure" of the "ratepayers" by virtue of the subsidy of £69 million needed to fund the "gift". The necessary financing was to be raised by a supplementary precept or rate which the London Boroughs "most reluctantly" obeyed. More accurately, one specific London Borough, Bromley, evidenced reluctance and "challenged" the validity of the precept. It might be noted, incidentally, at this stage, that we are nowhere informed that Bromley, a Conservative controlled Borough, is geographically located outside the principal London Transport networks and so obtained little direct benefit from the fares reduction, and consequently had an exceptional if not unique motive of self-interest for their reluctance to pay the precept. A final, somewhat ambiguous, feature of the case, was the Conservative Government's withdrawal of the rate support grant, a measure intended to penalise overspending Councils and resulting in an additional £50 million to the cost of the transport subsidy, which additional costs was also to be raised by supplementary rate, and was, according to the judgments, quite unforeseen by the G.L.C.

I shall observe briefly that the language of this introduction or characterisation of the case is already highly illuminating. As a putatively impartial description of the facts of the dispute, it is a failure. As an emotive stylistic characterisation of the parties to the dispute and a pre-

liminary evaluation of their actions, its highly selective use of apparently descriptive terms is of extreme intradiscursive and semantic relevance, it signals ahead, or prepares the reader for the outcome which will later be reached. Of especial importance, of course, is the use of the word "gift" to describe the effect of the fares cut, its connotations being anthropological or festive rather than economic. In combination with the other qualificatory factual and evaluative terms, it persuasively prejudices key aspects of later discussion. It should also be noted that, in terms of information conveyed, the details provided are uneven and very limited. Nor do the subsequent judgments provide any more explicit particulars as to who precisely is affected, in what ways, and by what decisions; aside from general and unsubstantiated disavowal of the "propriety", "fairness" or political "merits" of the policy decision, the contextualising details of the case are assumed as summarily stated. Thus, Watkins L.J. deems it fit to preface a remarkably bizarre and unargued judgment with the assertion, in his first sentence, that he has "no doubt whatsoever that the large reduction of fares . . . arose out of a hasty, ill-considered, unlawful and arbitrary use of power", and continues that "the ratepayers of this great city, who are unlikely to gain anything from it (many will in fact be at a loss), will bear the costs of what seems to many to have been an astounding decision."⁸⁶ Just as Lord Denning omits to detail which London Boroughs were reluctant to pay the supplementary precept and why, Lord Justice Watkins fails to elaborate either on who was "astounded" by a decision which had been well publicised as a feature of an election campaign or why they chose to be so astounded. Of the other prefatory remarks, I will merely note Lord Diplock's formulation that "all your Lordships are concerned with is the legality of that decision: was it within the *limited* powers that Parliament has conferred by statute upon the G.L.C."⁸⁷ Needless to say, it is precisely the broad or limited scope of the powers conferred which is the legal issue at stake in the case.

The omission of any detailed analysis of the relations — socio-economic and political — between the various, homogeneously conceived, actors in the dispute, and the replacement of descriptions by rhetorically significant assumptions, will transpire to be crucial to the language and reasoning of the decisions. Before analysing the legal details of the judgments, which details take the form of a broad series of loosely co-ordinated remarks as to the meaning of various passages and terms in the Transport (London) Act 1969, certain other, seemingly incidental, peculiarities deserve comment. In the broad terms of administrative law, the case concerns the general, and indeed superbly vague, principle of "reasonableness", whose definition, as a doctrinal restriction upon the exercise of statutory powers, has remained largely unchanged since the 17th century. Powers must be exercised reasonably, fairly, justly and in good faith; or alternatively, they must not be exercised unreasonably, arbitrarily or fancifully. To these self-identical or tautological propositions one can only add descriptions of cases in which powers have been held to have been utilised either reasonably or

unreasonably. Although the analogy would appear to be a precarious one, both the Court of Appeal and the House of Lords referred to the decisions of *Roberts v Hopwood*⁸⁸ and *Prescott v Birmingham Corporation*⁸⁹ and succeeded in eliciting from these arguably somewhat notorious decisions, general support or authority for the view that principles of “socialistic philanthropy” or of “feminist ambition” are “eccentric” and “unreasonable”, and from the second authority, the more relevant assertion that “benevolent” or “philanthropic” behaviour will not satisfy the fiduciary duty of a statutory authority to run transport services upon commercial lines found to be implicit in a 1930 statutory provision authorising the charging of such fares “as they may think fit.”⁹⁰ The *Prescott* decision concerned the granting of free travel to old-age pensioners, and while that decision clearly suggested a particular attitude towards provision of transport services, the instant decision concerned radically different circumstances and distinct statutory provisions. In view of the general agreement in the instant decision that it was the provisions of the 1969 Act that determined the outcome, the analogical relevance, both factual and legal, of the precedent decisions and the use of the phrase “ordinary business principles”, is ill-specified in the judgments, and largely obscure. Again, the reference to the earlier authorities briefly adverted to early in the judgments, is of a rhetorical or persuasive value — it suggests an amorphous background legality to the decision — but is not of any more specific or logical instrumentality.

Of an altogether greater significance with regard to the instancing of the G.L.C. case is the politically curious view which the judgments took with regard to the respective rights of ratepayers, the travelling public and the electorate in the erstwhile democracy of local government. The issue is a complex and important one and will be discussed in greater detail in relation to the term “economic” below. For the moment, I would merely note the view expressed that an election manifesto is not binding. To regard an election result as giving a mandate to fulfil a specific promise or as creating a commitment, come what may, was, for Lord Denning, “a complete misconception.” He continued to state “very few of the electorate read the manifesto in full. A goodly number only know of it from what they read in the newspapers or hear on television. Many know nothing whatever of what it contains. When they come to the polling booth none of them vote for the manifesto . . . they vote for a party and not a manifesto.” Slightly further on, the reader is informed that “when the party gets into power, it should consider any proposal or promise afresh, on its merits, without any feeling of being obliged to honour it or being committed to it.”⁹¹ Other judges were less ebullient in their language but fully agreed both that the electorate was only one of the groups to be considered in the implementation of policy, and secondly that extensive consideration should be given to ratepayers as a separate category, many of whom cannot vote. The duty owed to electors emerges as promissory and indirect, while the duty owed to ratepayers is direct and proprietary and would, on

occasion, appear to override the electorate's policy preferences. The crucial question, of course, is that of the circumstances and reasons which will create a paramount duty to the ratepayers, a question which only becomes fully obscured when the provisions of the Act itself come under discussion.

