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Semiotics and Methods of Legal Inquiry: Interpretation and Discovery in Law from the Perspective of Peirce's Speculative Rhetoric

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I. INTRODUCTION AND MAIN THRUST

Because I have written extensively elsewhere on Peirce's speculative rhetoric[1]—a term synonymous with semiotic methodology in his philosophy of signs—little attempt will be made here to discuss in detail this concept except to clarify it with respect to interpretation and discovery procedures in law. In brief, Peirce's semiotic methodology, or speculative rhetoric, is the highest division of his expanded, pragmatic logic. It seeks to account for the development of meaning in verbal signs in all acts of inquiry, such that a sign is shown to interpret its previous sign, or referent in discourse, and to bring a cumulation of meaning forward in a dynamic and open-ended process. The result of any given inquiry is a judgment which corresponds to the conclusion of a logical argument.

From the perspective of pragmatics, as defined by Peirce, a judgment is a value-sign which acts to bring about an end or goal which, ultimately, has effectual bearing on practical affairs in society. According to Peirce's scheme, ethics, or conduct in practical affairs, is governed by value-signs and value-systems which are networks of interrelating signs. All of logic, or possible modes of reasoning, in turn, is dependent on ethical systems. Thus, while speculative rhetoric, or methodology, as the highest level of reasoning underlies the process of developing values and value-systems, the whole of possible choices of modes of reasoning is subordinate to value-judgments which are, themselves, the consequents of previous processes of inquiry.

A system of value-judgments in general may be said to correspond with a code of law in that it functions as a point of reference. However, in Peirce's view no code is ever complete, and thus all judgments may be regarded as provisional only, capable of reinterpretation and reformation. Peirce's insistence on the incompleteness of codes, or law-like judgments, is

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1. Additional discussion of Peirce's speculative rhetoric can be found in R. KEVELSON, CHARLES S. PEIRCE'S METHOD OF METHODS (1986); Kevelson, *Time as Method in Charles S. Peirce,* 2 AM. J. SEMIOTICS 267 (1983); Kevelson, *Peirce's Dialogism and Continuous Predicate,* 18 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 110 (1982).

directly opposed to the Benthamite[2] conviction which holds that a code in law must be in all respects complete in all its parts. In short, Bentham presupposes a closed system of inquiry whereas Peirce's concepts of indeterminacy, infinity or openendedness, and interpretation in inquiry stress the dynamic development of all systems of thought. In this case, the legal system and its encoding/decoding process is of concern. From the Peircean perspective, a logic of justification in the traditional sense is inadequate to the task of describing a continually changing and evolving process. Rather, it is a logic of discovery and inquiry which is not only more appropriate, but because more appropriate is more ethically suited for the task of accounting for the actual procedures in practical life. These actual procedures, prototypically, we find in the legal procedures of discovery and interpretation in open, or relatively open, social systems such as the United States.

As has been written elsewhere,[3] there is strong evidence for assuming that not only was Peirce critically influenced by issues and problems in the law during the last half of the nineteenth century, but was influential upon a radically new approach to discovery and interpretation in the practice of law. Indeed, as this article claims, it may be said that Peirce stands behind that whole movement in American law known generally as legal realism.

Legal realism is not a term which stands for a homogeneous approach to the law, and neither does it represent a unified and systematically cohesive theory of jurisprudence. Rather, the term legal realism may be regarded as indicating certain characteristics in the transformation of American law in the period roughly between the 1870's and the 1930's. This demarcation of the sixty years, more or less, of this period in which some of the most important spokesmen of legal realism practiced and preached, should not lead one to assume that this movement sprang into being like Minerva, whole from Jupiter's ear, nor abruptly ended at a time coincident with the great economic depression in this country. On the contrary, the first major expression of a semiotic approach to legal discovery and interpretation is to be found in Francis Lieber's 1839 *Legal and Political Hermeneutics*.[4] Lieber's work was a major reaction against Savigny's theory of legal interpretation[5] and also, in significant ways, anticipated Peirce's philosophy of signs and sign interpretation, or semiotics, and forecast more directly, with respect to law, Oliver Wendell Holmes' effectual transformation of American consti-

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2. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 334 (1948) (1st ed. 1780).

3. *See* Kevelson, *Legal Speech Acts: Decisions,* in LINGUISTICS AND THE PROFESSIONS 121 (R. DiPietro ed. 1982); Kevelson, *Semiotics and Law* in ENCYCLOPEDIC DICTIONARY OF SEMIOTICS (T. Sebeok ed. 1986); *see also* Kevelson, *Semiotics and the Art of Conversation,* 32 SEMIOTICA 53 (1980).

4. *See* F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3d ed. 1880).

5. *See* F. SAVIGNY, 1 SYSTEM OF THE MODERN ROMAN LAW 166-268 (ed. 1979) (1st ed. Berlin 1849).

tutional law and his impact on the development of legal realism both in this country and abroad.

This article focuses on Peirce's contribution to legal realism, through which processes of discovery and interpretation in American law were raised as problems and issues in the law. Peirce's contributions have subsequently become modified, sometimes radically transformed, and have consequently come to be seen in current practice as significant areas in the law in need of critical investigation.

