

LEGAL DISCOURSE; STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS

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ABSTRACT

The principal substantive aim of this study is that of providing a critical account of the relationship of law to language. While studies within the philosophy of law have, on occasion, examined the presuppositions of legal analysis and legal practice in the terminology of the philosophy of language, law and language have in general been treated as discrete phenomena - the conjunction "and" has marked a constant separation of distinctive areas of expertise. Utilising the linguistic methodologies developed within sociolinguistics, discourse analysis and critical semiotics, the specific purpose of this study has been to develop an interdisciplinary approach to law and legal texts as language or as linguistic practice. It has been argued throughout this work that the language of the law is a prominent indicator of the social and historical genesis and motivation of the legal text as instrument of social regulation and discipline. Legal discourse, like any other of the traditional rhetorical genres or language varieties, is an historically and rhetorically organised product. It is thus proposed that a critical linguistic methodology can read within the structure of legal discourse the socio-historical and political affinities and conflicts that led to the emergence of the myth of law as a unitary language and as a discrete scientific discipline. If the present study has been in any measure successful, it will have contributed to the deconstruction of that myth and to its displacement by a more adequate and critical concept of legal discourse as a language of power, as the pursuit of control over meaning and as instrument and expression of domination.

ACKNOWLEDGEMENTS

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TABLE OF CASES

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Bromley London Borough Council v Greater London Council (1982) 1 AER 129.

Glinski v McIver (1962) AC 726.

Home Office v Harman (1982) 1 AER 532.

Horrocks v Lowe (1975) AC 135.

Lynch v D.P.P. (1975) AC 653.

Photo Productions v Securicor (1980) 1 AER 556.

Prescott v Birmingham Corporation (1954) 3 AER 698.

Regina v Finney (1874) 12 Cox Reports 625.

Roberts v Hopwood (1925) AC 578.

Rookes v Barnard (1964) 1 AER 400.

Universe Tankships of Monrovia v Int. Transport Federation (1982) 2 AER 67.

Viscountess Rhondda's Claim (1922) 2 AC 389.

Williams v Home Office (no. 2) (1981) 1 AER 400.

1. INTRODUCTION; LAW AND LANGUAGE

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 of specifically 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 (deductive) 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, both spoken and written, 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,¹ no recognition has been provided of the peculiar

[1] See, for example, D.Mellinkoff: The Language of the Law (1963) Yale U.P.; P.Carlen: Magistrates' Justice (1976) Martin Robertson; W.O'Barr: Linguistic Evidence (1982) Academic Press. A more sophisticated account is put forward in I.Stewart: Sociology in Jurisprudence, in B.Fryer et al. (eds): Law, State and Society (1981) Croom Helm 107.

and distinctive character of law as a specific, sociolinguistically defined, speech community and usage. The critical aims of the present study will be those of endeavouring to develop an awareness of the 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 of power over meaning. In short, it will be the principle critical objective of this study to evidence the view that legal language, like any other language usage, is a social practice and that its texts will necessarily bear the imprint of such practice or organisational background. In attempting to recover the social and political dimensions of legal semantics and textual practice by means of linguistic analysis, I will be further suggesting that an adequate reading of the law should treat legal discourse or the legal genre as an accessible and answerable discourse, as a discourse that is inevitably 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 on² 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 commonplace. 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 peculiar opacity of legislative drafting with distaste.³ At their most extravagant, disaffected lawyers have broadened the scope of these perceptions into critiques of the verbal nature of legal disputes and of legal culture generally, but the significance of the linguistic element in

[2] For a recent conspectus, c.f. D.R.Harris: The Development of Socio-legal Studies within the United Kingdom (1983) 3 Legal Studies 315. See also, the symposium on legal scholarship in (1981) 90 Yale Law Journal.

[3] 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 op.cit.; D.Crystal and D.Davey: Investigations of English Style (1969) Indiana U.P. ch.2; D.Miers and A.Page: Legislation (1982) London. For the first major French symposium, see, (1974) 19 Archives De Philosophie du Droit (Le Langage du Droit).

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 purpose 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 has been 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 most superficial of historical surveys, however, will clearly indicate that such 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, more importantly, 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.

Part I.

The specific division of the present work into two parts, the first concerned with linguistics and legal theory, the second with rhetoric, its modern equivalent discourse analysis, and the reading of legal texts, reflects both the critical and the historical methods and objectives outlined above. My principal interest is in the contemporary interrelations of law and language within jurisprudence and formal legal practice. It is nonetheless the case that any attempt to develop a critical analysis of the linguistic assumptions underlying legal studies and its representations and readings of legal texts, requires that some account be given of the complex and extensive traditions to which it belongs. Specifically in the context of developing an alternative methodology for the analysis and reading of legal texts, it has appeared useful to distinguish two antithetical traditions of linguistic and jurisprudential analysis, those of exegesis and rhetoric. The former tradition, that of textual exegesis, is, and has long been, the dominant paradigm of language study and of legal interpretation, its treatment of the text being predicated upon its unity as the expression of a precedent intention or will. Broadly, the exegete claims to recover, passively and philologically, the true meaning and order of the text by virtue of an analytic reconstruction of its source.⁴ In Part I of the instant work, I shall endeavour to give an account of the contemporary versions of the exegetical analysis implicit within the dual development of the 'sciences' of language and of law which emerged towards the end of the 19th century and which retain an unhealthy degree of theoretical and practical dominance within their respective disciplines to the present day.

It is the argument of Part I that linguistics and legal science share the time, place and theoretical context of their inception as sciences.

[4] On the definition of the exegetical school in jurisprudence, see, W.Twining: *Some Jobs for Jurisprudence* (1974) 1 *British Journal of Law and Society* 149; H.J.Berman; *The Origins of Western Legal Science* (1977) 90 *Harvard Law Review* 894; I.Stewart: *Kelsen and the Exegetical School in Jurisprudence* (1981) *Proceedings of the U.K. Association for Social and Legal Philosophy*, Edinburgh. For a French language study, c.f. Ch. Perelman: *Logique Juridique* (1976) Dalloz, Pt.I. See also, P.Legendre: *L'Amour du Censeur* (1974) Paris; J.Lenoble et F.Ost: *Droit, Mythe et Raison* (1980) Bruxelles, pp.219-230.

The time was that of the last quarter of the 19th century, and the place, and theoretical context, was that of central European neo-Kantianism or philosophical positivism. The result was a common development and systematisation of language and law according to a philosophical 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 structuralism, that of an objective idealism whose themes and limitations I take up first in their most fundamental, linguistic, manifestation in the work of Ferdinand de Saussure. Chapter 2 is concerned to introduce the terminology and principal concepts of a non-specialist account of the birth of contemporary linguistics. In the accompanying critical commentary I endeavour to formulate certain of the limitations, absences and inadequacies of this (now traditional) linguistics, conceived by Saussure as the project of defining a science of the form of language at the cost of banishing semantics, the analysis of linguistic practice or of realised meaning, from linguistics.

Chapter 3 carries the aporias raised in the context of structural linguistics into a precisely analogous account of the development of legal science or positivistic formalism. This chapter provides a detailed, substantive, account of the modern development of legal science in the work of Hans Kelsen and of Herbert Hart. In both cases I have endeavoured to characterise and critically analyse the structure, motives and practical implications of a common concern to develop an account of the syntax of legal validity and corresponding logico-linguistic theory of the deductive application of legal norms or rules. Despite the fact that the theories in question - and the institutional and pedagogic practices for which they act as rationalisations - are almost exclusively concerned with the analysis of texts, with the grammar of law conceived as predominantly the grammar of written law, neither of the theories in question are in any way explicit as to the linguistic methodology which their analyses assume and utilise. At best, certain slogans and highly eclectic remarks are offered in footnotes dealing with the philosophy of

language,⁵ but the overall methodology has to be recovered analytically in view of the unsystematic character of the occasional comments and references which are actually provided. For this reason, chapter 4 is devoted to an attempt to bring together the specifically linguistic dimension of these contemporary, positivistic, concepts of law. The model of language, and the exegetical and semiotic textual discipline to which jurisprudence, and legal studies more generally, lead are then briefly placed in the context of recent debates within linguistics, and especially the critique of Saussurian objectivism implicit within the development of sociolinguistics and discourse analysis over the past two decades. The purpose of the analysis is that of suggesting, if nothing more, that there are obvious and pressing reasons for a thorough reassessment of the role of linguistics in legal theory and that of language in legal practice.

Very broadly, it has been my purpose throughout Part I of this study 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 and ordered activities, as specialised normative and philological enterprises that can be studied scientifically and exclusively according to the internal laws, or grammar, of a static, governing, code. The relevant objection to any and all such structuralist accounts of linguistics or of legal language is that they privilege 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 will further be suggested that from the perspective 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 enclose and protect linguistic study and legal practice by presenting them as specialised, non-rhetorical, activities removed from the everyday commitments and discourses of social and political practice and conflict.

[5] This is particularly true of H.L.A.Hart: Concept of Law (1961) Clarendon. A comparable reading can be given to H.Kelsen: The Pure Theory of Law (1970) Univ. of California Press. Further references will be given in the main text.

Part II.

It is against this background of predominantly formalist and exegetical accounts of text and language within legal studies that I believe it is valuable to reassert the rhetorical, sociolinguistic and loosely pragmatic dimensions and contexts of any communicational practice. The second and longer part of this study is therefore devoted to the analysis and development of a concept of a rhetoric of legal language which will endeavour to provide an account of law as a social and political discourse. Insofar as the rhetorical tradition of textual and legal analysis is one of the oldest forms of political criticism, the project of delineating a concept of legal discourse as the requisite method for an account of the rhetoric of legal language has a significant historical constituent or dimension. At the same time, however, the history of rhetoric is generally one of decline, contraction and denigration of a discipline whose overall history has yet to be written.

In chapter 5 certain features of the classical rhetorical studies, those of Aristotle and Cicero, are analysed from the viewpoint of the subsequent decay and exclusion of the rhetorical discipline as a whole. Rather than attempt to provide anything more than an outline history of legally relevant aspects to the rhetorical tradition, however, it has appeared more productive to adopt a somewhat more analytic approach. Chapter 5 is thus restricted to an analysis of the historical circumstances and fundamental methods and concepts of early classical rhetoric. Having elicited a somewhat speculative or ideal typical model of a possible or potential rhetoric of law and of legal textual practice within the early classical studies, the latter portions of chapter 5 proceed to examine the manner in which modern traditions of linguistic and legal analysis have attempted either to wholly repress the rhetorical dimensions of discursive practice or, at best, to incorporate and disarm questions of rhetoric and of semantics within the accepted normative and philological specification of social and textual practice.

The classical studies of rhetoric, in other words, raise a wide variety of highly relevant and significant questions as to the politics of legal

language use, and as to the appropriate methods for the study of the semantic and discursive effects of linguistic practice conceived in terms of institutional and discursive processes. I shall endeavour to show that these questions remain both important and unanswered. It is indeed precisely the project of chapters 6 and 7 to evidence, first, that a concept of legal discourse necessitates a re-evaluation of the linguistic basis of legal studies. In opposition to the conventional assumptions of a primarily formal and exegetical kind which underlie the dominant concept of the autonomy of the legal text and the univocality of its language, I have argued for a critical, interdisciplinary and intertextual approach to the legal text. The specifically linguistic basis of such an approach is set out in detail in chapter 6, and is placed in the context of recent developments in sociolinguistics, communication studies, literary criticism and the theory of ideology. In chapter 7 this methodology is applied to the analysis of legal discourse. My concern has been in part that of providing a formal account or schema of the typical rhetorical and semantic organisational forms of legal texts as institutional discursive practices. It has also been in part substantive. I have endeavoured to exemplify the methodology outlined by means of a preliminary or introductory discourse analysis of particular legal texts.

If the latter part of the study is successful, it will have provided a methodology for the analysis and criticism of legal texts, with numerous substantive implications for the manner in which the law as a textual and discursive discipline and pedagogy is institutionalised, taught and practiced. It is my hope to have suggested a means for an alternative, political, reading of the law which is in many respects faithful to the major insights of the ancient, exciting and undervalued discipline of rhetorical study. I have been concerned, in other words, to challenge, from within the legal discipline itself,⁶ the manner in which the legal text is constructed or produced upon the pervasive privileging of its normative and formal features - features which, in the last instance, are

[6] C.f. B.Edelman: Ownership of the Image (1979) R.K.P. at p.24, ' we have left the ownership of their order to the jurists; we have left them unpunished. I mean that we have left them their place. This place is also perpetuated in its being, that is, perpetuated in its innocence, by our absence.' For a similar argument, c.f., P.Goodrich: The Antinomies of Legal Theory (1983) 3 Legal Studies 1, at pp.14-20.

the product of an obsessive jurisprudential concern with the logical validity of a notional system of legal rules and the epistemology of their source, ordered and personified in the concept and practice of a sovereign or some surrogate thereof. In more practical terms, I have been intrigued by one of the major paradoxes of contemporary legal culture, namely that its social practice is founded upon an ideology of consensus and clarity - we are all commanded to know the law - and yet legal practice and legal language are structured in such a way as to prevent the acquisition of such knowledge by any other than a highly trained elite of specialists in the various domains of legal study. To understand this paradox requires a critical and interdisciplinary approach to legal texts, the analysis of law as a social discourse, as a rhetoric or dialogue between legal speaker, legal institution and the various codes, contexts and audiences of the law. In short, if linguistics is to be of value to legal studies it will be by virtue of an endeavour to come to terms with the study of legal texts as communicational processes. It is to be hoped that the development of a concept of legal discourse will provide an account not simply of the linguistic and stylistic politics of legal meaning, but will also, in attempting to recover the before and after of the legal utterance, analyse legal language use in the hierarchical context of its institutional and organisational background so as to recapture an essentially social discourse from the interstices of a discipline that has all too easily and frequently defined itself by means of a near total social amnesia.

PART I: LINGUISTICS AND LEGAL THEORY

2. THE SCIENCE OF LANGUAGE

People talk a great deal about language nowadays, as if they had suddenly discovered that they had been talking for thousands and thousands of years. Now they are trying to discover what talking means. E.Ionesco.¹

2.1 PHILOLOGY, LINGUISTICS, PHILOSOPHY OF LANGUAGE

In terms of the history of the social sciences, the latter quarter of the nineteenth century was characterised in no uncertain manner by neo-Kantianism. The revival in question was aimed at rehabilitating the Kantian concept of science as a system, unified essentially by the idea of a system, rather than by any more realistic or historical classification of its subject matter.² The most notable and far-reaching effects of this revival were to be the constitution of the sciences of linguistics and of law. In both cases, the major portion of the nineteenth century had been dominated by attacks upon the received orthodoxies of universal grammar and of exegetical legal studies, respectively, and their displacement by the uncertainties of creationist and historical methodologies. It was only towards the beginning of the twentieth century that the fully scientific and objective status of the disciplines in question could again be proclaimed and the community of the faithful be reassured. The manner of such reassurance was strikingly similar within the disciplines of language and law, and may be broadly characterised as that of the project

[1] E.Ionesco: Fragments of a Journal (1968) Faber, at p.29.

[2] The specifically Kantian aspects to the concept of science as the study of (social) order will be analysed in greater detail in their more explicit context, that of Kelsen's science of law. For general accounts of the debates of the late 19th century with regard to the philosophy and methodology of the social sciences, see especially, G.Rose: Hegel contra Sociology (1981) Athlone Press, pp. 1-48; see also, A.Giddens: Positivism and Sociology (1974) London; B.Hindess: Philosophy and Methodology in the Social Sciences (1977) Harvester; G.Rose: The Melancholy Science (1978) MacMillan, ch.1.; R.Bhaskar: A Realist Theory of science (1978) Leeds, pp.12-62; G.Kortian: Metacritique (1980) Cambridge, pp.70-85.

of constituting autonomous sciences or axiomatic normative systems, whose principal value adherence was to transpire to be the positivistic postulate of order and of the logic of its development within a social life rationalistically conceived as being governed and regulated by imperative linguistic and legal codes.

In one sense it is thus easy to see that, whatever their historical congruence, linguistics and legal science share comparable problems. Both are concerned with the relationship of a set of general rules - a grammar, or the substantive jurisprudence of the totality of legal norms in force - to the circumstances of their application or realisation in speech or judgment. Such at least, in its broadest form, has been the manner in which both linguistics and legal studies have generally and consistently chosen to present the object of their respective disciplines, and while history displays numerous different resolutions to the problem as specified, its actual specification as a problem or problematic has seldom varied. For the moment accepting that grammar and speech, and rule and application, are indeed the central problems of linguistics and of legal studies, it is logical to view linguistics as the precedent or more fundamental science of which jurisprudence would be but one instance, a species of the genus language. It is logical, in other words, to view the legal code as a variant of a more basic linguistic code, and for this reason alone it would appear legitimate to begin the analysis of the interrelations of language and law with an account of the inception of linguistics as a science in its contemporary form in the context of the resurgence of neo-Kantian philosophic positivism towards the end of the 19th century.

To the above rather tentative argument may be added an historical one. Throughout the second half of the 19th century, and with an increasing emphasis from the publication of Saussure's Course in General Linguistics to the present day, linguistics has come to be treated as the model for the systematisations of social science in general. In one aspect, it is possible to discern a tendency, both within philosophy and within the various schools of 19th century linguistics, which consistently postulated the identity of thought and language, or the inseparability of the consciousness of social processes from the medium of that consciousness

and the mode of its expression, namely language as sign. Thus even at the beginning of the 19th century, in the course of a basically romantic characterisation of language, Wilhelm von Humboldt had perceived that it is only through words, 'the characteristic signs of consciousness', that things are made 'distinguishable and recognisable' in the ocean of sensations. More profoundly,

speech, which makes the concept a member of the world of thought, adds to it meaningfully something of its own, and while it gives determinacy to the idea, the idea is within certain limits its prisoner... From the mutual dependence of thought and speech it is clear that languages are not so much means of presenting already known truths as means of discovering truths hitherto unknown.³

In an essentially comparable fashion, in the German Ideology, Marx and Engels start from the premiss that 'for philosophers one of the most difficult tasks is to descend from the world of thought to the actual world' and they conclude in a critical vein that:

language is the immediate (concrete) actuality of thought. Just as philosophers have given thought an independent existence, so they had to make language into an independent realm. This is the secret of philosophical language, in which thoughts in the form of words have their own content. The problem of descending from the world of thoughts to the actual world is turned into the problem of descending from language to life.⁴

The postulate of identity has received further force through its reiteration in some of the most seminal works of 20th century philosophy and linguistics. Saussure's Course provides a powerful re-emphasis to the insight, in unequivocally asserting that, 'psychologically our thought - apart from its expression in words - is only a shapeless and indistinct mass ... without language, our thought is a vague, uncharted nebula. There are no pre-existing ideas, and nothing is distinct before the appearance of language.'⁵ A further, somewhat later example, can be drawn from Wittgenstein, and the well known view expressed in the Tractatus that: 'The requirement that simple signs be possible is the requirement that signs be

[3] W.von Humboldt, quoted in G.della Volpe: Critique of Taste (1978) London, p.100.

[4] K.Marx and F.Engels: The German Ideology (1965) London, pp. 503-504.

[5] F.de Saussure: Course in General Linguistics (1966) McGraw-Hill, pp.111-112.

determinate.' The possibility of linguistic signs is also the possibility of determinate reference, the assumption of 'how things are'.⁶ It is finally sufficient to note the remarkable profusion of theories of language within the human sciences over the last two decades.⁷ While there may be only infrequent coincidence in the substance of these theories - they range from the extremes of linguistic phenomenology to the formalism of structural semiotics - there is nonetheless an underlying common endeavour, the recognition of the prime importance of language to all aspects of social and institutional practice. Foucault indeed has gone so far as to suggest, in the course of a discussion of the history of linguistics in its relation to the human sciences, that the economic model of these sciences was replaced by,

the reign of the philological (when it is a matter of interpretation and the discovery of hidden meanings) and linguistic model (when it is a matter of giving a structure to and clarifying signifying systems). Thus a vast shift has led the human sciences from a form more dense in living models to another more saturated with models borrowed from language ... (a) shift paralleled by another: that which caused the first term in each of the constituent pairs (function, conflict, signification) to recede, and the second term (norm, rule, system) to emerge with a correspondingly greater intensity and importance⁸

The most interesting implication of Foucault's observation, one which he does not himself directly elaborate, is that the peculiarity of this shift in the human sciences was primarily the specific linguistic form which it took as its model, a model based upon the novel conjunction of philology and linguistics. In that linguistics as a science was the new arrival to a much older philological tradition, it would seem appropriate to briefly examine the tradition within which it had thus placed itself. Despite vast differences of cultural and historical context, the philologist is

[6] L.Wittgenstein: Tractatus Logico-Philosophicus (1961) R.K.P., p.13.

[7] See, for example, the thirteen theories of language and society analysed in D.Silverman and B.Torode: The Material Word (1980) R.K.P. For a somewhat different overview, see R.Coward and J.Ellis: Language and Materialism (1977) R.K.P. More useful, specialist, accounts are to be found in G.Sampson: Schools in linguistics (1980) Hutchinson; S.Hervey: Semiotic Perspectives (1983) London.

[8] M.Foucault: The Order of Things (1974) Tavistock, pp.358-360; see also, S.Timpanaro: On Materialism (1975) London, ch.5. G.della Volpe op.cit., part II and appendix 4.

always and everywhere the bearer of tradition, the decipherer and transcriber of the written monuments of the past. The philologist is the reverent exegete and pedagogue of former textual cultures, the decipherer of 'alien, "secret", scripts and words, and a teacher and disseminator of that which has been deciphered and handed down by tradition ... The first philologists and the first linguists were priests.'⁹ Their material was the precedent unity of dead languages and of foreign classics, that of a textual past that was amenable to objective study by virtue of the very fact that its languages were dead and by virtue of its distance from the present, a distance which was most frequently treated as connoting also the hierarchical superiority of that past to the present - of classical languages to vernacular languages - and so also the paternal and often sacred status of its mythologists and custodians. Thus in discussing the development of philology from the Renaissance to the Reformation, Nietzsche observes that whereas a 'sincere leaning towards antiquity renders one unchristian...on the whole...the church succeeded in turning classical studies in a harmless direction: the philologist was invented, representing a type of learned man who was at the same time a priest or something similar. Even in the period of the Reformation people succeeded in emasculating scholarship.'¹⁰

While the specific relations and dependencies of Saussure's General Course upon philological and objectivist concepts of grammar and text will be analysed subsequently, the general context and tradition within which the inception of a scientific linguistics is to be placed is that of the philological methodologies developed for the preservation of cultural textual heritage. Broadly, the modern tradition within which such methodologies are to be themselves located is that of philosophical rationalism and of the various systems of universal grammar which lead from the Port-Royal Logic of 1662 to Kant, Leibniz, Husserl and then

[9] V.Volosinov: Marxism and the Philosophy of Language (1973) Academic Press, p.73; M.Bakhtin: The Dialogic Imagination (1981) Texas U.P., ch.4.; W.Ong: Orality and Literacy (1982) Methuen, ch.4. See also, J.Derrida: Of Grammatology (1976) John Hopkins U.P.; F.Nietzsche: The Dawn of Day (1903) London, pp. 74-76.

[10] F.Nietzsche: We Philologists (1911) Foulis, at pp. 134-135; See also, F.Nietzsche: Homer and the Classical Philology (1905) Foulis; The Dawn of Day, op.cit., pp.74-76.

Frege.¹¹ In each case, the axiomatic basis of the system takes the form of variously specified dualisms which are ultimately reducible to the fundamental epistemological dualisms of the necessary and the contingent, or, in a more modern terminology, of the objective and the subjective. The point is that the dominant conceptualisations of a universal grammar within the rationalist tradition, have been consistently forced to select a unitary axiomatic basis for their formalist elaborations of the laws or normative imperatives governing language as a form. The model of science - the Kantian presupposition underlying the depiction of the logical necessity of a system - was generally one drawn from the physico-mathematical sciences. Language was conventional and arbitrary, it was to be analysed as a system of signs comparable to mathematical systems. The analogy is a persistent one, especially in the work of Saussure and of the early Wittgenstein, and it postulates the object of linguistics as being the relationship of sign to sign in a closed system which is always already accepted and authorised. The mathematical sign is the rationalist ideal of any sign, including verbal signs, and consequently it is the inner logic of the system of signs, conceived as analogous to an independent set of algebraic or logical formulae (conditions of possible application), which is the exclusive focus of analytic attention. Correlatively the content or meaning of sign and sign system are largely irrelevant because arbitrary.

Historically, the philosophy of language has tended uncritically to accept the linguistic truth of this formalist elaboration of sign systems as imperative codes. When it is a question of grammar, then language is to be studied as a particular exemplification of some more universal set or 'combinatory' of logical relation or functions. Where the philosophy of language does reopen and reappraise the questions of meaning and semantics as philosophical problems, it has done so within a terrain or problematic which has already been comprehensively defined by a thoroughgoing

[11] Respectively, A.Arnould and P.Nicole: Logic (1685) London; I.Kant: Critique of Pure Reason (1787) London; G.W.Liebniz: The Monadology (1714) London; E.Husserl: Logical Investigations (1900) R.K.P. The most useful of the secondary literature includes, N.Chomsky: Cartesian Linguistics. A Chapter in the History of Rationalist Thought (1966) Harper and Row; M.Pecqueur: Language, Semantics and Ideology (1983) MacMillan.

rationalist formalism.¹² Fully accepting that language is primarily a form rather than a content, the question with which the philosophy of language has been left is best conceived as the cast-off of rationalism, and is that of attempting to resolve the problem of meaning and of communication generally, within the context of a concept of the contingent and subjective status of language use or speech. For the principal figures within the development of the philosophy of language, meaning as use is everywhere relative and context bound - to say anything at all of significance on the subject of meaning it has inevitably proved necessary to retreat from actual meaning and actual usage to potential meaning and use; to revert, in short, to a norm-governed context and methodology of analysis while, in the guise, for example, of the problems of 'other minds' or of 'illocutionary force', leaving the questions of meaning as dialogue or as actual communication unresolved.

To the extent that positivist jurisprudence has explicitly faced the linguistic questions inherent in the theory of legal interpretation and judgment, it has done so most often by reference to the philosophy of language rather than by way of any more direct encounter with the science of language. It is nonetheless the case that an adequate assessment of the role played by the philosophy of language requires an appraisal of its specifically linguistic bases and implications. This, I shall argue, is particularly true of contemporary positivist jurisprudence which, perhaps more than any other discipline, has underpinned its substantive analyses with highly disputable assumptions about the nature of language. It is upon the validity and fecundity of these assumptions about the nature of language that such jurisprudence has explicitly demanded that it be judged.¹³ Any attempt to render a full account and intelligible critique of contemporary jurisprudence has good reason to treat such an assertion as to basic premisses seriously. It should be added, however, that such an

[12] Specific references to the philosophy of language will be detailed in chapter 3. For introductory accounts, see, B.Harrison: The Philosophy of Language (1979) MacMillan; E.Gellner: Words and Things (1980, 2nd ed.) London; G.P.Barker and P.M.S.Hacker: Language, Sense and Non-sense (1984) Blackwell, ch.1.

[13] Specifically, D.N.MacCormick: Challenging Sociological Definitions (1977) Brit. J.Law and Society 89, at p.93, where it is argued that 'to confirm or confute' the positivist account of law, it is 'necessary to take up some position in analytic philosophy and the philosophy of language'.

exercise is not entirely a negative one. By returning to linguistics and to the historical development of linguistics in its relations to philosophy and, more particularly, to the philosophy of language, it is possible both to render a critique of the extant philosophy of law, and at the same time to provide positive proposals for an alternative conception of the meaning and operation of law.

As I would hope has been made fairly apparent, it will be here contended that neither the philosophy of language nor that of law has maintained a unitary or over time consistent account of language. In what follows, however, I shall maintain that there has to a large degree been a common development to both disciplines, which development is best scrutinised historically in terms of a dominant tendency towards formalism.¹⁴ As I have suggested, the philosophic credentials of the tendency go back as far as the 17th century and the Port Royal School, which first proposed a universal logic of grammar. The most productive period for this tendency was, however, the latter half of the 19th century, when the rise of neo-Kantian inspired studies of grammar fundamentally determined the future path and 20th century development of linguistics, the philosophy of language, and further, had not inconsiderable effects upon the early work of Hans Kelsen. In the light of the fact that contemporary jurisprudence has somewhat distanced itself from the Pure Theory of law, it may seem curious or largely academic to seek its genesis in the founding moments of linguistics at the turn of the 20th century. It is, however, crucial to the argument that where more recent jurisprudence has had recourse to the philosophy of language and to theories of enunciation or speech acts, it has entered a terrain which, from the perspective of the development of linguistics, is still dominated and defined by a formalist imperative. What are at first sight subjectivist philosophies of language, such as are proposed by the later work of Wittgenstein, or by J.L.Austin, in terms of

[14] By formalism I mean the privileging of form over content, generally in the terms of the proposal of closed, determinate, systems within which the object of a particular discipline is said to be wholly circumscribed. A useful definition of legal formalism is presented in, R.M.Unger: The Critical Legal Studies Movement (1983) 96 Harvard Law Review 563, at p.564, in terms of 'a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes which people call ideological, philosophical or visionary.'

meaning being defined by use, are only comprehensible in terms of the antecedent inability of formalist theories to give any account whatsoever of the social and historical constitution of meaning. It is further almost a truism of jurisprudence that the development of a specifically analytic jurisprudence is only comprehensible and accessible in the light of the preceding formalist orthodoxies of Austinian and Kelsenian positivism.¹⁵

2.2 STRUCTURAL LINGUISTICS: F.DE SAUSSURE

While I intend to deal with the formalist tendency within the study of language primarily by reference to the seminal work of Ferdinand de Saussure, the Course in General Linguistics,¹⁶ certain preliminary comments are necessary. It should firstly be noted that the history of formalism within linguistic studies is a supremely lengthy one. This tendency, which has frequently wholly dominated the discipline, has accumulated many celebrated representatives and continues to do so. One need only refer to recent developments within the Chomskyan school, to the Soviet formalists or to more recent developments within the field of structural semiotics, to be forced to accede to the point that, for good reasons, the tendency has a lengthy future ahead of it. That is not my concern here, but it does follow that to select Saussure is to choose one of a multitude of arguably equally significant figures. Aside from considerations of a pragmatic nature, there are two principal reasons for this excision.

It is first the case that the locus classicus of contemporary scientific theories of language must be, as was noted above, the work of the Port Royal School. Their 'Grammar' defined the basic categories, and in particular the fundamental distinction between determinative and explicative grammatical relations,¹⁷ that were to guide numerous future

[15] C.f., for example, H.L.A.Hart: The Concept of Law (1961) Oxford.