I do not intend to deal with the numerous arguments concerning different aspects of the Act in any detail. As Lord Diplock expressed it, the language of the Act is sometimes "opaque and elliptical", it "lacks clarity", and is on occasion "baffling".⁹² Nowhere is the lack of clarity more evident than in the sections dealing with the discretionary powers of the G.L.C. Under section 1 a general duty is specified in terms of policies aimed to develop and encourage measures which will promote the provision of "integrated, efficient and *economic* transport facilities for Greater London." By section 3 the G.L.C. is empowered to make grants to the L.T.E. "for any purpose", in relation to meeting the "needs" of Greater London. By section 11 (3) alterations in fare arrangements may be to achieve "any object of general policy specified by the council." I have already indicated the view that the powers granted by the Act as a whole were seen to be broad, in the sense that the language of their expression was frequently indeterminate. The Act confers "a large degree of autonomy."⁹³ It allows the implementation of general public policies, and at several points the judges were concerned to stress that "discussion at the political level" as to the extent and manner of financing public transport "as a social service" by means of subsidies, and with a view to best meeting "needs", was of "considerable relevance to a proper understanding of the language of the Act."⁹⁴ Elsewhere, the court "*must recognise*" that such debate exists.⁹⁵ Aside from an incidental and brief quotation from the Labour Party manifesto, mentioning how "better services, less congestion, better housing, more jobs, and a safer, cleaner, environment"⁹⁶ were benefits directly and indirectly related to the transport subsidy, the case is remarkable for its utter refusal to consider arguments and calculations as to the costs and benefits — the effects — of the transport subsidy. On the other hand, the case is even more remarkable for the unargued and uncalculated assumptions which it makes precisely as to what the costs and benefits of the G.L.C. actions were. They did so primarily in the form of discussions as to the meaning of the words "economy" and "economic" in various sections of the Act.

The semantic appropriation of the term economic was one of the principal achievements of the decision as a whole. The process of institutionalising an acceptable "legal" meaning was marked by a superb diversity of discursive strategies. Again, it must be stressed that the context of this lexical and semantic appropriation was that of the general admission of the vagueness and indeterminacy of the Act *and* of the word economic. It was stated that the legislature itself had in all probability failed to resolve the political controversy surrounding the meaning of the word economic at the time of passing the Act. The Court was forced to construct its own meaning for the term. A wide variety of approaches

emerged. For Lord Scarman, the term “economic . . . has several meanings. They include both those for which the appellants contend and that for which Bromley contend.”⁹⁷ He concludes that it means both “cost-effective” and that the burden on the ratepayers be avoided or diminished “so far as it is practicable to do so.”⁹⁸ The G.L.C. has a right under the Act to subsidise the travelling public, if London’s transport “needs” indicate that it should do so. In the event, however, the G.L.C. acted “impracticably” and “uneconomically”, “policy preference” wrongfully displaced “economic necessity”.⁹⁹ At this point I shall merely note the apparent mutual exclusion of the categories of the economic and policy.

For Lord Wilberforce, the word economic is vague, although it eventually transpires to mean that transport services should be run on “business-like or economic lines,” but, paradoxically, this did not mean that it was required to make “or try to make, a profit.”¹⁰⁰ It is to be understood rather, in terms of the dual duty owed to the travelling public and the ratepayers, to exclude all non-economic arguments and considerations. Before analysing what these exclusively economic considerations actually are, I shall briefly advert to the equally broad elucidations provided by the Court of Appeal. For Lord Denning, the 25% reduction in fares was quite simply “a completely uneconomic proposition done for political motives, for which there is no warrant. . . .” The duty of the G.L.C. was to charge ratepayers what was “reasonable and no more”, a duty to be balanced with a “conflicting” duty owed to the travelling public, by taking into account “all relevant considerations . . . on either side. They must not be influenced by irrelevant considerations . . . They must hold the balance fairly and reasonably.”¹⁰¹ In the event the G.L.C. had given undue weight to their “arbitrary” manifesto commitment, and had been less than fair to the ratepayers. Somewhat curiously, Lord Denning explained that he saw no difference “between abolishing fares altogether and cutting them by one-half or one-quarter”, they are all gifts to the travelling public wholly devoid of “financial rationality” — “why not 20% or 30% or even 50%?”¹⁰² Penultimately, Lord Justice Oliver adds to the view that economic means breaking even “so far as is practicable”, the view that general policy objectives cannot “be an object arbitrarily selected by the G.L.C. for reasons which have *nothing* to do with the functions which it is required to perform . . . It must be an object of general policy . . . for the promotion of an integrated, efficient and economic transport system.” Lord Justice Watkins writes of a “total disregard” for the interests of the ratepayers of Bromley “and *every other* borough of London.” Running the transport system on other than “business” lines could have “disastrous consequences.”¹⁰³

It is the tacit content and motivations underlying the actual application of their Lordships’ very general and frequently wholly ambiguous formulations of the law that is the key point of interest. First, however, a brief comment upon the general interdiscursive form of the argument. In reaching their conclusions, the judges utilise many of the standard preconstruc-

tions of the discursive formation as a whole. (i) The *sovereignty* of legal discourse is not only expressed tacitly in the axiomatic character of much of the argument and its manipulation of evaluative epithets, but also explicitly in the assertion of the independence of the legal issues from the political debates and controversies. The Law Lords are not concerned with the evaluation of the political or general policy dimensions of the G.L.C. decision. The language of the text, however, would appear to indicate the precise opposite. The reasonableness of the G.L.C.'s substantive decision is a constant object of ethically imbricated comments, their duty to the electorate is analysed in some detail and legally circumscribed, and the meaning of the term "economic" is considered specifically in relation to general transport policies that range from the arbitrary and socialistic to the business-like and fair. (ii) A subsidiary device, is the reiteration at various points of the "*artistic*" character of legal reasoning. The issues to be decided are technical and verbal, they concern the syntax and construction of a specific statute. Again, however, the general evidence discussed in the judgments evidences the necessary interrelation of syntax and semantics. Any of a number of conclusions can be reached upon the wording of the Act itself, and the Act is vague and baffling (if somewhat less so than the judgments) and must be construed purposively, in its context and with reference to "all the relevant considerations". (iii) Finally, the *instancing* of the discourse with regard to the subjective rights and duties at issue. The dispute does not concern the socio-economic and political relations actually appertaining between different social groups or classes. These are indeed never discussed. What is at issue is the relation between and relative weight of three sets of abstract and in this instance, we are told, conflicting rights and duties. The electorate, the travelling public and the ratepayers are the actors, listed in the ascending order of their actual importance, in this epic struggle to tame power by law. Again, the issue is purportedly legal and so isolated from other discourses and from the realm of actual interests and their interrelationships. The rights and duties involved are statutory and notional, their agents are similarly context-independent legal subjects — empty discursive spaces which the judgments provide with morally and rhetorically significant contents.