It should be pointed out in passing, without close discussion at this time, that a semiotics perspective on law which this article assumes and carries forward is not to be confused with some recent structuralist approaches to law. These structuralist approaches are sometimes confused with what is intended here and in previous writings[6]—legal semiotics. Although, from a historical point of view the emergence of structuralism and semiotics in this country coincided around the early 1960's, totally different philosophical assumptions underlie each of these approaches, despite certain similarities which appear on the surface. Also, while there are important correlations between a semiotic approach to legal interpretation and the popular continental movement in hermeneutics,[7] the relationship between a Peirce-grounded semiotics and its method of interpretation and inquiry is not so much superficial as it is reflective of a divergence between the objectives of these two modes of sign interpretation. It is the task of the investigator of Peircean semiotics to recognize and distinguish Peirce's influence in semiotic studies of law and other areas which are not so explicitly labelled. It is the investigator's further task, then, to argue that although Peirce's enormous contributions are rarely directly discussed, they do actually constitute the basis of realism in law and its related movements.[8] While James and Dewey are most often cited as the philosophical forebears of these movements in American law,[9] and Peirce's work is largely neglected in this literature, this oversight may be attributed to the fact that the greatest bulk of Peirce's writings was not available to the early writers on realism, and, indeed, has only become accessible in very recent years. Thus, a legal semiotics as proposed here and elsewhere intends, not only to correct this oversight, but more importantly, to attempt to show how Peirce's thought, in total, may provide new directions and even some solutions to current problems in interpretation and discovery and in those closely related institutions of economics and politics.

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6. *See especially* R. KEVELSON, *supra* note 1.

7. For a discussion of the Hermeneutics movement on the Continent, see R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983).

8. For a discussion of the relation between the terms "Legal Pragmatism" and "Legal Instrumentalism," see R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

9. *See id.* at 19-80.

More than forty years ago Max Fisch showed clearly the relation between Peirce's pragmatism and the prediction theory in law which is generally associated with Justice Holmes.[10] Indeed, less than a year earlier we also find Edwin Garlan actively descrying the then, and still current, practice of our official legal actors "still struggling against a frame of reference predicated upon premises, principles, and method characteristic of eighteenth-century rationalism and nineteenth-century evolutionism and utilitarianism, attitudes which have already been seriously questioned and modified in other social disciplines."[11] Garlan correctly understands that the law must also move in a new direction toward a "pragmatic philosophy of law."[12]

Legal realism is such a movement and its purpose, according to Garlan, is dual: it intends law as an "experimental and fact-controlled method," and also—inseparably also—as a process of "functional interpretation" of its assumptions, rules, and statutes, in which law is always to be regarded as coordinate with other social institutions and, therefore, capable of being "tested by its contributions to the larger whole."[13] We recall here Holmes' assertion that the *Constitution of the United States is nothing but an experiment.*[14] An experiment, in semiotic terms, is an operation or series of operations upon an hypothesis, or possible idea. An idea, which is, to Peirce, simply another word for a possibility, *is a sign.* An idea, then, is a representation of some realizeable aim or goal. It is a complex structure which is not fixed and permanent, but which is malleable and cultivatable. An idea, regarded as an area of thought, may be so defined and circumscribed by boundaries which, for the purposes of experimentation and investigation, distinguish it from its customary ground or context. It is growable and thus capable of quantitative as well as qualitative change, increasing in its extensive and its intensive dimensions. Inquiry as a process is such a method for increasing the yield of an area of thought, or idea, or sign—and in our case—of law itself as an experiment.

If the main purpose of correct reasoning in general is to reduce uncertainty in selected instances, the main purpose of law in particular is to reduce uncertainty with respect to social interactions which fall within the province of institutional jurisdiction. Within the institution of law itself the legal practitioner or lawyer is primarily concerned with prediction, not only as it bears on the theoretical problems of judicial interpretations and opinions, but also because prediction, as a theory of law, permits some limited certainty

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10. *See* Fisch, *Justice Holmes, the Predication Theory of Law, and Pragmatism,* 39 J. PHIL. 85 (1942).

11. *See* E. GARLAN, LEGAL REALISM AND JUSTICE 3 (1941).

12. *Id.* at 4.

13. *Id.* at 6.

14. *See* O.W. HOLMES, *A Theory of Legal Interpretation,* in COLLECTED LEGAL PAPERS 203 (1952); *see also* Dewey, *Justice Holmes and the Liberal Mind,* in MR. JUSTICE HOLMES 33 (F. Frankfurter ed. 1931).

with respect to the future action of the courts.[15] Thus, legal realism attempts a thorough-going pragmatic transformation of the idea of law such that no contradiction should separate legal theory from legal praxis. But the lawyer, no less than the legal philosopher, should be engaged in the same acts of law—where "act" is both on the level of ideas, and their development in thought, and in the courts with respect to practical legal procedure.