[16] Critical editions of the Course are provided by, K.Godel: Les Sources Manuscrites du Cours de linguistique Generale de F.de Saussure (1957) Geneva; and, R.Engler: Cours de linguistique Generale (1968) Wiesbaden.

[17] The distinction is based upon the opposition of extension and comprehension, and in modern terminology, is that between reference and meaning.

logicians and philosophers in their attempt to subordinate language to a fixed and universal set of logically determinate relations. While the extensive work of Gottlob Frege¹⁸ provides a more contemporary and highly sophisticated account of the logic of grammar, it is nonetheless the case that his frequently incisive elaboration of the distinctions between object and thought, and between sense and reference, are, in terms of the history of linguistics, extensions of the Port Royal project. It was in Arnauld and Lancelot's 'Grammar' that logic, and with it the theory of knowledge that corresponds to it, were first taken to be the pre-existent foundation of all the seemingly diverse forms in which linguistic utterances might appear. Thus 'grammar is not to be taken as the prescriptions of a legislator, at last giving the chaos of utterances their constitution and laws ... it is a discipline which states the rules to which any language must conform for it to be able to exist'¹⁹ It was in Saussure's Course that such a statement of principle and purpose was first used in a systematic way as the foundation of a science of linguistics. From that moment on, linguistics set about discovering the rules governing the coherence or order of the most fundamental social code: language, conceived either as system of signs or as strategy for the transformation of logical sequences. Further, this structuralist linguistic methodology was also to become the paradigm for much of the rest of social science, its significance thus being extended considerably beyond the elaboration of the internal constitution of linguistics itself. For much of the 20th century the concepts of language system and of social or real process have been treated as synonyms within the language of social science.

A second and perhaps more important reason for selecting Saussure as the central figure within the formalist tendency is more complex. As against a fairly widespread desire to classify Saussure's theory of

[18] C.f. G.Frege: On sense and reference, in P.Geach and M.Black (eds): Translations from the Philosophical Writings of Gottlob Frege (1972) Blackwell. See also, B.Harrison, op.cit. pp. 51-67.

[19] M.Foucault, Introduction, in A.Arnauld and C.Lancelot: Grammaire generale et Raisonnee. (1969) Paulet.

language as straightforwardly and uncompromisingly 'objectivist',²⁰ one of the more interesting and illuminating aspects of his work is his agonising awareness of the dangers inherent in formalism. Recent textual studies²¹ have brought to light the dramatic extent to which Saussure equivocated before finally proposing the polemically formalist separation of language system from language use, and consequently also from any realistic concept of semantics. It is precisely at this point, in the formulation of and equivocation over, the problem of the proper place of speech (*parole*), rather than in his eventual, partially misconceived, solution to the problem, that Saussure has most to offer. To understand how and why this is the case it is necessary to recall the highly contentious state of linguistic study in the latter half of the 19th century.

While the 19th century as a whole was dominated by historical linguistics, by the the widespread belief that the only scientific study of language was to be conducted according to the methods of Indo-European comparative grammar, this was by no means an uncontested development. Thus on the one hand, largely under the influence of successful models of natural science, especially that of mechanistic physics and latterly Darwinian evolutionary theory, the eventually dominant propensity in the study of language, which tendency moved from Rask and Bopp to the neo-grammarians school, was concerned to describe the history of language in terms of uniform laws analogous to those of sound changes. A set of universal, deterministic, laws drawn from the highly successful studies in philology, and especially Indo-European phonetics, could provide a set of regularities, a proto-language, which naturalistic abstraction could explain away all individual variations and irregularities. Volosinov is undoubtedly correct to identify the birth of linguistics with what he terms an 'abstract objectivist' tendency produced by these philological studies. He comments at length upon the concept of language as system, and concludes upon the basis of the available historical material, that 'at the

[20] A line of criticism most forcefully developed by Saussure's contemporary, V.Volosinov, *op.cit.* For more recent accounts, see J.Kristeva: Desire in Language (1980) Columbia U.P.; J.Baudrillard: For a Critique of the Political Economy of the Sign (1981) Telos Press; G.P.Barker and P.M.S.Hacker, *op.cit.*, ch.8.

[21] These are well summarised in S.Timpanaro, *op.cit.*, ch.4. See as well, C. Samson, *op.cit.*

basis of the modes of linguistic thought that lead to the postulation of language as a system of normatively identical forms lies a practical and theoretical focus of attention on the study of defunct, alien languages preserved in written monuments.' The object of such linguistics are 'dead, written, alien language' and the 'isolated, finished, monologic utterance' divorced from all verbal and actual contexts. By way of general disciplinary characterisation, he continues to further state that:

This philological orientation has determined the whole course of linguistic thinking in the European world ... (which) thought formed and matured over concern with the cadavers of written languages; almost all its basic categories, its basic approaches and techniques have been worked out in the process of reviving these cadavers ... Philological need gave birth to linguistics, rocked its cradle and left its philological flute in its swaddling clothes. That flute was supposed to be able to awaken the dead. But it lacked the range necessary for mastering living speech as actually and continuously generated.²²

There is, however, a clearly polemical element in the ever more forceful 19th century assertion of the unconscious character of phonetic laws and their freedom from exceptions. Claims as to the 'blind' and 'necessary' workings of these laws were, towards the last quarter of the century, being increasingly challenged both within the neo-grammarians school and outside it, by a 'historicist' tendency which desired to return linguistics to the historical and anthropological sciences as opposed to the natural sciences. The aim of this wide grouping of romantically inspired linguistics was not only that of opposing the over-rigid classificationism of the neo-grammarians but, more importantly, to provide a radically alternative basis for the explanation of sound change in terms of individual, subjective, innovations and, more generally, by moving towards psychological or anthropological methods of study. Language according to this school, must be treated in terms of the psychology of individual speakers, rather than in terms of a collective spirit (sprachgeist) having some kind of external existence above and beyond individuals. 'But the sprachgeist does nothing of itself, separately from men, rather all changes in language are brought about by men themselves.'²³

[22] V.Volosinov, op.cit. p.71-73'

[23] Rudolf von Raumer (1858), quoted in G.Sampson op.cit. p.27.

It is this polemical character of late 19th century linguistic studies which has to be considered in order to understand the highly telling antinomies within Saussure's theory, and particularly the form taken by the central and celebrated oppositions of langue to parole (system/creativity), synchrony to diachrony, form to substance, and indeed the overall ambivalence which it displayed as to what were then perceived to be the contradictory claims of linguistics as a science of 'social' facts and language as a contingent instrument of communication. Thus Saussure's determination 'to make distinctions (which are admittedly, distinctions between "points of view" and not between "things themselves") serves ... a defensive function in relation to those tendencies which appeared to be designed to bring about the dissolution of linguistics as a science.'²⁴ In other words, Saussure's theory is both one of the greatest products of formal linguistics and, at the same time and quite consistently, a polemical systematisation which is acutely, though infrequently explicitly, aware of the weaknesses of such formalism. Both facets of the theory provide strong encouragement for examining the text itself and for providing a reading of the theory which seeks to emphasise its key formulations of the systematicity of langue both as statements of a scientific project and as a programme of a more strategic intervention.

As has already been commented upon, Saussure was writing at a time when the scientific status of linguistics was threatened by an increasingly dogmatic insistence upon the subjective side to linguistic facts. To save the object of linguistics from disintegrating into the hands of a variety of disciplines, Saussure proposed the constitutive distinction between the language system (collective institution/langue) and the speaking subject (the individual embodiment/parole). Such a distinction is at the basis of modern linguistics and is elaborated by Saussure in terms of the necessity, from the point of view of science, of maintaining an absolute separation of two notionally though completely independent realms of study. For Saussure it is this distinction which makes the science of linguistics possible. It is, in its strongest formulation, a neo-Kantian transcendental logical assumption whereby the scope of linguistics can be

[24] S.Timpanaro op.cit. p.142.

defined a priori as that of determining' the forces that are permanently and universally at work in all languages, and to deduce the general laws to which all specific historical phenomena can be reduced.'²⁵ The justification for this pregnant assumption is both pragmatic and theoretical:

As I see it there is only one solution to all the foregoing difficulties: we must from the very outset take langue as our point of departure and use langue as the norm of all other manifestations of language ... Taken as a whole, language (langage) is many-sided and heterogeneous; straddling several areas simultaneously - physical, physiological, and psychological - it belongs both to the individual and to society; we cannot put it into any category of human facts, for we cannot discover its unity. Langue, on the contrary, is a self-contained whole and principle of classification. As soon as we give langue first place among the facts of language, we introduce a natural order into a mass that lends itself to no other classification.²⁶

The concept of langue separates what is social in the sense of being presupposed or logically given, from what is individual. More significantly, the distinction is also deemed to separate what is essential from what is 'accessory or more or less contingent'²⁷ order from chaos.

Leaving temporarily to one side the debates as to the philosophical derivation and influences upon Saussure's methodological axiom, it is sufficient to note that it is strongly anti-materialist and to proceed to an examination of its repercussions within the theory of the essentially synchronic nature of linguistic science. Having asserted the condition for the possibility of linguistic science, namely that langue be conceived as a systematic and universal unity, it logically follows that this unity is best studied as a static and ahistorical system, as a complex, internally defined set of relations. 'Langue is a system whose parts can and must all be conceived in their synchronic solidarity', and elsewhere we are informed that 'changes never affect the system as a whole but rather one or another of its elements.' Thus while Saussure never attempted to

[25] F.de Saussure op.cit. p.6.

[26] Ibid. p.9.

[27] Ibid. p.9.

deny that the system, or synchronic 'state of affairs', was only ever momentary, it was nevertheless the case that for him 'only states matter', indeed 'diachronic facts are blind forces set against the organisation of the system of signs'.²⁸ By way of paraphrase, the formalism of this position might be summarised in terms of two related propositions; first, langue is not historical precisely to the extent that it is a system; second, it is to the extent that langue constitutes a system, a structure, that it can be the theoretical object of linguistics. The object of linguistics is given in the general form or Kantian 'idea' of langue, whose substantive subject matter will thus necessarily be the predominant concern with the logical interrelations of elements of the system - a concern with syntax or with such lexico-grammatical relations as may be studied 'in themselves' or as discrete phenomena. What is also given, of course, is the correlative and radical exclusion of all the non-synchronic facets of language. These diachronic and semantic aspects of the language totality are not denied, they are rather excluded; they exist unhappily outside science in the irrationality and subjectivity of history conceived as a chaos of individual facts. Again, however, a certain caution is necessary, for while Saussure did eventually and rigidly exclude the possibility of studying the effects of history and of utterances upon the system of langue, he asserted the general principles of such exclusion far more forcefully than he was prepared to unequivocally accept its more specific linguistic implications. In other words, the theoretical exigencies of defending the scientific status of linguistics rest uneasily beside Saussure's not infrequently encountered, residual desire for a realistic linguistics.

For the purposes of defending or 'saving' the scientific status of linguistics, Saussure had perceived the need to isolate and demarcate an exclusively 'objective' and unimpugnable field of study. The means he used to achieve this end may be reconstructed in terms of a neo-Kantian transcendental assumption or, in a strict sense, axiomatic logical presupposition as to what language must be like for a science of language

[28] Ibid. pp. 87,95,89.

to be possible.²⁹ At the same time, however, as the synchronic unity of langue was to some degree correctly asserted to be the primary object of linguistics - the system of signs is undoubtedly amenable to independent study (phonology, morphology and syntax) - Saussure also deemed it necessary to wholly exclude any concern with the history or the realisation of the system of langue from the legitimate domain of study. Thus, for example, 'langue is not a function of the speaker, it is a product that is passively assimilated by the individual ... langue is the social side of speech, outside the individual who can never create nor modify it by himself.'³⁰ The objectivity of langue, conceived as a self-sufficient and logically coherent system of signs, is thus placed in polar opposition to the complete subjectivity of parole. There is, as I shall propose below, something rather unfortunate about this antithetical relation of system to the subjectivity and unknowability of the utterance and of linguistic creativity or practice in general. It suggests, not least, an extreme and unnecessary dualism, that of a wholly abstract or unmediated relation between system and the individualised locus of its realisation, between whole and part, within which both extremes are virtual entities. It is an antinomy which is best analysed in the general terms of the tendency of formalist conceptions of linguistics to reinforce a motivated definition of language system by producing a thoroughly ideological and eventually untenable semantic subjectivism. Questions of social meaning and process, questions of the actual existence of the language system - its history and general development as a national language - can be excluded ab initio from the concern of science, by virtue of being defined as purely and simply subjective, and contingent upon notional rather than actual individual usage. It is in relation to the concept of the 'arbitrariness' of the sign and to the role of signification and value within language, that Saussure's theory is most strained.

[29] On which, see G.Rose (1981) op.cit. The literature within the philosophy of science, on the transcendental (and ontological) assumptions underpinning the claim to 'scientificity' is massive. I have found the following especially useful. Lakatos and Musgrove: Criticism and the Growth of Knowledge (1970) Cambridge U.P.; R.Bhaskar: A Realist Theory of Science (1975) Leeds; D.Hillel-Ruben: Marxism and Materialism (1977) Harvester; P.K.Feyerabend: Science in a Free Society (1982) London.

[30] Saussure, op.cit. pp.14,17.

The thesis of the arbitrariness of the sign is central to Saussurian linguistics and has received a wealth of divergent interpretations.³¹ As Saussure himself states it, ' (the) principle dominates all the linguistics of language; its consequences are numberless ..' Simply stated, the thesis is to the effect that the sign, the unity of concept (signified) and sound-image (signifier), is something which is socially or conventionally given and is consequently arbitrary rather than a rational or natural relation of the two elements that make up the sign. The bond between signified and signifier is arbitrary; the idea of 'sister' is not linked by any inner relationship to the succession of sounds 's-o-r', and it is thus collective behaviour or convention rather than any intrinsic value, which rules the use of signs. This arbitrary or unmotivated character of the sign does emphasise, on the one hand, the institutional or social nature of the system of language but it is crucial to realise that the emphasis upon social or institutional facts is not a reference to any actual or empirical features of language use. The social nature of language is, for Saussure, a normative assumption - an artistic reference to the ultimate basis of the linguistic code, its presupposition of an always pre-given agreement or consensus - rather than a recognition of any communicative or instrumental linguistic functions. Saussure is not concerned to argue that there is a relationship between signs and extra-linguistic processes. Quite the contrary, it is the immutability of the sign, its internal or self-definition in terms of a fixed and singular relation of signifier to signified that commands Saussure's attention. 'The signifier, though to all appearances freely chosen with respect to the idea that it represents, is fixed, not free, with respect to the linguistic community that uses it ... the community itself cannot control so much as a single word; it is bound to the existing language.'³² In other words, the definition of the sign as an arbitrary and unique relation between its two elements is the sole principle of its rationality. It is by virtue of the excision that creates a one to one, fixed, relation between form and

[31] Thus, J.Culler: Saussure (1978) Fontana, purports to regard it favourably as a proposal of the essentially social character of language, while other linguists, from E.Benveniste: L'origine de la formation des mots (1935) Paris, onwards, have seen it as a regrettable lapse into a conception of language as a simple naming process. See, Timpanaro, op.cit.; Pecheux, op.cit.; for discussions of these debates and developments.

[32] Saussure, op.cit. p.71.

content, an exact correlation between a given and discrete signified and an equally discrete signifier, that the conventional, equational, concept of the sign as a simple denotation equalling (precisely) its denoted, is possible.³³ A point which is reinforced when Saussure accredits the arbitrary nature of the sign with protecting language from any attempt to modify or change it and argues that because the sign itself does not have any rational or indeed symbolic basis, and because it is constituted by a multiplicity of signs and their interdependence as discrete items (differences) within the lexical code, that it is unamenable to any non-normative description or explanation. It is thus, importantly, that the arbitrary nature of the sign comprehensively removes the question of linguistic value from the realm of language use, effectively substituting for the question of meaning the problem of syntax and of signification as problems of the logical relations between normatively determined units and their rule governed potential application in linguistic practice.

The question of linguistic value, as posed within synchronic linguistics, is that of defining or delimiting the linguistic entity or unit, the minimal lexeme within the code. 'The process of delimitation involves calling in meanings (functions) to differentiate sounds'. While one might suppose or hope that the introduction or acquisition of meaning might herald at least some examination of a cognitive, rational or real principle for the classification of social processes and functions, this is not to be the case. Far from seeing linguistic value as fundamentally related to or embedded in the communicative or contextual aspect of language use as transmission or practice, langue is otherwise defined as a 'system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others.'³⁴ The idea of value, in other words, cannot be separated from the place of the sign as a lexical item within the system of langue or code conceived as a simple dictionary of meanings. It would, however, do Saussure's theory a disservice if it were not to be briefly acknowledged that even here he occasionally

[33] C.f. R.Barthes: S/Z(1974) Cape, at p.9, 'denotation is not the first sense, but pretends to be; under this illusion, it is ultimately only the last of connotations ... the superior myth by which the text pretends to return to the nature of language, to language as nature.'

[34] Saussure, op.cit. pp. 114-115.

displays a healthy ambivalence. It is certainly true that for Saussure the primary characteristic of linguistic value is its dependence upon the language system - the value of the sign is determined by its identity and difference in relation to other signs - but value is not simply signification. Making use of an analogy with monetary value, which is determined both by exchange with non-monetary items and by the internal hierarchy of the monetary system, Saussure notes a paradoxical quality to linguistic value as well. The linguistic unit too has an exchange value - it can be exchanged for a dissimilar (an idea outside language) - but this primarily psychological reference exists unhappily or paradoxically beside the fact that value is also determined by comparison of the sign with 'similar' (i.e. other signs): 'the conceptual side of value is made up entirely of relations and differences with respect to the other terms of langue'.³⁵ In short, the implication is that the referential aspects of the sign, in so far as they suggest an extra-linguistic process of the circulation of actual meanings, are to be excluded from the confines of science.

At all events, the paradoxical character of linguistic value is one which is noted rather than solved in the theoretical passages of the Course. However, the later discussions of syntagmatic and associative relations strongly support the view that where the conception of linguistic value does involve recognising certain of the contextual or extra-linguistic factors which influence the development of langue, these are to be excluded as extrinsic to the proper ambit of scientific study as aspects of parole and of the chaotic subjectivity of language use. Thus, while syntagmatic relations are deemed to be linear and internal to the coherence of the system, being in essence predetermined by the syntactic rules governing intelligibility, associative (more recently and frequently 'paradigmatic') relations, which govern the choice of one of several possible terms, occur outside discourse, 'they unite terms "in absentia", in the brain of the particular speaker'.³⁶ Certainly, from the point of view of the organisation of langue, it is 'syntagmatic solidarities' which are by far the most 'striking', whereas associative

[35] Ibid. pp.117-118.

[36] Ibid. p.123.

solidarities, while they may occasionally be fixed by langue, are generally 'indeterminate' in order and indefinite in number. They are in such respect relegated to the concern of the psychology of parole, amenable only to diachronic study because, together with 'analogical creativity',³⁷ such relations are in the last instance subjective and fortuitous; by implication, they are a matter of rhetoric or style, of actual meaning rather than logical grammar. Saussure, in other words, succeeds in avoiding the dangers posed by the indeterminacy of associative relations and the more profound irregularities of analogical creativity only by excluding such relations from the realms of scientific study. The solution is that of offering no solution at all, it is merely asserted that such relations cannot be studied scientifically, while it is further added that such questions are not worthy of scientific study because they only ever affect aspects of the system and never the system itself - for the self-evident reason that the system itself has only a virtual, normative, existence. The systematicity of langue is preserved, but at the relatively high price of creating a radical disjunction or excision whereby the lexical code is notionally fixed as a system of univocal equivalences purportedly unaffected by and independent of the historical contexts and real processes whereby usage and practice produced these momentary equivalences, or settled them as dictionary meanings and as a system. Suffice it to say that Saussure was certainly aware of the gaps or paradoxes existent within the edifice of the system, and opted or felt forced to fill these lacunae - through which might pour the seemingly 'unscientific' legions of language use - in terms of an exclusively normative conception of the language system as imperative regulative code. Thereby he excluded the vital and interesting questions of parole and of social meaning from the domain of linguistics:

it could even be suggested that the way linguistics was constituted as a science (in the forms of phonology, then morphology and syntax) was precisely by a constant discussion of the question of meaning and of the best way to banish the question of meaning from its domain. The 'semantic questions' encountered by linguistics today thus constitute what might be called the return of the origins of a

[37] Ibid. p.161 ff.' Analogy is grammatical throughout, though its result - creation - belongs at first only to speaking. Analogy reaffirms that speaking (the chance product of an isolated speaking subject creating analogy) is dependent upon langue.'

science (of what it had to separate itself from to become what it is) within that science itself.³⁸

I shall argue later that this formalistic exclusion of semantics was and is unsuccessful, both as a theoretical resolution to the problem of the object of linguistics conceived as an order, and even more so as a practical or pragmatic device allowing for the syntactic or semiotic analysis of textual structure. For a provisional understanding of why this is so, it is sufficient to reinsert and dwell upon the undoubted gaps within the systemic conception of the internal coherence of langue.

The exclusion of history, and more specifically in the present context the exclusion of any rational or sociological classificatory principle contained within the history of langue, is an obvious starting-point. The rejection of history is, after all, a primary or defining feature of all formalism and is generally to be aligned to the positivist quest for science as order. What is at issue here is the point of view or, to use a frequently less felicitous term, the ideological motivation adopted by a particular science. The synchronic aspect of language is the point of departure for linguistics, it is accorded pre-eminence as the 'true and only reality' and even Saussure's residual realism can allow language change or diachrony only a minimal significance. History is excluded in terms of the immutability of the sign based upon the multiple interdependence of the value of any particular term. In allowing that values do change and in acknowledging that the sign is also, paradoxically, mutable, Saussure is again somewhat strained: 'Time, which insures the continuity of language, wields another influence apparently contradictory to the first; the more or less rapid change of linguistic signs.' Having recognised the dilemma, however, the proposed solution is less than satisfactory:

Langue is radically powerless to defend itself against the forces which from one moment to the next are shifting the relationship between the signified and the signifier. This is one of the consequences of the arbitrary nature of the sign. Unlike language, other human institutions - customs, laws etc - are all based in varying degrees on the natural relations of things; all have of necessity adapted the means employed to the ends pursued. Language

[38] M.Pecheux, op.cit. pp.55-56.

is limited by nothing in the choice of means³⁹

Being limited by nothing in its choice of means is precisely the theme which provides the linguistic sign (as opposed to other semiotic systems) with the principle of its a priori rationality; namely that it functions solely and simply as an agent of monologic abstraction, a reduction of all the potentialities and qualities of meaning to one equivalence - that between signifier and signified. 'The rationality of the sign is rooted in its exclusion and annihilation of all symbolic ambivalence on behalf of a fixed and equational structure'.⁴⁰ The sign proffers itself as a full value, from which all connotations and virtualities of meaning, from which symbolic, rhetorical and polysemic features, have been severed in the cause of an imperative concept of structure - the coded control of the order of signification. It can only be remarked and noted that having defended the scientific status of linguistics in the more obviously systematic spheres of phonology, morphology and syntax, Saussure is rather surprisingly willing to revert to the opposed camp, to irrationalism and subjectivism, in the realm of diachronic linguistics. The diachronic dimension is surrendered to the very theory which Saussure so determinedly and in some measure successfully combats in relation to synchronic linguistics. Two aspects of this strategy or choice deserve emphasis.

It is first the case, if the proposal is accepted at its face value, that the absence of the diachronic or historical dimension ineluctably propels linguistics in the direction of a highly restrictive concern with form. It is in many respects a return, or at least a step backwards, in the direction of the philosophical premisses of the Port Royal Grammar, wherein it is determinative linguistic relations and the speculative universality of regulative principles which predominate. The interesting questions, those of explicative relations, as well as those of implication, articulation and meaning effects generally, are treated as contingent, accessory and irrational. When Hjelmslev later coined the phrase that

[39] Saussure, op.cit. pp.74, 75-76.

[40] J.Baudrillard, op.cit. p.149. See also, J.Kristeva op.cit. ch.3. ('The notion of sign is a product of scientific abstraction - identity-substance-cause-goal as structure of the Indo-European sentence - designating a vertically and hierarchically linear division.'). See also, G.P.Baker and P.M.S.Hacker, op.cit., pp.276-286.

'language is form' he was merely restating the underlying tendency of Saussurian linguistics and, in common with a great deal of the later work of that school, was greatly overstating the communicative perfection of the system of langue. To use but the briefest of arguments, it is precisely because of the imperfections of formally designated signification - which after all specifies no more than the minimum conditions of intelligibility - that it is frequently, if not always, only in the light of a particular context (verbal or situational) that statements are comprehensible. I shall return to this crucial lacuna and to proposed solutions to it, at a later stage. For the present it is sufficient to note that it constitutes the problem of linguistic practice as a problem of semiotics and not of semantics. It is not the ambivalence or the contingent historical features of meaning that are to form the object of future linguistic developments, but simply the organisational structures of the code which is taken, in principle, to be determinative of the valency and the circulation of linguistic signs as an instance of signs in general. The methodology of such study is again derived from Saussure, and from a celebrated aside in which he remarked that the science of semiology was to be 'a science which will study the life of signs in society ... It will teach us what signs consist of, what laws govern them. Since it does not yet exist we cannot say what it will be, but it has a right to exist; its place is insured in advance.'⁴¹ As Kristeva has observed, the linguistics that has developed within the confines of semiotics, is bathed in an 'aura of systematics', and she continues to elaborate that:

as soon as linguistics was established as a science (through Saussure for all intents and purposes) its field of study was hemmed in; the problem of truth in linguistic discourse became dissociated from any notion of the speaking subject... Any attempt at reinserting the "speaking subject", whether under the guise of a Cartesian subject or any other subject of enunciation more or less akin to the transcendental ego (as linguists make use of it), resolves nothing as long as that subject is not posited as the place, not only of structure and its regulated transformation, but especially, of its

[41] Saussure, op.cit. p.16. For introductory accounts of the Saussurian basis of semiotics, see, amongst others, O.Ducrot and T.Todorov: Encyclopedic Dictionary of the Sciences of Language (1981) Blackwell, pp.84-92; A.J.Greimas and J.Courtes: Semiotics and Language (1982) Indiana; S.Hervey, op.cit.; J.Culler: In Pursuit of Signs (1981) R.K.P. Pt.I., U.Eco: Semiotics and the Philosophy of Language (1984) Macmillan, pp. 14-46.

loss, its outlay.⁴²

The problem, finally, is that of noting the essential circularity of the relation of system to creativity. Saussure was aware, as is clear from the dual aspect of the conception of linguistic value, that language has both a signifiatory and a communicative function, that it is both the condition of intelligibility and the material of meaning. The arbitrariness of the sign, however, relegated the communicative function of language to the very weak and ill-defined sphere of parole. The assignment of communication, and with it the related concepts of creativity, meaning and idea, to the subjective and unknowable or at least inherently unpredictable sphere of parole has deleterious consequences. While on the one hand it forces linguistics to abdicate from all concern with a major dimension of its object of study, it is also the case that the lacuna thereby created has serious effects upon the conception of langue itself. It constitutes first a logical circularity: creativity both presupposes the existence of a system which it can change or destroy and also implies that every system is only the resultant effect of a previous creativity. Creativity thus produces the notion of a system as its complement, and by virtue of the subjectivist or substantialist character of the conception of creativity as parole, it further reacts upon and defines the notion of system in a particular, somewhat overstated, way. The term parole constrains that of langue, to the effect of forcefully overloading the systematicity characteristic of the latter and, as more recent developments in the discipline bear out, the linguist is forced either towards a residual agnosticism in relation to semantics - language is seen to be unfortunately indeterminate (a commonplace assumption in the philosophy of language) - or towards attempts to produce a conception of pragmatics on the periphery or outside of linguistics itself, wherein conceptions of intention have frequently been resurrected or formalised to explain meaning as potential usage.

At all events, these are some of the major difficulties with which post-Saussurian linguistics have had to grapple. It will be suggested subsequently that they are problems which linguists have partially solved

[42] J.Kristeva: Desire in Language (1980) Columbia U.P. p.24.

in a variety of ways. Furthermore, they are problems which have consistently recurred in the domain of the philosophy of language, and equally, in a precisely analogous form, in the work of contemporary legal philosophers. The convergence of jurisprudence and the philosophy of language is, however, a fairly specific affair and deserves to be treated with caution. While the meeting point of these disciplines has generally been in relation to questions of semantics and of the constitution of meaning by context, largely in the terms outlined above, it is nevertheless the case that for most of the present century the dominant and consistent theme within legal philosophy has been the direct counterpart of the Saussurian concern with the concept of language system, namely that of a concern with legal form. What has been argued in relation to Saussure's scientific linguistics, in essence that formalism and subjectivism are a complementary pair, will prove to be equally true of legal philosophy. Formalist conceptions of law, theories of law as a 'purely' normative order or as primarily a system of rules, inevitably entail an element of subjectivism as an ideological complement in relation to questions of legal interpretation, judgment and rule usage. While the questions of linguistic interest have tended to occur with respect to these issues of legal meaning, they nonetheless deserve to be located historically and theoretically in relation to an antecedent and still much vaunted legal formalism, namely the normative theory of law, and the concept of an objective legal science which, in its linguistic turn, is a theory of pure legal signs. It is in the interests of fully evidencing the structural context of the problem of legal meaning within positivist jurisprudence that the central theme of the next chapter will be that of the constitution of the object of legal studies as a problem of structure - of the form of law as an order.