Suffice it to say that the generality of the formal arguments and the ambiguity of the norms or rules to be applied within the space of interdiscourse effectively permit the Court to institutionalise or appropriate any of a large number of meanings to resolve the case. One could indeed plausibly argue that the normative resolution to the dispute is of little or no relevance or pertinence to the actual decision "upon the facts" — it would always have been possible, in terms of the latitude normatively available, to decide and justify a decision for either of the parties to the dispute. The question which arises, in other words, is that of why the case was decided — on its facts — in favour of the Bromley Council. There is, of course, no single answer available to this question. A number of different reasons and rulings could plausibly be extracted from the case¹⁰⁴ although

the predominant issue is probably correctly posed as being the meaning of the word "economic." Devoid of any adequate dictionary definition, the term was to be appropriated in its various linguistic contexts. These in turn proved inadequate and it was deemed necessary to analyse, very briefly, certain of the economic relations actually involved in the case. At no point in the case, however, was any attempt made to prove that the actual logic or actual effects of the G.L.C.'s decision were "uneconomic." The inflated circulation of terms of moral condemnation within the judgments was not matched by any comparable analysis of what would have been the economically rational way to run London Transport. As one commentator has it, "nobody who had read anything at all on the economics of public transport would have concluded that the economically rational way to run London Transport was by trying as hard as one could to make revenue meet costs."¹⁰⁵ Upon even the most elementary comprehension of economics, it is clear that there are numerous plausible economic arguments in support of subsidies, and further, that in terms of an overall analysis of cost-benefit¹⁰⁶ it would be highly unwise to suppose that one could characterise the costs and the benefits of the G.L.C. fare subsidy in the manner in which the House of Lords appeared to.

In the course of a number of general assertions, the Law Lords appear to view the economics of subsidy in the highly simplistic terms of a straightforward, short-term, detriment to all ratepayers and a direct, gratuitous, benefit to the travelling public. As this view is frequently crucial to the reasoning of the judgments, its details deserve comment. It excludes from the outset the possibility of a short-term loss producing a long-term benefit in the form, for instance, of a restructuring and reversal of the decline of inner city transport systems by means of incentives to use public rather than private transport. The short-term loss is paramount, and their Lordships deem it to fall exclusively upon the ratepayers: 40% or less of ratepayers use the public transport facilities; 60% neither vote nor travel on the transport services. The latter are apparently the real losers and, by implication, receive no benefit for their losses. A moment's reflection suggests that this is not as obviously true as it seems. Two categories of economic argument would appear to support an opposite conclusion, without entailing any technical economic concepts whatsoever. There are, firstly, arguments based upon benefits to non-consumers. Transportation facilities affect non-travellers in a variety of ways. These side-effects (externalities) may be beneficial or harmful but presumably it is permissible to assume that where the positive externalities are valued higher than the size of the subsidy, the beneficiaries of these side-effects will be prepared to pay for them in the form of rates. The decision in the G.L.C. case made great play upon the hardship caused to companies and businesses by the fare subsidy. Two side-effects of the subsidy are directly relevant to such an argument. First, a cheap and efficient transport service will benefit businesses and traders in the centre of cities, insofar as most people who travel to city centre shops do so by public transport.¹⁰⁷

Further, social and recreational stimulus to the city centre will benefit other firms. There is no reason why those affected should not contribute to the cost of these benefits. More marginally, there is also the benefit of creating employment, which was specifically stressed in the Labour Party manifesto. So too was a reverse argument concerning the removal of unwanted externalities — that the environmentally and socially harmful side-effects of private transport: noise, pollution, death, injury, congestion, and the costs of remedying these negative externalities, would be reduced by the subsidy. The issues involved are directly economic, yet the Law Lords denied the possibility of making these decisions (to purchase desired goods) upon grounds which they alleged to be economic.

The arguments mentioned are, of course, no more than a few, simplified, instances of possible economic analyses of the actual costs and benefits of the decision to subsidise London Transport. Of the more technical concepts relevant, that of “option value” (consumption without purchase) most clearly supports the previous list of benefits to non-users. Very briefly, the existence of a service is often of financial benefit to non-users. In the case of transport, financial calculations as to the purchase or maintenance of other forms of transport can be directly affected by the existence of alternatives providing an option in the event of the breakdown, failure or future and unforeseen exigencies affecting the primary choice of transport. The financial value of having the option to use something is its option value, and while it may be hard to measure, there is no categorical reason for refusing to approximate a sum by way of taxation or rates. An analogous argument can be made with respect to those who benefit directly from subsidies — the travelling public — in terms of “consumers’ surplus”, the extra benefit of the subsidy to actual consumers, calculated upon the basis of the financial value consumers place upon the services over and above the sum that they pay. If the overall surplus for consumers and producers taken together exceeds loss, then it is economic to subsidise costs that cannot be met out of revenue. Finally, the actual motive or reason for the G.L.C. subsidy in its original form probably approximates to a very basic theorem of welfare economics, marginal cost pricing — pricing according to the extra cost of providing a specific unit of service, once the capital and other costs of establishing a service have been met. The marginal cost of providing an additional unit of transport — carrying an extra passenger — is likely to be relatively low. Pricing at this level will not cover costs, but it is equally arguable that it is an economically more efficient and desirable use of resources than raising prices.

In conclusion, I am not concerned to argue anything more than that the above concepts and analyses are relevant — they are all economic arguments pertinent to the reasonableness of providing a subsidy. It may well be that the economic arguments against subsidies are more persuasive than those in their favour, or that non-economic arguments could conclusively override the economic arguments. My point is more general. The meaning of the word “economic” is dependent upon its discursive context, and the

Law Lords, in assuming that it, was inherently uneconomic to subsidise London Transport, wholly excluded from consideration precisely those economic concepts and analyses which could have thrown some light upon the decision they were reviewing. In the last analysis, the patterns of interdiscursive meaning evidenced in the judgments analysed are, I would suggest, typical of the general form of legal justificatory argument. It is only by critically analysing the details of the language and discursive processes inherent within the legal text, that the preconstructions, preferred meanings, rhetoric and ideological dimension generally of legal discourse can be rationally challenged within the legal institution itself. In reading the law, it is constantly necessary to remember the compositional, stylistic and semantic mechanisms which allow legal discourse to deny its historical and social genesis. It is necessary to examine the silences, absences and empirical potential of the legal text and to dwell upon the means by which it appropriates the meaning of other discourses and of social relations themselves, while specifically denying that it is doing so. It is, in short, politically necessary to take seriously the character of law as a social discourse.