What is needed, Peirce stressed, is not a doctrine, but a method such that the consequences of discovery and inquiry in thought may be understood as representations of actual phenomenal processes in the world of experience. Thus, Peirce's semiotics was intended to represent, as a whole, actual processes of inquiry in experience. The prototypical experience has long been regarded as the relation between persons in society and the law, just as the legal argument is assumed to be the prototype of ordinary argument.[16] As has been claimed elsewhere,[17] and is briefly repeated here, Peirce's expanded logic, or semiotics, is a representation of this legal relation. His method of methods may be understood as a model for interpreting models of inquiry of which signs and systems of signs constitute the material for the understanding.

As Garlan writes: "What realism has attacked is . . . not logic but the tendency to use logic along with insufficient concern for any but the formal character of the premises. Its own aim is an adequate, though thus far unobtainable, logical structure."[18]

Not only is Garlan representative of his colleagues in his failure to recognize that in Peirce's expanded logic, or semiotics, the legal realists had that which they claimed was needed, but in addition, Garlan is representative of a more current failure. For today, it remains for present investigators to bring to the attention of the legal community Peirce's thought as it directly bears on some of the most problematic issues in law which include the economic basis of legal interpretation as well as the interpretation in the courts of economic issues.

In the following, some of the major problems in discovery and interpretation in law will be indicated, although time does not permit detailed discussion. The general background of these problems will be pointed to, and the attempts of legal realism to deal with them, on specific issues, will be recalled.

It is of special importance to show that some of the major conflicts between legal realists themselves, and between legal realists and their opponents, derive from an inadequate grasp of the pragmatic assumptions which underlie realism and give it its impetus as a movement in American law. For example,

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15. E. GARLAN, *supra* note 11, at 6.
16. S. TOULIM, THE USES OF ARGUMENT (1958).
17. *See* R. KEVELSON, *supra* note 1; *see especially id.* at ch. 7.
18. E. GARLAN, *supra* note 11, at 9-10.

neither James' nor Dewey's versions of pragmatism carry forward certain of Peirce's ideas which still need to be examined in this context. Also, because Peirce did not conceive of a direct application of his pragmatics, or "pragmaticism" as he later termed it, to practical affairs, there has been a general tendency to disregard his actual and significant contributions to law, and to legal-economic theory and practice.[19] There have been, fortunately, outstanding exceptions to the general disregard of Peircean thought in the practical science of law, politics and economics. For example, Hayek's views on the economic bases of law in a free society oppose Keynsian thought in a manner which recalls Peirce's own rejection and refutation of Keynsian economics and Benthamite utilitarianism. Here, again, time permits only brief discussion of these issues, which must be taken up elsewhere for more comprehensive examination.

Briefly, also, the widespread assumption of the deontic structure of law will be discussed and shown to be inadequate. Rather, inquiry based on a Peircean semiotics corresponds much more closely to an erotetic structure, or a logic of questions and answers. While both deontic and erotetic structures presuppose a dialogic relationship, it is only the erotetic model which correctly indicates that a law is potentially problematic, and of the nature of a question rather than as a command, or an absolute given. The assumed givenness is, as Peirce stresses, hypothetical only, and thus open to a method of interpretation which is, in effect, a method of creating new law. Frank's famous question on this point will be discussed in this context.

The concluding section of this paper raises the question of whether proposed reforms in civil discovery law, especially in the United States, will bring about reductions in obstructions to justice in the courts by significantly minimizing the predominant adversarial system of adjudication which prevails today. The adversarial system as currently practiced is harshly criticized from many quarters as an unwanted vestige of the "sporting theory of justice." These criticisms, as will be pointed out, spring from those who also advocate stronger federal codification of rules and regulations governing commerce. It may be suggested that the strongest objections to more inclusive and comprehensive discovery charge discovery with promoting "overdiscovery." Levine's study found,[20] for example, that the "use of discovery is so excessive as to cause unnecessary expense and delay and to permit the better-financed litigant to coerce his opponent into an unfair settlement."[21] What is lacking in the current controversy is a well-defined model—a logic of discovery that is appropriate, not to a closed system of thought or of society, but rather, to such open, pluralistic societies as characterize modern de-

19. *Cf.* R. SUMMERS, *supra* note 8.

20. *See* J. LEVINE, DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS 115 (1982).

21. *Id.*

mocracies. This logic of discovery should also be appropriate to such multidimensional, open and motion-picture systems of thought as Peirce attempted to account for in those aspects of his existential graphs[22] which were primarily concerned with the modalities of possibilities.

It is worth noting, in passing, that our present interest in the impact of American pragmatism on one of the most revolutionary movements in the history of law, which in a general sense has been termed legal realism, was one of the major commitments of the *Institute of Law* which was established at The Johns Hopkins University in the late 1920's. This important research came to a virtual standstill, not through lack of interest nor because of any failure to develop significant relations between pragmatic philosophy and legal problems, but rather because of lack of funding brought about by the Great Depression. The Hopkins Institute was seen as a victim of economics in its demise; but its mission reemerged in the 1960's with modern semiotics. Scholars, who identify modern semiotics with Peirce's thought in general, and who regard legal semiotics as both root and ramifications of Peirce's semiotic philosophy—the method of which is pragmatics in the comprehensive sense intended by Peirce—now reassume it, as is argued here and elsewhere,[23] as their mission.