3. THE LANGUAGE OF LEGAL FAITH

Just as in religion, so long as there is a religion, there must be a dogmatic theology, which cannot be replaced by any religious psychology or sociology, so, as long as there is a law, there must be a normative theory of law. H.Kelsen.¹

3.1 THE CONTEXT OF LEGAL SCIENCE

In discussing the broad historical context of Saussure's peculiarly explicit formulation of an autonomous science of language, I placed considerable emphasis upon the extensive philological tradition to which this science belongs. While Saussure's formulation of the object of linguistics as the language system is most normally, and quite accurately, examined in the more modern terms of its dependence upon the neo-Kantian conception of scientific methodology which to varying degrees pervaded all the social sciences during the second half of the 19th century,² the wider context and history of linguistic study deserve recollection. In common with the entire spectrum of medieval European humanistic scholarship, it is the rediscovery and reception of the works of the classics of Hellenic and Roman civilization within the confines of the monastery and of the university which originally demarcated and defined the scholarly disciplines.³ If philology was the methodology of such

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- [1] H.Kelsen: *The Pure Theory of Law, Its Methods and Fundamental Concepts* (1934) 50 *Law Quarterly Review* 474, at 490.
- [2] The most wide-ranging and frequently incisive discussion is to be found in Nietzsche's short book 'We Philologists', reprinted in F.Nietzsche: The Case of Wagner (1911) Foulis pp.109-190. Of the philological tradition, Nietzsche comments, 'it is a sad story, the history of philology. The disgusting erudition, the lazy, inactive passivity, the timid submission.' (p.140). The philologists - the historians, the philosophers, the jurists - rely upon belief and not upon any critical faculty.
- [3] On the humanist curriculum, see, D.Knowles: The Evolution of Medieval Thought (1962) Yale; R.W.Southern: The Making of the Middle Ages (1967) Hutchinson, ch.4; R.W.Southern: Medieval Humanism (1984) Blackwells; L.D.Reynolds and W.G.Wilson: Scribes and Scholars (1978) Oxford, ch.5 and 6; J.J.Murphy: Three Medieval Rhetorical Arts (1971) University of California Press; W. Ong (1958) op.cit.

recovery and transmission in general, and exegesis of the written monument or of the petrified written form was the characteristic mode of dissemination, then it is not hard to see that the later developments of an objective grammar or of language studied as a code are broadly consistent, if secularised, representations of earlier textual traditions. Thus if Indo-European linguistics could take the classical languages as their fully formed and autonomous object of investigation, the more modern project of a scientific linguistics merely extends the philological methodology to the concept of grammatical structure, and further rationalises and universalises the normative consistency of the classical texts into a set of rules that are now to be taken as the laws governing language as such.

The analogue to the philological textual basis of linguistics takes an almost exemplary form within legal studies. The concepts of legal tradition as continuity, and of law as based upon custom or upon practice derived from 'time immemorial' are established themes of legal history.⁴ For legal scholarship the past has a pre-eminent role as the source of legal authority. More specifically, the origins of the discipline of legal science are to be sought in a textual past and most particularly in the methodology and substantive curriculum of the medieval reception of the textual monuments of the second Roman Empire, the Justinian Code and the Digest.⁵ Although the inception of legal science as a science, that is as the study of law as an independent or autonomous subject matter, is more usually referred to its modern rationalist context,⁶ the principal characteristics of the later discipline were already present in the

[4] C.f. for example, F.Maitland and F.Pollock: The History of English Law (1958) London; H.Maine: Ancient Law (1891) London; T.S.Midgley: The Language of Equality (1978) Ph.D. Thesis, University of Edinburgh; T.S.Midgley: The Role of Legal History (1975) 2 Brit. J. Law and Society 153.

[5] C.f. P.Vinogradoff: Roman Law in Medieval Europe (1929) Oxford, ch.2, 4; H.J.Berman: The Origins of Western Legal Science (1977) 90 Harvard Law Review 894; F.Schulz: History of Roman Legal Science (1946) Oxford. More generally, c.f., J.H.Wigmore: A Panorama of the World's Legal Systems (1928) West Publishers; M.Hamburger: The Awakening of Western Legal Thought (1942) New York; R.Kelvelson: Comparative Legal Cultures and Semiotics (1982) 1 American Journal of Semiotics 63.

[6] See, e.g., R.M.Unger: Knowledge and Politics (1975) Free Press, pp.80-100; R.M.Unger: Law in Modern Society (1976) Free Press, pp.11-13, 66-76, 83-6, 176-181; D.Kennedy: Form and Substance in Private Law Adjudication (1976) 89 Harvard Law Review 1685; D.Kairys (ed.): The Politics of Law (1983) New York, ch.2.

medieval curriculum and the scholastic exegesis of the classical texts. The medieval glossators were exemplary philologists:

To say that law was taught and studied in the West as a distinct science at a time when the prevailing legal orders were only beginning to be clearly differentiated from politics and religion, raises a number of questions. What did the first law teachers teach? The answer surely sounds curious to modern ears. The law that was first taught and studied systematically in the West was not the prevailing law; it was the law contained in an ancient manuscript which had come to light in an Italian library toward the end of the 11th century. The manuscript reproduced the enormous collection of legal materials which had been compiled under the Roman Emperor Justinian in about 534 A.D. - over five centuries earlier.⁷

The first law schools were established specifically for the purposes of studying ancient manuscripts, and 'for the doctors of the new study the books of Justinian were sacred books, the sources of authority from which all deductions were to be made.'⁸ The absolute and canonic authority of the text, the presupposition, common to both jurisprudence and theology, that certain texts were to be comprehended as containing a complete and integrated body of doctrine, was central to the scholastic method of the glossators: 'As in the case of theology, the written text as a whole, the Corpus Iuris Civilis, like the Bible and the writings of the Church Fathers, was accepted as sacred, the embodiment of reason.'⁹ The jurists task was that of making sense of a series of texts which were objectively given and authoritatively laid down. No attempt was to be made to question the rationality, the utility or the historical and social conditioning of those legal or scriptural authorities. From its very beginnings in the 12th century, the science of law was to treat its object as an autonomous body of written doctrine which was to be philologically reconstructed and handed down by an elite group of juristic exegetes, the

[7] H.J.Berman, op.cit. 898.

[8] P.Vinogradoff, op.cit. 57 ff. See also, J.Dawson: The Oracles of the Law (1968) Yale U.P.; J.Lenoble et F.Ost: Droit, Mythe et Raison (1980) Bruxelles. See, Y.Thomas: Le Langue du droit romain (1974) 19 Archives de Philosophie du Droit 103, at 104: The task facing the romanist was in many ways that of endeavouring to discover the origin of contemporary dogma in a golden age of law. By abolishing history, this eternal logic of the spirit of the law (l'esprit juridique), this eternal axiology of legal principles, was consecrated and sanctified.

[9] H.J.Berman, op.cit. 909. J.Dawson, op.cit. p.114 ff; P.Stein: Regulae Iuris (1966) Edinburgh U.P. 36-48, 118-123.

first lawyers of post-classical Europe.

If the conceptual language of Western legal faith has changed considerably since its earliest representation in the scholastic reception of Roman law, the change of terminology should not be taken as evidencing any corresponding revision of substance. While the 19th and 20th centuries have witnessed several attacks upon the orthodoxies of legal exegesis, and while historical and realistic tendencies within legal studies have to some extent challenged the formalistic assumptions resident within the dominant pedagogy of legal science, the greatest successes of modern jurisprudence have been precisely characterised by the re-assertion of the autonomy of law. The specific context of contemporary legal science which is to form the subject of the present chapter, is coextensive with that of linguistics itself. It too was to take the form of a restatement of a challenged faith in the object of its discipline, and it too was to return to Kant for the purposes of recovering the order or structure that rightly underlies and determines the practice, in this case that of law. Indeed the influence of Kant upon Kelsen cannot be doubted. What is peculiarly striking, however, is the manner in which Kelsen's definition of the object of legal studies, his formalist conception of a science of the logical hierarchy of legal norms and correlative thesis of the autonomy of legal signs, have dominated and continue to dominate the jurisprudential study of law. The statement of a weltanschauung quoted at the outset of this chapter was by no means uncharacteristic of Kelsen's work. Just as Kant's philosophy of reason was in one of its aspects a rigid defence of protestant faith, so Kelsen too was concerned to protect 'the intellectual needs of those who deal with the law' and to provide a 'dogmatic jurisprudence'¹⁰ which would ever and consistently serve such a function. In what follows, it will be argued that the influence and success of Kelsen's reaffirmation of the science of law has travelled largely unacknowledged into the methodology and practice of contemporary legal positivism. In the words of a recent critique of positivist theories of law application:

Formalism is not an antiquated theory of merely historical interest.

[10] Kelsen, op.cit. 490.

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.¹¹

Utilising the work of H.L.A.Hart, it will further be argued that it is precisely the residual formalism of positivist methodology that best illustrates the incoherence of the doctrine as a whole, and most specifically undermines those conceptions of legal language and communication that have frequently been used to justify both the methodology and the substantive analyses of legal positivism and its practice. In the ensuing discussion, however, I shall concentrate principally upon the jurisprudential context of the linguistic assumptions of legal science and will reserve for the following chapter the analysis of the specifically linguistic arguments which can be elicited from the positivistic tradition.

3.2 ON PURITY AND MORAL DANGER: HANS KELSEN AND LEGAL FORMALISM

The generic development of contemporary legal formalism is a reasonably well documented phenomenon.¹² Of central concern was the idea of analysing law as a self-contained system of norms, which system was to be independently identifiable or internally guaranteed, without reference to any content, usage or history of the rules that comprised the system. It was, in other words, a science of the form of law and significantly enough it shared many features in common with its historical contemporary, the Saussurian science of linguistics. That there should be elements of similarity between the two sciences is not, of course, surprising. They were both though to variant degrees, the product of the polemical concerns of late 19th century European philosophy and both inevitably bore the

[11] M.S.Moore: *The Semantics of Judging* (1981) *Southern California Law Review* 151, 166.

[12] Generally, J.Shklar: *Legalism* (1964) Harvard U.P.; J.Cohen: *The Political Element in Legal Theory* (1978) *Yale Law Journal* 1; Ch. Perelman: *Logique Juridique* (1976) Dalloz; H.Kelsen: *General Theory of Law and State* (1946) Harvard 409-446, H.Kelsen: *Essays in Legal and Moral Philosophy* (1973) Reidel. More critical accounts can be found in J.Lenoble et F.Ost, op.cit. 467-553; E.Balibar: *Positivism and Irrational Thought* (1978) 107 *New Left Review* 3.

imprint of contemporary debates as to the nature of the social sciences. If anything, Kelsen's supremely rigorous and acute theory of the grammar and hierarchy of the legal order was even more explicitly a product of its philosophical context than was the Saussurian conception of linguistics. The Pure Theory of Law, however, made its own claim to scientific status. It was to be:

...objectivist and universalistic. It aims at the totality of law in its objective validity and seeks to conceive each individual phenomenon in its systematic context with all others - to conceive in each part of the law the function of the total law... The law is an order, and therefore all legal problems must be set and solved as problems of order. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments.¹³

The apparent implication is not unfamiliar and may be immediately noted: in the name or cause of the unity of the system of law, the object of this science was to be specifically constructed so as to exclude the elements of subjectivity inherent in historical and particular facts. The questions to be posed are those of how and to what effect in terms of content and substantive practice this aim was to be achieved.

The former question, that of how this science was to be constructed, is the one most amenable to a swift and schematic resolution. Kelsen's major methodological innovation was that of the introduction of a Kantian methodology to the study of law. A more detailed explication of this invention will be undertaken below. Generally, however, it may be observed that the formalist orthodoxies of legal philosophy and particularly of the exegetical study of adjudication, were being increasingly challenged in the latter half of the nineteenth century by the rise of historical jurisprudence.¹⁴ While evolutionary studies of legal development enjoyed

[13] H.Kelsen: Pure Theory of Law (1970) Univ. of California Press, pp.191- 192.

[14] 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: Schools in Linguistics (1980) Hutchinson, ch.1. 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 volkslied which was also believed to be the unconscious product of the anonymous people.'

considerable success, substantial inroads had also been made by the Hegelian 'Philosophy of Right' and by the Marxian conception of historical materialism and of the historicity of legal ideology. Although these theories all constituted separate and distinctive challenges, they did combine, in the name of very different conceptions of historical development and indeed of political practice, in opposing the positivist thesis of the autonomy of the legal object. The centrality of history was deemed to preclude the possibility of any social science based upon a physico-mathematical model, and worse still, these historical studies generally adhered to an unrepentant conflation of fact and value. The scientific status of legal philosophy was in obvious danger of succumbing to the rising tide of historically orientated studies. Legal science urgently required a champion, and such was the role which Kelsen, throughout a lengthy and productive life, considered to be his own.

A threatening situation was always likely to produce an extreme reaction, and Kelsen's Pure Theory of Law, was no exception. Throughout his literary life Kelsen consistently maintained a polemical attitude towards any and all competing conceptions of legal theory. As he himself phrased it, 'a glance at the traditional science of law, in its nineteenth and twentieth century developments shows plainly how far removed from the requirement of purity the science was.' The traditional science had lost its faith in the possibility of a purely logical analysis of law, it had forgotten the methodological axiom which separates the pure from the alien, the normative from the causal or empirical, it had been permissive and indiscriminating in its contact with other disciplines, the 'real science of law'¹⁵ had been lost in direct proportion to the extent of jurisprudence's conjunction with other disciplines. It would indeed be no exaggeration to say that for Kelsen the history of legal philosophy in its entirety, was a virtually uninterrupted narrative of a single simple, though gargantuan, error. It was that of the failure to distinguish the question of the formal validity of the normative order, a properly logical question, from that of the content of particular laws, a question of a

[15] H.Kelsen: (1934) 50 Law Quarterly Review 474, at 477, 486.

theological, ethical or political nature.¹⁶ The former question alone was to be the subject matter of legal science, a discipline which for Kelsen should be wholly given over to the study of the systemic characteristics of the legal order conceived as a grammar and hierarchy of norms. It was, as stated, to be a structural theory of law and, as will be detailed below, it goes hand in hand with an emotivist theory of ethics and the axiomatic rejection of the possibility of any causally based historical science of law. Indeed the first step along the Kelsenian road to legal science was precisely that of moving away from history in the direction of a Kantian, transcendental epistemology, or 'neo-critical' dualism.

The basic premiss of Kelsen's 'epistemology of the scientific outlook' is the rejection of the transcendental entities of antecedent metaphysics and their replacement by the theory that:

Cognition cannot be merely passive in relation to its objects; it cannot be confined to reflecting things that are somehow given in themselves ... Cognition itself creates its objects, out of materials provided by the senses and in accordance with its immanent laws. It is their conformity to laws which guarantees the objective validity of the results of the process of cognition ... The ideal of objectivity emerges as dominant. Therefore we also find the prevalence of logic and the tendency to relativism.¹⁷

The process of cognition was thus to produce the object of legal science, by means of the now celebrated presupposition of what law must be like for the science of law to be possible, namely the transcendental-logical presupposition of any legal system, the basic norm. 'Just as the chaos of sensual perceptions becomes a cosmos, that is, "nature" as a unified system, through the cognition of natural science, so the multitude of general and individual legal norms, created by the legal organs, becomes a

[16] See the very useful essays collected in H.Kelsen: What is Justice ? (1957) Univ. of California Press. Kelsen's theme in these essays is that of an unstinting attack upon any and all attempts to introduce any considerations of morality, politics or history into legal science. I cannot refrain from quoting his extraordinary conclusion to the essay 'Natural Law before the Tribunal of Science': 'From the point of view of science, (natural law) method is entirely worthless. In the Laws Plato distinguishes lies which are, and those which are not permissible. Lies are permissible if they are useful to the State. That the natural law doctrine, as it pretends, is able to determine in an objective way what is just is a lie; but those who consider it useful may make use of it as a useful lie.' (p.173).

[17] H.Kelsen: General Theory of Law and State, op.cit. 434-5.

unitary system, a legal order, through the science of law.'¹⁸ The basic norm of the legal hierarchy was thus to be created or produced so as to fulfil the requirements or logical conditions necessary for an objective interpretation of the legal order. For science to be possible, in other words, it was necessary to presuppose that the world, and here the legal world, be constituted in a particular form. The presupposition is not, however, an epistemological prescription alone. It is, of course, perfectly true that Kelsen was consciously carrying forward an essentially Kantian objective idealism by utilising fully the concept of 'architectonic', which Kant had defined as the 'art of constructing a system'. Most briefly, Kant's argument had been that 'without systematic unity, our knowledge cannot become scientific, it will be an aggregate and not a system.' As regards the system itself, it is subsequently defined by Kant as 'the unity of various cognitions under one idea. The idea is the conception - given by reason - of the form of the whole, insofar as the conception determines a priori not only the limits of its content, but the place which each of its parts is to occupy.'¹⁹ In less guarded moments, however, Kelsen was to suggest a more pragmatic and ideological character to the presupposition which was to determine law as system: its paramount value as dogma to the 'jurist concerned with the particular legal order, the lawyer, the legislator or the law teacher.'²⁰ Elsewhere, Kelsen's role as defender of the legal faith (by fiat) is even more explicit; in answer to the question of why law should be obeyed, Kelsen replies:

the norm that we ought to obey the provisions of the historically first constitution must be presupposed as a hypothesis if the coercive order established on its basis and actually obeyed and applied by those whose behaviour it regulates is to be considered as a valid order binding upon those individuals; if the regulations among these individuals are to interpreted as legal duties, legal rights, and legal responsibilities, and not as power relations ...²¹

In short, the epistemological precondition for a science of law, and with it the legitimation of the binding validity of legal norms was contained in the axiomatic postulate of the logic and unity of the system of norms.

[18] Pure Theory of Law, op.cit. 72.

[19] I.Kant: Critique of Pure Reason (1887) London, at 504.

[20] General Theory of Law and State, op.cit. xiii.

[21] What is Justice? at 262.

Such was presented as a formal construction, it claimed to privilege both system and objectivity as a function of system, without, in Kelsen's view, importing any considerations of value: 'even an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to approve of this law.'²² To fully grasp the force of this formal requirement, and to further elaborate the nature and difficulty of the system of norms conceived as a grammar of legal validity, it is as well to turn to its substantive implications.

The condition of the existence of legal science was that it studied only the interrelationship of legal norms within a closed, hierarchic and essentially textual system. It was by virtue of this condition that the question of the binding validity of legal norms could be posed as a question internal to the form of written law, and might, for Kelsen, be solved in terms of the logical or systemic interdependence of norms. The question of the validity of a norm would thus be established objectively, it was a matter of necessary 'imputation' - when 'A' is, then 'B' ought to be - and in no way incorporated any of the purportedly subjective questions of either history or volition. It should here be noted parenthetically that Kelsen is conforming to a tradition of philosophic doctrine that returns ultimately to Aristotle's rigid distinction and opposition of the necessary and the contingent or, in a linguistic form, between the analytic (demonstrable) and the rhetorical. Kant in turn had reworked the opposition in the form of the corresponding distinction between analytic and synthetic judgments.²³ It is precisely the assumption of the scientificity of the normative order and the necessary interrelation of its elements, the status of the system itself as a series of necessary (analytic) entailments, that precludes consideration both of questions of

[22] Pure Theory of Law, op.cit. at 218. The point is one which is repeated ad infinitum by the later proponents of legal positivism. See, for example, D.N.MacCormick: Law, Morality and Positivism (1981) 2 Legal Studies 131; compare, D.N.MacCormick: Legal Right and Social Democracy (1983) Oxford, ch.1.

[23] Critique of Pure Reason, op.cit. p.7: 'In all judgments wherein the relation of a subject to the predicate is cogitated ... this relation is possible in two different ways. Either the predicate B belongs to the subject A, as something which is contained (covertly) in the conception A; or the predicate B lies completely outside of the conception A, although it stands in connexion with it. In the first instance, I term the judgment analytic, in the second, synthetic.'

causality and also of substantive adjudication. Both the latter problems are relegated to the realm of the contingent or synthetic:

By defining law as a norm and by limiting the science of law to the cognition and description of legal norms and to the norm-determined relations between norm-determined facts, the law is delimited against nature, and the science of law as a science of norms is delimited against all other sciences that are directed toward causal cognition of actual happenings.²⁴

To his indubitable credit Kelsen enumerated fully and unequivocally the implications of this position in the major body of his work. The ideal of objectivity and the correlative concern with logic as the privileged mode of legal statements must necessarily produce a behaviouristic account of law, a description of the system of norms as an ideality, concerned only with the externalities of legal institutions and of legal meaning.

It may first be noted that the concept of legal meaning as produced within the science of law refers exclusively to such meaning as is externally created by the process of cognition itself. The objective meaning of an act or behaviour, a legal norm, is quite independent of the subjective meaning of the act; 'from the point of view of cognition directed toward the law, relations between individuals are not at issue, but only relations between legal norms or between facts determined by the legal norms, among which human behaviour represents only one special case...'²⁵ A legal relation is not an actual relation existent in reality, it is a relation objectively constituted by the system of norms; 'that the human being is a legal subject means nothing else but that human behaviour is the content of legal obligations and legal rights.'²⁶ There is, in other words, an objectivity to legal meaning within the theory of pure law, which objectivity, or necessity of a specific logical form, excludes the possibility of any subjective, social or historical, constituents. Kelsen, most significantly, designates any such subjective content to norms as wholly arbitrary, the particular origin and content of a norm being entirely distinct from the description of its logical validity within a

[24] Pure Theory of Law, op.cit. p.75.

[25] Ibid. 165.

[26] Ibid. 173.

system, or more precisely, within the idea of a system. Thus, 'inasmuch as (the) norms... are enacted by human will, the values constituted by them are arbitrary.'²⁷ Norms posited by human acts of will possess - in the true meaning of the word - an arbitrary character. Any behaviour we please, that is, can be decreed in them to be obligatory. As Joseph Raz²⁸ has commented, such a conclusion is ultimately a product of the presupposition of the basic norm as the principle of origin and the criterion of validity for legal norms. Fidelity to Kant entails referring the unity of the normative system to the basic norm and not to any law-creating act on the part of either the legislature or the courts. The question of the form of law is thus preserved as a question of science and such questions of science within the Pure Theory also inevitably entail the thesis of the arbitrariness or accidental quality, of the content of law. Kelsen is at his best, as regards self-consistency, in describing the 'static' aspect of law in terms of the supposed political indifference of science to any and all questions of legal content. Certainly more recent legal positivists have not been prepared to continue Kelsen's unrestrained attacks upon anthropomorphic metaphors of corporate personality, legislative acts, or of representation.²⁹ Nor have they generally had the clarity to see that the common liberal claim that law is essentially related to freedom and to the self-determination of the legal subject is ideological because it necessarily implies a certain content to law and is 'essentially formed with regard to the concept of property right.'³⁰ The intransigent formalism of the Kelsenian theory of norms emphatically denies the possibility of the liberal authorisation of the capitalist legal order, in precisely the same terms as those used elsewhere to impugn the socialist critique of legality.³¹ Any system of law is a coercive order of human

[27] Ibid. 18. See also, Essays in Legal and Moral Philosophy, p.218:

[28] J.Raz: The Concept of a Legal System (1980) Clarendon, p.95 ff.

[29] For commentary on this aspect of Kelsen's work, see, G.Della Volpe: Rousseau and Marx (1978) London, ch.2 and Appendix.

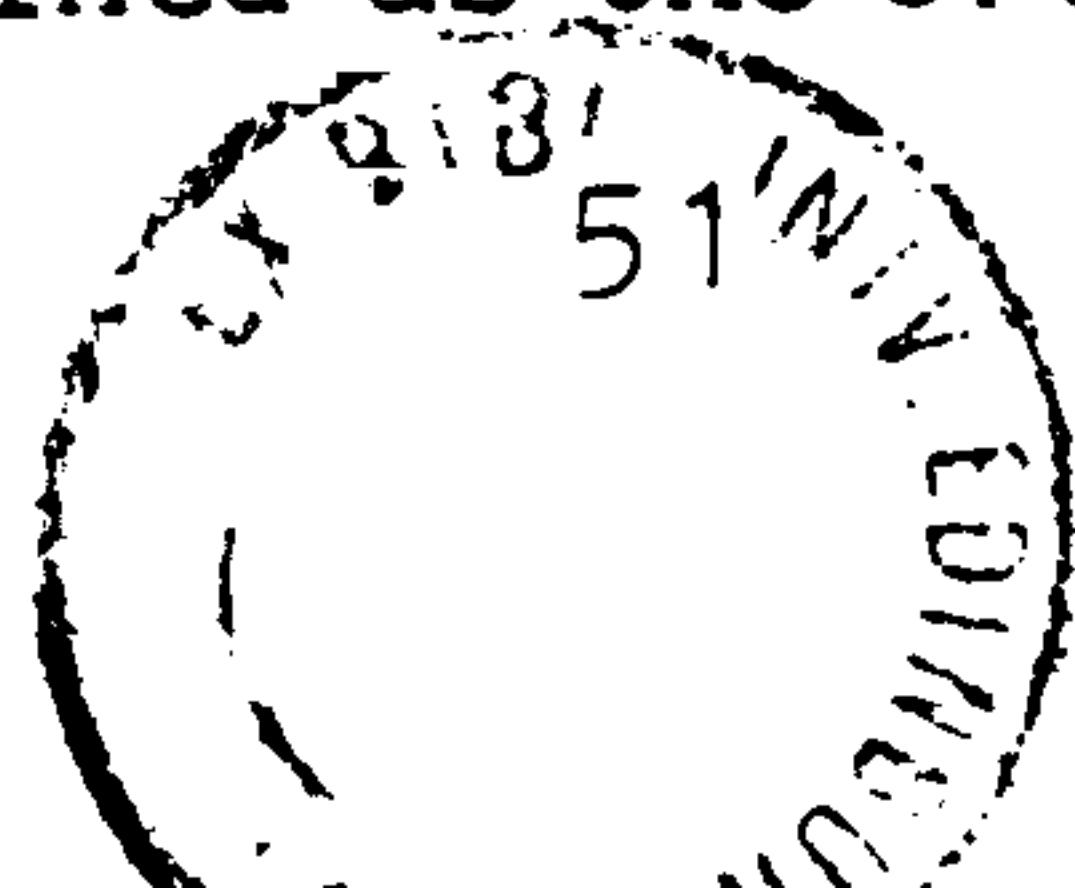
[30] Pure Theory of Law, op.cit. p.170. In view of more recent debates as to the ideological character and significance of the legal subject, it is interesting to note Kelsen's conclusion that, 'It is easy to understand why the ideology of legal subjectivity seeks to establish a link with the ethical value of freedom. An order that refused to recognise man as a free personality in this respect, that is, an order that does not guarantee the subjective right of property, is rejected by this ideology as not being a legal order at all.'

[31] H.Kelsen: The Communist Theory of Law (1976) Aalen.

behaviour and is amenable to any content whatsoever. To paraphrase Kelsen's own words, a science which genuinely removes the veil of metaphysics and does not close its eyes, faces squarely the Gorgon head of power unalloyed.

Such consistency or reductive systematicity does not, however, come cheap. It has already been observed that it entails a conception of the radical arbitrariness of all questions of value. The realm of value, and with it that of volition, is quite simply excluded, as contingency, from the ambit of science; history and the socio-historical generation of the individual norm - or content and meaning of the normative system - is not a question open to valid study. Precisely because history is conceived as a domain of irrational subjectivity the problem of history has to be collapsed into the presupposition of a valid source of law, and the difficulties that such irrationality had posed may now be avoided by reducing all questions of the historical basis of actual legal norms to the purely formal question of legal dogmatics, that of the 'internal' validity of norms, their lineage in logic, their source. In short, reality is displaced by thought, a position which helps explain the excessive rigidity and objectivism of the Pure Theory when it comes to examine the questions of 'legal dynamics', of law creation and law interpretation. There is indeed a self-reinforcing circularity to the relation of content to form, whereby emphasis upon the form of law in the account of legal statics, forces the study of law creation and its correlative, the application and so also content of norms, in the direction of an unworthy subjectivism. Whereas other structuralists, and in particular Saussure, had been prepared to abandon the study of the diachronic or 'nomo-dynamic' and to relegate such subject-matter in its entirety to non-science, the position of the Pure Theory is presented as being more complex. Such complexity is, however, more apparent than real.³²

[32] C.f. O.Weinberger, introduction, in H.Kelsen: Essays in Legal and Moral Philosophy, op.cit. at p.xviii: 'The theory of legal dynamics and the hierarchical structure of law ... represents an integral constituent of the Pure Theory of Law. The whole of legal life, legislation, legal transactions, the judicial or administrative decision, official action and execution, are similarly explained and defined as the creation and fulfilment of norms.'



It is a peculiarity of the legal order that it is not simply a system of norms co-ordinated to each other, 'standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms.' It is the hierarchical character of the legal order that forms the object of the theory of legal dynamics, which theory studies the creation and application of law and so also analyses the changing content of legal norms. 'Law regulates its own creation inasmuch as one legal norm determines the way in which another norm is created, and also, to some extent, the contents of that norm.'³³ The process whereby legal norms are created and applied in consistency with the criteria provided by higher or superior norms of the order, is not, however, considered by legal cognition beyond the extent to which higher legal norms regulate the creation and application of lower norms. It is, in other words, the fact that, from the systematic viewpoint, legal dynamics are norm-determined processes that captures the exclusive attention of the science of law. The requirements of law creation and law application are purely formal, they concern solely the conformity of lower norms to higher norms - principally the relationships of subsumption and of delegation - and thereby enable Kelsen to reassert the unity of the legal order. A structural logic can thus be reintroduced to the study of legal dynamics to the end of denying the possibility of lacunae in the law - even where the legal order does not contain a general norm positively regulating a particular behaviour, it is nonetheless the case that such behaviour is still regulated negatively - and it is equally the case that 'no conflict is possible between a higher and a lower norm of a legal system' - both unlawful judicial and administrative decisions and also unconstitutional statutes are analytic contradictions which would destroy the unity of the system of norms by making it impossible to describe it in non-contradictory rules of law.³⁴

It is consequently first the case that the introduction of a discussion of legal dynamics strongly reinforces the conception of the objectivity of the logical system of law. The question of the substantive, socio-historical, production of legal norms is further distanced from the ambit of scientific study. The formalism of the conception of legal dynamics

[33] General Theory of Law and State, op.cit. p.124

[34] Pure Theory of Law, op.cit. p.276, 245.

indeed refurbishes the tendency towards an extreme subjectivism in relation to legal substance. The one implies the other, and Kelsen's originality resides in his having determinedly opted in favour of a formalism which could only be exacerbated when the science of law finally and hesitantly commented upon the problem of legal interpretation. Kelsen here opens up, albeit in a peculiarly unsatisfactory way, the problems of legal language and legal meaning which have most captivated and troubled the future development of legal positivism. If nothing else, a certain equivocal realism leads Kelsen to acknowledge that 'every law-applying act is only partly determined by law and partly undetermined. The indefiniteness may concern either the conditioning fact or the conditioned consequences.'³⁵ Proceeding to castigate the ambiguity of linguistic expression as a frequent cause of uncertainty, Kelsen concludes pre-emptively that:

There is simply no method ... by which one of several meanings of a norm may gain the distinction of being the only correct one ... Despite all the efforts of traditional jurisprudence it has not been possible so far to solve in an objectively valid fashion the conflict between will and expression in favour of the one or the other.³⁶

It is not only impossible but further, it is futile or fictitious even to attempt to specify any single, correct, interpretation or application of a general norm. The reason for this agnostic semantic subjectivism is most simply stated as the default of legal science in the face of its own conception of the relativity or arbitrariness of legal content; 'for the process of creating an individual norm within the framework of a general norm in the process of applying the law, is a function of will.' The exercise of will, or the domain of language use entails the entry into the legal process of other norms: 'such as the norms of morals (and) of justice, constituting social values ... from the viewpoint of positive law nothing can be said about their validity ... except to characterise them

[35] Ibid. 319.