NOTES AND REFERENCES

- ¹ For a recent conspectus, see D. R. Harris, "The development of socio-legal studies within the United Kingdom" (1983) 3 *Legal Studies* 315.
- ² Generally, see G. Williams, "Law and Language" (1945) 62 *Law Quarterly Review* 385; H. Morris, "Verbal Disputes and the Legal Philosophy of John Austin" (1960) 7 *Univ. of California Law Review* 27; D. Mellinkoff, *The Language of the Law* (1963); D. Crystal and D. Davey, *Investigations of English Style* (1969) ch. 2; W. O'Barr, *Linguistic Evidence* (1982) 15–29. For the first major French symposium, see the 1974 volume of *Archives de Philosophie du Droit (Le Langage du Droit)*.
- ³ The most useful and accessible accounts of the rhetorical tradition are to be found in: K. Burke, *A Rhetoric of Motives* (1969); T. Todorov, *Theories of the Symbol* (1982); P. Ricoeur, *The Rule of Metaphor* (1978); G. Genette, *Figures of Literary Discourse* (1982); Ch. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric* (1971); T. Eagleton, *Walter Benjamin* (1981); E. Grassi, *Rhetoric as Philosophy* (1980); P. Goodrich, "Rhetoric as Jurisprudence, An Introduction to the Politics of Legal Language" (1984) 4 *Oxford J. Legal Studies* 88. With regard to the exegetical tradition, by far the most impressive account is to be found in the work of M. Bakhtin, *The Dialogic Imagination* (1981); see also, W. Ong, *Orality and Literacy* (1982); V. N. Volosinov, *Marxism and the Philosophy of Language* (1973); J. Derrida, *Of Grammatology* (1976) Part I. Of general interest for the interpretative accounts provided, see, F. Nietzsche, *The Birth of Tragedy* (1909) and *We Philologists* (1911); M. Foucault, *The Order of Things* (1974); M. Glucksmann, *The Master Thinkers* (1980) 34–65. For more technical legal histories, see, Ch. Perelman, *Logique Juridique* (1976); J. Lenoble and F. Ost, *Droit, Mythe et Raison* (1980), and their accompanying bibliographies of continental material.
- ⁴ The primary sources are, Aristotle, *Rhetoric* (trans, Welldon, 1886); *Topics* (trans, W. D. Ross, 1950); Cicero, *The Orator* (1952); *Topics* (1952) both Loeb Classical Library. As regards periodisation, see, W. Ong, *Ramus, Method and the Decay of Dialogue* (1958), T. Todorov *op. cit.* pp. 9–84; R. Barthes, "L'Ancienne Rhetorique" (1970) 16 *Communications* 1; C. Metz, *Psychoanalysis and Cinema* (1982) Pt. IV.; F. Moretti, *Signs taken for Wonders* (1983) ch. 1.
- ⁵ Aristotle, *Rhetoric* (1886) 9 (Bk I.i. 1355–56).

- ⁶ St Augustine, *On Christian Doctrine* (1956) 323; Cicero, *Topics* 166–169a.
- ⁷ J. B. Elshtain, *Public Man, Private Woman* (1981) 19–55; J. J. Rousseau, *Essai sur l'Origine des Langues* (1761) 72–73; J. Derrida, *op. cit.*, Pt. II.
- ⁸ Cf. T. Eagleton, *op. cit.*, p. 101 ff, K. Burke, *op. cit.*, p. 23 ff. It is from Nietzsche that the aphoristic statement “rhetoric is republican” is derived, on which see P. Ricoeur, *op. cit.*, ch. 2.; P. de Mann, *Allegories of Reading* (1979) ch. 1.
- ⁹ Plato, *Phaedrus* (1978) 259–267; *Gorgias* (1978) 459 c-d, 463 b-d; Aristotle, *Rhetoric*, 5–6. See, generally, J. Derrida, “The White Mythology, Metaphor in the Text of Philosophy” (1974) *VI New Literary History* 7–74.
- ¹⁰ Aristotle, *Metaphysics* (1957) 4 1006 b 13.
- ¹¹ P. Ricoeur, *op. cit.*, ch. 2; G. Genette, *op. cit.*
- ¹² T. Todorov, *op. cit.*, ch. 3; T. Eagleton, *op. cit.* For corresponding legal developments cf. W. Kunkel, *An Introduction to Roman Legal and Constitutional Law* (2nd ed. 1973); J. Dawson, *The Oracles of the Law* (1968); H. J. Berman, “The Origins of Western Legal Science” (1977) 90 *Harvard Law Review* 894.
- ¹³ See, M. Pecheux, *Language, Semantics and Ideology* (1982) 45.
- ¹⁴ See, M. Bakhtin, *op. cit.*, p. 271, 286.
- ¹⁵ See, O. Ducrot and T. Todorov, *Encyclopedic Dictionary of the Sciences of Language* (1981) Pt. I.; M. Foucault, Introduction, in A. Arnauld and C. Lancelot, *Grammaire generale et raisonnée* (1969); G. Sampson, *Schools in Linguistics* (1980); M. Foucault, “The Discourse on Language”, translated as an appendix to, M. Foucault, *The Archaeology of Knowledge* (1981).
- ¹⁶ *Supra*, note 4. See also, J. Locke, *An Essay Concerning Human Understanding* (1979) 508 (Bk III. X. 34); I. Kant, *The Critique of Judgment* (1952) 53; I. Kant, *Critique of Pure Reason* (1887) xxii-iv; Ch. Perelman and L. Olbrechts-Tyteca, *op. cit.*, Introduction and ch. 1.
- ¹⁷ See, J. Kristeva, *Desire in Language* (1982) ch. 1; M. Foucault, *Power/Knowledge* (1980) 78–133.
- ¹⁸ On the exegetical school in jurisprudence, see H. J. Berman, *op. cit.*, W. Twining, “Some Jobs for Jurisprudence” (1974) *Brit. Journal of Law and Society* 149; I. Stewart, “Kelsen and the Exegetical Tradition in Jurisprudence” (1981) *Proceedings of the U.K. Association for Social and Legal Philosophy*, Edinburgh.
- ¹⁹ P. Vinogradoff, *Roman Law in Medieval Europe* (1929) ch. 2, 4.
- ²⁰ P. Legendre, *Jouir de Pouvoir* (1976) 157–9; see also, A. Glucksmann, *op. cit.*
- ²¹ By far the best treatment of the issues raised in this section is to be found in M. S. Moore, “The Semantics of Judging” (1981) 54 *Southern California Law Review* 151; otherwise, B. Danet, “Language and Legal Process” (1980) 14 *Law and Society Review* 445; B. S. Jackson, *Semiotics and Legal Theory* (forthcoming, 1985); R. Carrion-Wam, “Semiotica Juridica” (forthcoming, 1984) *Liverpool Law Review*; P. Goodrich, “The Rise of Legal Formalism, or the Defences of Legal Faith” (1983) 3 *Legal Studies* 248 and “The role of Linguistics in Legal Analysis” (forthcoming, 1984) *Modern Law Review*; C. Sumner, *Reading Ideologies* (1979). On the more general linguistic background, see, R. Barthes, *Elements of Semiology* (1967); S. Timpanaro, *On Materialism* (1975) ch. 4; S. Clarke, *The Foundations of Structuralism* (1981); G. Lepschy, *A Survey of Structural Linguistics* (1982); A. J. Greimas, *Semantique Structurale* (1966); A. J. Greimas and J. Courtes, *Semiotics and Language* (1982); U. Eco, *A Theory of Semiotics* (1976). For critical accounts, see F. Jameson, *The Political Unconscious* (1980); J. Larrain, *The Concept of Ideology* (1979); J. Baudrillard, *For a Critique of the Political Economy of the Sign* (1981); R. W. Bailey et al (eds.), *The Sign; Semiotics around the World* (1978); J. Derrida, *Positions* (1981); G. Gillan, *From Sign to Symbol* (1982); and finally, the synoptic essays contained in J. Culler, *In Pursuit of Signs* (1981).
- ²² I shall be dealing here with the Saussurian based conceptions of semiotics, “a science which would study the life of signs within society . . . It would teach us what signs consist of, what laws govern them.” F. de Saussure, *Course in General Linguistics* (1966) 16. For useful introductory discussions of this tradition, see T. Eagleton, *Literary Theory* (1983)