Rumble's opinion that legal realism is founded on pragmatism is widely shared.[24] The literature on this aspect of the relationship between American philosophy and American law is enormous, and need only be mentioned here in passing. Rumble correctly points out that for more than three-quarters of a century the link between pragmatism and the new law has been acknowledged;[25] but what has been lacking since Holmes, especially in his correspondence with Harold Laski,[26] is a thorough-going inquiry into the influence of pragmatism on law. While it was unmistakeably clear to the Legal Realists that the "indispensable first step . . . is to trace the impact upon them of the pragmatism of James and Dewey, the sociological jurisprudence of Roscoe Pound, and the views of Mr. Justice Holmes,"[27] we find little or no mention of Peirce. Thus, not only has this first step not been completed, but it cannot even be properly initiated until Peirce's semiotics is firmly put in place as the ground from which, and against which, this movement was brought forward. Pragmatism, Rumble notes, "was the dominant current of philosophical thought in the 1920's and 1930's. The

22. Peirce's Existential Graphs were designed as a means of presenting a visual structure of the logical development of a cohesive argument or idea. Peirce completed the Graphs to represent deductive and inductive modes of reasoning, but never completed the graphs which explain and show modal reasoning.

23. *See* R. KEVELSON, *supra* note 1.

24. *See* W. RUMBLE, AMERICAN LEGAL REALISM 1-20 & *passim* (1968).

25. *Id.*

26. *See* HOLMES-LASKI LETTERS (M. Howe ed. 1953).

27. *Id.*

realists were not, in general, philosophers who applied ready-made systems to the law. They were lawyers first and foremost,"[28] who concurred with Dewey's assertion that the "logic of rigid demonstration" is inadequate and that what is needed is a "logic of search and discovery . . . an experimental logic . . . a logic of inquiry."[29] In these remarks, prefatory to his major work on the logic of inquiry in which he recovers much but not all of Peirce's semiotic method of inquiry, Dewey unmistakeably shows the constructivist aspect of all systems of thought as models of action in the world. Thought itself is viewed, as in Peirce, as significant actions which are oriented to goals and consequences and are not merely reflective of, or extensions of, antecendents and referents.

Such a view presents serious problems, not only for semiotics or logic—and Peirce regarded semiotics as the whole of logic—but on a workaday level, for law. If the referential function of a legal code is no longer to be regarded as a complete and fixed authority, and yet, if the rules for open-ended inquiry and discovery in law are to be specified with respect to any given system of law, how is discovery to proceed when the guidelines or rules determining discovery are only provisional and modifiable in response to the outcome of discovery procedures? Are discovery and interpretation not only to be antithetical to the "sporting theory of justice," but are they to go beyond the old adversarial, "sporting" system by infusing the processes at every stage with an element which resembles, at the surface, capriciousness? How is chance to be inseparable from the logic of inquiry proposed by the pragmatists, and yet not force judicial interpretation and discovery into a kind of institutional instability? Further, if the rules for interpretation and discovery are said to be a part of any given system of law which they govern, *then it must be conceded that the system of law, as a whole, is unstable and that this instability is desirable. What should be apparent here is that legal reasoning, from the realists' point of view, if it is faithful to its pragmatic ground, must violate the traditional laws of contradiction, that is, a legal system in the process of Becoming rather than one which is at least, ideally, existent and in place.* Indeed, this is precisely what Peirce shows us: the traditional laws of thought *are* inadequate to describe the actual process of evolving ideas, and logics need to be constructed which sustain paradox and account for contradiction and which do not attempt to impose reductive solutions. It is in this area of inquiry, which involves indeterminate situations, that Dewey fails to bring forward Peirce's more radical concepts; yet, it is Dewey, rather than Peirce, who became the philosophic touchstone for the realists in the 1920's and 1930's.[30]

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28. W. RUMBLE, *supra* note 24, at 8.
29. J. DEWEY, PHILOSOPHY AND CIVILIZATION 126-34 (1931).
30. *See* W. RUMBLE, *supra* note 24, at 8; R. KEVELSON, *supra* note 1.

II. INTERPRETATION AS LEGISLATION

Given the scope of this article a historical recapitulation of the development of theories of legal interpretation is not possible. It might be pointed out, however, that the concern with interpretation, reaching back as far, in a systematic way, to the earliest professional law schools in Western civilization—to Bologna and Milan—was primarily with the notion of a legal system as a closed system, in response to a relatively closed society, within a fundamentally completed, circumscribed and finite universe. If, as Berman suggests, the Justinian Codex served the students of law of the 12th and 13th centuries as a frame of reference, the Codex was never assumed to provide actual reference for then modern legal systems, but was used as a model only, as a frame of reference for interpreting legal codes in general.[31] When Savigny undertook in the 18th century to describe procedures for the interpretation of law, his fidelity to the Roman codes as such was in an important sense atavistic.[32] Subsequent approaches to legal interpretation, in reacting against Savigny, emphasized the responsibility of interpretation to a changing society and changing social values. For example, Francis Lieber, Savigny's student, stressed the concensual nature of interpretation required in the defining of terms, or signs as he correctly called them.[33] Beal's *Cardinal Rules of Legal Interpretation,* in 1896, presumes that such a consensus exists and, in fact, agreement obtains on the meaning of special, technical legal terms. Still, definition remained as a paramount task, preliminary to interpretation in the courts. Up until this time the juristic principle, "when the text is clear there is no room for interpretation," (*in claris non fit interpretation*) was generally assumed, so that usual or authentic interpretation referred to the interpretation of law for which rules governing interpretive processes were provided by the legal system in question and, indeed, were an integral part of that system. Doctrinal interpretation, on the other hand, referred to interpretation in the absence of rules for interpretation. This "doctrinal interpretation," regarded as anomolous in traditional approaches to interpretation, becomes central from the perspective of legal realism.