[36] Ibid. 352.

negatively; they are norms which are not of positive law.³⁷ It transpires, in other words, that at the end of the day the Pure Theory of Law is unable to provide either guidance or comment upon a question of critical practical and theoretical significance, namely that of the interpretation and consequent application and justification of specific rules of law. The difficulty is one which is peculiar to formalism. On the one hand, it necessarily admits that values, and so also substantive questions of meaning, intrude upon and play a role in the history and realisation of the legal order. On the other hand, the methodological exigencies of a unified legal science virtually preclude the possibility of any rational examination of the actual manner in which such values and meanings affect the realisation of the system and so also, in a substantive sense, constitute that system as a practice. An uncodified system of legal norms is, after all, nothing other than the resultant effect of previous legal practice. Such a paradox is, in essence, the unresolved problem which Kelsen bequeathed to the future generations of legal positivists.

There are, as should be apparent, several facets to the problem of the intrusion of questions of value and of meaning, of history generally, into the study of the system of norms. There is firstly what may be termed a problem of a lesser order. It is that of the attempt to provide a satisfactory account of legal semantics from within a formalist conception of the role of legal science. The issue here is that of accepting the general terms in which the Pure Theory designates the problem of interpretation as a problem of volition or subjectivity, and of endeavouring to supplement it with a more positive approach to substantive questions. It is, in effect, a laudatory form of criticism: the lacunae in the theory may be remedied; and it is also, for obvious reasons, the most frequent mode of procedure on the part of those who would term themselves positivists. It is to the effects of this largely unacknowledged position

[37] Ibid. 352-4.. For discussion of this aspect of Kelsen's work and the periodisation of his various changes in position with regard to the theory of adjudication, see, 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: Kelsen and the Exegetical Tradition in Jurisprudence (1981) Proceedings of the U.K.Association for Social and Legal Philosophy, Edinburgh; S.Paulson: On the Status of the Lex Posterior Derogating Rule (1983) V Liverpool Law Review 5.

within contemporary legal positivism that I shall direct my attention in the ensuing section. I shall further argue that the apparent shift of emphasis from the systemic unity of the form of law and the correlative thesis of the objective meaning of the normative order, to a concern with substantive issues of legal meaning and language use, significantly illuminates flaws within the positivist position as a whole. A serious examination of the contemporary use of arguments haphazardly drawn from the philosophy of ordinary language to defer or deny the collapse of legal science in the face of the demand that it account for its specifically social and historical role and rhetoric, fully evidences its theoretical inability to escape from the complementary pitfalls of formalism and subjectivism.

3.3 ADVENTURES OF LEGAL MEANING: HERBERT HART AND LEGAL SUBJECTIVISM

Numerous criticisms of the Kelsenian conception of legal science are possible and have been essayed. An extreme though arguably somewhat too simple mode of attack is that of denying the relevance of the entire edifice of the normative theory. It has thus been claimed by E.B.Pashukanis,³⁸ that the Pure Theory of a normative science is a logical absurdity. From a very different position within philosophic existentialism, the sometimes admirable Georg Cohn³⁹ similarly extended a critique of legal science to include any form of conceptual jurisprudence as a flagrant denial of what Sartre had termed 'lived experience'. Both such frontal attacks have their merits but, from the viewpoint of legal philosophy as traditionally conceived and established, are overextensive. It is, of course, perfectly legitimate to impugn abstractly a particular conception of legal science for not being, respectively, a materialism or a phenomenology. Such thorough-going criticisms, however, remove the debate from the domain of substantive jurisprudence to that of philosophic method. As Finnis⁴⁰ has observed in a slightly different context, such debates are largely pre-emptive and allow of a simple analytic defence,

[38] E.B.Pashukanis: Law and Marxism (1978) London.

[39] G.Cohn: Existentialism and Legal Science (1967) New York.

[40] J.Finnis: Natural Law and Natural Rights (1980) Clarendon, p.21.

namely that of distinguishing the very different objects of the disputant theories. It is thus possible to argue that a more appropriate and certainly less well tried mode of approach is that of seriously considering the disputes and emendations generated by the Pure Theory within the loosely defined boundaries of legal positivism. It is certainly only within the context of such a mode of criticism that it is possible to fully appreciate the extent to which the formalism of the Pure Theory has lived on and continues to dominate the apparently more substantively and semantically orientated contributions of later positivists. The persisting conception of a unified, systemically defined, legal order has continued to produce the pernicious exclusion of both historical and sociological considerations, such, even yet, being stigmatised as realms of irrational volition or of contingency pure and simple. Recalling the earlier discussion of linguistics, it was suggested there that an overstated formalism with regard to the conception of a unified, regulative, system of langue generated a rather false problematic for the future development of semantics. For the present, I shall restrict myself to endeavouring to show that where legal positivism has had recourse to the philosophy of language, it has remained wholly within the confines of that false problematic.

With regard to both of the above concerns, a signal and in many facets exemplary contribution has been made by the jurist H.L.A.Hart.⁴¹ From a background both in legal philosophy and in legal practice, he was well placed and to his credit fully aware of the pivotal need for jurisprudence to account for and to contribute to substantive problems of the interpretation and application of legal rules. His concerns were, in other words, both practical and theoretical, and the bulk of his work may in many respects be seen as an extended endeavour to draw a middle way between the extreme and rigid positions of mid-twentieth century jurisprudence. The exigencies to be avoided were comprised on the one side by the overarching formalism of imperative or 'command' theories of law, including the Kelsenian Pure Theory - a theory which was almost wholly inarticulate on matters of legal practice - and on the other side

[41] Particularly, H.L.A.Hart: Definition and Theory in Jurisprudence (1953) Oxford; Concept of Law (1961) Clarendon.

by reductionist theories of law, represented for Hart by some of the cruder slogans of the American realists.⁴² It is at all events to Hart that legal philosophy owes the explicit introduction, albeit in a highly eclectic form, of methods drawn from the philosophy of language; methods which Hart was to use as the means whereby to respond to the sterile seeming orthodoxies and wilder polemics of the antecedent jurisprudence. It may be noted, however, that in principle any attempt to chart a course between antinomian tendencies or extremes is as likely as not to bear certain of the marks, both positive and negative, of the theses that it wishes to avoid. It is by no means clear that Hart's concept of law is an exception to such a principle.

If the above brief characterisation of one aspect of the historical and theoretical context of Hart's work is correct, then it is for present purposes permissible to deal with his substantive theory relatively succinctly. This may be done by concentrating upon a particular theoretical moment of his overall schema, namely that of a residual tendency throughout his work to rely upon subjectivist or psychologistic resolutions to the inherent rigidity and impracticability of the formalist or monist theory of law, with which theory he is otherwise in substantial agreement. Such an analysis is, indeed, valid both for the conception of law as primarily a social fact⁴³ and for the methodological incorporation of linguistic analysis to resolve the problems of rule application. It is in fact the case that both of these aspects of Hart's concept of law are equally influenced by contemporary developments within the philosophy of language, developments associated with the later work of Wittgenstein and with that of Hart's colleague J.L.Austin.⁴⁴ I shall move from the general - and purportedly sociological - to the particular - and specifically linguistic; a movement from the formalist presuppositions of Hartian positivism to the subjectivist solution proposed to the problems

[42] See, H.L.A.Hart: Analytic Jurisprudence in the Mid-20th Century (1957) 105 Univ. of Pennsylvania Law Review 953.

[43] The concept of law as social fact or as institutional convention is identical to the concept of the sociality of language to be found in F.de Saussure: Course in General Linguistics (1966) McGraw-Hill, wherein the social nature of language is equally deemed to be dependent upon pre-existent conventions or is 'given' as a normative fact.

[44] Particularly, J.L.Austin: How to do Things with Words (1962) Clarendon, L.Wittgenstein: Philosophical Investigations (1963) Blackwell.

that such a formalism produces. In both cases the requisite starting point is Hart's distinctive contribution to the analysis of law as a system of rules.

Thus, in very general terms, Hart conceives of law, as is by now well known, as a combination of primary and secondary rules. The leap into the legal state is deemed to occur when primary rules of moral obligation are supplemented by secondary rules and, most importantly, by a rule of recognition.⁴⁵ The notion of recognition is probably more familiar to psychologists and to linguists - being, respectively, a facet of perception or of linguistic competence - than to legal philosophers, but it has a specific and substantial role to play within the Hartian conception of legal system. In opposition first and foremost to the formalist criterion of legal validity based upon a unitary essence to legality - either as imperation or logical presupposition - Hart is concerned to emphasise the character of law as social fact. The rule of recognition, 'a rule for conclusive identification of the primary rules of obligation' will operate by specifying 'some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the serious social pressure it exerts.'⁴⁶ While Hart does in general fully support the formalist analysis of legal validity as exclusively concerned with the manner in which specific laws are themselves norm-determined, the rule of recognition itself falls outside the normative unity of the system:

...a rule of recognition is unlike other rules of the system ... whereas a subordinate rule of a system may be valid and in that sense exist even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.⁴⁷

As Hart refers to this single addition to the normative theory as a fundamental point of difference between his own and the Austinian and

[45] Concept of Law, op.cit. p.89-90.

[46] Ibid. 92.

[47] Ibid. 107.

Kelsenian theories, the nature and content of this 'social' fact is ripe for closer examination.

Even on its face value it is hard to conceive of the rule of recognition as a very momentous advance upon Austin's requirement of a 'habit of obedience' or Kelsen's stipulation that the basic norm be by and large 'efficacious'. At the same time, however, it is worth observing that the reference to the specifically social characteristics of the rule of recognition are also fashioned to meet the criteria of Hart's critical comments upon the imperative or command theories of Austin and Kelsen. Aligned to his use of the Wittgensteinian distinction between the internal and external aspect of rule usage,⁴⁸ Hart is concerned to argue that legal systems are more complex social entities than their description as being merely coercive or imperative might suggest. Borrowing from Peter Winch's work on the methodology of the social sciences, Hart perceives the legal rule to be a variant form of social rule. 'In terms of methodological principle, he can then argue that as a social 'thing', the legal rule is to be defined by reference to internal criteria - it must be not merely observed but also understood: 'for their being intellectual or social, as opposed to physical, in character depends entirely on their belonging in a certain way to a system of ideas or mode of living.'⁴⁹ Suffice it to say at this point, that in adopting such a position Hart is undoubtedly correct in principle, the legal system certainly involves complex mechanisms of consent and an adequate theory of law should have recourse to some criterion of acceptance. How else, in other words, can a theory of law explain what might plausibly be termed the single most complex ideological phenomenon of western political systems? If the proposal of a criterion of acceptance is clearly apposite, what is considerably less clear is whether Hart has succeeded in practice, in the context of his avowed opposition to the formalist theories, in providing an adequate account of acceptance, or in significantly contributing to the 'descriptive sociology' of the substantive legal order.

[48] C.f. Philosophical Investigations, op.cit. paragraphs 50, 75; see also, P.Winch: The Idea of a Social Science (1958) R.K.P. pp.57-62, 96-136; E.Gellner: Thought and Change (1964) London, ch.8.

[49] P.Winch, op.cit. p.108.

Returning to the criterion of acceptance as it is set out by Hart, it is soon apparent that it is effectively a very minor amendment to an essentially formalist account of legal validity. The much vaunted internal aspect of rules or hermeneutic viewpoint is of little import as regards the question of the validity of a system of legal rules. The basic premiss of Hart's position is contained in the familiar proposition that 'if the question is raised whether some suggested rule is legally valid, we must, in order to answer the question, use a criterion of validity provided by some other rule.'⁵⁰ It is in full consonance with such a premiss that Hart severely limits the degree and scope of acceptance or 'internalisation' necessary for the existence of a legal system as a social fact. The entire populace of 'ordinary citizens' are, indeed, deemed to manifest their acceptance of laws by 'acquiescence in the results of .. official operations',⁵¹ and it is largely in ignorance of the dark machinations of the mysterious legal machinery that the 'ordinary' citizen passively keeps the law:

... the reality of the situation is that a great proportion of ordinary citizens have no general conception of the legal structure or of its criteria of validity. So long as the laws which are valid by the systems' tests of validity are obeyed by the bulk of the population this surely is all the evidence that we need in order to establish that a given legal system exists.⁵²

To this somewhat curious and hardly sophisticated foray into 'descriptive sociology', Hart merely adds the rather unconvincing caveat that the above platitudinous and external description be supplemented by a further description of the 'relevant relationship of the officials of the system to the secondary rules which concern them as officials.' There follows an even more bizarre piece of prescriptive psychology: 'here what is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the systems' criteria of validity.' At least insofar as he straightforwardly assumes the justification of legal

[50] Concept of Law, op.cit., p.103; see, J.Raz, op.cit. pp.197-202 for a different account.

[51] Ibid. 60.

[52] Ibid. 111. Compare, J.Austin: The Province of Jurisprudence Determined (1954) London, p.63 ff.

authority, Hart follows squarely in the Austinian tradition of legal analysis and consequently endeavours both to steer the questions of existence and acceptance away from the mirky clutches of the ignorant plebian and simultaneously to reassert, without argument, the unity or hegemony of a governing or official elite, in the form of the legal personification of state power. Nonetheless, even if it be a sorry and predetermined contest, the officials of the system are accredited with such intellectual status or psychological percipience as may be accorded to a stipulatively given 'unified' or shared internal viewpoint. It is interesting to note that Kelsen had already considered and rejected as fundamentally ideological just such a theory of recognition according to which:

positive law is valid only if it is recognised by the individuals subject to it, which means: if those individuals agree that one ought to behave according to the norms of positive law. This recognition, it is said, actually takes place, and if it cannot be proved, it is assumed, fictitiously, as a tacit recognition. The theory of recognition, consciously or unconsciously, presupposes the ideal of individual liberty as self-determination, that is, the norm that the individual ought to do only what he wants to do.⁵³

In the last instance, in other words, Hart's reworking of the Kelsenian presupposition fails to produce more than an apparent reformulation of questions of logical entailment into the terminology of the psychological requirements of a normative system. The assumption of recognition (a presupposed social fact) in no way resolves the problem of acceptance, it is rather the systemic requirement that renders the concept of law possible. It is precisely as such, as a structural precondition of legal analysis and as a pre-given 'social fact' (as a necessary convention) that the rule of recognition is best represented. Questions of acceptance, and indeed of the role of law as the legitimation of power, are again, as in all formalism, collapsed into or reduced to the problem of the internal or logical validity of the 'source' of law, which for Hart merely takes a surrogate psychological form.

[53] Pure Theory of Law, op.cit., p.218.

It would be quite wrong, however, to suppose that Hart's brief affair with the psychology or subjectivity of acceptance was a gratuitous or momentary aberration. On the contrary, it stems fully consistently, though perhaps circuitously, from his innovative adoption of methods drawn from the philosophy of language, and aimed at resolving the problems of law application or adjudication. Here too the very logic of formalism determines that Hart, in common with the whole tendency of ordinary language philosophy, moves towards a subjectivist conception of semantics and so too of law applying acts, while nonetheless remaining fundamentally within an overall schema of philosophic formalism. At all events, the distinctive conception of rule usage which Hart employs is taken indirectly from Wittgenstein's work on the rule governed nature of language use, and also clearly benefits from J.L.Austin's salutary comments upon the philosophy of meaning, comments which in many respects accord with Bentham's earlier proposals with regard to paraphrase and exemplification.⁵⁴ Loosely speaking there are two related questions to be answered, neither of them, from a linguistic viewpoint, being particularly profound. The first, more general question, concerns the nature of language and more particularly the role of definitions in legal theory. The second is a correlative of the first, and is specifically concerned with providing a semantics of law application: how is the meaning of a general term to be ascertained in a situation in which its lexical or factual application is imprecise?

The former of the two questions set out above was the principal subject-matter of Wittgenstein's doctoral thesis, the Tractatus Logico-Philosophicus.⁵⁵ It was the realisation that he had signally failed, in that work, to answer the second question that persuaded him to return from his semi-retirement as a teacher and to take up again the unresolved questions of semantics left over from the earlier work. The outcome was his brilliant if somewhat vague Philosophical Investigations, which work elaborated a philosophy of meaning as constituted in language use, to remedy the wholly referential or denotative conception of essentially

[54] H.L.A.Hart: Definition and Theory in Jurisprudence, op.cit. 1-8.

[55] L.Wittgenstein: Tractatus Logico-Philosophicus (1961) R.K.P.; for a useful general commentary, G. Della Volpe: Logic as a Positive Science (1980) London, Appendix 3.

propositional languages expressed in his earliest work. If the crudest of sketches is permissible, the Tractatus may be characterised as a severe critique of psychologism which bases itself upon an ostensive or determinative conception of language. Words name objects and in combination describe states of affairs (states of things). States of affairs form elementary propositions ('the totality of propositions is language') which propositions either do or do not correspond to reality (the totality of facts).⁵⁶

While the truth of propositions may be tested against reality, the philosophy of language is more concerned with the propositional form of language, the fact that the sense of propositions is wholly governed by or reducible to logical formulae, the logico-linguistic rules which govern what it is and is not possible to express. While the Philosophical Investigations share many of the formal tenets of the Tractatus, there is a profound change in emphasis as regards the importance of propositional languages. Wittgenstein rejects the notion of words as exclusively naming objects and moves dramatically towards a conception of language as context bound. The change of emphasis is a most significant advance; the uses of language (language-games) are numerous and complex, and the Investigations begin by allowing that the ostensive teaching of words by which an association is established 'between the word and the thing'⁵⁷ is but one such use of language. The multiplicity of language-games or usages must be kept in constant view, 'the speaking of language is part of an activity, or a form of life' and such forms of life are multiple; 'naming is something like attaching a label to a thing. One can say that this is preparatory to the use of a word ... nothing has so far been done when a thing has been named. It has not even got a name except in the language-game.'⁵⁸ It is the study of the game, the fond metaphor of liberal theories' desire to trivialise the social and political, that is to replace the denotative conception of language, '... to imagine a language means to imagine a form of life'⁵⁹ and the use of language or language-game which appertains to it.

[56] Tractatus Logico-Philosophicus, op.cit., para.4.001.

[57] Philosophical Investigations, op.cit., para. 6; c.f., generally, T.Eagleton: Wittgenstein's Friends (1982) 135 New Left Review 64, especially pp.70-72.

[58] Ibid. paras. 23, 24, 49.

[59] Ibid. para. 19.

While it is clearly the case that the notions of 'form of life' and indeed of 'language-game' are thoroughly indeterminate⁶⁰ - they are neither anthropological nor sociological entities, but would rather appear to vaguely connote the pragmatic functions of language or what J.L.Austin was to term 'speech acts' - it is nonetheless the case that what may be sociolinguistically crude may also bear an important philosophical message.

Using an inelegant and general terminology, it might be said that the philosophy of language was moving towards a logical empiricism in relation to semantics. The form that such an empiricism takes may be explicated by examining the conception of a game, and more particularly the manner in which the game is stated to be rule governed. Words do not have a single 'given' or ostensive meaning, they have a meaning rather by virtue of the role which they play within a particular language-game,⁶¹ 'just as a move in chess doesn't consist simply in moving a piece in such-and-such a way on a board - nor yet in one's thoughts and feelings as one makes the move: but in the circumstances that we call "playing the game of chess", "solving a chess problem" and so on.'⁶² Two aspects of the game are therefore crucial. It is firstly the case that the game is in general rule governed in the sense that the terms used must accord with a pre-determined set of rules (customs, uses, institutions). To say that a term of a language-game is rule governed does not, however, provide us with its meaning. The meaning is also a question of practice (hermeneutics), the 'mastery of a technique' which entails 'understanding' of the rules so as to allow what we call 'obeying the rule' and 'going against the rule' in actual cases.⁶³ The conception of meaning thus requires not only that the utterance be intelligible but that the rule governing it be comprehended. To comprehend the rule, the linguist must refer to the context and manner in which language is used, to the internal aspect of rule observance which is to be ascertained by means of a method which J.L.Austin was later to term

[60] See, e.g., Ibid. para. 23. C.f. also, E.Gellner, op.cit., 'the terrible thing about Wittgenstein was the supposition that the fact that a concept was a part of a form of life settles or solves anything.' It is rather, 'a problem, never a solution.' (185 ff).

[61] Philosophical Investigations, op.cit. para.50 75.

[62] Ibid. para. 33.

[63] Ibid. para. 199, 200.

'linguistic phenomenology'.⁶⁴

The semantics thus produced by the understanding of rule usage, as shall become apparent in relation to Hart's jurisprudence, leads either back towards an essentially lexical analytic of linguistic functions, or towards a psychology or subjectivism of language use. Both propensities are clearly related, they inhere to the ideological coupling of system to creativity which has already been noted, and they receive further substance in the work of J.L.Austin, the most proximate source of Hart's linguistic methodology. The problems which Austin was concerned to solve were largely coextensive with those which Wittgenstein's later work had brought to light but had left in large measure unanswered. It is certainly helpful to assess Austin's work in such a context. Having moved from a rigidly denotative and consequently largely propositional conception of language, Wittgenstein had proceeded, as has been briefly suggested, towards a more instrumental conception of language: language acquires meaning or is meaningful by virtue of being a tool that can be used or a technique that is mastered. Its meaning thus appertains to the activity and context in relation to which it is used, a proposition which gained favour amongst philosophers of language in general. It is interesting to note that Wittgenstein never took the matter much further than this, no definition of linguistic contexts nor classification of specific instrumentalities was forthcoming. Wittgenstein's contribution was here restricted to that of stating an undoubtedly correct, though unoriginal, general principle. It is unequivocally the case that one facet of language is to be located in the fact that usage, or linguistic practice as historical activity, powerfully affects meaning. Some considerable time before Wittgenstein arrived at this conclusion, the London school of linguistics, headed by J.R.Firth, had already argued the point at length. They had made substantial use of the linguistic ideas of Malinowski who had already, in 1923⁶⁵ written of language functioning 'as a link in concerted human activity ... It is a mode of action and not an instrument of reflection.' Elsewhere we find examples which are virtually

[64] J.L.Austin: Philosophical Papers (1961) Oxford U.P., p.182.

[65] B.Malinowski: The Problem of meaning in primitive languages in C.K.Ogden and I.A.Richards: The Meaning of Meaning (1929) R.K.P.

identical to Wittgenstein's discussion of words as tools. Thus, for example, Malinowski relates that: 'a small fleet of canoes moving in concerted action is constantly directed and its movements co-ordinated by verbal utterances ... The meaning of a cry announcing a shoal of fish consists in the complete resetting of all the movements of the fleet.'⁶⁶ Both Malinowski, the precursor of sociolinguistics,⁶⁷ and Wittgenstein, whose work prefigures Austin's theory of utterances as speech acts, started from a similar, seemingly anthropological, basic premiss - that of language as an activity, as a 'performance' within a context or form of life.

Both the performative and the contextual facets of meaning were stressed by Austin to novel effect, namely that of producing a typology of linguistically constituted activities or speech acts. While Austin rigorously stressed the importance of the context to the understanding of utterances - he even went so far as to suggest that to ask what the meaning of a word was in isolation from a context was non-sensical - he was most concerned with the classification of that which utterances accomplish. The notion of a speech act encompasses the actual performance of several different activities⁶⁸ : thus in the appropriate context, by asking the question 'what were you doing on Friday the 13th of this month?' an interrogation is commenced. Similarly, when Finney stated 'I made a mistake in the tap' an excuse is pleaded.⁶⁹ In both cases the nature of the illocutionary act is conventionally constituted, the actualisation of the performative is consequent upon the existence of a particular social ceremony or context, the police station or the trial. So far, the nature

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- [66] B.Malinowski: Coral Gardens and their Magic (1955) Allen and Unwin. Compare Philosophical Investigations, op.cit., paras. 10, 11, 15.
- [67] C.f. G.Sampson: Schools in Linguistics (1980) Hutchinson, ch.1; M.A.K. Halliday: Language as Social Semiotic (1978) Arnold; O.Ducrot and T.Todorov: Encyclopedic Dictionary of the Sciences of Language (1981) Blackwell, pp.61-68.
- [68] How to do Things with Words, op.cit., passim. C.f. also, J.Searle: Speech Acts (1962) Oxford; B.Harrison: Introduction to the Philosophy of Language (1979) MacMillan, pp. 165-183; S.Hervey: Semiotic Perspectives (1983) London, ch.4.
- [69] Regina v Finney (1874) 12 Cox 625; discussed in, Philosophical Papers, op.cit., p.196 ff. For similar arguments, see, K.Olivecrona, Legal Language and Reality, in R.Newman (ed.): Essays in Jurisprudence in Honor of Roscoe Pound (1962) Bobbs-Merrill; D.N.MacCormick: Law as Institutional Fact (1974) 90 Law Quarterly Review 102; J.W.Harris: Olivecrona on Law and Language - The Search for Legal Culture (1981) 40 Tidsskrift for Rettsvitenskap 625.

of the illocutionary act as a function of language might be summarised by reference to the institutional nature of certain ceremonies: a contract or will is made, a company is set up, a trust fund is established, a marriage is entered into and so forth, these are legal acts and are only possible as such by virtue of the rules of the particular institutions concerned.⁷⁰ At the same time, however, Austin recognised that the arbitrary or conventional nature of language does not fully exhaust its semantic possibilities. The social functions of utterances are multiple, as numerous indeed as the contexts in which language is used, and for this reason Austin introduces the conception of 'illocutionary force'. While it may be possible to some extent to decode the meaning of an utterance by reference to its context it is nonetheless admitted to be the case that an utterance can only be understood if the listener can ascertain the intention or force behind it.⁷¹ We are eventually referred, in other words, to the purpose or intention of the agent making the utterance: a piece of advice, for example, may be proffered humorously, cynically or by way of hyperbole, and the only way in which such illocutionary force may be ascertained is by intruding upon the mind of the speaker or author. If such is the case then it will frequently be impossible to fully determine what is meant by any specific utterance; the 'other mind' remains in many instances opaque - intentions are frequently vague, multiple or in the context of a larger discourse changing, even worse, the dead no longer have intentions. In short, to reduce understanding, in the last analysis, to a matter of subjectivity or of access to an individual psychology, is an unfortunate conclusion and all too easily dismissive of the need to further analyse the actual context and social determination of meaning and of understanding.

[70] Additional material may be found in M.Adler and S.Asquith (eds.): Discretion and Welfare (1980) London, pp.247-268; Z.K.Bankowski and G.Maher: Ordinary Language and Judicial Discretion (1981) 12 Rechtstheorie 1; D.N.MacCormick: Contemporary Legal Philosophy (1983) 10 Journal of Law and Society 1.

[71] J.L.Austin: Philosophical Papers, op.cit., p.99 ff. C.f also, P.Grice: Meaning (1957) 66 Philosophical Quarterly 377; P.Grice: Utterer's Meaning and Intentions (1969) 78 Philosophical Quarterly 147. For commentary, see, B.Harrison, op.cit.; P.Ricoeur: The Rule of Metaphor (1978) R.K.P., study 3; J.Habermas: Communication and the Evolution of Society (1979) Heinemann, ch.1; J.Israel: The Language of Dialectics and the Dialectics of Language (1979) Harvester, ch.4.

Returning to the jurisprudence of H.L.A.Hart, the influence of the philosophy of language is writ large upon his early work. In the remainder of this chapter I shall examine and critically comment upon Hart's substantive proposals for jurisprudence, while reserving for the next chapter the further task of reformulating the problem of linguistics and especially of a critical linguistics in its relation to legal theory. If his earliest work on 'ascription' is excluded (Hart explicitly disavowed that work) the subject-matter of the first topic for consideration is Hart's general conception of the role of language in analytic jurisprudence. He conceived of the analytic discipline in a somewhat restricted way as a method of clarifying the use of legal language and the meaning of specific legal terms. At its most general, legal theory is concerned with the specific characteristics of the legal normative order and particularly with the specific and distinctive features of legal language: a sharpened awareness of words will refine and clarify our appreciation of that for which they stand. In a curiously positivistic reprise we then learn, however, that legal words do not in point of fact correspond to real entities or processes at all: 'the great anomaly of legal language is our inability to define its crucial words in terms of ordinary factual counterparts.'⁷² The reasons for this inability take one once again into the realm of the systemic characteristics of the legal order. When it comes to matters of definition and theory in jurisprudence, it must firstly be realised that legal language is 'peculiar' and 'distinctive', that the logical structure of rules is 'puzzling' and not amenable to 'common' modes of definition. The reason given for this opacity is formulated generically: 'the language involved in the enunciation and application of rules constitutes a special segment of human discourse with special features which lead to confusion if neglected.'⁷³ The evil hand of formalism and with it the denial of the theoretical relevance of historical and social processes is already clearly visible, law and life are logically distinct - by implication the non-referential and impenetrable character of legal discourse is simply a facet of its normative character, a feature of linguistic generality and

[72] Definition and Theory, op.cit., p.7-8.

[73] Ibid. 8.

not a product of the rhetorical or political-administrative goals of legal practice. For Hart, rules refer to other rules, the system of rules determines the 'value' or normative meaning of any specific term. The legal order and legal terminology are no exception, they are self-referential in the sense that the legal dictionary is semantically determined by the interdependency of its terms (lexical units) within the legal code or unity of jurisprudence. Where Wittgenstein had spoken of the 'picture of the world' that verifies the logic of any specific rule usage;⁷⁴ where Austin talked of the truth conditions, the presuppositions and implications, of particular statements;⁷⁵ Hart proceeds to an analysis of the implications and logical presuppositions of legal utterance. The favoured mode of such an analysis is the analogy of the rules governing a game - cricket - with the rules of a legal system - arguably a more frightening sport though certainly not without equivalent social reference groups. The logico-linguistic point, however, is that the characteristic usages of legal terms such as right, duty or obligation do not correspond to any determinate set of facts or processes, but rather bear a meaning or value by virtue of the complex normative institutions and systemic rules of an effective and hermetically sealed legal system. It is thus the case that at the general level of definition and theory it is the interdependence of rules that must be looked to for the definition of any particular term. Definitions are subject to the requirement of systemic 'consistency', 'the primary function of legal words is not to stand for or to describe anything but a distinct function ...'⁷⁶ which is the correlative of their role within their 'form of life'. What is presupposed, in the last instance, is the unity of jurisprudence - law is assumed to be a coherent system of meanings and texts, a coded unity accessible to legal experts though to no-one else. In the course of a notable debate with Lon Fuller, Hart may be observed moving even more clearly towards a wholly formalist, intrinsic, conception and self-justification of legal meaning. Anticipating somewhat certain later arguments, the following short statement is illuminatingly unequivocal:

[74] Tractatus Logico-Philosophicus, op.cit., pp.5 - 10.