- ch. 5; S. Hervey, *Semiotic Perspectives* (1983) ch. 1; O. Ducrot and T. Todorov, *op. cit.*, pp. 84–92; J. M. Benoist, *The Structural Revolution* (1978) ch. 5. The major developments of this conception of semiotics have been those of R. Barthes, *op. cit.*, A. J. Greimas, *Du Sens* (1974); U. Eco, *op. cit.*, ch. 1. Since Barthes (pp. 9–11) semiotics (semiology) has consistently used language as its model of signifying systems, and where other social forms have been examined by structuralists (kinship systems, myths, fashions *etc.*) they have been likened to language in their functioning. What is at issue in each case, is the code — the underlying structure or system of rules that assigns or determines the functions or intelligibility of the sign, in a manner analogous to the grammatical (syntactic) determination of the use of words in linguistics. See A. J. Greimas and J. Courtes *op. cit.*, pp. 282–293 for a recent definition of semiotics.
- ²³ For the sake of completeness, positivism may be broadly defined as “any neo-Kantian kind of pure logic, which grants validity to an autonomous method and its objectifications, which is ‘positive’ in the general sense of suppressing the social and historical preconditions of its own possibility.” G. Rose, *Hegel contra Sociology* (1981) p. 32.
- ²⁴ See S. Timpanaro, *op. cit.*, pp. 192–218.
- ²⁵ See, G. Sampson, *op. cit.*, ch. 1; S. Timpanaro, *op. cit.*, pp. 135–170; V. Volosinov, *op. cit.*, *passim*. The “Vossler” school is generally regarded to have been the most virulent in its attacks upon the traditional objectivist linguistics of the period.
- ²⁶ Saussure, *op. cit.*, p. 6.
- ²⁷ *Ibid.*, pp. 6–9, 85, 87, 89.
- ²⁸ *Ibid.*, p.9.
- ²⁹ *Ibid.*, pp. 114–115, 117–118. See also M. Pecheux, *op. cit.*, pp. 55–56; J. Kristeva, *op. cit.*, ch. 1; J. Baudrillard, *op. cit.*, pp. 143–150.
- ³⁰ I refer here to the principal works of H. Kelsen, primarily to H. Kelsen, *General Theory of Law and State* (1946); *The Pure Theory of Law* (1970); *What is Justice?* (1959); “The Pure Theory of Law, Its Methods and Fundamental Concepts” (1934) 50 *Law Quarterly Review* 474. For the periodisation of Kelsen’s work and particularly for analyses of his various changes in position with regard to the theory of adjudication, see O. Weinberger (ed.), *Hans Kelsen, Essays in Legal and Moral Philosophy* (1973); S. Paulson, “Material and Formal Authorisation in Kelsen’s Pure Theory” (1980) 39 *Cambridge Law Journal* 172; S. Paulson, “Subsumption, Derogation and Non-Contradiction in “Legal Science” (1981) *Univ. of Chicago Law Review* 802; I. Stewart *op. cit.*; O. Weinberger, “Logic and the Pure Theory of Law” (1981) *Proceedings of the A.S.L.P. Conference*, Edinburgh; S. Paulson, “On the Status of the Lex Posterior Derogating Rule (1983) V *Liverpool Law Review* 5.
- ³¹ The most obvious comparison to be made is that concerning the use of the concept of “*Volksgeist*” within both linguistics and jurisprudence. As regards the former, see G. Sampson, *op. cit.*, ch. 1 (the tradition being that which runs from W. Von Humboldt, to Von Raumer and Vossler). In legal studies, see, Von Savigny, *On the Vocation of our Age for Legislation and Jurisprudence* (1831); H. U. Kantorowicz, “Savigny and the Historical School” (1937) 53 *Law Quarterly Review* 326, at 334–5: “Even language, with which the historical school constantly compared law, . . . (is) used by the school in a purely romantic sense, and is strongly influenced by the romantic conception of the *volkslied* which was also believed to be the unconscious product of the anonymous people.” More generally, see Ch. Perelman, *Logique Juridique* (1976) Pt. I.; J. Lenoble and F. Ost, *op. cit.*
- ³² H. Kelsen, *G.T.L.S. op. cit.*, pp. 409–46; *W.J? op. cit.*, ch. 4; Kelsen (1950) *Law Quarterly Review* 486 ff.
- ³³ H. Kelsen, *P.T.L.* 191–92. The best introductory analyses of this aspect of Kelsen’s work are J. Cohen, “The Political Element in Legal Theory” (1978) 88 *Yale Law Journal* 1; J. Raz, *The Concept of a Legal System* (1980) p. 95 ff; J. W. Harris, *Law and Legal Science* (1979).
- ³⁴ I. Kant, *Critique of Pure Reason* (1897) 503; H. Kelsen, *G.T.L.S.* 434–35; *W.J.?* 262; *P.T.L.* 7–18, 72–75, 196–200.