One hears Peirce's reminder in the background of legal realism, that all propositions are, at bottom, hypothetical, and all laws are provisional only. To Holmes, the capacity to call into question even, and especially, one's first principles marks the "civilized man."[34] Frank, in *Law and the Modern Mind,*[35] affirms the need for legal rules; rules, like codes, when absolutely

31. H. BERMAN, LAW AND REVOLUTION: THE FORMULATION OF THE WESTERN LEGAL TRADITION (1983).
32. *Cf.* F. SAVIGNY, *supra* note 5, at 166-268.
33. *Cf.* F. LIEBER, *supra* note 4.
34. HOLMES-LASKI LETTERS (M. Howe ed. 1953).
35. J. FRANK, LAW AND THE MODERN MIND (1930).

binding are a form of legal fundamentalism and as such have no place in modern society and its institutions. Frank speaks of the construction, or hypothesizing of doubts with regard to so-called established truths. Doubts to Frank, as to Peirce, become the means for systematic and scientific interpretation and thus for greater freedom from dogmatic authority. Frank says: "Increasing constructive doubt is the sign of advancing civilization. We must put question marks alongside many of our inherited legal dogmas, since they are dangerously out of line with social facts."[36] Frank, with this book, was exploring new territory in legal theory and practice. Indeed, he was no less a pioneer than Peirce, who recognized that his ventures into semiotics would mark him as a frontiersman in a new, unexplored, and possibly dangerous field.

What Frank opposed was not so much the "rules of law," but the myth of certainty in the rules of law. With respect to the rules of interpretation, Frank was explicit in his refutation of some of the earliest formulations of interpretation rules which appeared, as mentioned before, at the close of the nineteenth century. In particular he opposed such doctrines of interpretation as Edward Bele's *Cardinal Rules of Legal Interpretation*[37] and its congeners. Frank also opposed the notion of "legal absolutism," advanced by Harvard law professor Joseph Beale; he, not the earlier Edward, was the target of Frank's epithet: "Bealism." To the realists, this "Bealism" came to stand for all of legal absolutism, a movement which they opposed.[38] The kind of "word-magic" which Frank accused Beale of practicing was, in a legal context, none other than the denunciatory "nominalism" which Peirce levelled at his opponents. Frank clearly follows the path of the law which Holmes, implicitly affirming Peircean method, had cut through. Frank says that "Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them."[39] Frank goes on to say that "[t]he law, therefore, consists of *decisions,* not of rules. If so, then *whenever a judge decides a case he is making law.*"[40] Frank is careful to qualify what he means by "decisions"; they are signs which point to future decisions, or, in Peirce's terms, they are *indexical signs.*[41] Frank speaks of the "if-y" and the "chancy";[42] and

36. *Id.* at 159.
37. E. BELE, CARDINAL RULES OF LEGAL INTERPRETATION (1896).
38. J. PAUL, THE LEGAL REALISM OF JEROME N. FRANK 35-38 (1959).
39. J. FRANK, *supra* note 35, at 127.
40. *Id.* at 128 (emphasis added).
41. *Id. See also* Kevelson, *Legal Speech Acts: Decisions,* in LINGUISTICS AND THE PROFESSIONS 121 (R. DiPietro ed. 1982), where a decision is regarded as having the structure of the interrogative in verbal legal acts.
42. *See* Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism,* 9 RUTGERS L. REV. 425, 428-29 (1954).

although there is little or no direct reference to Peirce's semiotics in Frank's voluminous writings, it is fair to assume that what he means by these terms is what Peirce, himself, describes as hypothetical reasoning (the "if-y") and the element of chance (the "chancy"). This element of chance must be taken into account in a universe which Becomes, rather than Is, in an infinite universe which we, as makers of reality and its laws through our sign constructions, create. It is no mere coincidence that prompts Frank to write on the application of non-Euclidean geometry to law; it is Peirce's influence which finds one of its most ripe and receptive carriers in Frank. In a footnote,[43] Julius Paul remarks that Frank was critical of his fellow realists (like Llewellyn, Patterson, Cardozo and Felix Cohen) and critical as well of John Dewey whose pragmatism shared, with the above realists, a lack of dimensionality which Frank felt was essential. Frank, according to Paul, did not "discover" Charles Peirce until 1942 (if we are to believe Wormuth).[44] A more faithful report on this "discovery" would reveal that Frank, like Peirce before him, had begun to think beyond three-dimensionality, to multi-dimensionality which presupposes, in von Wright's words, a logic "which studies the conceptual frame of a dynamic world, a world of change and flux," a world in which contradiction plays a major role and not one in which paradox is to be resolved and eliminated.[45]