[75] Philosophical Papers, op.cit., pp.47 - 53.

[76] Definition and Theory, op.cit., p.8.

... instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete ... we shall say that the social policies which guide the judges choice are in a sense there for them to discover; the judges are only drawing out of the rule what, if it is properly understood, is latent within it.⁷⁷

The truth contained within the legal rule is, in other words, an analytic or syntactic one, and the role of the legal philosopher is that of passively describing the analytic wonders - the complexities and implications - of the legal system as a strictly coherent normative order. It might be said that the supine philosophic nose has been smeared in norms and the legal world is consequently deemed to be an entirely normative vapour. At each point where uncertainty or polysemy (ambiguity, vagueness, metaphor and so on) are admitted to encroach upon the system of rules, the dogma of analytic method forces the reassertion of the unity of the code as the legal paradigm governing even those instances where, in principle, the application of the rule is not dependent upon its legal or systemic context. The challenge to legal faith in the unity of jurisprudence, is nowhere more clearly and desperately evaded than in the exclusion of empirical and properly semantic questions as they affect the application - the actual meaning - of the legal rule.

If such is the case at the level of high abstraction constitutive of definitions, the promise of a descriptive sociology of law in the preface to the Concept of Law might have raised hopes of a more profane kind with respect to the description and rationalisation of legal practice or of law application. Such hopes are not wholly disappointed but nor are they greatly satisfied when the philosophy of language is again called into service in the discussion of substantive rule application. Hart begins indeed with a discussion of Waismann's conception of the 'open texture' of rules.⁷⁸ We are quickly informed that there is 'a limit, inherent in the nature of language, to the guidance which general language can provide.'⁷⁹ In the face of 'particular fact-situations' the application of 'verbally formulated general rules' will lead to uncertainties, but to our relief we

[77] H.L.A.Hart: *Positivism and the Separation of Law and Morals* (1958) 71 *Harvard Law Review* 606. See also, B.S.Jackson: *Sources du Droit* (1982) *Archives De Philosophie Du Droit* 147; M S.Moore, *op.cit.*, pp. 273 - 292.

[78] F.Waismann: *Verifiability* (1945) *Proc. of the Aristotelian Society*, vol.19.

[79] Concept of Law, *op.cit.*, p. 123 ff.

learn that such uncertainties are infrequent. Despite the indeterminate and polysemic nature of 'general language', despite the fiendish and unpredictable inventiveness of future facts, despite certain ambiguities that are part of the 'human predicament', it is usually the case that the meaning of any particular term is 'clear' or indisputable. The problem is solved; in most cases the legal lexicon is fully determinate, there is a 'paradigm' meaning which clearly states the scope and conditions of rule application. There is only a slight doubt remaining, that appertaining to the infrequent occasion of 'hard' cases concerning 'grey areas' or penumbral, as yet uncertain contexts of rule application. Here matters are less satisfactory and discretion emerges as vagueness increases. It is a question, apparently, of a twilight area and has given rise to many not altogether flatulent jurisprudential debates over the relevance and legality of 'policies', 'principles', canons of interpretation and the like. Hart however is satisfied to conclude in terms of the abdication of the analytic enterprise in the face of discretion, in terms with which Kelsen would certainly have concurred: 'In these cases it is clear that the rule-making authority must exercise discretion, and there is no possibility of treating the question raised by the various cases as if there was one uniquely correct answer to be found ..'⁸⁰ This discretion is by no means wholly unfettered, but it is nonetheless a choice or compromise between 'conflicting interests'. We are not, however, told what these interests are, nor why it is legitimate to assume that they only ever affect penumbral cases. From the viewpoint of Hart's legal theory, the problems raised by the semantics of rule application are raised merely to be summarily dismissed by means of a linguistically naive assertion of a thoroughly artificial distinction between the univocality of the legal lexicon and the occasional indeterminacy of its application. The logic or purity of the normative analysis of law may be tainted by slightly fuzzy or polysemic edges, it may be unavoidable that in hard cases resort has to be made to a subjective (intentional) or discretionary semantics, but generally or 'paradigmatically' the system of norms is self-referential and internally defined. The law speaks only to its own; or more formally, the unity of the object language is reinstated as the necessary

[80] Ibid. 128.

consequence and also, presumably, as the most attractive ideological benefit, of a determinedly positivistic and formalist metalanguage.

Hart's overall conclusion is thus that a strongly subjective element of discretion in a limited number of cases is the necessary complement to the general determinacy of the system of norms. The requirement of any positivism that theory be descriptive - and so purport to be neutral and in some sense scientific - of a logically derived, unified, object, again leaves no room for the analysis of the actual 'social facts' or historical and particular 'forms of life' that determine the substantive meaning of legal rules. Even leaving to one side the wider questions to be raised in any analysis of the possible and probable ideological motive, affinities and effects of such a concept of law application, it is extremely difficult to comprehend the substantive use of the distinction between paradigm and periphery meanings of legal terms. Even within the context of normative jurisprudence difficulties abound. R.M.Dworkin has plausibly suggested that even in clear cases extrinsic considerations may alter the apparently obvious or predetermined application of a rule;⁸¹ while D.N.MacCormick, in the course of a defence of Hart's position, has commented upon the fact that the very notion of clear cases and hard cases is logically an ex post facto judgment, for the very classification would otherwise pre-empt the substantive decision.⁸² The problem in terms of substantive rule application, is that once it has been admitted that extrinsic - political, social and historical - forces play a part in the semantic determination of at least some aspects of the normative order, it becomes increasingly difficult to explain the stipulative exclusion of these unwanted characters from other areas. The category of clear cases comes to seem curiously unrealistic even as ideology; the problem of language itself threatens to become something more than a mere matter of occasional vagueness. An example may usefully clarify the issue.

While I am not at this point concerned to attempt any exhaustive proof of the necessary semantic indeterminacy of many if not all key legal terms or categories of law, it is I believe the case that the self-asserted

[81] R.Dworkin: Taking Rights Seriously (1978) Duckworth, ch. 2 - 4.

[82] D.N.MacCormick: Legal Reasoning and Legal Theory (1978) Clarendon, ch.8

certainty of the law in its paradigm instances is palpably more rhetorical than actual. The reasons are partly sociological and partly historical, they are also in some measure the product of the general nature of language and of the exigencies of communication which have more recently been elaborated in terms of the dialogic and intertextual structure of discourse in general. I shall return to these issues and to contemporary developments within linguistics at a later stage. For the present, the difficulty to be alluded to concerns the manner in which the distinction between paradigm and penumbra confuses two separate orders of linguistic problem. On the one hand, Hart's definition of paradigm meanings as 'settled' and as 'standard instances',⁸³ refers to the dictionary meaning or denotation of a word. It will be recalled that within traditional linguistics the sign is constituted as a meaning within the lexicon by virtue of its interdependence with other terms in the code. It will further be recalled that the language system or code is not a real entity, but the notional system or unity which underlies and governs the basic (lexical and syntactic) units and potentialities of the language totality. In short, what the analysis of the lexical structure of the code does not and cannot accommodate or comment upon is the application or usage of the code as linguistic practice. While it might be possible to argue that the problem of polysemy - the problem of meaning as practice - also affects the code, it is a basic category mistake to suppose that it is primarily a problem of lexicon and syntax. The problem of polysemy connotes a different order of linguistic difficulty, the order of semantic problems inherent in language use - the combination of lexical items at or above the level of the sentence. Thus when Hart comes to admit the problems of penumbral instances of law application, problems which he discusses in terms of examples of indeterminate reference and of unforeseen factual situations, the order of difficulty which they raise is primarily semantic - questions of legal linguistic practice - and not lexical. To attempt, as Hart does, to collapse the problems of linguistic practice into a discussion of the determinacy of the legal lexicon is to conflate the order of the language system with that of the semantics of actual utterances, semiotics with discourse.

[83] H.L.A.Hart: Problems of the Philosophy of Law (1967) 6 Encyclopedia of Philosophy 264, at 271 ff.

Finally, in terms of a superb if slightly idiosyncratic example from the earlier part of the twentieth century, it might well be supposed that the lexical meaning of the word 'disqualification' in section 1 of the 1919 Sex Disqualification Removal Act was generally unproblematic or settled. The section states that: 'A person shall not be disqualified by sex or marriage from the exercise of any public function.' It might further have been supposed that the semantics of the section so stated would clearly have enabled the Viscountess Rhondda, a peeress in her own right, to receive, as would any peer, a writ of summons to Parliament. The commonsensical linguistic argument that but for her sex she would have been so entitled, was treated as legal philistinism by all but four of twenty six Law Lords. The then Lord Chancellor, Lord Birkenhead, explained why. The right to a writ had never attached to peerages held by a peeress:

It is not a question of a suspension of a right or abeyance of an activity ... a minor may grow up, a felon may receive a pardon and a bankrupt his discharge. These things are possible in nature and permissible in law; but a person who is born a female must remain a female till she dies.

It would be idle to quibble, on technical grounds, with the biological diagnosis of the permanence of gender classification, but its legal effects were more disturbing:

She is not disqualified by her sex from the exercise of this right ... she is a subject of rights which ex vi termini cannot include this right ... a peeress in her own right is not a person who has an incident of peerage but is disqualified from exercising it by her sex. She is a person who for her life holds a dignity which does not include the right of a female to exercise that function at all.⁸⁴

The example may be somewhat dated, but the contorted logic is of undoubted interest. What is lexically clear may become semantically opaque, facts which in all probability were foreseen by those who drafted the Act may transpire to be penumbral and to evade the application of the rule.⁸⁵ Whatever analysis positivist jurisprudence (pure or hermeneutic) might care to provide, it is neither the case that the decision (the meaning of

[84] Viscountess Rhondda's Claim (1922) 2 A.C. 389, at 463 - 464.

[85] On the historical context of the decision, see, A.Sachs and J.H.Wilson: Sexism and the Law (1978) Martin Robertson, ch.1.

the term disqualification) is (semantically) exceptional in this instance - and so a matter of easy dismissal as a question of subjectivity or discretion - nor is the decision (lexically) clear and hence merely a matter of legal language being special and distinctive by contrast to ordinary meaning. For all the stridency of Lord Birkenhead's argument, it is not, after all, the lexical (or semiotic) reference of the term 'disqualification' which determines the non-application of the rule, but rather the legal construction of the meaning and capacity of the feminine gender which is deemed to preclude access to the House of Lords. The issues raised are, in other words, semantic and to even the most generous or naive of readers, the concept of semantics being reducible to the opposition of central and peripheral meanings at the level of the lexicon must appear inadequate. The problem of polysemy rather invades and permeates all aspects of rule usage. Whereas Hart suggests a purely stop-gap notion of a benign vagueness hovering largely outside the law, the linguistic truth is that of a fundamental and, for the positivist, malignant polysemy evident, for those prepared to look, throughout the legal process.

That Hart was not prepared to acknowledge the full scope of the problem of polysemy is not, of course, especially surprising. In the context of the tradition of legal science, the dominant method of textual analysis has always been philological and has equally consistently insisted upon the overall coherence and unity of legal meaning as it is to be found in the textual corpus of jurisprudence (*ratio scripta*). Aside from the specific use which Hart made of the philosophy of language, his work as a whole falls clearly within the general, dogmatic, motivation of the legal discipline - that of the privileging of the formal, written, law conceived as a unitary code over any analysis of its application or practice. In the broad terms of the history of the study of text and language, the choice which Hart makes in favour of the general (grammatical) determinacy of legal meaning recalls, as will be elaborated in the second part of this study, the Aristotelian distinction between logic and rhetoric, in which rhetoric is much the lesser art. In many respects indeed the history of philosophical reflection upon language may be reduced to the distinction between logic and rhetoric, and the introduction thereby produced in the linguistic domain of much broader considerations as to the variously

defined relationships between objects and the properties of objects, between necessity and contingency or, within the Kantian tradition, the opposition of the analytic and the synthetic, between objectivity and subjectivity. In Aristotelian terms the relevant opposition is that between 'substance' and 'accident' wherein the properties of the substance are necessary whereas the properties of the accidental are capable of being or not being indifferently. For the purposes of linguistic philosophy the Aristotelian schema overlaps with the distinction between determinative and explicative linguistic relations, first mentioned earlier in connection with the Port Royal Grammar. In terms of the 17th century ontology of the General Grammar, the relation of determination - the relation whereby words designate things (substantives) - is of a much greater status, concerned as it is with the order of being, the world of essences, than the explicative relation - the attribution of properties (adjectival) - incidental or accessory to determination. The explicative relation belongs to the 'art of speaking' which has no other aim than that of conforming to the rules and logic of the order of essences. The historical and contingent is, in effect, governed by the rules immanent within the linguistics of determination.

The ontology in question has not of course gone unchallenged or unchanged since the 17th century, but it is nonetheless the case that the linguistics which began with Saussure still utilises a strongly formalist conception of the systemic unity of 'langue' and couples this conception of system to a notion of the accessory and contingent place of the history of speech. Neither did Wittgenstein nor Austin fully escape the parameters of the opposition. While they very creditably opposed the structuralism or metaphysics inherent in the proposal of a wholly systemic conception of the logic or 'immanent laws' of linguistic determination, they do not entirely free the philosophy of language from its grasp. The emphasis which, at certain junctures, they both place upon the instrumentality of language and the importance they give to the role of enunciation and utterance, must be seen in the more general context of a logically precedent concern with, respectively, the logic of propositional languages, and the truth conditions of statements (their presuppositions and implications). The concern with problems of presupposition

constitutes a 'contradictory bond'⁸⁶ with the formalist tendency in linguistics, the concern with context and use mitigates in an opposite direction. It does so, I will argue, to an insufficient degree and in an oversimplified way.

By way of a general characterisation, it has been argued that both in the case of linguistics and in that of comparable developments in the philosophy of law, the constitution of a scientific project took place by means of excluding history. In linguistics this initially meant an emphasis on the form of language and the rules which govern it to the exclusion of semantics and speech. The reintroduction of semantic problems, when it eventually came in the anthropology and philosophy of language, still lived in the shadow of science and in many respects it has been insufficiently emphasised to this day in its relation to, and effects upon, the conception of language and text. The outcome has been that the problems of history and semantics have been, and continue to be, treated within the oppositional framework of the necessary and the contingent, the objective and the subjective, with the analysis of the context and usage of language in terms of their eventual subjective unknowability being really little more than a palliative. In a similar fashion, the positivist construction of the object of legal studies as the systemic unity of the legal code evinces, more than anything else, the embeddedness of contemporary jurisprudence in the formalist confines of a lengthy tradition of legal faith. In brief, it is necessary to reject the epistemology of legal positivism and with it to jettison the assumed ontology of legal sources. Together they constitute a thoroughgoing obfuscation of the real nature of legal power, its specifically historical and real contours.

[86] M.Pechoux: Language, Semantics and Ideology (1982) MacMillan, p.6.

4. THE ROLE OF LINGUISTICS IN LEGAL ANALYSIS

Antiquity was acquainted only with theories of oratory and poetry which facilitated production ... that formed real orators and poets, while at the present day we shall soon have theories upon which it would be as impossible to build up a speech or a poem as it would be to form a thunderstorm from a brontological treatise. F.Nietzsche¹

Legal theory has traditionally made a fairly extensive use of the philosophy of language. At a very general level it has frequently been argued that linguistic philosophy is a valuable heuristic tool for the elaboration of general questions concerning the institutional nature of law and the meaning of key legal terms. At a more substantive level it has also been claimed that linguistic methodology and the various exegetical and hermeneutic traditions of textual analysis may aid in the practical endeavour of explaining the intricacies of rule interpretation and rule application. Despite such claims, however, the role of linguistics - both historical and potential - in legal analysis has never been an object of systematic study. It is indeed something of a paradox that while problems of definition, of interpretation and of vagueness, ambiguity and polysemy generally are constantly referred to by the major theories of law, no attempt has been made to analyse the specifically linguistic basis of such problems. If one concedes that the major schools of legal thought are differentiated, as much as anything else, by the divergence of their approaches to the theory of adjudication and of law application, the absence of any encounter with linguistics might well be taken to indicate the subordination of the will to truth to the need to conceal; the privileging of ideological concerns over the pursuit of knowledge.

While it is not the purpose of the present chapter either to account for or to fully explain the traditional jurisprudential tendency to

[1] F.Nietzsche: We Philologists(1911) Foulis, p.144. (Brontology is that part of metereology which studies thunder).

exclude linguistic questions from the central concerns of legal theory, considerable clarification of the issues at stake may be achieved by examining the models of language, communication and meaning implicit within the various schools of positivistic legal analysis. The preceding two chapters have indeed already to some degree evidenced the common historical and theoretical basis and context of contemporary linguistics and legal science and have further suggested that one result of this convergence was a common development and systematisation of language and law according to a shared philological model of normative science. The two disciplines have made use of a common conceptual structure which, in its most basic substratum, separates and opposes a scientific object of study, that of an underlying system or grammar (real/necessary), to the manifestation or realisation of that system in an individual or particular instance of its usage (apparent/contingent). To the Saussurian opposition of langue and parole may be juxtaposed the essentially analogous legal elaborations of distinctions between legal validity and the volitional content of legal norms or between positive law and the judicial application of legal norms: legal theory has always faced a problem analogous to that of the distinction between language system and actual utterance and it has been variously formulated as the opposition between legal system and adjudication, between legal validity and legal meaning, between the propositional content of a norm and its volitional or discretionary application in legal judgment or practice. A comparison at the level of the necessary circularity of structuralist theories of language and law as such, constituted by the circularity of the complementary poles of system and creativity, does not, however, take the issue very far.² Having observed the measure of identity in the theoretical context of the two disciplines it is of an altogether greater significance to endeavour to assess the degree of analytic convergence to be found in the plethora of shared concepts utilised within the respective

[2] Although I shall deal with this problem in greater detail in Part II of this study (s.7.1), it may here be observed that several of those studies which do raise the issue of the relationship of structuralist linguistics to legal theory: B.Edelman: Ownership of the Image (1979) R.K.P.; M.Pechoux: Language, Semantics and Ideology (1982) MacMillan; in particular, have been drawn into the somewhat irrelevant elaboration of this level of comparison. It will be argued in Chapter 7 that the evaluation of the epistemological status of the legal subject is of less import than the analysis of the manner in which such a category actually operates within substantive legal discourse.

domains of study. Analysing first the linguistic, or more precisely semiotic, implications of the legal use of the concepts of code, norm/rule, convention and utterance, I shall move subsequently to suggest that recent developments in linguistics - and most particularly within sociolinguistics - indicate both that the traditional linguistic assumptions of legal analysis are inadequate to the task of analysing the semantics of legal discourse and also that an alternative approach to the study of legal language and communication is available and desirable.

4.1 THE DOMINANT PARADIGM: LINGUISTICS LEGAL SCIENCE, LEGAL SEMIOTICS

In discussing the increasingly contested issue of the referent of the term positivism as applied to legal theory, H.L.A.Hart includes the 'contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies or moral standards.'³ In examining the structural features of two versions of legal positivism in the preceding chapter, I emphasised that a tenet such as the above - generally activated in the concept of the unity, coherence or systemic quality of jurisprudence - was one pole to the positivist systematisation of law, whose alternate extreme took the form of the arbitrary, volitional or discretionary content of legal judgment. Objectivism as regards the form of law, it was argued, implies subjectivism with respect to law application or legal meaning in certain limiting instances or contexts. In the ensuing analysis I shall shift emphasis away from the systematisation of law to a consideration of the system of communication or theory of language that positivism implies. I will do so by means of distinguishing two different - though complementary - positions adopted by positivist legal theory with regard to legal semantics.

[3] H.L.A.Hart: Positivism and the Separation of Law and Morals (1958) 71 Harvard Law Review 601-602. C.f. also, R.S.Summers: The New Analytic Jurists (1966) 4 New York University Law Review 861; R.S.Summers (ed.): Essays in Legal Philosophy (1968) Oxford, ch.1.; D.N.MacCormick: Legal Reasoning and Legal Theory (1978) Clarendon, ch.2; P.Milton: Reason and Criticism in Legal Theory (1980) 2 Liverpool Law Review 75.

4.1.1 Law as Code

i). One of the most obvious features common to linguistics and legal science is the utilisation of the concept of the code. The parallel is not, of course, unique to the contemporary elaboration of the disciplines: the Latin word codex had an original paleographic meaning - it referred to a particular form of writing tablet (caudex) - and only secondarily to the later, legal, codifications - the 'tables' of the law being one species of a more general term designating parchment (papyrus) or paper books. Even in its earliest forms, the term code referred in specific ways to particular modes of communication, graphic, theological and legal. The connection between writing and law is still an important one and although contemporary uses of the term are considerably more specific and technical than its earliest meanings, the connection is one which bears recollection.⁴

Within a more contemporary context the usage of the term code derives from linguistics and specifically from the work of Saussure for whom the language system as lexicon and grammar constituted a synchronic code of syntagmatic and paradigmatic equivalences.⁵ The code, for Saussure, refers to language as a system, as a combination of elements or units in a syntax which constrains the potential uses of the units of the code. In its strictest sense the code is a set of correlations or equivalences, a dictionary of which Morse code or elementary ciphers would be clear examples. Saussure did not, however, greatly elaborate either upon the scope of semiotics or upon the senses in which language was a code or was coded. It was the work of later structuralists and especially Levi-Strauss⁶ which produced something of a landslide in the development of the study of codes and gave birth to the substantive discipline of semiotics:

[4] L.Febvre and H.J.Martin: The Coming of the Book (1976) London, ch.1; W.Ong: Orality and Literacy (1982) Methuen. For other accounts, see, F.H. Baul: Varieties and consequences of medieval literacy and illiteracy (1980) 55 Speculum 277; J.Derrida: Scribble (Writing-Power) (1979) 58 Yale French Studies 116.

[5] On the recent history of the term code, c.f., F.de Saussure: Course in General Linguistics (1966) McGraw Hill p.16 ff; U.Eco: A Theory of Semiotics (1976) Indiana U.P. pp.3-46; R.Barthes: S/Z (1975) Cape; U.Eco: Semiotics and the Philosophy of Language (1984) MacMillan pp.164-182.

[6] C.Levi-Strauss: Structural Anthropology (1963) New York; C.Levi-Strauss: The Elementary Structures of Kinship (1969) Boston.

the popularity of the new category (code) had all the characteristics of an exorcism; it constituted an attempt to force order upon movement, structure upon events, organisation upon earth tremors. Speaking of codes meant for many to identify "scripts" where, previously, only random, blind impulses, unspeakable creativity, dialectic contradictions were recognised. It was perhaps a short rationalistic season ..⁷

Of the plethora of concepts of code produced within the last three decades, two in particular are of relevance to the elaboration of the linguistic assumptions underlying positivist legal theory: correlational and institutional codes. Both connote 'systems' and there is considerable overlap between the two categories although only the former is properly speaking a 'closed system'. In its linguistic usage the correlational code is a dictionary of correlations or equivalences: a set of synonyms, of expressions for expressions or of expressions for content. The correlational code is arbitrary and synchronic; in a strict sense it constitutes a lexicon, of which the laws governing linguistic value in Saussure's Course provide a complex example. The institutional code, on the other hand, is canonically defined as a system of rules or grammar of norms which, while it may include correlations, is differentiated by virtue firstly of the inferential or functional status of the rules, which inferences or functions produce the consistency or coherence of the system as code. The institutional code is of course broader than a mere set of correlations and inferences, the institutional code - morality, etiquette and so on - is a set of social conventions governing and instructing behaviour, issuing imperatives or offering generalised instructions as to how to act. Following Saussure, language, alone amongst the institutional codes, is arbitrary and so amenable to scientific study as a closed synchronic system. Saussure consistently differentiated language from other social institutions and concentrated upon its singularity: 'we are convinced that whoever sets foot on the ground of language is bereft of all the analogies of heaven and earth'; he later explains that 'the other institutions are all founded, in varying degrees, on the natural relationship of things ... For example, a nation's legislation, or its political system, or even the whimsical fashion which sets our mode of

[7] U.Eco (1984) at p. 168.

dress: the latter cannot for a moment overlook the given proportions of the human body.'⁸ Reserving for the moment the argument that Saussure was incorrect to differentiate language from the more general and realistic description of the other social institutions, it is sufficient to observe that the motivated character of institutional codes in general constitutes their diachronic and essentially open character. The institutional code, in semiotic terms, is a pragmatic code, open to circumstantial and contextual variation. Thus, in one formulation, 'a system of behavioural instructions, such as a moral or etiquette code, involves acceptations and rejections, considers the possibility of violations, introduces imperatives, law reinforcements, and concessions, is open to possibility: it is a calculus of a modal order.'⁹ More importantly, obedience to the rules of an institutional code indicates a decision to appear faithful to the institution, an act of acceptance whose significance resides both in the general justificatory grounding of the institution and in the more specific interpretation of its rules in the context of their openness, their motivation.

Although the above distinction is a somewhat artificial one, it does, I believe, contribute to clarifying certain of the linguistic issues raised by the theories of law so far analysed as exemplars of the genre of legal positivism. It may also be added that there is a certain polemical value to the distinction made insofar as the basis of the institutional code is in the last instance justificatory rather than logical, ontological rather than epistemological. Which is to say that the sense in which the institutional code is a system is secondary to the sense in which it constitutes an open set of general rules, a point whose elaboration must be postponed until the traditional assumptions of positivist theory have been analysed and commented upon.

ii). Leaving to one side the problem of the peculiar character of language as an institutional code, it seems clear that Saussure, in positing the object of linguistics as a purely epistemological or theoretical construction of the language system, opted to view language as

[8] Cited from Notes Inedites by S.Timpanaro: On Materialism (1975) London pp.157-158.

[9] U.Eco (1984) at p. 180.

a semiotic code in the strictest of senses. Linguistics studies only the normative aspects of language: the fixed meanings of the lexicon and the invariant syntactic order governing grammaticality though not meaning as usage. Insofar as Saussure acknowledged the social nature of the language totality, he did so only to the extent of recognising the conventional status of the rules governing grammaticality: the structural context of language use was the product of agreement or convention, which conventions, as an aggregate, constituted the normative precondition of language use. In terms of the distinction made above, the language code is comprised of a set of correlations and inferences; the sense in which the institutional code actually governs usage and behaviour is ignored as being an aspect of speech rather than system. If we move to examine the linguistic assumptions of legal theory we may observe the adoption - in spite of Saussure's salutary warnings as to the motivated character of non-linguistic institutional codes - of a precisely analogous construction of the theoretical object of legal science.

Although exegetes of the vast corpus of Kelsen's writings upon the theory of law have pointed to various, relatively peripheral, changes in his position as regards the meaning of the legal norm¹⁰ and have also elicited various ambiguities in his formulations of the grammar of law,¹¹ it is important to stress that the overwhelmingly predominant tendency of the pure theory is that of the epistemological construction of the grammar or code of written law. For the vast bulk of his lifetime Kelsen was concerned to argue, time and again, that law could only be comprehended scientifically as a unified normative system. Whatever his changes of position, indeed, Kelsen never jettisoned his belief in the utility of the legal system as the object of scientific study, a belief founded upon the constructive presupposition of a basic norm which lies at the basis of the

[10] See, S.Paulson: Material and Formal Authorisation in Kelsen's Pure Theory (1980) 39 Cambridge Law Journal 172; M.Troper: Kelsen, La Theorie de l'Interpretation et la Structure de l'Ordre Juridique (1981) 35 Revue internationale de philosophie, 518; O.Weinberger: Logic and the Pure Theory of Law (1981) ASLP conference, Edinburgh; S.Paulson: On the Status of the Lex Posterior Derogating Rule (1983) V Liverpool Law Review 5. As to Kelsen's later position, see, H.Kelsen: Essay's in Legal and Moral Philosophy (1973) D.Reidel, introduction and ch. 10.

[11] J.W.Harris: Kelsen's Concept of Authority (1977) 36 Cambridge Law Journal 353; J.W.Harris: Law and Legal Science (1979) Oxford U.P.; I.Stewart: Kelsen and the Exegetical Tradition (1981) ASLP conference, Edinburgh.

logical validity of the legal order. In general terms, what differentiates the legal norm from other norms, for Kelsen, is its objectivity - its formal authorisation within a syntax of legal validity which is presupposed in the 'thought process' which constitutes the hierarchy of legal norms as an object of logical as opposed to empirical cognition:

The external fact whose objective meaning is a legal or illegal act is always an event that can be perceived by the senses .. and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm.¹²

The objective dimension attributed to the legal norm deserves to be emphasised. It has several aspects. At the level of greatest generality the norm has a Kantian, categorial, existence - it is an 'ought' statement which exists independently of any possibility of verification or falsification. The mode of being of the ought statement is notional rather than empirical, it is a member of a lexicon of legal rules which exist as correlational elements or units - as imputations - within a system of legal validity or logical inference. It is against this background that it is possible to comprehend that the norm is also a 'schema of interpretation' or the objective framework qualifying human behaviour in its various subjective or social manifestations:

The norm functions as a scheme of interpretation ... the qualification of a certain act as the execution of the death penalty rather than as murder - a qualification that cannot be perceived by the senses - results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure... That a document is objectively as well as subjectively a valid testament results from the fact that it conforms with conditions stipulated by (the civil) code. That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution. That means, that the contents

[12] H.Kelsen: The Pure Theory of Law (1967) California U.P. at p.5.

of actual happenings agree with a norm accepted as valid.¹³

Finally and importantly it is necessary to stress that the norm, by virtue of its place within the hierarchy of legal norms, is the precondition for the logical regulation and production of other norms. Law regulates and creates more law. The point is an important one because it adds a new dimension to the semiotic framework of legal objectivity. Whereas the previous two senses of norm are primarily correlational, the legal code states imputational equivalences between acts and their legal qualification, the formal authorisation of legal validity in its nomodynamic sense is referential; the unity of the legal system is based upon norms of competence: 'determining the organ is the minimum that must be accomplished in the relation between the higher and lower norm'¹⁴ or, somewhat later, 'the act by which the individual norm of judicial decision is created is usually predetermined .. by general norms of formal and material law.'¹⁵ The relationship between higher and lower norms, however Kelsen equivocated over the precise nature of the propositional content or broad semantic implications of the normative hierarchy, is principally one of correlation and inference internal to the system of norms; the relationship is one of subsumption or derogation and only secondarily, 'to a certain extent',¹⁶ material in the sense of predicating the content of the lower norm.