- ³⁵ For analyses of the pragmatic and political character of this "science", see E. B. Pashukanis, *Law and Marxism* (1978) 45–65; L. Colletti, *From Rousseau to Lenin* (1976) ch. 1; B. Edelman, *Ownership of the Image* (1979) appendix 2; J. Lenoble and F. Ost, *op. cit.*, pp. 506–546.
- ³⁶ I am thinking particularly of the work of J. L. Austin and of L. Wittgenstein, and the use made of it in the work of H. L. A. Hart, *Definition and Theory in Jurisprudence* (1953); *The Concept of Law* (1961); K. Olivecrona, "Legal Language and Reality" in Newman (ed.), *Essays in Honour of R. Pound* (1962); D. N. MacCormick, *Legal Reasoning and Legal Theory* (1978). For preliminary analyses of the linguistic aspect of such work, see M. S. Moore, *op. cit.*, B. S. Jackson, "Sources du Droit" (1982) 27 *Archives de Philosophie du Droit* 147; Z. K. Bankowski and G. Maher, "Ordinary Language and Judicial Discretion" (1981) 12 *Rechtstheorie* 1; P. Goodrich, "Antinomies of Legal Theory" (1981) 3 *Legal Studies* 1. Insofar as the adoption of the slogan "meaning equals use" or the elaboration of a hermeneutic adds anything of substance to the positivist account of a syntax of legal validity, they will be discussed in the subsequent section in relation to sociolinguistic and discursive analyses of law. More generally, cf. J. Searle, *Speech Acts* (1970); P. Harrison, *An Introduction to the Philosophy of Language* (1979); S. Hervey, *op. cit.*, ch. 4.
- ³⁷ *G.T.L.S.* 434–5; *P.T.L.* 2–19.
- ³⁸ *P.T.L.* 349–352. For a recent critique of this aspect of positivism, see, S. Henry, *Private Justice* (1983) ch. 1, and 220–22.
- ³⁹ Compare F. de Saussure, *op. cit.*, pp. 101–13; H. Kelsen, *G.T.L.S.* 216 ff; *P.T.L.* 194–210. At *P.T.L.* 198–99. Kelsen proposes the syllogistic basis of legal validity, that of an interpretation leading from a major premiss — the objective validity of a norm — to a conclusion, the legitimation of the actual command, utterance or decision.
- ⁴⁰ M. S. Moore, *op. cit.*, p. 163. Moore continues, "Formalism is not an antiquated theory of merely historical interest. The claims of contemporary theorists are not isolated instances of an impoverished legal education. Formalism survives because it is, *prima facie*, the theory of adjudication required by our ideals about the rule of law." See H. Kelsen (1950) 50 *Law Quarterly Review*, 490 for a striking statement of those interests that dogmatic jurisprudence must, does and should service.
- ⁴¹ For general overviews, see A. J. Greimas and J. Courtes, *op. cit.*; R. W. Bailey, *op. cit.* Of specific applications, the more informative and accessible include: C. Metz, *Psychoanalysis and Cinema* (1982); R. Barthes, *S/Z* (1970); R. Jakobson and M. Halle, *Fundamentals of Language* (1956); R. Jakobson, *Linguistics and Poetics* (1972); J. Culler, *Structuralist Poetics* (1975); J. Sturrock (ed.), *Structuralism and Since* (1979). For specifically legal applications on the continent, see E. Landowski, *La Recherche en Sciences Humaines, 1979–1980*, (1981).
- ⁴² Particularly, G. Kalinowski, *Introduction à la logique Juridique* (1965); A. J. Greimas, *Semiotique et Sciences Sociales* (1976) 79–128; A. J. Arnaud, *Essai d'Analyse Structurale du Code Civil Francais* (1972); G. Mounin, "La Linguistique comme science auxiliaire dans les disciplines juridique" (1974) 19 *Archives de Philosophie du Droit* 7. For preliminary English language studies, see J. Broekman, "A Structuralist approach to the Philosophy of Law" (1975) 49 *Proceedings of the American Catholic Philosophical Association* 37; W. B. Michaels, "Against Formalism" (1979) 1 *Poetics Today* 23; R. Kevelson, *Inlaws/Outlaws: A Semiotics of Legal Systems* (1977); "Semiotics and Structures of Law" (1981) 35 *Semiotica* 183; and finally, to a limited extent, W. T. Murphy and R. W. Rawlings, "After the Ancien Regime" (1981) 44 *Modern Law Review* 617, (1982) 45 *Modern Law Review* 34.
- ⁴³ The distinction concerns the selection and combination of signs, the two structural axes of any sign system. The terms go back to the work of Saussure, *op. cit.*, p. 123 ff, and the opposition of "associative field" to "syntagm". It was taken up in its modern form in A. Martinet, *Elements of General Linguistics* (1964); and has received numerous modern applications, including the dubious honour of that in F. Burton and P. Carlen, *Official Discourse* (1979).
- ⁴⁴ Whereas Saussure distinguishes signifier and signified as the two elements of the lexical