For many of the legal realists the problem of interpretation was tantamount to a rejection of legal positivism, perhaps exemplified by Kelsen who contrasts positive law with sociological jurisprudence.[46] In some ways Kelsen is compatible with Peirce although he is clearly opposed to the position of sociological jurisprudence, which he identifies with the "American legal realists."[47] Kelsen contrasts his position by stating that a normative theory of the law attempts to prescribe how rules govern men in their practical affairs through the mediation of legal and other deontic systems. The object of sociological jurisprudence, or American realism, he points out, intends only to describe how persons actually do behave and how a legal system of rules merely extends actual behavior in an authorized and responsive manner. Actual behavior is the starting point for observing general principles which can then be written into legal rules. Society, then, is the model for a legal system, and not, according to the positivists, the other way around, with the law as model for right conduct.[48]

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43. *See* J. PAUL, THE LEGAL REALISM OF JEROME N. FRANK 35-38 (1959).

44. Wormuth, *Aristotle on Law*, in ESSAYS IN POLITICAL THEORY: PRESENTED TO GEORGE H. SABINE 45 (M. Konuitz & A. Murphy eds. 1948).

45. *Cf.* G.H. VON WRIGHT, TIME, CHANGE AND CONTRADICTION 14-32 (1968).

46. Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 53 (1941).

47. *Id.* at 52 n.2.

48. *Id.* at 57-58.

Peirce's position is that semiotics, or logic as a whole, is descriptive rather than prescriptive. His methodology, similarly, is descriptive. It attempts to account for the process of evolving thought and does not attempt to impose commands of an ethical or moral nature on the phenomenon of thinking. In this respect, as in others, Dewey is at variance with Peirce. Dewey *does* wish to use a logic of inquiry as an instrument for bringing about correct thinking, especially with respect to indeterminate situations and apparent paradox. This is an essential distinction. If this distinction is not marked as perhaps the most significant difference between the positivists and the realists, Kelsen's notion that a "rule of law" is, "like the law of nature, a hypothetical judgment that attaches a specific consequence to a specific condition" seems Peircean and not unlike the realism of Pound, for example, or even Llewellyn.[49] On the one hand, according to Kelsen, rules for interpretation are hypotheses, but these hypothetical or provisional rules exert a deontic force: they are to be regarded at least on the surface as binding and as if they were commands which "ought" to be followed, that is, referred to precedentially. Thus, the need for legalisms and legal fictions which honor the imputed permanence of the provisional rule perpetuates the myth, as Frank claimed. It should be mentioned that Kelsen denies the coercive force of a rule in law. Kelsen denies that law exerts an enforced obedience and he insists that the moral and psychic sanction which members of society experience in the violation of fundamental rules of conduct is merely transferred to the legal system, which carries out society's moral condemnation in a specifiable and concrete manner. Kelsen argues that "the law is not, as Austin formulates it, rule 'enforced' by a specified authority, but rather a norm which provides a specific measure of coercion as sanction."[50] In effect, Kelsen's theory—the pure theory of law—conflates values with ethics and shows the normative character of the law as a mechanism for fulfilling ideal social goals and for repairing the ideal fabric of society which is rent by its delicts. From this view a whole is presupposed; from Peirce's views, and from the view of the Realists, the idea of wholeness in society in general, or in law as a particular social institution, is at best a working idea—a model subject to change and correction, or, in a word, an experiment.

If a positive jurisprudence intends to reinforce belief in a stable and nonchanging code, a system of law which is predominantly under the influence of the positivists may actually regard rules for interpretation (and interpretation in each case) as provisional. However, this system of law will superimpose over the provisionality of rules a semblance of absoluteness, such that the interpretive acts of the judiciary appear to be discovery rather than the invention in law which, in fact, they are.

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49. *Id.* at 51.
50. *Id.* at 57-58.

On the other hand, the realists' position, at its most extreme (in the writings of Lon Fuller), states that "all forms of legal positivism have the common characteristic of being *formal* in their method; they deal not with the content of the law but with its form and sanction."[51] Fuller argues for greater judicial autonomy over against the traditional sovereignty of the legislator. Interpretation, in Fuller's proposed system, would become the responsibility of the judge to deliberately evolve a rule so that the rule becomes subsumed in the interpretation; that is, the rule's meaning becomes part of the accumulated meaning of the new decision which does not merely extend the old rule but, in effect, transforms it into a new sign, or new law. This new law, in Peirce's sense, is what he calls an interpretant. In any given process of inquiry, the object, or rule in question, is the immediate interpretant. Its "factiveness," or agreed-upon definition with respect to the case at hand in the inquiring experience is the dynamic interpretant. The adaptation to the case at hand by means of qualification, revision, redefinition, or any of the available means by which meaning is increased in a term results in a judgment arrived at through interpretation. This judgment is the final interpretant. This final interpretant conveys a kind of certainty in the law until, or unless, in the future some "surprising fact" or novel aspect of another case impels fresh doubt and hence fresh inquiry into the relation between the law, now as a provisional given, and the situation at hand. Thus, every case brings with it at least the possibility of doubt, and therefore the possibility of a new inquiry resulting in a new judgment, law, or final interpretant emerges.