In short, the preponderant thrust of the Kelsenian theory of norms is that of representing a grammar of legal structure in both its static and dynamic aspects. It proposes a code or semiotic of legal communication conceived as the objective direction of human behaviour - principally the behaviour of actors within the legal institution - according to a syntax of specifically legal and univocal meanings, or pure legal signs. The problem of the grammaticality of an utterance propounded by Saussure

[13] Ibid. 4.

[14] Ibid. 235.

[15] Ibid. 242. See also, H.Kelsen: General Theory of Law and State (1945) Harvard U.P. p. 216 ff. In its strongest form Kelsen proposes the syllogistic basis of law creation, 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. See, H.Kelsen (1967) pp.198-199; (1973) pp.240-242; Harris (1977) p.356 ff.

[16] Kelsen (1967) p.22.

becomes, for Kelsen, that of the validity of the legal statement analysed according to a purely formal syntax of 'concretisation' or 'nomo-dynamics'. While it carries with it the attractions of clarity and of abstract verifiability in terms of presupposition or propositional logic it does not and cannot go beyond the specification of the minimum normative requirements whereby legal communication - as intelligibility, signification or syntax - is possible. It states, as a metalanguage, the normative context within which legal meanings are realised or created, as opposed to providing any analysis of those meanings which are actually manifested. It is only if one forgets this extreme limitation to the pure theory that it is possible to see it as in any way substantiating the concept of legal rationality or univocality which so comforts those within the legal institution who have a professional interest in the belief or mythology of legal determinacy, or as accurately validating what has been described as 'the common sense position prevalent amongst most lawyers, judges and legal scholars today.'¹⁷

4.1.2 Legal Meaning Revisited

The convergence of Kelsenian science of law with structural linguistics is situated at the level of epistemology. In more practical terms there are important differences between the theories. It is precisely at the point where Kelsen and later theorists have moved to consider the specific institutional character of law that the openness of the legal order to norm interpretation, conflict and change has imposed the need to develop a linguistics of legal meaning. Prior to summarily examining the manner in which H.L.A.Hart and his followers have endeavoured to salvage the objectivity of legal meaning by means of the theory of speech acts, Kelsen's own account or non-account of the institutional character of law will be briefly rehearsed.

Kelsen always recognised and acknowledged the sense in which law was a set of imperatives directing human behaviour. Law, for Kelsen, was power, and his definition of the legal norm fully recognised its coercive aspect:

[17] M.S.Moore: The Semantics of Judging, (1981) 54 Southern California Law Review at p.163.

"Norm" is the meaning of an act by which a certain behaviour is commanded, permitted or authorised. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is ...¹⁸

The legal norm as an act of will commands, permits and authorises forms of human behaviour : 'a norm is the meaning of an act of will intentionally directed to the behaviour of another (or many others) ... to say that a norm 'refers' to actual behaviour is to say that the norm can be applied to actual behaviour, that actual behaviour can be confronted with it.¹⁹ As has been cogently emphasised by B.S.Jackson²⁰ the norm constitutes legal meaning in the form of a speech act communicating to an addressee the requirement of behavioural conformity. The character of this speech act, however, whereby 'these norms.. which have the character of legal norms .. make certain acts legal or illegal'²¹ is formal rather than material: the speech act has the character of a legal norm purely by virtue of being created in conformity with a higher norm²² - the legal norm itself is the meaning of an act which has a propositional content. The act, in other words, creates a norm and constitutes an 'ought' statement which may be used to qualify behaviour but it is the norm as an object of cognition and not the intentional act of volition which is the object of legal science. In short, Kelsen returns the legal meaning of the norm to the sphere of validity and (largely consistently) opposes validity to the intentional semantics and 'extra-legal' factors which bear upon the volitional act itself: 'the norm is an ought, but the act of will is an is.'²³ The resultant position might be formulated in the claim that the relationship of subsumption determines the legal validity (competence) of the normative qualification of behaviour in a generic, semiotic, sense, but that the actual content of the qualification, the judgmental act which links norm to behaviour, is contingent and non-cognitive.

[18] Kelsen (1967) 5.

[19] H.Kelsen: On the basis of legal validity (1981) 26 American Journal of Jurisprudence 178.

[20] B.S.Jackson: Semiotics and Legal Theory (forthcoming, 1984) R.K.P. ch.10, which work the author has generously allowed me to see in computer script.

[21] Kelsen (1967) 4.

[22] C.f. J.Lenoble et F.Ost: Droit, Mythe et Raison (1980) Bruxelles, pp. 512 ff.

[23] Kelsen (1967) 5, 7 ff.

For Kelsen, the institutional character of law would appear to mean little more than that legal norms have an imperative character and exist within a system of norms which, as institutional rules, state potential or prospective qualifications of human behaviour and are amenable to abstract, objective, description and cognitive systematisation. Legal meaning is no more than a logical property of the interrelation of legal rules or a cognitive attribute of the process of subsumption. The 'thinking process' as cognition, is for Kelsen separate from the act of interpretation; the one is normative, the other empirical. For later positivists the dualism to be upheld between determinate (notional) legal meanings and problems of institutional semantics was every bit as rigid as that proposed by Kelsen. I shall again take as my example the work of H.L.A.Hart.

The background to Hart's somewhat tentative and unsystematised remarks upon the language of the law may be taken to be the considerable stress which he lays upon law as an institutional code, as the direction of human behaviour by means of general norms:

In any large group general rules, standards and principles must be the main instrument of social control, and not particular directions given to each individual separately. If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognise as law could exist.²⁴

Although the formulation does not suffer from any great originality it is useful in that it provides a model of communication against which to tabulate Hart's various remarks and positions with regard to the philosophy of language.

Despite frequent remarks as to the indeterminacy of general expressions²⁵ and as to the open texture of rules, the major thrust of

[24] H.L.A.Hart: The Concept of Law (1961) Clarendon, p.121.

[25] See, e.g., Ibid. p.15 ff., 'What is important is that ... the several instances of a general term are often linked together in quite different ways from that postulated by the simple form of definition. They may be linked by analogy ... They may be linked by different relationships to a central element ... Or again ... the several instances may be different constituents of some complex activity.'

Hart's observations upon the peculiar status of legal language is, as was noted earlier, to the effect that this special instance of language use is characterised by determinacy rather than polysemy. The semiotic perspective of the major portion of Hart's work would appear to be one that views legal meaning as objective, coded and largely unproblematic. Thus, in 1958, he remarks:

If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use ... must have some standard instance in which no doubts are felt about their application. There must be a core of settled meaning ...²⁶

The point is made even more forcefully in the Concept of Law:

.. in the vast majority of cases there is very little doubt .. the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case. This salient fact of social life remains true, even though uncertainties may break out as to the applicability of any rule .. to a concrete case. Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function.²⁷

There seems to be little doubt that the primary sense of legal meaning is normative and constitutes a code in the correlational and inferential senses defined above, the clear meaning is fully determinate.

Resting with the systemic pole of Hart's linguistics it may be briefly observed that his definition of legal language as essentially determinate may be elaborated in two different ways. The first such elaboration would make use of a semantic distinction between 'extension' and 'intension', a modern variant of the logico-linguistic opposition of sense and reference.²⁸ An extensional definition of a word defines it in terms of its reference to the external world, while an intensional definition identifies the meaning of words in terms of their linguistic context,

[26] Hart (1958) 612; (1961) 12; c.f. also, D.N.MacCormick: H.L.A.Hart (1981) Arnold, p.125; K.Baldinger: Semantics (1980) Blackwell, pp.42-61.

[27] Hart (1961) 131 ff.

[28] See M S Moore (1981) 167-70, 271-281; K.Baldinger (1980); W.B.Michaels: Against Formalism (1979) 1 Poetics Today 23.

their relation to other words within a language system. Hart's early comments upon the specificity of legal words would clearly seem to indicate an intensional view of the meaning of legal words: 'The first efforts to define words like 'corporation' 'right' or duty reveal that these words do not have the straightforward connexion with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words. There is nothing which simply corresponds to these legal words.'²⁹ It should be noted then that when Hart borrows the concept of 'meaning equalling use' or the comparable view that the meaning of a word is to be discovered by reference to the role or function which the word plays in a form of life he is generally to be taken as invoking the role or function which the word plays within the system of legal language or legal rules. What is invoked therefore is not the social or discursive semantics of legal language use conceived in terms of an empirical context, but rather the coded properties of legal meaning as dictionary or lexicon of conventional uses.

The latter observation raises a further point of interest. Both Austin and Wittgenstein recognised that every utterance was a performance, that in uttering, the utterer is in the 'full normal sense' doing something.³⁰ Ignoring the various distinctions which may be introduced into the concept of the speech act, it is sufficient to observe that 'to do something' is taken to be the equivalent of intending something. To intend something, however, transpires to have two separate senses. On the one hand, all normative propositions or rules are intended to affect behaviour. Irrespective of whether or not these intentions are achieved in any empirically verifiable way, they may nonetheless be expressed objectively in terms of an institutional code or system of rules. In this sense, according to Hart and more particularly according to D.N.MacCormick,³¹ law prescribes behaviour by manner of a generic set of conventional meanings. In this sense law is comprised of 'regulative' and 'constitutive'

[29] H.L.A.Hart: Definition and Theory in Jurisprudence (1953) Oxford, 5.

[30] For commentary on this aspect of Austin's work, see, J.Searle: Speech Acts (1970) Cambridge U.P., p.17 ff.; B.Harrison: An Introduction to the Philosophy of Language (1979) MacMillan, pp.165-183; S.Hervey: Semiotic Perspectives (1983) Allen and Unwin, ch.4.

[31] D.N.MacCormick: Law as Institutional Fact (1974) 90 Law Quarterly Review 102.

conventions, respectively controlling the manner in which a particular activity is performed, or imposed upon an independently existing activity which, in the absence of the appropriate convention, would cease to exist. On the other hand, however, to ascribe intentions to the author of the utterance or rule is to indicate that in the last instance it is the idea or motive, the subjective intention underlying or external to the language of the rule itself which defines its meaning. It was in this sense of intention, in 1952, that Hart argued that:

Before we speak of a person meaning something by a statement, it must be true not merely (i) that he utters noises and those were in fact interpreted as signs, and not merely (ii) that he intended the noises to be interpreted as signs, but that he should intend a listener not merely to believe or to do something but to recognise from the utterance that he intended the listener to believe or do something. Thus two notions are essential to an analysis of the meaning and understanding of words though irrelevant to a similar analysis of signs. The first is that of the listener recognising from the speaker's utterance the speaker's intention that he should respond (e.g. believe or do something) in certain ways, but recognising it without necessarily responding in these ways; the second is that of the speaker intending when he uses words that the listener should thus recognise his intention.³²

Although this early definition of communication should not be taken as canonical, it does reflect a subjectivist pole to Hart's thought which may be traced to his later work and particularly to his various elaborations of the distinction between core and penumbral meanings specified in terms of degrees of determinacy of authorial intention (singular or collective).³³

The problems raised by the introduction of a conception of meaning as intention or as illocutionary force are numerous. The positivistic argument separates intentions according to a quantitative axis of distribution to which there are two poles - the one being that of 'general agreement' forming a coded context, the other being the context of the singular intention represented for Hart in the discretionary application of a rule. The difficulty with such an analysis is not simply the

[32] H.L.A.Hart: Signs and Words (1952) Philosophical Quarterly 59, at 62.

[33] See, e.g., Hart (1961) 125 ff.

fictional status of the 'intention'³⁴ as applied to collective contexts, but rather the confusion which the concept of intention introduces in the form of an extraordinary oversimplification of the empirical, social and political, determinations of legal meaning as the active product of legal textuality and decision making. In terms of the speech act theories closest to Hart's account of legal communication, the linguistic difficulty faced by the positivist account of legal language may be formulated as the exclusion or resistance to semantics. The theory postulates a binary opposition between performance and illocution. The privileged domain is that of legal logic and grammar, the code or system of normative propositions, which take the linguistic form of a set of performatives understood as sheer convention and thus reducible to a grammatical code amongst others. Recognising, however, that all texts contain certain elements that are by no means ungrammatical, but whose semantic function is not grammatically definable, Hart admits to a residue or outlay of meanings which are to be characterised in terms of illocutionary power. These latter meanings are to be referred to the psychology of intentions, to the realm of the subjective and affective, to a dreary and banal pragmatics which, in privileging the logic of the code, bypasses and excludes the semantic and rhetorical functions at work in all texts. It is not a psychology of individual meanings or intentions, however, which the theory of legal language requires, but rather a socio-historical account of legal argument as a rhetoric of proof.

4.2 THE NEED FOR AN ALTERNATIVE APPROACH

It is the substantive aim of the second part of this study to elaborate in detail the linguistic basis of an alternative approach to language as social action and law as social discourse. For that reason I shall not here embark upon any extensive analytic criticisms of the positivist

[34] See, e.g., J.Stone: Legal System and Lawyer's Reasoning (1964) London, pp.29-41; J.Derrida: Signature, Event, Context (1977) Glyph 172, 'One writes in order to communicate something to those who are absent. The absence of the sender, of the receiver, from the mark that he abandons, and which cuts itself off from him and continues to produce effects independently of his presence and of the present actuality of his intentions, indeed after his death, his absence, which moreover belongs to the structure of all writing.' (177). See also, J.Culler: On Deconstruction (1983) R.K.P. pp.110-125.

account of legal language. I shall instead adopt a strategy of description and will provide an overview of the manner in which contemporary developments within linguistics approach the problem of meaning as linguistic practice, to the end of evidencing the inadequacy of the simple opposition of formal system to intentional utterance. Positivism lives in the past. It lives by the law of the excluded middle. In providing an account of legal language in terms of the unity of law and the consensual status of legal meaning it wholly fails to consider the character of law as social action, it ignores the mediation of all meaning in practice. If nothing else, I would hope that the reassertion of the social and rhetorical character of linguistic practice raises the question of the need to reconsider the role of linguistics in legal analysis.

By way of a general characterisation it must be stressed that the development of post-Saussurian linguistics has been extremely diverse. There is no longer any single, generally recognised, definition of the method and scope of a science of language and accuracy also requires the admission that the formalist tendency of Saussurianism has frequently continued to predominate. Widely received advances have been associated with Hjelmslev's glossematics, with Jakobson's functionalism, with Chomskyan generative grammar and with Greimasian structural semantics.³⁵ Such theories, which may be loosely grouped under the heading of linguistic structuralism, continue to stress stipulative conceptions of the universality of the language system. At the same time, however, as the more traditional, formalist, concerns of linguistics have continued to thrive, a growing body of linguistic research interest has also come to focus upon the precise character and implications of the boundaries that circumscribe the concept and methodological utility of the language system. It has increasingly been suggested that significant heuristic advantages may be gained by re-examining in greater detail the fact that the system of language is limited by non-systemic determinations which, on

[35] For ease of reference, see, G.Lepschy: A Survey of Structural Linguistics (1982) Deutsch, and the extensive bibliographical essay contained therein. Also, O.Ducrot and T.Todorov: Encyclopedic Dictionary of the Sciences of Language (1981) Blackwell; A.J.Greimas and J.Courtes: Semiotics and Language (1982) Indiana U.P.

the fringes of the system, both oppose and affect it. The initial consideration here is that the system of language is equally the basis and also the recipient of wider discursive, social and ideological processes. In one terminology, language is bound to discourse and this single fact alone renders any attempt to wholly isolate the system from all consideration of its insertion in discursive processes liable to the accusation of being a motivated methodological assumption. That language is primarily a social fact or institution here means that it is inherently historical and material and not simply that it is arbitrary and conventional. Certainly it is this last consideration which has aroused a lively and contentious research output focussed upon the possible applications of a critical linguistics. Such interest has attended not only to the relevance of a critically conceived linguistics as a model of a scientific methodology to be utilised in other social sciences,³⁶ it is also a concern with linguistics as the appropriate means whereby to gauge or elucidate the general dependence (and also interdependence) of all social institutions and processes upon the medium of language.³⁷ The latter point deserves especial emphasis. Starting from the postulate that meaning is socially determined, a semantic analysis of any particular language 'variety' or discursive 'formation' is primarily concerned with the manner in which social processes, purposes and ideologies determine

[36] The first general studies were, R.Coward and J.Ellis: Language and Materialism (1977) R.K.P.; D.Silverman and B.Torode: The Material Word (1980) R.K.P. Of greater interest are the various applications of linguistics to other social sciences. These are too numerous to be listed here - references will be given, where relevant, in Chapter 6. As regards the application of such methodologies to legal analysis, the most consistent output has been on the continent. French developments are usefully summarised in J.Kalinowski et E.Landowski: La Recherche en Sciences Humaines (1981) Edition de CRNS, Paris, p.125 ff. See also the bibliography to P.Goodrich: Law and Language, An Historical and Critical Introduction (1984) 12 Journal of Law and Society 173, 200-6. For English language applications of sociolinguistic models, c.f. P.Carlen: Magistrates Justice (1976) Martin Robertson; F.Burton and P.Carlen: Official Discourse (1979) R.K.P.; W.O'Barr: Linguistic Evidence (1982) Academic Press; R.Dingwall and P.Lewis (eds.): The Sociology of the Professions (1983) MacMillan, ch.5.

[37] My particular concern here relates to the advance of linguistics as it has developed from the early work of the London School of linguistics. See, G.Sampson: Schools in Linguistics (1980) Hutchinson; R.Fowler (ed.) Language and Control (1979) R.K.P.; R.Fowler: Literature as Social Discourse (1981) Batsford; M.A.K.Halliday: Language as Social Semiotic (1980) Arnold. The other line of development of relevance is related to the elaboration of a theory of discursive processes begun in the work of M.Foucault: The Archaeology of Knowledge (1972) Tavistock, and variously continued, though in my opinion most effectively in the work of M.Pecheux: Language, Semantics and Ideology (1982) MacMillan. See also, P.Goodrich: Materialism and Linguistics (1982) 32 Radical Philosophy 34.

the 'paradigmatic' or transparent, 'evident', meanings of any specific discourse. At a more fundamental level such semantic analysis suggests a profound reorientation of traditional linguistic methodology, insofar as the socially determinate, discursive, conception of meaning reacts upon and undermines the conception of a strictly autonomous linguistic system. The socio-linguistic studies of discursive processes suggest most forcefully that the traditional conceptions of the autonomy of lexicon, syntax and value are more prescriptive than descriptive of their linguistic basis. In short, they reiterate, but do not explain or advance, the mythology of language as a fixed code of meanings or determinate set of equivalences.³⁸

Turning to what I have broadly termed the development of a critical linguistics it may thus be characterised first as an analysis of the failure of traditional linguistics to provide any adequate account of the social determination of meaning: 'beyond a few natural meanings which are encoded in most languages (e.g. basic colour terms), the majority of meanings in languages, and in different varieties of a language, are crystallised in response to the social, economic, technological and theoretical needs of the cultures concerned.'³⁹ While it remains true that language may for many purposes be usefully studied as a system - as internally defined, and as a relatively autonomous basis - it is also the case that language is, in all aspects of its usage, an instrument of communication and of non-communication related to and frequently determined by the institutional and ideological processes in which it functions. The linguistic system is the common basis of numerous and ideologically divergent discursive processes:

If the same word, the same expression and the same proposition can have different meanings - all equally evident - depending upon which discursive formation they are referred to, it is because a word, expression or proposition does not have a meaning attached to its literalness, its meaning is constituted in each discursive formation.⁴⁰

[38] See, Harris: The Language Myth (1981) Duckworth; P.Baker and P.M.S.Hacker: Language, Sense and Non-Sense (1984) Blackwell, ch.8.

[39] R.Fowler (1981) 21. See also, M.A.K.Halliday (1980) 165 ff.

[40] M.Pêcheux (1982) 112.

It should of course be noted that while the concept of discursive formation raises immediate questions of the social and ideological determination of meaning, it is also a linguistically determinate concept insofar as it is also defined by 'the system of relationships of substitution, paraphrases, synonymies etc, which operate between the linguistic elements - signifiers - in a given discursive formation.'⁴¹ Any specific discursive formation may thus be defined in terms of its meaning effects - loosely, its paraphrastic unity - and these in turn may be analytically related to the role or function which a particular discourse is to play in relation to other discourses and the social formation. The key to meaning, it is argued, resides primarily in the institutional basis of specific linguistic 'registers' or codes, of which legal meaning would be but one extreme example, '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 power.'⁴²

To summarise this first point, the highly suspect 'givenness' of meanings within a particular discursive formation is neither, as Wittgenstein claimed, a solution to the problem of meaning, nor is it referable to any strictly systemic conception of linguistic value, it is rather a problem to be critically analysed in terms of the relation of such meanings to institutional and ideological practices. As Foucault has extensively argued in terms of the archaeology of knowledge, the problem may ultimately only be answerable in terms of the political organisation of linguistic and discursive processes, seen as the exercise of power.⁴³ It has, indeed, become a truism of much recent communicational research that the most interesting and illuminating aspect of the study of discursive

[41] Ibid. 112.

[42] J.Lenoble et F.Ost (1980) 83.

[43] See, 'The Discourse on Language', translated as an appendix to M.Foucault: The Archaeology of Knowledge (1981) New York; also, M.Foucault: Power/Knowledge (1980) Harvester; M.Foucault: The History of Sexuality (1978) Allen Lane. For critical accounts of the specifically linguistic issues raised see, T.Pateman: Linguistics as a branch of Critical Theory (1981) 14/ 15 UEA Papers in Linguistics 1; M.Pecheux (1982). For interesting discussion of related issues with regard to gender specific linguistic practices see, A. Assiter: Did Man Make Language ? (1983) 34 Radical Philosophy 25; D.Cameron: Sexism and Semantics (1984) 36 Radical Philosophy 14; also, L.McKluskie: Women's Language and Literature (1983) 14 Feminist Review 51.

processes is to be concentrated upon the manner in which power defines meaning and non-meaning within discourse. The processes in which such determination occurs may be analysed objectively (as opposed to anthropologically or psychologically) through the critical use of linguistic methodologies.

Such an analysis of the manner in which power organises and determines meaning is not, however, merely an abstract enterprise in theoretical sociology. The second fundamental concern of critical linguistics is to relate the essentially semantic analysis of discursive processes to the specific syntax and grammatical transformations of the particular text, or 'intradiscursive' level. Very generally, it is argued that the 'preconstructed' patterns of meaning operative variously within discursive processes react upon the linguistic structure. Language use inevitably bears the impress of social ideologies: 'there are social meanings in a natural language which are precisely distinguished in its lexical and syntactic structure and which are articulated when we write or speak. There is no discourse which does not embody such meanings.'⁴⁴ The problem of meaning, in other words, re-emerges within the linguistic system and belies its unity; social structure determines linguistic variety and significantly affects the availability and potential expression of concepts. Linguistic structure itself encodes inequalities of power and is also instrumental in enforcing them. The linguistic structures of a text or of a particular institutional practice are thus a matter for critical interpretation. Insofar as the text reflects and expresses the roles, purposes and ideologies of its participants or subjects, these implicit or unconsciously regulated operative meanings are accessible to study through their expression in the lexicon, syntax and semantics of the text.

If the principles of critical textual analysis are reasonably clear, the linguistic tools used to effectuate such analysis are more diverse. The reason for such diversity - Fowler, for example, lists five broad

[44] R.Fowler (1979) 185. See also, G.Kress and R.Hodge: Language as Ideology (1979) R.K.P.; H.Davis and P.Walton: Language, Image, Media (1983) Blackwell. The most original material is to be found in V.Volosinov: Marxism and the Philosophy of Language (1973) Academic Press; M.Bakhtin: The Dialogic Imagination (1982) Texas U.P. and will be analysed in detail in Chapter 6.

categories of critically/ideologically interesting linguistic structures'⁴⁵ with roughly thirty sub-divisions - is broadly speaking a product of the very different roles that linguistic processes are to play within wider social processes. Any particular text, genre or variation is a complex combination of linguistic constructions, functions and codes correlated to variable socio-political and ideological contexts. Research does, however, suggest that certain cautious generalisations are appropriate. Turning to the work of the French linguist M.Pechoux, it may be noted that his analysis of the textual effects of discursive processes - processes which are themselves materially and ideologically determinate - makes use of the categories of 'syntactic embedding' and of 'articulation'. The phenomenon of syntactic embedding is indeed accorded the status of 'one of the fundamental points of articulation between the theory of discourse and linguistics.'⁴⁶ If we reiterate the general thesis that the preconstructed meanings of discursive processes determine the lexicon and syntax of the text, it may be added more specifically that the term 'preconstructed' is used to designate 'what relates to a previous, external or at any rate independent construction in opposition to what is "constructed" by the utterance.' Using the example of a sentence such as 'he who discovered the elliptic form of the planetary orbits died in misery', it may be observed that traditional linguistic analysis would provide a formal designation of the meaning of such a sentence. The meaning of the utterance, according to Frege from whom the example is drawn, is the effect of the syntactic phenomenon of the determinative relative clause - reference being to Johannes Kepler, the German astronomer who died in 1630. For the purposes of discourse analysis, however, the determinative relative clause is no more than a formal precondition of the meaning effect. What are also concerned are the material conditions in which Kepler died, a reality which has little or nothing to do with the discovery of the laws of planetary motion except in a religious or moral perspective for which misery is the counterpart of genius, and a punishment for knowledge seen as transgression. Thus for Pechoux, the meaning is eventually more complex than might be formally

[45] R.Fowler (1981) ch.2 appendix B.

[46] M.Pechoux (1982) 64.

apparent, 'its material cause really resides in the asymmetrically discrepant relationship between two domains of thought, such that one element from one irrupts in an element of the other in the form of what we have already called the preconstructed, i.e. as if that element were already there.⁴⁷

Other linguists have suggested that what Pecheux has termed syntactic embedding, the discrepant relationship between different domains of thought, is a necessary phenomenon of intertextuality⁴⁸ and may be studied syntactically both in terms of linguistic relations of implication and also in terms of the articulation or internally asserted narrative structure of the text. Thus, following Fowler's more detailed elaboration, the vocabulary - especially lexicalisation and relexicalisation; the syntax - especially the transformations, nominalisations and thematisations; the variant interpersonal modalities; the cohesion and finally the transitivity of the text may all be usefully studied to elucidate the preconstructed or socio-cultural determination and extension of the text and its meaning. Examples and linguistic checklists may be multiplied, it is sufficient that the purpose and methodology of such analysis is clarified. By way of summarising and concluding, I would suggest that the jurisprudential implications of these recent developments in linguistics are fairly clear.

The primary implication concerns the positivistic conception of the unity of law and of the determinate language of the normative order, a proposition first arrived at in its contemporary form by Kelsen and, with minor emendations, still adhered to by Hart and by MacCormick. It will be

[47] Ibid. 62.

[48] The definition of intertextuality is a matter of some controversy, not least because of gross disparities between the theoretical elaboration of the term and its use in substantive criticism. I would suggest that its meaning may best be clarified by consideration of its basis in a linguistics of communication or dialogue, on which, c.f. M. Bakhtin (1982): 'no living word relates to its object in a singular way: between the word and its object, between the word and the speaking subject, there exists an elastic environment of other, alien words about the same object, the same theme ...' (276 ff.) the subsequent development of the concept of intertextuality by, amongst others, J. Kristeva: La Revolution du Langage Poetique (1974) Seuil, is derivative of Bakhtin's work and utilises the concept of dialogue or dialogism in the more specific context of textual criticism: 'whatever the semantic content of a text, its condition of existence as a signifying practice presupposes the existence of other discourses' (388-9).

recalled that the linguistic basis of Hart's analysis of paradigm and penumbral meanings relies heavily upon a conception of the systemic determination of key legal words. Such rule governed determination of legal meaning was deemed to be the distinctive characteristic of legal language, and thereby was proposed a conception of the autonomy of law which denies, save in certain restricted categories of exceptions, that political, moral or other references are considerations that play any role within the semantics of legal validity. It is clear that the linguistic principles reviewed above lead to a position almost in direct antithesis to Hart's more traditional use of linguistics. I should like, finally, to take the argument one step further. To argue that a theoretically informed analysis of the legal code must take account of the socio-cultural extensions of legal language has profound empirical implications for the study of legal texts. It is moreover the case that a critical linguistic orientation also suggests that the separation or isolation of questions of law and legality from wider considerations of the organisation of discursive processes as a modality of power and of inter-group or class relations is hollowly ideological. The idea of a special and separate legal language remote from common speech is the product of a society in which only a very limited class of 'legally competent' people can read the texts of that language. What is in effect the relexicalisation of the law, its archaic terminological obscurity and its pedagogic specialisation, are all geared to the reproduction of an economic elite and the discriminatory values that such an elite serves. It is already a privilege to read the law, and the very idea of the objectivity and specialisation of legal language functions consciously or unconsciously to exclude participation in the legal process. I would argue finally that any legal philosophy worthy of the name should fast begin to concentrate its attention upon a precise analysis of the social and political values existent throughout the syntactic and discursive processes of the law. It is my hope that part two of this study constitutes a substantive step in such a direction.

PART 2: LEGAL DISCOURSE

5. RHETORIC AS JURISPRUDENCE

AN INTRODUCTION TO THE POLITICS OF LEGAL LANGUAGE

INTRODUCTION

It is altogether appropriate that the term rhetoric, which in one of its aspects refers to the study of grammatical ambiguities,¹ should itself bear a diversity of meanings. In its most ancient definition it was quite simply and diffusely the study of all forms of public speech. The subsequent history of rhetoric, however, to which I will return below, was one of reduction, restriction and quite frequently disparagement. The most common modern acceptations of the term are pejorative or poetic and bear little trace of the discipline which was originally to have charted the interrelations of language and power. Ordinary usage now defines rhetoric as the specious, bombastic or deceitful use of language; rhetoric, in other words, is the abuse of language; while within the scholarly division of disciplines it generally fares little better as the study of linguistic forms or devices, located at the level of the word and divorced from any serious consideration of their content or use. At the risk of oversimplifying, rhetoric may plausibly be referred either to a pre-scientific theory of ideology or to a formalistic aesthetics.