- sign, later studies have elaborated a more complex, cross-cutting distinction between denotation (lexical content/reference) and connotation (expression). The seminal works are L. Hjelmslev, *Prolegomena to a Theory of Language* (1962); R. Barthes, *Elements, op. cit.*, pp. 89–94.
- ⁴⁵ The structural opposition between metaphor and metonymy is a confusing one. It properly belongs to the last great rhetorical treatises of the 18th and 19th centuries (see, T. Todorov, *Theories of the Symbol, supra*, ch. 5; C. Metz, *op. cit.*, Pt. 4) but it received its most original treatment in the work of R. Jakobson, *Essai de Linguistique Generale* (1963). It is confusing because it is treated as a formal distinction between axes of language or of the signifying system within recent semiotic work, despite the fact that its derivation is rhetorical and semantic. See, on this point, P. Ricoeur, *The Rule of Metaphor, op. cit.*, pp. 174–185; C. Metz, *op. cit.*, pp. 152 ff.
- ⁴⁶ Especially, G. Kalinowski, *op. cit.*; K. Baldinger, *Semantic Theory* (1980) 42–61; E. Landowski, *op. cit.*,
- ⁴⁷ E. Benveniste, *Problems of General Linguistics* (1971); “*La forme et le sens dans le langage*” (1967) *Le Langage* 27; R. Jakobson, *Linguistics* (1970) 455 ff.
- ⁴⁸ Most famously his semiotic (logical) quadrants, best approached via A. J. Greimas and F. Rastier, “The Interaction of Semiotic Constraints” (1973) *Yale French Studies* 86; for introductory accounts, see J. Culler, *Structuralist Poetics, op. cit.* ch. 4; J. Larrain, *The Concept of Ideology* (1979) 132–140. By far the most compelling account is to be found in F. Jameson, *The Political Unconscious* (1981) 46–9, 121–27.
- ⁴⁹ A. J. Greimas, *Semiotique et Sciences Sociales, op. cit.*, p. 79: “our pursuit over a number of years, of a method (semiotic) of semantic analysis would have failed if its procedures were not applicable to the elucidation of any discourse; if the models proposed were not capable of providing an account of the modes of production, of existence and of functioning of any text whatsoever.”
- ⁵⁰ *Ibid.*, pp. 90–4.
- ⁵¹ *Ibid.*, pp. 88–90.
- ⁵² *Ibid.*, p. 91.
- ⁵³ *Ibid.*, p. 92.
- ⁵⁴ I do not intend any substantive distinction between sociolinguistics and discourse analysis—various perspectives and traditions run across both fields of study. The principal works include B. Bernstein, *Class, Codes and Control* (1971); P. Gigliopoli (ed.), *Language and Social Context* (1972); V. N. Volosinov, *Marxism and the Philosophy of Language* (1973); M.A.K. Halliday, *Language as Social Semiotic* (1978); R. Fowler et al, *Language and Control* (1979); Hudson, *Sociolinguistics* (1979); R. Fowler, *Literature as Social Discourse* (1981); T. Pateman, “Linguistics as a branch of critical theory” (1981) 14/15 *U.E.A. Papers in Linguistics* 1; M. Bakhtin, *The Dialogic Imagination* (1982); M. Gurevitch et al. (eds.), *Culture, Media and Society* (1982); D. Morley, *The Nationwide Audience* (1982); H. Davis and P. Walton (eds.), *Language, Image, Media* (1983); M. Pecheux, *Language, Semantics and Ideology* (1982). For preliminary applications to law, D. Crystal and D. Davey, *Investigating English Style* (1969) ch. 2.; P. Carlen, *Magistrates Justice* (1976); J. M. Atkinson and P. Drew, *Order in Court* (1979); W. L. Bennett and M. S. Feldman, *Reconstructing Reality in the Courtroom* (1981); D. Carzo, *I Segni del Potere* (1981); F. Burton and P. Carlen, *Official Discourse* (1979); W. O’Barr, *Linguistic Evidence* (1982).
- ⁵⁵ For the historical and theoretical basis of these remarks, see T. Eagleton, *Walter Benjamin* (1981) 101–13; T. Eagleton, *Literary Theory* (1983) 194–218; P. de Mann, *Allegories of Reading* (1979) ch. 1, 5–6; J. Kristeva, *Desire in Language* (1982) ch. 1; M. Pecheux, *op. cit.*, Pts. 1, 2; M. Foucault, *The Order of Things* (1970) 302–344.
- ⁵⁶ See, F. Nietzsche, *Early Greek Philosophy and other Essays* (1908) 180 ff.; P. de Mann, *op. cit.*, pp. 105 ff.
- ⁵⁷ Especially, V. N. Volosinov, *op. cit.*, Pt. 1; and under the pseudonym of M. Bakhtin, *op. cit.*, ch. 4; R. Fowler, *op. cit.*, ch. 2.
- ⁵⁸ Z. Harris, *Discourse Analysis Reprints* (1967) 7; for more recent definitions of the discipline, see G. Brown and G. Yule, *Discourse Analysis* (1983); M. Stubbs, *Discourse Analysis* (1983).

⁵⁹ M. Bakhtin, *op. cit.*, pp. 270–1.

⁶⁰ V. Volosinov, *op. cit.*, p. 20 ff.

⁶¹ M. Bakhtin, *op. cit.*, pp. 262–3.

⁶² *Ibid.*, p. 401. I cannot here enter into the linguistic details of such an account of meaning. V. N. Volosinov elaborates a useful typology of speech forms according to the contexts of group and class interaction. His point is that all signs are ideologically saturated or “*multiaccetual*” and that the accent or meaning which prevails is the object and outcome of struggle between differently oriented sign users, the product of group and class conflict aimed at winning credibility for specific accents, interests, meanings and purposes. See V. N. Volosinov, *op. cit.*, pp. 20–25 especially. More recent work in sociolinguistics has elaborated the concepts of “register”, “discursive process” and “topic transformation” to depict a frequently comparable view of the linguistics of semantic appropriation, or control over meaning, as based upon the social and institutional status and significance of the discourse or social utterance. See, respectively, M. A. K. Halliday, *op. cit.*, ch. 6, 10; M. Pecheux, *op. cit.*, pp. 110–129; H. Davis and P. Walton, *op. cit.*, ch. 3. For the ideological dimensions of meaning “effects” see G. Therborn, *The Ideology of Power and the Power of Ideology* (1980); M. Foucault, *The Archaeology of Knowledge* (1972) 50 ff; A. Gouldner, *The Dialectic of Ideology and Technology* (1976) ch. 2.

⁶³ Respectively, M. Foucault, *op. cit.*, n. 62, pp. 50–1; *Power/Knowledge* (1980) 131. See also M. Bakhtin, *op. cit.*, p. 264 ff; R. Fowler, *op. cit.*, p. 111 ff.

⁶⁴ The term hermeneutic — meaning little more than speaker’s intention or purposiveness (*Verstehen*) — is first used in P.M.S. Hacker and J. Raz (eds.), *Law, Morality and Society* (1977) ch. 1; while its more recent currency derives from D. N. MacCormick, *Legal Reasoning and Legal Theory* (1978) ch. 8; D. N. MacCormick, *H. L. A. Hart*. Aside from sources already adverted to in terms of Hart’s own work, and the extremely useful commentaries of M. S. Moore, see H. L. A. Hart “Signs and Words” (1952) 2 *Philosophical Quarterly* 59, for a highly telling account of communication in terms of intention and illocution.

⁶⁵ The primary source for this slogan is usually taken to be J. L. Austin, *Philosophical Papers* (1962); J. L. Austin, *How to do things with words* (1962). For a criticism of this derivation, see G. Sampson, *Schools of Linguistics* (1980).

⁶⁶ L. Wittgenstein, *Philosophical Investigations* (1967) paras. 23–24, 49, 199–200.

⁶⁷ Generally, see P. Ricoeur, *op. cit.*, for an interesting commentary upon the linguistics (lack of) of the Oxford School. Also, E. Gellner, *Words and Things* (2nd. ed. 1980).

⁶⁸ H. L. A. Hart, *The Concept of Law* (1961) 4–6, 121–132, 233, 249; *Definition and Theory* (1953); “Positivism and the Separation of Law and Morals” (1958) *Harvard Law Review* 589.