Fuller mentions in a footnote[52] to his argument in favor of judge-made law the school of legal realism in Sweden, which derives from the writings of Hagerstrom, and is best known to English readers through *Law as Fact,* by Olivecrona.[53] There is little evidence to support the thesis that Hagerstrom and his disciples, including Olivecrona, were familiar with Peirce's work; but indirectly, through Dewey, we would expect to find a Peircean semiotics in full play.

Fuller's claim, which is supported by the Swedish realists,[54] is that the judge plays an active role, through interpretation, in shaping common morality; he does so in a dialogue with society, in response to the changing values of a changing community. Realists such as Fuller are intent upon reasserting the malleable and revisable character of a common law, and want to show that the rule of today's judiciary, in shaping extra-legal or moral attitudes, is in large measure comparable to the pre-statutory period of the common law when the dialogue between the highest judge in English common

51. L. FULLER, THE LAW IN QUEST OF ITSELF 133-34 (1940) (emphasis added).
52. *Id.*
53. K. OLIVECRONA, LAW AS FACT (ed. 1939).
54. *Id.*

law—the King—was clearly of a dialogic and responsive nature. This dialogic structure, as has been shown elsewhere,[55] is describable by a logic of questions and answers—an erotetic logic to which a deontic logic is subordinate and derived.[56]

Fuller, it should be noted, does not go as far as others known as realists. For example, Roland Gray as early as 1909 set about to refute Austin's theory of the sovereign and to show that the actual force in the making of law and the keeping of legal unity was the judge.[57] Gray failed to regard a judicial act, such as an interpretive decision, as an act; instead, he regarded such acts as commentary only. Holmes, on the other hand, had shown more than a dozen years earlier that a judicial decision was effectively more than mere commentary, or words, but was in fact consequential action.[58] It is appropriate to remark in this context that Peirce and the pragmatists who followed him believed also that all thought was action, but of a form which differed from observable physical acts. Peirce regarded ideas as phenomena, and maintained that one could, indeed, observe the development of an idea by mapping it, or representing it diagrammatically. Thus, in terms of movement toward the realization of a goal, Peirce's predictive semiotic method assumed that visible physical motion and process was no more and no less action than the growth of a thought. This thought is considered phenomenal because its consequences, or extensions, may be readily ascertained as a fact by any community of thinking persons.

The concluding few pages of this article discuss the notion of fact from the shared perspective of the realists and the pragmatists, especially Peirce. What facts are admissible in discovery? What is needed for something to function as a fact in discovery? How does a logic of discovery for law account for the selection of facts? The foregoing disucssion is intended more to open questions than to resolve them. In particular, this discussion is intended to indicate how Peirce's semiotics, rejecting both positivism and nominalism, places the process of inquiry within an open-ended frame of creating relations out of novel material as well as creating new structures of relationship between the given and the new. This logic of inquiry, or semiotics, transforms previous notions of interpretation. Peirce's interpretation of signs as integral within inquiring processes is a method which bears little resemblance to the theories of hermeneutics currently in the forefront of Continental philosophic interest. As stressed throughout, Peirce's se-

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55. *See* Kevelson, *Semiotics and Structures of Law,* 35 SEMIOTICA 182 (1981); *see also* Kevelson, *Peirce's Dialogism and Continuous Predicate,* 18 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 110 (1982).

56. R. Kevelson & P. deRidder, Inlaws/Outlaws (1977) (available at Indiana University Research Center for Semiotic and Structural Studies).

57. J. C. GRAY, NATURE AND SOURCES OF THE LAW (2d ed. 1929).

58. *Id.; see also* O. W. HOLMES, *The Path of the Law* in COLLECTED LEGAL PAPERS 127 (1920).

miotics is most faithfully represented by the legal realists, as far as they went, but not as far as this idea may yet evolve.

III. Discovery and Concluding Remarks

This article has made mention of inquiry as a method of discovery, which is describable by a logic of questions and answers. In law, interrogatory procedures have traditionally been a part of legal discovery, and have developed as one among other methods of discovery. When William Petheran wrote his treatise, *The Law and Practice Relating to Discovery by Interrogatories Under the Common Law Procedure Act, 1854,*[59] it was evident that not all interrogatories may be conducted as means through which discovery may be sought, but rather only those interrogatories for which rules of procedure and interpretation have been established. At this time reference is made to the fact that it is the courts which establish those rules which determine what kind of interrogatory may be administered, and how it is to be administered. The problem of the interrogatory includes the selection of appropriate affidavits and testimony which are preliminary to the administering of interrogatories. Not all interrogatories imply oral questioning of litigants in court. An important feature of this early examination of discovery is that the shaping of discovery was largely in the context of equity proceedings.