It takes little originality, however, to observe that even as latterly vulgarised, the conjunction of rhetoric and jurisprudence creates a number of analytic possibilities. Two in particular deserve attention. It may first be noted that criticism and satire of the obscurity and opacity of legal language, together with attacks upon the casuistic and manipulative nature of legal argument, have formed time-honoured and characteristic themes of literature, drama, and more recently, sociology and indeed realistic jurisprudence. To the understandably frequent claim that

[1] The definition is that of P. de Mann: Allegories of Reading (1979) Yale U.P. at p.10.

lawyers are thieves and rogues, and that the law itself is a linguistic confidence trick, one may add the marginally more sophisticated arguments of Jeremy Bentham's endearing yet little known project of establishing a triplicate or neutral vocabulary in his Table of the Springs of Action² His proposal was for a dictionary of neutral 'appellatives', wherein each neutral term would be accompanied by both a eulogistic and a dyslogistic, equivalent. If such an endeavour appears, as surely it must, to be both implausible and naive, it is as well to remember that it was predicated upon the best of motives. These had already been analysed and elaborated in his earlier work, in the Theory of Fictions and in the Book of Fallacies, which had vigorously attacked the covert imagery latent within legal fictions and legalistic abstractions, and had also displayed a healthy abhorrence for the logical fallacies lurking behind rhetorical devices such as the use of 'question begging appellatives' (the fallacy of confusion) or of 'vague generalities' (a covering device). Thus, for instance, Bentham had argued that since the word order is of wider application than the term for any particular order, it may include both good order and bad, and thus a call for order can mask or conceal a call for tyranny, tyranny itself being a species of order. In a similarly demystifying vein he wrote of the vague generality British Constitution: 'Rally round the constitution: that is, rally round waste, rally round depredation, rally round oppression, rally round imposture - imposture at the hustings, imposture in the

Bentham's argument was that, by virtue of the power invested in it, the vague linguistic generality constitution was used rhetorically to cloak the sectarian interests and inequalities of its actual practice. It was thus that it could lay claim to being an object of veneration and respect rather than becoming the butt of the vilification which he believed it often deserved. More generally, it may be stated that in this respect Bentham's project was that of inaugurating a critical rhetoric based upon a theory of language as communication; a communication structured by an extra-linguistic reality which it might either express or obscure.

[2] The only extended discussion of this aspect of Bentham's work of which I am aware is to be found in K. Burke: A Rhetoric of Motives (1969) California U.P. pp.90 ff.

Bentham's theme is, of course, an exemplary one. To take but one further example, a recent, somewhat less felicitous, theory of law as ideology comments at length upon the magical form of legal discourse, namely that of a series of 'sacred texts: the canons of social order.' The profane basis of this sacrosanct legality is partly bureaucratic and partly linguistic. Of the latter aspect we are informed that: 'legal discourse in modern societies is ... bureaucratised magic expressed in legalese. It is therefore not only a discrete phenomenon but downright impenetrable.³ The magical form of law - to which one might counterpose Bentham's notion of 'allegorical idols' - is arguably rhetorical in a variety of related senses. In a broad and tendentious linguistic sense, the impenetrability of legal language may be viewed as a function of its non-referential character. In this perspective the obscure terminology, as well as the figurative and metaphorical devices of legal expression, which both Bentham and Sumner are concerned to unmask, are operative upon a symbolic or connotative axis of language which is effectively maintained at one remove from⁴ the 'real' linguistic realm of denotation or reference. Loosely, the rhetorical use of language is seen as inducing, by symbolic or figurative means, the co-operation and accommodation of social and institutional forces whose real affinities are antagonistic and conflictual. In another terminology, legal rhetoric functions as an elaborated and elitist linguistic code or speech variant.⁵ That it is frequently impenetrable should ideally alert the theorist to the socio-linguistic features of a code which simultaneously serves the functions both of communication and of non-communication; of precision and of impenetrability. Rather than further anticipating the extensions and qualifications that such theses necessitate, I shall instead assert that it is my intention in the ensuing analysis to introduce into the domain of legal studies, the concept of a critical rhetoric; namely that of a rhetoric capable of indicating and specifying the political dimensions of

[3] C.Sumner: Reading Ideologies (1979) Academic Press p. 270.

[4] The concept of distance properly belongs to structural linguistics, which generally refers to the rhetorical as a second order of signification which overlays and possibly also overrides - catachresis (the arm of a chair) being the obvious example - a primary signification. C.f. G.Genette: Figures of Literary Discourse (1982) Blackwell ch.2.; also R.Barthes: Elements of Semiology (1967) Cape iv.2.

[5] C.f. B.Bernstein: Class, Codes and Control (1974) R.K.P. p.77 ff. Also, A.Gouldner: The Dialectic of Ideology and Technology (1976) Macmillan ch.2.

legal language and further capable of explaining its apparently non-communicative qualities by reference to the relations of power within which the legal text (as scripture) is inscribed.

The second, more specialist, contemporary meaning of the term rhetoric, is that of the discipline which studies the linguistic form of discourse and more particularly the word-based figures of literary and poetic genres, primarily those of metaphor and metonymy. In this acceptation, rhetoric may no longer bear a pejorative connotation, but is nonetheless a somewhat confined and pedantic discipline, serving as little more than an aesthetic appendage to lexicology and etymology, a particular subset of syntactic relations.⁶ To proceed to a statement of the obvious, the relevance of this latter sense of rhetoric as the study of figures or as tropology, lies precisely in the history rather than the product of its confinement. The historical question to be raised; one which applies with equal force both to the present context and to the preceding, pejorative, sense of rhetoric; is that of the relation of philosophy, and more particularly logic (as the study of 'necessary truths'), to the domains of a rhetoric which had originally sought to demarcate the political and socio-historical contours of discourse. The history in question is that of the repression and exclusion of rhetorical and 'topical' contingencies, largely coincident with the rise of the empiricist and rationalist philosophies of the 17th century. It is in the reading of the history of the excluded discipline and in the delineation of the terms of its repression, that it is possible to reconstruct the rise of the formalist and essentially patriarchal myth of a determinate and univocal language of legal authority.⁷

[6] These remarks are necessarily somewhat generalised. They are based upon the historical studies of G.Genette op.cit.; R.Barthes: *L'ancienne Rhetorique* (1970) 16 *Communications* 1; C.Metz: *Psychoanalysis and Cinema* (1982) MacMillan Part IV. On the place of Rhetoric in the medieval trivium, see, W.Ong: *Ramus, Method and the decay of Dialogue* (1958) Harvard U.P.; P. de Mann: *Resistance to Theory* (1983) 63 *Yale French Studies* 3.

[7] For want of a better definition of patriarchal authority, I shall follow Weber's, 'The person or persons exercising authority are designated according to traditionally transmitted rules. The object of obedience is the personal authority of the individual (or organised group) which it enjoys by virtue of its traditional status.' Quoted in T.Mathieson: *Law, Society and Political Action* (1980) Academic Press pp.110-111.

An understanding of the past is also the possibility of an alternative future. The discipline which has traditionally purported to explicitly chart the structural, semantic and, crucially, political facets of legal texts, is jurisprudence. It has, of course, long abandoned any substantive engagement with the politics of legal interpretation, and in so far as it has remembered the linguistic form of legal enunciation it has generally been in terms of a determinate logic of legal signification, conceived in terms of systemic rather than communicative functions. Which is to say, that the dominant tendency within jurisprudence has been that of the formalist project of applying the categories of logical philosophy to the linguistic produce of the law, for the purposes of inserting the newly born norms of legal judgment into the sterility and safety of a systemic normative justificatory framework.⁸ Even when recourse has been made to the terminology of 'practical reasoning' or to the theory of argumentation,⁹ the message has been that of the reiteration of the specificity of the legal, in terms of the powerful logical constraints within which legal decision making must ever operate. If the high culture of the law is cautiously pointed towards a semiotics of legal logic,¹⁰ there is nonetheless implicit within the apparently anti-formalist concepts of practical reasoning and of a New Rhetoric (within continental jurisprudence), the recognition of the political and ethical dimensions of all law applying acts. In arguing that the strikingly vague (and overdetermined) concept of 'consequentialism', or that the similarly generic notion of 'topics of legal argument', are both predicated upon a profound belief in the patriarchal authority of the legal judgement, I hope to provide the basis for the introduction of a concept of legal discourse as pre-eminently the discourse of power.

[8] For a useful analysis of correlative arguments concerning legal rationality, c.f. J.Lenoble et F.Ost: Droit, Mythe et Raison (1980) Bruxelles pp. 169-217; A similar theme is implicit in F.Burton and P.Carlen: Official Discourse (1979) R.K.P. ch.5 & 6.

[9] Respectively, D.N.MacCormick: Legal Reasoning and Legal Theory (1978) Clarendon, Ch.Perelman: Logique Juridique (197) Dalloz.

[10] C.f. for instance, G.Kalinowski: Introduction a la logique Juridique (1965) Paris.

5.1 RHETORIC IS REPUBLICAN

To begin by means of an example I shall offer some polemically descriptive remarks, from the perspective of a hypothetical classical rhetoric, upon certain of the arguments used by Lord Diplock in a recent decision of the House of Lords, namely Home Office v Harman.¹¹ The case turned upon a variety of intriguing arguments concerning the production, reading, re-reading and reporting of legal documents; a series of properly textual issues. In the course of an earlier action,¹² a civil rights organisation (N.C.C.L.) had obtained discovery of a number of Home Office documents which documents were subsequently read aloud (and recorded) in open Court. With a view, presumably, to ease of access or speed of availability, the solicitor for N.C.C.L. had permitted an 'investigative' journalist to read the discovered documents in her possession - thereby saving the journalist concerned the trouble and expense of recourse to the official transcripts - with a view to his writing a feature article on the subject of the control unit at Hull prison. The article which resulted from this reading was highly critical of Home Office prison policy. In the instant case, the solicitor was found guilty of contempt of court. Very briefly, 'there are two kinds of' (legitimate)' reporters of proceedings in courts of justice'¹³ and the investigative journalist; by virtue of bad motive, ill-intent and the failure to privilege the legal self-definition of its own terrain, purposes, documentation and language; falls outwith the categories of bona fide reporting. The solicitor who, by dint of dual loyalties to the legal profession and to a civil rights organisation, facilitates the misreading of legal documents, is held to be in contempt of court.

The primary rhetorical question to be raised, concerns the techniques employed by the judge to discover (inventio)¹⁴ appropriate arguments upon

[11] Home office v Harman (1982) 1 AER 532.

[12] Williams v Home Office (1981) 1 AER 1151; Williams v Home Office (no.2) (1981) 1 AER 1211.

[13] Home Office v Harman op.cit. at p.539 f-j.

[14] This and the subsequent bracketed figures of argument are purely illustrative. Annotated lists of figures can be found in K.Burke op.cit. pp.65-69; Ch.Perelman and L.Olbrechts-Tyteca: The New Rhetoric (1971) Notre Dame U.P. pp.167-174.

which to base the subsequent deliberation or proof of the outcome described. Lord Diplock begins his judgment with an interestingly explicit exposition of a possible, false, major premiss:

My Lords, in a case which has attracted a good deal of publicity, it may assist in clearing up misconceptions (correctio/rectification) if I start by saying (prolepsis/anticipation) what the case is not about (contrarium/antithesis) . It is not about freedom of speech, freedom of the press, openness of justice or documents coming into the 'public domain' (auxesis/amplification),¹⁵ nor with all respect to those of your lordships who think the contrary, does it in my opinion call for consideration of any of those human rights and fundamental freedoms (contained in) the European Convention for the Protection of Human Rights and Fundamental Freedoms ... What this case is about is an aspect of the law of discovery of documents in civil actions in the High Court (allusion/identification).... The case in my view, turns on its own particular facts, which are very special (distributio/arrangement).¹⁶

Without embarking upon any detailed examination of the ensuing judgment, a few further observations are of relevance to the statements cited. Lord Diplock's initial assertion, or dissociative definition, for which neither argument nor explanation were proffered, apparently excludes the issues of 'freedom', 'openness' and 'publicity' from judicial consideration as extrinsic to the legal contextualisation of the case. The negative assertion should, of course, be read in conjunction with Lord Diplock's positive proposals as to the subject matter of the dispute, but even then the intrinsic issues are somewhat ungraspable. Without further evidence of the criteria of demarcation of the extrinsic and the intrinsic, it has to be accepted (on authority simpliciter) that when the judge does discuss: the rule that trials be conducted in open court, the anomaly that a transcript of the documents is available to be read but that the documents themselves are not, and finally the characteristics of the bona fide press reporter as opposed to those of 'collateral' or 'ulterior' motive, the issues of 'freedom', 'openness' and 'publicity' are not raised. The answer to this apparent paradox, however, lies precisely in the rhetorical or oratorical character of the initial, negative, definition: it

[15] The amplification concerned is generally designated 'aggregation'.

[16] Home Office v Harman op.cit. at p.534 d-j.

serves an explicitly argumentative or persuasive function in relation to the wider audience which the case has attracted; it identifies the correct readership for the ensuing text, and thereby also reasserts the autonomy or privilege of legal language, legal method and more generally of the legal form. The substance of the decision, after all, is a forceful reminder of the fact that those who do not respect the 'peculiar character' of legal procedure in civil litigation and who fail to perceive the distinction between the formal normative character of the legal process and the substantive content of the documentation of a dispute, are in contempt of court and so also, more generally, of the authority of the law.

It is precisely the latter considerations, namely those of the persuasive function of particular rhetorical techniques and of their appropriateness to the character of the audience or addressee, that form the object of the classical studies. The bracketed rhetorical figures provided in the quotation from Lord Diplock's judgment are not of interest for their taxonomic or aesthetic properties, but are of profound significance as indicators of argumentative intention and of argumentative effect; the linguistic form of the judgment, in other words, is to be viewed in this respect in terms of its communicative, socially orientated, functions. As one recent study has phrased it:

A political criticism is not the invention of Marxists ... The most widespread early criticism on historical record was ... a mode of what we would now call 'discourse theory', devoted to analysing the material effects of particular uses of language in particular social conjunctures. It was a highly elaborate theory of specific signifying practices - above all those of the juridical, political and religious apparatuses of the state. Its interest was ... systematically to theorise the articulations of discourse and power, and to do so in the name of political practice.¹⁷

There is, of course, a heavy burden of historical responsibility attendant upon such a broad and homogeneous formulation of the motives underlying the earliest rhetorical treatises. There is, however, a coherent sense in which a major portion of classical rhetoric was indeed concerned with

[17] T.Eagleton: Walter Benjamin (1981) Verso p.101. For similar discussions, c.f. U.Eco: A Theory of Semiotics (1979) Indiana U.P. pp.277 ff; E.Grassi: Rhetoric as Philosophy (1980) Pennsylvania State U.P. ch. 1 & 2.

persuasion as the primary function of language use or public speech understood in terms of its social, and hence also political, orientation. It is fortunately no part of my intention to provide anything approaching a comprehensive schema or account of classical rhetorical categories; the remarks which follow are aimed solely at eliciting the method and categories of one particular interpretation or species of classical rhetoric, an account which relies heavily upon the great works of synthesis, those of Aristotle and of Cicero. The 'ideal typical' model of rhetorical method which ensues is intended to be suggestive and, more pragmatically, will provide the historical background to a discussion of the subsequent decline of rhetoric.

5.1.1 Persuasion

For Aristotle, then, 'rhetoric may be defined as the faculty of discovering all the possible 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.'¹⁸ The division of rhetoric into subjects or genres is thus secondary to the universality of its method, and will be examined below. For the moment, it is the conjunction of rhetoric with 'means of persuasion' that is of interest. Rhetoric studies persuasion, but in the absence of an analysis of the rhetorical history of the term persuasion itself, little has so far been gained. Whereas logic dealt with 'instruction' - demonstrative proof by means of necessary truths - the study of persuasion (which Aristotle defines in opposition to flattery, seduction or threat) was concerned with the marshalling of the means of contingent or 'topical' communication, and with the elimination of differences or conflicts of value or perspective as between speaker and audience:¹⁹

It is evident that rhetoric ... is useful. It is evident also that its function is not to persuade but to discover the available means of persuasion such as the circumstances of each particular case allow. And in this respect Rhetoric is like the other arts. For example, it is not the function of Medicine to restore a person to

[18] The Rhetoric of Aristotle, trans. J. Welldon, (1886) MacMillan p.10. Aristotle (W.D. Ross ed.) (Oxford) Bk. I.2. 1355b.

[19] See, e.g., A. Blum: Theorizing (1974) Heinemann pp.170-3.

perfect health but only to bring him to as high a point of health as possible; for even people who can never possibly recover their health may still be scientifically treated.²⁰

As the metaphor of medical practice suggests, the study of persuasion is subject to a concept of the use of language determined by the relation of means to ends.²¹ Rhetoric thus studies the linguistic means that allow a chosen end to be achieved; its object thus includes eloquence conceived as effective speech, language conceived as action and speech itself defined in terms of its functions and not as a manifestation of structure or necessity. Thus, in a metaphor traditionally attributed to Cicero, rhetoric 'this arrangement of topics in speaking, like the arraying of soldiers in battle, can readily bring victory.'

Certainly, the structure of Aristotle's Rhetoric would appear to be strongly influenced, if not determined, by a concept of active strategies of discursive persuasion. Book I of the Rhetoric deals both with the theory of argumentation in general (its relation to Dialectics, Politics, Ethics and so on), and also with the acquisition or invention (*inventio*) of argumentative starting points. Book II outlines a classification and arrangement (*dispositio*) of concrete arguments with a view simultaneously to the purposes and formal circumstances of the speaker, and also to the character of the audience. The final Book briefly reconsiders the concept of appropriateness or proportionality of the linguistic forms or rhetorical devices (primarily those of metaphor and simile) and outlines the virtues of style (*elocutio*) in terms of the appropriate forms of clarity. From start to finish the goals of the study are those of specifying the means of persuasion, conviction and, in so far as is possible, proof. To the tripartite division of the subject (*inventio* - *dispositio* - *elocutio*) correspond, respectively, the goals of probability or verisimilitude, understanding, and pleasure, viewed as the correlative of clarity or proportion. To which it should be added that such goals are conceived actively rather than passively; the audience should identify with the terms, character, motives and values underpinning the speech; its

[20] Aristotle, *op.cit.*, p.9 (Bk.I.1. 1355b).

[21] For a very concise analysis of this aspect of persuasion, c.f. T.Todorov: Theories of the Symbol (1982) Blackwell ch.2.

understanding will be altered and, ideally, it will be persuaded to action. A most explicit and concise formulation of this principle of rhetoric both as persuasion and as inducement to action, is given in the 4th century work of St. Augustine's On Christian Doctrine. The addressee is persuaded if:

' .. he likes what you promise, fears what you say is imminent, hates what you censure, embraces what you command, rejects whatsoever you built up as regrettable, sympathises with those whose wretchedness your words bring before his very eyes, shuns those whom you admonish him to shun .. and in whatever other ways your high eloquence can affect the minds of your hearers, bringing them not merely to know what should be done, but to do that they know should be done. ²²

It was only much later in the history of the rhetorical discipline that persuasion became divorced from argument, along with content from form, and style or eloquence from truth. To summarise, in its earliest phases, the rhetorical conceptions of eloquence and of persuasion were functional and pragmatic, they were, in brief, firmly tied to a conception of the argumentative and communicative role and context of public speech; they were, finally, concerned with all three aspects of the tripartite division of rhetoric, and not merely, as was to occur later, with style alone.

5.1.2 Audience

The concept of rhetoric as the study of the manifold means of persuasion, is necessarily predicated upon a conception of communication or, classically, dialectic. Obviously enough, persuasion is dependent upon both the presentation and the reception of messages. The means or mode of such semantic and instrumental transmission is, however, a matter of considerable complexity. The key to this problem, for the rhetoricians, lay in the concept of the concrete situation. The concept may plausibly be subdivided; it bears both a philosophical and also a more specific, pragmatic, connotation; in Aristotle's terminology²³ the rhetorician must study both the common or general topics of argumentation, as well as analysing the special topics of the particular rhetorical genres - the deliberative (political), the forensic (legal) and the epideictic

[22] St. Augustine: On Christian Doctrine (1956) New York, p.216.

[23] C.f. Rhetoric op.cit. p.20 (BkI.2.1358a).

(panegyric/ceremonial).

The Aristotelian distinction, however, between the common and the special topics is highly normative, not to say properly metaphysical. Indeed it implies a distinction between mind and action,²⁴ which I am not here concerned either to elaborate or to criticise. Very briefly, rhetoric as a sub-branch of the general theory of argumentation (dialectic), may profitably also make use of the theoretical analyses of universally applicable theses provided elsewhere in Aristotle's philosophy; to be precise, the general topics are 'equally suitable to questions of justice, physics or politics, and to many questions of many different kinds.'²⁵ The Topics²⁶ thus classifies generally available arguments according to a schema of arguments relating to accident, species, property, definition and sameness. The latter portion of Book II of the Rhetoric similarly analyses arguments relating to possibility, temporality, degree and analogy. The common topics thus apparently appertain, for Aristotle, to a universal audience, an ideological and idealist conception which will be re-encountered elsewhere. A more amenable position is to be found in the work of Cicero.²⁷ Mind, for Cicero, can only be known through its works; and I believe it plausible²⁸ to interpret Cicero's several discussions of the invention of arguments as dependent upon the view that all thought and argument are revealed through human social activity, labour and need. His conception of the topic is closer to the contemporary notion of the 'topical': both philosophy (reason) and rhetoric, respond to, and take their arguments from, the concrete social situation. History determines the content (res, and generally, res publica) of theory; theory, to be meaningful, must be related to the social and political community, to practice. In this sense all topics or loci are special; although their generality may vary, such is not an essential difference but merely a further characteristic of

[24] On this, see Ch.Perelman and L.Olbrechts-Tyteca op.cit. at pp.47 & 84, and E.Grassi op.cit. pp.24-27, 41-46, P.Ricoeur: The Rule of Metaphor (1978) R.K.P. pp.27-35.

[25] Rhetoric p.31.

[26] Cicero: Topics (1952) Chicago III. 116-119a

[27] Particularly, The Orator 2.36.52; Topics 2.7.

[28] My view here depends heavily upon E.Grassi op.cit., G.Kennedy: The Art of Rhetoric in the Roman World (1972) Princeton, A.Blum op.cit.

contingency or situation: all knowledge is to be viewed as a product of labour upon the real with essential reference to the needs of the actual historical community.

At least when it comes to the discussion of the special or particular topics, both Aristotle and Cicero are agreed that it is the notion of suitability or of appropriateness of the argument to its context which should form the object of rhetorical analysis:

This indeed is the form of wisdom that the orator must especially employ - to adapt himself to occasions and persons. In my opinion one must not speak in the same style at all times, nor before all people, nor against all opponents, nor in defence of all clients, nor in partnership with all advocates. He, therefore, will be eloquent who can adapt his speech to fit all conceivable circumstances.²⁹

If we turn to Book I of the Rhetoric, Aristotle explains the tripartite classification of rhetoric into the deliberative, forensic and panegyric genres, precisely by reference to the audiences to which such speeches are directed: 'the end or object of the speech is determined ... by the audience.' The deliberative or political audience is concerned with expediency, the forensic with justice and the panegyric with honour. It is not, however, the somewhat dogmatic division of rhetoric into genres - elements of the panegyric, for instance, will frequently saturate the other two genres - but rather the specification of the special topics pertinent to these audiences, which lays claim to attention. With characteristic mindfulness to detail, Aristotle embarks upon the analysis of special topics by observing; significantly enough, in the context of a comment on legal decision making; that 'it must necessarily be our object not only to render our speech demonstrative and credible, but also to produce a particular impression of ourselves and a particular disposition in our judges'. The justification for such a remark is that our 'estimate (of a speech) is not the same, but either wholly different or different in degree, according as we regard a person with feelings of affection or dislike, and are angrily or charitably disposed towards him.'³⁰ Avoiding

[29] Orator op.cit. p.123.

[30] Rhetoric op.cit. pp.112-113 (Bk.II.1).

unnecessary detail, the analysis which ensues may be paraphrased as follows. It is a surprisingly lengthy and detailed account of the various 'ideal types' of listener or audience. Just as the rhetorician must observe the generic features of the audience - it is hard to praise Athenians when you are talking to Lacedaemonians - so too the specific opinions, beliefs, values and general psychology of the audience must be taken into account in analysing the persuasive contours and effectivity of the rhetorical or public speech. What follows, is thus a detailed survey of popular beliefs, attitudes or values, an exegesis of the commonplace assumptions of likely audiences on questions of morality, politics and psychology. This speculative inventory of the popular is not of interest for its content, but rather for its emphasis upon the form of communication as dialogue. While the other Books of the Rhetoric are normative and frequently dogmatic in their method and intention, the discussion of the special topics does at least retain the conjunction, albeit momentary, of the cognitive and the affective, the abstract and the concrete, the form and the content, so essential to the broadest meaning of rhetorical analysis, that of charting the interrelations of language and power. While it can certainly be argued that this aspect of the Rhetoric is flawed or unsuccessful, its burgeoning subject-matter always being likely to explode the boundaries of the available method, such is not here at issue. The significance of this expedition into a thoroughly 'popular' social psychology, resides in its potential and its implications. The perspective which is introduced in the study of the special topics is one of intersubjectivity, a nascent theory of communication as based upon the social determination of meaning.

5.1.3 Public speech

In the course of a discussion of style, a domain of rhetoric to which Aristotle brings little enthusiasm, we find the following comment:

Strict justice ... if applicable to Rhetoric, would confine itself to seeking such delivery as would cause neither pleasure nor pain. For the right condition is that the battle should be fought out on the facts of the case alone; and therefore everything outside the proof is merely superfluous, although extraneous matters are highly

effective ... owing to the depraved character of the audience.³¹

The upright audience, of course, would be composed purely of philosophers, it would be the universal audience of self-evidence and right reason, everyone and no-one. What is interesting about the remark in the present context, however, is not so much its arrogantly reluctant acceptance of the non-philosophical, but rather its recognition of the social orientation of language use. However much philosophy might wish to rid itself of rhetoric, it could never, of itself, abrogate the concrete situations and republican institutions upon which rhetoric was based. The political assembly, the tribunal and the market place of the city state would constantly bear witness to the restraint of speech by its hearers; discourse is always discourse in the presence - at least implicit - of another.

There is always, however, a danger of romanticising the past upon the basis of contemporary affinities. A society predicated upon slavery as the mode of production can hardly lay claim to serve as a political or ethical ideal. That is no reason, however, for ignoring the indisputable achievements of an elitist culture and its limited republicanism. Within its sphere³² rhetoric was tied to an eloquence imbued with power, to a speech with purpose and to a politics which was pre-eminently of the public domain. For Cicero, at least, both speech and meaning were to be understood as the product of a determinate historical sociality; rhetoric was indissociable from rhetorical practice, it was the study of power or *res publica* as dialogue rather than monologue, it was the politics of the phonocentric rather than the scriptural,³³ of the face to face as opposed to that of the monarchic or bureaucratic dispersion. The rhetorical domain, then, was that of a community of speech in which eloquence was the highest quality of the individual as citizen and as inseparable from the collective actions of the polis, the political whole. The material

[31] Ibid. p.226 (Bk.III.1.)

[32] On which, c.f. J.B.Elshtain: Public Man, Private Woman (1981) Princeton U.P. pp.19-55; and, more generally, on the subject of inclusion and exclusion, J.Elshtain: Feminist Discourse and its Discontents: Language, Power and Meaning (1982) 7 Signs 603.

[33] The distinction is that of J.Derrida: Of Grammatology (1976) John Hopkins U.P. p.138.

precondition of an engaged rhetoric, in other words, was that of the city state, the democracy, now utopian, of proximity and of dialectics, in which speech as persuasion, as opposed to coercion and to manipulation, played the role of public force. Rhetoric was necessary precisely because power was not yet conceived as detached from the public control of language and meaning.

The enduring value or applicability of rhetoric as a discipline is to be gauged, I would suggest, in exact proportion to its ability to analyse and codify the public and political dimensions of institutional discursive practice. It would be the study of the institutional and administrative determination of social meaning, a study, for instance, of the frequently obscured persuasive, argumentative and coercive levels inherent in the writing of legal texts, and equally a critical evaluation of a contemporary legal culture and practice predominantly based upon the exclusion of dialogue in favour of an authoritarian monologue of initiation. A culture confined within the parameters of a professionalised and esoteric language, in turn supported by a jurisprudence of legal univocality within which the institutional meaning of the law is always already given and merely remains to be said. Certainly it can do no harm to recall that rhetoric is born of social practice and that its predominant object of study was that of legal argument viewed as persuasion indissociable from the substantive issues and audiences involved. Its object was thus, in the last instance, external to it, its method (technique) was functional and its outcome was the analysis and codification of discursive practice, viewed precisely as practice rather than truth (stasis). So, at least, I have argued, while remaining fully aware that even in classical Greece, rhetoric was also viewed as a danger and a threat to the imperialistic philosophical motive which has only later to fully eclipse rhetoric by wholly subordinating it to logic and to the concept of necessity. The subsequent history of the rhetorical discipline, in other words, was largely that of a retreat, 'from market place to study, politics to philology, social practice to semiotics'³⁴ and indeed, in its most abject moment, from social discourse

[34] T.Eagleton, op.cit. p.108.

to the supposed ontological uniqueness of the language of poetry.

5.2 RHETORIC AS METHOD

The republican spirit of rhetoric is probably best captured in the image of an immediate community of speech, within which power, and power over meaning, were dispersed rather than hierarchical, changing and essentially fluid rather than static and determinate. Thus if the discipline of rhetoric bore a philosophical and political meaning, it was that of the historical and practical-human character of reason and of knowledge. Rhetoric, as the study of contingency, was implicitly (and frequently explicitly) opposed to any elaboration of knowledge which was dependent upon the use of absolutised categories of reason or necessity. Rhetoric was both radical and to a degree theoretically innocent; it pre-existed the division and separation of the political and the social and, in the terms of Rousseau's somewhat romantic account of the historical relationship of language to government, it may well have claimed that: 'any tongue with which one cannot make oneself understood to the people assembled is a slavish tongue. It is impossible for a people to remain free and speak the tongue.'³⁵ Which is to say, that to understand rhetoric is to imagine a history prior to, or other than, that of the division of labour, be it in an economic, legal and political or theoretic and semantic form. To which it might, finally, be added that, with regard to the concept of language, the rhetorician was inherently concerned with the descriptive and critical identification of semantics with and in the social, in opposition again to any analytic or prescriptive, formal, concept of language and semantics as constitutive of the social, or as 'naming' an identity which it would otherwise lack.

5.2.1 The necessary and the probable

It should be reasonably clear from the foregoing discussion that the precondition of the decline or demise of rhetoric should, in the last instance, be explained in terms of the initial elitism and subsequent

[35] J.J.Rousseau: Essai sur l'origine des langues (1761) Paris pp.72-73

decay of the institutions to which it was tied.³⁶ Without entering any of the disputes as to the precise periodisation of the various mutations and indeed mutilations of the rhetorical domain, it does at least seem clear that the status of rhetoric had always been the subject of philosophical attack. Before it became futile, rhetoric was dangerous. Such at least was Plato's view of the subject.