⁶⁹ For J. L. Austin’s “linguistic phenomenology”, see J. L. Austin, *Philosophical Papers* (1962) 182 ff; on “illocution”, *ibid.*, p. 99 ff.

⁷⁰ This is most evident in Ch. Perelman, *Logique Juridique* (1976) 108, 132, 162–3, 173.

⁷¹ On which point, see Z. Bankowski and G. Maher, “Ordinary Language and Judicial Discretion” (1981) 12 *Rechtstheorie* 1; T. Mathieson, *Law, Society and Political Action* (1980) 89–111, 140–145.

⁷² Particularly, P. Carlen, *Magistrates Justice* (1976) pp. 18–38, 98–127; W. O’Barr, *Linguistic Evidence* (1982) 61–91, appendix 1; M. Cain, “The General Practice Lawyer and the Client: Towards a Radical Conception” in *The Sociology of the Professions* 1983; eds. R. Dingwall and P. Lewis) 106–130. ch. 5. For a somewhat desultory, ethnomethodological, variation upon similar themes, see J. M. Atkinson and P. Drew, *Order in Court* (1979) ch. 1, 2.

⁷³ For recent and important works concerned with gender and language, see R. Lakoff, *Language and Women’s Place* (1975); J. B. Elshtain, “Feminist Discourse and its Discontents: Language, Power and Meaning” (1982) 7 *Signs* 603; K. McKluskie, “Women’s Language and Literature” (1983) *Feminist Review* 51; the classic study is D. Spender, *Man Made Language* (1980), usefully criticised in A. Assiter, “Did Man Make Language?” (1983) 34 *Radical Philosophy* 25; D. Cameron, “Sexism and Semantics” (1984) 36 *Radical Philosophy* 14.

⁷⁴ Cf. M. Bakhtin, *op. cit.*, p. 342 ff.

- ⁷⁵ J. Lenoble and F. Ost, *Droit, Mythe et Raison* (1980) 83. At p. 87: "It is as though each text has entered a secret pact with the institution in whose name it speaks." More generally, T. Mathieson, *op. cit.*, pp. 77–111; G. Therborn, *op. cit.*, p. 80 ff; D. Kairys (ed.), *The Politics of Law* (1983) ch. 3; R. M. Unger, "The Critical Legal Studies Movement" (1983) 96 *Harvard Law Review* 561; R. Dingwall and P. Lewis (eds.) *op. cit.*
- ⁷⁶ D. Crystal and D. Davey, *op. cit.*; W. O'Barr, *op. cit.*
- ⁷⁷ R. Fowler *et al.* (eds.) *op. cit.*, ch. 2, 10; H. Davies and P. Walton, *op. cit.*, ch 3, 14; R. Fowler, *op. cit.*, pp. 24–46.
- ⁷⁸ See, M. Pecheux, *op. cit.*, ch. 90 M. Foucault, *Power/Knowledge* (1980) ch. 5.
- ⁷⁹ E. Edelman, *Ownership of the Image* (1979); F. Burton and P. Carlen, *op. cit.*; M. Bakhtin, *op. cit.*, pp. 407–410; N. Poulantzas, *State, Power and Socialism* (1978) 76–99; J. Palmer and F. Pearce, "Legal Discourse and State Power" (1983) 11 *Int. Journal of the Sociology of Law* 361.
- ⁸⁰ R. M. Unger, *op. cit.*, especially pp. 665–675; D. McBarnet, *Conviction* (1983) ch. 8, and "Legal Form and Legal Mystification" (1982) 10 *Int. Journal of the Sociology of Law* 409.
- ⁸¹ R. M. Unger, *op. cit.*; N. Poulantzas, *op. cit.*; R. Dingwall and P. Lewis, *op. cit.*, ch. 5.
- ⁸² Pragmatics is a catch-all term for speech context as a determination of semantic content. For recent developments, see D. Sperber and D. Wilson, "Pragmatics" (1981) 10 *Cognition* 281; S. Worth (ed.) *Conversation and Discourse* (1981) ch. 8; M. Stubbs, *Discourse Analysis* (1983); S. Levinson, *Pragmatics* (1983); D. Sperber and D. Wilson, *Foundations of Pragmatic Theory* (forthcoming, 1984).
- ⁸³ M. Bakhtin, *op. cit.*, p. 284; see also R. Fowler, *op. cit.*, pp. 28 ff.
- ⁸⁴ [1982] 1 A.E.R. 129.
- ⁸⁵ *Ibid.*, pp. 131–2. My discussion of the asserted facts — the *exordium* — will concentrate upon the judgments of the Court of Appeal where the depiction of the circumstances of the case is most detailed and strident. The House of Lords was able, by and large, to assume knowledge of the facts *as stated* in the Court of Appeal, and so concentrated upon the putatively separate issues of law.
- ⁸⁶ *Ibid.*, p. 149.
- ⁸⁷ *Ibid.*, p. 159.
- ⁸⁸ [1925] A.C. 578.
- ⁸⁹ [1954] 3 A.E.R. 698.
- ⁹⁰ *Ibid.*, 706–707.
- ⁹¹ [1982] 1 A.E.R. 129, at 135.
- ⁹² *Ibid.*, 160; see also Lord Wilberforce at p. 154.
- ⁹³ *Ibid.*, p. 158.
- ⁹⁴ *Ibid.*, p. 164.
- ⁹⁵ *Ibid.*, p. 157.
- ⁹⁶ *Ibid.*, p. 132.
- ⁹⁷ *Ibid.*, 158, 174. Lord Scarman comments, "it is a very useful word; chameleon-like, taking its colour from its surroundings."
- ⁹⁸ *Ibid.*, 174.
- ⁹⁹ *Ibid.*, 177.
- ¹⁰⁰ *Ibid.*, 155.
- ¹⁰¹ *Ibid.*, 134–5.
- ¹⁰² *Ibid.*, 135.
- ¹⁰³ *Ibid.*, 139, 141.
- ¹⁰⁴ The strongest of which were probably the procedural arguments, although it is impossible to view them as wholly isolated from the broader issues.
- ¹⁰⁵ P. M. Morriss, "Should we subsidise Public Transport?" (1983) 54 *Political Quarterly* 392, at 398.
- ¹⁰⁶ Several recent studies have suggested that on a cost benefit analysis subsidies of urban public transport are justified/economic. Cf. S. Glaister, *Fundamentals of Transport Economics* (1981) pp. 86–91; A. Grey, *Urban Fares Policy* (1975) ch. 5.; C. A. Nash, *Economics of Public Transport* (1982) ch. 2.
- ¹⁰⁷ P. Morriss, *op. cit.*, 394.