In 1912 Robert Ross published what appears to be the first comprehensive discovery treatise: *The Law of Discovery.*[60] This treatise set forth the general rules relating to discovery in law and the related rules, both general and particular, which governed interrogatories. Here, too, it is the court, or judge, who decides: (1) if interrogatories will be permitted; (2) if permitted, which will be permitted; and (3) which interrogatories, if any, are even to be considered. The criteria for the allowing of documents related to proposed interrogatories have to do both with the question of fairness with respect to the case, and also with the economic costs involved. Thus, the problem of cost and discovery was as crucial seventy years ago as it is in the present, especially in deriving legal and economic relations. If interrogatories are allowed they must be confined only to those questions which enable the interrogating party to obtain information directly related to the material facts which are at issue. To begin with, then, in discovery all of the procedure permitted or disallowed is entirely at the discretion of the judge.

Disclosure of evidentiary documents and inspection of such documents are clearly distinguished. In a similar fashion, Peirce would hold that the

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59. *See* W. Petheran, The Law and Practice Relating to Discovery by Interrogatives (1864).

60. R. Ross, The Law of Discovery (1912).

selection of a "quality" is equivalent to the disclosing of a potential fact. But the examination of the so-called fact is a different stage of the discovery process, both in legal procedure and in Peirce's phenomenological preliminary to semiotic analysis. A fact, to Peirce, is not yet a sign. Analogously, the admissibility of evidence or facts in court is a prior stage to the interpretation of the fact with respect to the settling of a claim.

Peirce's phenomenology, as a preliminary stage to the semiotic inquiry, corresponds methodologically to discovery in law. What is needed is a point by point discussion of the correspondence between Peirce's discovery procedures and his justification of such procedures within a logic of discovery, and discovery in law as preliminary to the court's judgment on the case. This is a task for the immediate future of legal semiotics.

It should be pointed out that Peirce had not worked out a logic of discovery, but had discussed it in much detail. Gore, at the end of the nineteenth century, was among the first to point to the need for a logic of discovery as a means of accounting for the transition from felt values to ethical conduct in scientific inquiry, to a testing of such values in a logical manner according to the method of a logic of discovery.[61] Carmichael, in 1930, in *The Logic of Discovery,* equates a logic of discovery with a logic of creativity. If this is the case then Carmichael must believe it highly unlikely that a science of inference from the known to the unknown can be developed. But this is not the major problem Carmichael sees. He says that the major stumbling block is that "[d]iscovery is relative to the point of view,"[62] and, therefore, would need not *a* logic of discovery, but rather, *logics* of discovery. This is precisely Peirce's point when he stresses that the aim of semiotics is to make clear and accessible a method of methods, that is, a method of inquiry which permits inquiry into not one but a countless number of points of view or of systems of thought. Further, Peirce held that we need such a method of methods to see how these various thought systems are related, or become related, or give birth to new relations. The method of semiotics, then, would provide a means of deriving the most general principles upon which the judiciary decides, even for the most realist of active judges. Rather than focus on the arbitrariness of individual judicial decisions, Semiotics would seek the *principles* of inquiry which relate even opposing judges, as each represents a *system of thought.* Peirce's Methodology—an inquiry into inquiry—seeks to bridge systems of thought by creating new relations between them.

Finally, it has long been accepted, if even as a controversial issue, that what we call a "material fact" is not a single, observable phenomenon. Rather a fact is a complex organization of prior judgments. Peirce, similarly,

61. G. GORE, THE ART OF SCIENTIFIC DISCOVERY (1878).
62. R. CARMICHAEL, THE LOGIC OF DISCOVERY 42-43 (1930).

anticipating the inquiry of science—in law as in physics—into the unity of the fact itself (the empirical and presumably verifiable "thing"), carefully explains how even the first glimpse of an observable is never actually a first glimpse, but is an inference from previous judgments of former glimpses which only appear single, but which at every stage are *relations of judgments of the observable fact in question.* Thus at every stage, beginning with the admission of a quality of an observable in one's attention, facts are always relationships. No factual relationship can ever truly be established on infallible ground. No matter how fine our instruments, Peirce insists, no individual can discover a fact. A fact requires the testimony of two or more persons who agree to agree on the fact as such.

So long as we no longer regard individuals as atomistic particles of society, or regard law as a discrete institution in a social context—or self-referential only—we are forced to begin inquiry with a contradiction between two points of view, where two points of view are, *because they are two points of view,* contradictory in some respect.

To paraphrase von Wright, if we ignore the underlying contradictory relation we lapse into an untenable conviction which holds onto a nonexistent unity, or finite totality of rule. But, if we "lose at the micro-level what we gained at the macro-level" we lose a measure of possible freedom.[63] Unfortunately, von Wright gives Peirce little credit for having earlier arrived at a similar conclusion; von Wright proposes a deontic method of inquiry in law where as mentioned, the more primitive (that is, more basic) would be interrogative logic of inquiry.

Holmes' view of law as an experiment presupposed such freedom of inquiry and interpretation. The realists who followed did not go far enough, either forward or back to the Peircean semiotic basis of inquiry. It remains for those who elect to evolve this idea to regard it as an interpretant, infinitely open to inquiry and to the genuine novelty of contemporary thought upon this special topic.

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63. G.H. VON WRIGHT, *supra* note 45, at 31.