In one sense rhetoric was a great leveller of discourse; all discursive activity was to be analysed in terms of its fundamental equality, based upon its relation to and pertinence for, a particular practice, be it a collective decision, a judgment or an action. If all language use was subject to a concept of historical becoming, it would seem logical that no particular discourse should be able to claim any radical privilege. Philosophical discourse, for instance, would thus be but one discourse amongst others; legal discourse would be subject to the same criteria of evaluation, criticism and contestation as any other. 'But is not this a great comfort, Socrates, to be able without learning any other art but this one, to prove in no way inferior to the specialists?'³⁷ Gorgias' unwitting question opens the way for Socrates to elaborate a primordial distinction between an idealised concept of knowledge and the concepts of belief and probability, denigrated as mere subjectivity and whim. The distinction leads to the conclusion that rhetoric is 'the semblance of a part of politics, that it is in sum and substance... flattery',³⁸ used by those skilled in their dealings with people. The rhetoricians, it transpires, exist in a world of lies, 'their mistake being that of having realised that probability deserves more respect than truth' and who 'could make trifles seem important and important matters trifles by the force of their language, who dressed up novelties as antiques and vice versa, and find out how to argue concisely or at interminable length about anything and everything.'³⁹ The charge, at least, is fairly straightforward. Rhetoric is immoral; to which Socrates elsewhere adds that it is further to be

[36] See Eagleton, *op.cit.* See also, W.Kunkel: An Introduction to Roman Legal and Constitutional Law (2nd. ed., 1973) Harvard U.P., pp.93-108; J. Dawson: The Oracles of the Law (1968) Yale U.P., pp.114 ff.

[37] Plato: Collected Dialogues (1978) Princeton U.P. Gorgias 459 c-d.

[38] *Ibid* 463 b & d.

[39] Phaedrus 267 a & b.

distrusted as being emotive, a matter of opinion and of persuasion rather than conviction. To use the proper philosophical metaphor, rhetoric belongs to the shadowy and twilight sphere of the cave, to the realm of appearance and of the probable as yet unilluminated by the real or truth.⁴⁰ It is the derided concept of the probable which is crucial and to which Aristotle adds a considerable depth of negative connotations. Prior to examining the developments which Aristotle sought to introduce, however, it might be briefly observed that Plato's defence of philosophy is not without its own difficulties and inconsistencies. Rhetoric, he has admitted, studies 'the kind of persuasion employed in the law courts and other gatherings.... and concerned with right and wrong.'⁴¹ In other words, it shares its subject matter with philosophy, but errs in its method. Its error transpires to be principally that of appealing to the emotive or affective rather than to the rational and demonstrable. But if the latter categories of the philosophical are analysed closely, it appears that they too are based upon the emotive, at least in so far as Socrates associates philosophy with eros and with its own Muse.⁴² There seems, at least, no other way of interpreting Socrates' subsequent remarks upon the concept of a 'true' rhetoric, which is defined as the dialectic itself; as philosophy in turn making use of language. Only the 'Idea' of the real itself remains, presumably, to differentiate the emotive and philosophical, from the emotive and merely probable.

It is to Aristotle, however, rather than to Plato, that the rejection of rhetoric is usually traced. Pecheux, for instance, boldly refers to:

an immensely long trajectory, throughout whose length, from the philosophy of Aristotle to the 'scientific' discipline that today goes by the name of semantics, two threads have constantly intersected: that of analytics (the rules of demonstrative reasoning which give access to knowledge) and that of rhetoric (the art enabling one to convince by use of the verisimilitudinous); a trajectory which, in its very development, seems condemned to retrace its own steps.⁴³

[40] On which metaphors, c.f. J.Derrida: *The White Mythology: Metaphor in the text of Philosophy* (1974) VII. *New Literary History* pp.5-74.

[41] Gorgias 454 b.

[42] Phaedrus 259d. See also H.Kelsen: What is Justice? (1957) California U.P. ch.2.

[43] M.Pecheux: Language, Semantics and Ideology (1982) MacMillan p.45.

The proposition is an interesting one, not least on account of its perception of the history of the concepts concerned being ineluctably bound to a specific ideological 'problematic'⁴⁴ within the history of knowledge; that of logical empiricism (analytics) face to face with and complemented by metaphysical realism (rhetoric). Which is to say, in the last analysis, that philosophers and linguists, so long as they remain within this ideological problematic, are doomed constantly to repeat the same questions - those raised by the opposition of the necessary to the contingent in its various manifestations - and to live haunted by the absence of any scientific solution to their repetition of the wrong questions. Without daring as yet to enter the domain of Pecheux's devout and unreconstructed scientific materialism, his reading is certainly suggestive of some of the key problems and inconsistencies to be found in Aristotle's analysis of the 'probable'.

Any account of the concept of the probable requires a return, already much delayed, to Book I of the Rhetoric. Granted that Book II was concerned to examine at some length the intersubjective and dialogical or communicative facets of public speech, it must be unequivocally admitted that this analysis of 'opinions' (as 'given' in the audience) is prefaced, in Book I, by a largely disparaging treatment of rhetoric as a lesser or inadequate variant of the philosophical. For Aristotle was only too aware of the dangers of rhetoric; its inclination to break away from philosophy (as analytics), if not to replace it, necessitated the elaboration of the theoretical subordination of rhetoric to logic. Rhetoric, the counterpart of dialectic, is to study argumentation in terms of proof, and of persuasion understood ideally 'as a sort of demonstration. ' Thus at the outset of Book I we read that: 'it is the proofs alone which form the proper subjects of artistic treatment, and anything except the proofs is a mere accessory. ' Referring to the earlier rhetorical handbooks ' they omit all mention of enthymemes, which are the soul of proof, and occupy

[44] The concept of problematic is derived from L. Althusser: Pour Marx (1965) Paris p.70 and claims to articulate the unity of an ideology in terms of its underlying structure. The elements of an ideology are interdependent and it is therefore impossible to extract an individual element without altering its meaning. 'A problematic comprises the objective internal reference system of a body of thought: the system of questions, or problems, which determines the answers an ideology can offer.' M. Kelly: Modern French Marxism (1982) Blackwell p.124.

themselves almost exclusively with such things as lie outside the actual issue', such as prejudice, compassion, anger and other emotions. To which it is added that,

there ought to be a provision in the laws by which a veto is set upon travelling out of record ... for it is improper to warp the judgment of a juror by exciting him to anger or compassion, as this is like making the rule, which one is going to use, crooked.⁴⁵

Aristotle is, of course, here asserting that rhetoric must be ethical in the sense of being appropriate to its audience - its subject matter and genre. More than that, however, Aristotle is also preparing the ground for a series of propositions concerning rhetorical method and, most especially, the requisite form of all argumentation.

Very briefly, the import of chapters 1 and 2 of Book I is that of constituting and classifying rhetoric as a branch of the philosophical. It requires firstly a method or 'art'⁴⁶ in the strict sense, conceived as the formal criteria or techniques for producing persuasive discourses. Most explicitly:

It is clear that the proper subjects of artistic treatment are proofs. But proof is a species of demonstration, and a rhetorical demonstration takes the form of an enthymeme, which may be broadly described as the most powerful form of rhetorical proof. Again the enthymeme is a species of syllogism, and it falls within the province of Dialectics, either in whole or in some one of its branches, to make a complete examination of the syllogism in all its forms.⁴⁷

Even rhetoric then can be brought to heel within the empire of the syllogism; it is to be differentiated from dialectics only in so far as its object is the probable or contingent as opposed to the necessary or true. Rhetoric is thus to study persuasion as a 'relative conception', and is to investigate the general character of probable arguments; to provide a normative scheme of deliberations applied to 'such things as are in general indeterminate'. We are informed that 'it is human action which is

[45] Rhetoric op.cit. p.2-3, (Bk.I.1.).

[46] Defined in the Nicomachean Ethics 1140 a 6-16.

[47] Rhetoric p.5-6 (Bk.I.1.).

the sphere of deliberation and inquiry; ' and then, with remarkable honesty, Aristotle admits that ' all such action is of an indeterminate character, it may be said to be practically never necessary. '48

Openness to the scope of indeterminacy is, however, rapidly qualified. The definition of probability itself is as follows. It is something 'which usually happens in ... such matters as are indeterminate; and it stands to the thing which is to be proved in the relation of the universal to the particular.'⁴⁹ It may thus be stated that the genuine form of the rhetorical argument is, for Aristotle, the development of a general rule (or common topic) by means of the enthymeme. It is a species of syllogism, but one which has as its major premiss a statement of the probable - a starting point provided or literally 'given' by the audience to be addressed. Which last point raises the central dilemma within the Aristotelian conception of the rhetorical domain, or, to use a more critical idiom, problematic. The desire to locate the proper form of the rhetorical method as an 'art' or as a technique leads eventually in Book I to a rhetoric conceived as being in the thrall of logic. Where then is its content, or its substantive recognition of indeterminacy? To remain a species of proof or demonstration, rhetoric must accept a starting point, a probability, which is given prior to proof - it must draw upon that series of accepted truisms, moral platitudes and everyday wisdoms of folk psychology enumerated in the characteristic opinions of the depraved or recalcitrant audience of Book II of the Rhetoric. There is nothing, in other words, to suggest that the probable, the normal or the ordinary are in any sense desirable or critically acceptable as the content or substance of the schema of argumentation. In more modern contexts there is indeed nothing to guarantee that the rhetoric of a consensus amongst the audience as to the probable - or in legal contexts the visions of the ordinary men of the common law - actually represent anything more than an eminently contestable interpretative legislation or prescription as to what, in the ideal moral order of reaction, the normal audience ought to

[48] Ibid p.16-17 (Bk.I.2.).

[49] Ibid p.18.

think, believe or otherwise adhere to.⁵⁰ What is interesting about the probable in this respect, I would surmise, is not the subsequent role which it is to play in a formal proof, but rather the process whereby it is ascertained or selected. It is the process of the discovery of the 'given' probability which is likely to serve as the most accurate indicator of the structure and semantic motivation of a discursive practice.

Such, however, is not in essence Aristotle's problem. His demarcation of the rhetorical form was his contribution - albeit of a potentially malignant kind - to the subsequent development of the discipline. The association of rhetoric with logic and with the various methods of the demonstrable may have opened the way for the decline of rhetoric into taxonomy or tropology but, as to his own purposes, it safeguarded philosophy and the proper appreciation of the necessary. Rhetoric as the dialectic of the probable, then, was Aristotle's achievement and, in a rather delightful aside, he comments of those who would introduce either ethics or politics into such a discipline that they have assumed 'the mask of politics; whether from ignorance or imposture or any other human infirmity,⁵¹ he cannot say.

5.2.2 Figure and Metaphor

The decline of rhetoric is generally associated with the tendency from Quintilian onwards, to reduce the discipline from a domain of three equal divisions - argument, composition and style - to the greatly restricted, monistic and largely formal study of style (elocutio) alone. With only the occasional exception, rhetoric was to be irrevocably severed from the more general considerations of the theory of argumentation and of argumentative functions. It was to become, in the post classical era, an incremental, didactic and largely empty form of study, focussed almost

[50] It might be noted, parenthetically, that it is no great distance from the 'probable' to the more contemporary, positivist, prescriptions of the 'form of life', contained in H.L.A.Hart: The Concept of Law (1962) Oxford p.99 ff. which elaborates the acceptance of law in terms of an 'internal aspect', a notion which has recently gained considerable currency, and which might lead one to suspect that the interpretative schema offered by M.Pecheux op.cit., of the sense in which this problematic will indefinitely repeat itself, contains a certain daunting truth.

[51] Rhetoric p.12 (Bk.I.2.).

obsessively upon the word and its multifarious role in the figures of speech. It is not, however, my intention to attempt a survey or adequate explanation of the historical process whereby the discipline became hollowed out - various accounts are available to evidence the extreme difficulty of such a task - but rather to exemplify certain of the themes and motives which were to become more closely associated with the modern conception of rhetoric.

In many respects, as I have suggested, the Aristotelian conception of rhetoric was already a reduction of its previous domain and potential. More significantly, it demarcated an opposition between instruction (strict demonstration) and persuasion, or more generally, between the necessary and the contingent forms of proof, which opposition specifically subordinated the rhetorical to the logical. However unequal the weighting of the different parts of the discipline may have been, it must nevertheless be allowed that the Aristotelian conception of the rhetorical did allow for some species of equilibrium between the various parts or divisions of the subject; the dialogical, intersubjective and contingent (historical) facets of rhetoric may have been diminished in their actual import, but they were nonetheless retained. Aristotle's influence upon the subsequent development of rhetoric is, thus, best understood not in terms of its explicit classification and ordering of the discipline but rather in terms of its implicit restriction of the choices structurally available to the rhetoricians who were later faced with the decline of all forms of democracy and the extreme contraction of the public domain of politically significant speech. The schema presented in the Rhetoric effectively limited the discipline to but two avenues of future extension. The one, which was never to be consistently explored, would have been that of a prolonged elaboration and classification of the received opinions and accepted truths of the various possible rhetorical audiences. The motive for such a putatively enlarged classification would have been, as with Aristotle and Cicero, that of clarifying the available topics or starting points of argumentation. That such an investigation did not, at least after Cicero's Topica, fully materialise as the substantive content of rhetoric can doubtless be explained in a variety of ways. In terms of the intellectual division of labour, for instance, such an endeavour might well have repeated the subject matter of other

disciplines. More significantly and more plausibly, the elaboration of the moral truths of Book II of the Rhetoric presupposes a unity or consensus as to political values and social justice which could neither be readily affirmed outside of the teleological certainty of the Aristotelian system nor long be plausibly maintained in the face of the ideological divisions which were ever emergent after the death of the hegemonic city state of classical Greece and the first Roman Empire. The field of study would have been too vast, too chaotic and too contentious to be adequately or credibly propounded. Rhetoric itself, yielding perhaps to the probable rather than pursuing the possible, chose the less dramatic and more limited of the options available to it, that of the theory of style and of the classification of figures. Coincident with this choice, rhetoric was to move from the study of argument to the appreciation of ornament, from dialectics to aesthetics, from semantics to a species of grammar, and, finally, implicit throughout, from the study of effective speech to acquiescence in a useless discourse - paradigmatically that of poetics.

The model of the verbal figure which was to dominate rhetoric right up until the twentieth century, may be found nascent, in Aristotle's theory of metaphor, analysed at length in the Poetics and also in Book III of the Rhetoric. As regards the latter text, the context of the discussion of metaphor is that of a series of considerations upon the history and uses of style. Aristotle is evidently wary of his subject; style should be invisible, it should be 'neither mean nor exaggerated, but appropriate,' it should render the meaning of the language used with clarity, it should avoid artificiality and ornament, and, in general, it should support the common life and usage of speech. We are reminded, in other words, that the overriding concerns of the rhetorical speech are to inform and also to persuade. Thus the style of the speech should not disguise or confine or deceive, though it may on occasion be appropriate that the style gives rise to pleasure, we are told, by displaying surprising resemblances - those which may be generally grouped under the heading of metaphor. It will suffice to single out two, with hindsight crucial, features of the role of metaphor, a double aspect well captured, in the definition provided in the Poetics: 'Metaphor consists in giving the thing a name that belongs to something else, the transference being either from genus to species, or

from species to genus, or from species to species, or on grounds of analogy.' Therewith we learn that metaphor is both a peculiar or aberrant form of naming things and is also a potentially logical act of predication attributing a resemblance, or analogical relation, between two (non-linguistic) entities.

(i). Firstly, metaphor is a 'foreign' or 'strange' use of words. Metaphor, while being for Aristotle the most general form of the figures of speech - it includes (metonymy, synechdoche) , abridges (simile) or exemplifies (analogy) all the others - is nonetheless strictly limited in its semantic scope.⁵² Metaphor is to be studied primarily in the lexical terms of the noun and of the verb, precisely for the reason that they have in common the facility of being intelligible in themselves, they refer to an object or to a unity of sense, they bear a 'proper' or denotative meaning and incorporate the essence or telos of language, that of univocality⁵³. There is a distinction, in other words, which is fundamental both to an accurate comprehension of the Aristotelian concept of metaphor and indeed to the much later theory of figures (which in effect broadened the scope of metaphor from noun and verb to words generally). It is that which separates two orders of language, two series of meanings and subsequently opposes them to each other. There is, for Aristotle, the 'ordinary' word and the 'strange' word, the latter existing to be compared to the former; there is the transfer of meaning of a 'borrowed' word to a thing to be named; there is the substitution of one word for another that could have been used in the same place; there is the possibility, ever present, of 'restoring' the original word for the substituted word; there is, in the last analysis, an order of 'proper' or 'original' meanings whereby we recognise the ornate or metaphorical order of meaning as being strange, incidental, extraordinary and redeemable. To which it merely needs to be added that proper meanings are viewed as superior to metaphorical meanings; the one is primary, the other secondary; the former transports the speech into the teleological mythology of a purely logical lucidity

[52] C.f. Rhetoric Bk.III.2. and also J.Derrida op.cit. pp.29-46.

[53] ' . . . for it is impossible to think anything if we do not think one thing; but if this is possible, one name might be assigned to this thing. Let it be assumed that the name has a meaning and has one meaning.' Aristotle: Metaphysics 4 1006 b13

and grammar of necessary relations, the latter merely embroils the speech in the realm of contingent communication, it is an affectation which may be creative of pleasure or surprise, but never of anything in excess of the inferior or inchoate logic of analogy.

(ii). Metaphor, like rhetoric in general, is potentially menacing and certainly foreign to the eyes of the Aristotelian philosophy. It has its uses - truth, after all, should not be unnecessarily disadvantaged by being forced to enter the world unarmed - but it is more likely, if not strictly controlled, to lead to the abuse of language, to the improper use of names and to mystification in general: 'The metaphor must be appropriate, and the appropriateness will arise from proportion or analogy.'⁵⁴ The nominalisation of metaphor - the requirement that it be governed by the theory of proper names - transpires to bear restrictive implications for its use in discourse. Here too it must be shown to be subordinate to logic, to be inconsequential and alien to a truth perceived as the guarantee of the singular reference of proper names. The appropriate use of metaphors will perceive resemblances and predicate likenesses in terms of the general and the probable, but precisely by virtue of being appropriate the metaphor must be restrained. Its status is intermediate or ancillary, it is not philosophical although it may on occasion, when properly controlled, be used in the service of truth: 'Metaphor must be drawn ... from things that are related to the original thing, and yet not obviously so related - just as in philosophy also an acute mind will perceive resemblances even in things far apart.'⁵⁵ Just as rhetoric is less than philosophy, so too metaphor is less than truth; it may be persuasive, pleasurable or pleonastic but it will seldom be necessary; for even the proportional or analogical metaphor displays only the properties of objects and never their essence, it may predicate but never fully name, it may relate to each other the properties abstracted from the essence of different things upon the basis of their resemblance but it cannot fully or directly state the essence.

[54] Rhetoric pp.231-2 (Bk.III.2.).

[55] Ibid p.233 (Bk.III.2.).

5.2.3 Rationalism and, and against rhetoric

Even the briefest and most superficial of surveys of the general themes of the rhetorical discipline throughout the centuries of its stultification and decay, right up to the theories of Du Marsais and Fontanier in the 18th and 19th centuries respectively, and conventionally regarded as the end of rhetoric, cannot help but observe the recurrence of the Aristotelian dualistic oppositions in ever more extreme and inappropriate forms. The problematic did not so much change as harden or ossify. Despite the universality of the discipline - figurative stylistic devices and verbal tropes are a feature of all discourse - and despite its increasingly precarious claim to also be the study of 'speaking well in civil matters', it never disabused itself of its lack of any claim to a truth value. It was marked, indeed, by an absence of content. Behind the pedagogy of tropology and of the lists of figures; behind the formal classification of devices and the accounts of ambiguity; concealed beneath the essentially epideictic appreciation of the ornamental and the merely persuasive or pleasing, resided a 'proper', grammatical, language and the order of a philosophical univocality which was untouched by rhetoric and which would ever condemn its domain to the triviality of the purely verbal.

In the work of Du Marsais, for example, rhetoric was no more than the study of words which 'dwell in a borrowed home', of figures defined solely as forms of wording which deviate from the common expression. It was to become, in short, an inauthentic discipline which would play with the paradigmatically poetic deviations from the proper rules of language and was irrevocably linked, according to Fontanier, to the immorality of the figurative: 'the utterance of what grammar and logic would seem to regard as superfluous, the omission of what they would seem to demand as necessary.'⁵⁶ From being the study of the historicity of discourse, rhetoric was here to become the shadow of a discipline, one which was quite unable to contest the dramatically exaggerated claims of the empiricist and rationalist philosophies which were, in their turn, to wholly discount

[56] Both cited in T.Todorov op.cit. at pp. 89 & 103; see as well G.Genette, op.cit. ch.2; P.Ricoeur, op.cit. ch.2.

the rhetorical. Rhetoric was, indeed, to become the other of philosophy, it was to become synonymous with the discursive errors and deceits which the rise of European rationalism - in the works of Descartes, Locke and Kant particularly - was specifically concerned to exclude. As to the mode of this exclusion, it is largely predictable, in view of the goals of the ascendant philosophies, those of a demonstrable discourse, a discourse of 'certitude' and of a methodic description detailing the universal or necessary relations to which the human understanding 'ought', as a matter of prescription or of an 'a priori' logic, to yield. Such enterprises are, of course, concerned with 'laws of thought' and with statements of that which is necessarily true; their abstraction, formality and neglect of history would inevitably lead to the perception of rhetoric as an oppositional category, as a non-science, as illogical and eventually as foul play. Locke, for example, is peculiarly damning of the professors of rhetoric and of their motives:

But if we would speak of things as they are, we must allow that all the art of rhetoric, besides order and clearness; all the artificial and figurative applications of words eloquence has invented, are for nothing else but to insinuate wrong ideas, move the passions and thereby mislead the judgment, and so are perfect cheats ...⁵⁷

The purpose of the philosophical discourse, Locke maintains, is solely that of informing and instructing, and rhetoric is therefore designated erroneous, deceitful and dangerous. Even in its proper sphere, that of the appreciation of ornamental and non-didactic discourses, one suspects that the philosopher would find little of value in what is essentially, from this viewpoint, an immoral hedonism of language; language for the sake of language, a species of decorative art.

Similar sentiments are propounded by Kant:

Oratory (ars oratoria), being the art of playing for one's own purposes upon the weaknesses of men (let this purpose be ever so good in intention or even in fact) merits no respect whatsoever. Besides, both at Athens and at Rome, it only attained its greatest heights at a time when the State was hastening to its decay, and

[57] J.Locke: An Essay Concerning Human Understanding (1979) Oxford at p.508 (Bk.III.X.34.).

genuine patriotic sentiment was a thing of the past.⁵⁸

The decaying of the Athenian and Roman city state was to be compared unfavourably, it seems, in the eyes of rationalism, to the growing national autonomy and nationalism or patriotism of the bourgeois world. It may also be observed that the opposition constituted by the Critique of Judgment closely parallels the opinions of Locke already cited. There are, for both authors, two series of speech, which may be distinguished, in the last instance, by their motives. As regarding the second order of discourse, that of the oratorical, it may be admired only so long as it is useless. The moment, however, that it adopts a purpose external to the purely linguistic, it rapidly becomes threatening and diabolical. The use of rhetoric to persuade is a seemingly satanic challenge to the philosophical: it 'subjugates', it 'brainwashes', it 'deceives', it 'wins minds'; ultimately its error is that of the failure to distinguish, and respect, the rational and convincing from the irrational and merely persuasive, human strength from human weakness. The distinction is elaborated more fully in the preface to the Critique of Pure Reason:

If a judgment is valid for every rational being, then its ground is objectively sufficient, and it is termed a conviction. If, on the other hand it has its ground in the particular character of the subject, it is termed persuasion. Persuasion is a mere illusion ... it has only private validity ... Persuasion I may keep for myself ... but I cannot and ought not to attempt to impose it as binding upon others.⁵⁹

It only remains, in other words, for the last extended rhetorical treatises of the 19th century to spell out the severe limitations of a now taxonomic enterprise, an analysis of discourses which cannot bind, cannot be true or state the real, but which might from time to time be a source of idle delight.

Rhetoric, of course, is banished at the same time that history is decried in the name of an absolute reason; the science, no less, of the faculty of understanding. Rationalism, be it philosophical, linguistic or indeed legal, is grounded in and also serves to perpetuate the belief (the

[58] I.Kant: The Critique of Judgment Pt.I. (1952) Oxford at p.53.

[59] I.Kant: Critique of Pure Reason (1887) London pp.xvii-xxiv.

mythology) in an order of proof, of grammar and of determinacy paralleling and reflecting the order of the necessary. Its most logical antithesis is nihilism - correspondingly theological, rhetorical and anarchistic - as lucidly portrayed in the work of the great classicist and philologist, Nietzsche. It was the nihilistic philosophy, after all, that first sought to deny the God that lived on in grammar, as well as in knowledge and in the Christian justificatory doctrine of natural law. It was Nietzsche indeed who first inquired as to the status and value assumptions underlying the order of truth which had so long and so vigorously denied the role of rhetoric in the analysis of discourse and its relation to power:

What therefore is truth? A mobile army of metaphors, metonymies, anthropomorphisms: in short a sum of human relations which become poetically and rhetorically intensified, metamorphosed, adorned, and after long usage seem to a nation fixed, canonic and binding; truths are illusions of which one has forgotten that they are illusions; worn out metaphors which have become powerless to affect the senses.⁶⁰

The attack upon false literalism and the re-affirmation of the symbolic quality of all language, however admirable the philosophic sentiments it espouses, is unfortunately lodged at the same level as the doctrine of truth which it seeks to invert. It repeats, in reverse, the abstraction of the system it opposes; nihilism is, however, different in one respect. Nietzsche's philosophy was careful to treat nihilism as a preliminary, negative, strategy, preparatory to the production of new values, the transvaluation of values into the context of what Nietzsche termed the Dionysian mode of thought. Nihilism is then, arguably, profoundly historical in its sources and in its evaluation of the dominant rationalist Christian philosophies; it is a moment in the history of ideas and equally only a beginning or, better, a precondition for a later positivity. So much, at all events, in anticipation of misunderstandings of a frequently maligned but deeply philosophical doctrine. As regards language and rhetoric, the import of the attack upon truth and upon logic is to be traced to some of Nietzsche's earliest lectures on rhetoric, delivered during his tenure at the University of Basle. Firstly:

[60] F. Nietzsche: Early Greek Philosophy and other Essays (1908) Foulis p.180.

... it is not difficult to demonstrate that what is called rhetorical, as the devices of a conscious art, is present as a device of unconscious art in language and its development. We can go so far as to say that rhetoric is an extension of the devices embedded in language ... No such thing as an unrhetorical, 'natural' language exists that could be used as a point of reference Tropes are not something which can be added or subtracted from language at will, they are its truest nature. There, is no such thing as a proper meaning that can be communicated only in certain particular cases.⁶¹

Rhetoric, in other words, takes its revenge upon rationalism, not by reasserting any intrinsic merit or value to the rhetorical discipline but by claiming that rationalism too is ill of a figurative virus. More important, however, than the claim that all discourse is rhetorical or that the sign is effectively always a metaphor for the signified, is the related claim that the differentiation of discourses or uses of language is to be based not upon the self-asserted degree of determinacy which the particular discourse claims, but rather upon the basis of the values it espouses and the ends it serves. Reverting to the context of legal analysis, it might be noted that social morality and institutional functions are the determining features of legal language and that claims to the authority, determinacy or logic of legal judgment, from the rhetorical viewpoint, are of no greater value than the purposes or ends that they frequently conceal. Which suppositions, however, mean little and are unsurprising until such time as rhetoric is capable of specifying and elaborating the interrelations of language and power. To a limited degree, and in what I shall argue is a misguided direction, the New Rhetoric has undertaken just such an analysis in relation to law.

5.3 THE NEW RHETORIC AND ITS APPLICATION TO LAW

The term 'New Rhetoric' is something of a misnomer; its now conventional referent being the work of Chaim Perelman;⁶² the theory of argumentation

[61] Quoted in De Mann op.cit. at pp.105-106; c.f. also, F. Nietzsche: Homer and Classical Philology (1909) Foulis.

[62] I shall refer principally to Ch.Perelman & L.Obrechts-Tyteca op.cit. (hereafter cited as Treatise) and Ch.Perelman: Logique Juridique (1976) Dalloz (hereafter cited as Logic). For a translation of a recent precis of his work, see Ch.Perelman: The Empire of Rhetoric (1978) Notre Dame U.P.

and of practical philosophy; the theory of the old rhetoric partially revived, partially rewritten. Certainly there is little to be gleaned from it by way of positive theoretical novelty; its contribution in this respect is no greater than that of reiterating, with certain reformulations, the familiar problematic and categories of classical Aristotelian rhetoric. Little appreciation of history, or indeed of diachronic semantics, however, is needed to observe that it would be inappropriate to assume that the passage of the discipline of rhetoric over virtually two millenia had left it immaculate and in all essential respects unchanged. The context and implications of the New Rhetoric are, indeed, in that sense new. The interest of this resurrected system of analysis, however, lies elsewhere. Its interest lies in its practice and, more specifically, in its application to law and to the analysis of legal judgment. Without wishing to anticipate the arguments that follow, it may be noted that even in this facet, and somewhat paradoxically, the New Rhetoric is far from being substantively innovatory. In many of its aspects it is positively conventional and politically conservative in the extreme in its invocation of the traditional categories of legal reason and of legal interpretation.⁶³ It is not, in other words, a critical or radical project. It assumes the specificity and efficacy of the legal to be self-evident. It is concerned not with the political and institutional power that underpins and guarantees the authority of legal discourse, but rather with abstracting idealistically from the normative justificatory techniques of legal judgment and of the legislative process generally, the self-image or self-presentation of the law, to enumerate a generic list of the rhetorical, persuasive and argumentative mechanisms that permit the law to postulate that it is based upon and adequately reflects a consensus as to values and as to social justice. Thus the primary question to be posed by the New Rhetoric is that of whether or not it is possible to analyse with some degree of rhetorical rigour the argumentative techniques that allow a loosely defined legal discourse which is necessarily, so it is claimed, embedded in opinions and 'plausible'

[63] The parallels between the New Rhetoric and the canons of orthodox legal hermeneutics are striking and strikingly obvious. For this reason I shall advert (by way of footnotes) by way also of comparison, to the summary of such principles of legal method as proposed in the work of D.N. MacCormick, *op.cit.*, a work no less polished and no less vague than that of the New Rhetoric

arguments, to appear justified, convincing, agreeable and frequently inevitable to the various audiences to which it is directly and indirectly addressed. It is certainly indicative of the general character and motivation of the New Rhetoric, and it may be suspected in advance to be a central contradiction in this body of work, that while it devotes several thousand pages to the analysis of social values, the construction of world views, the strength of widely held opinions or to the persuasive effects of argumentative techniques and forms, it will only ever make use of the word ideology three times⁶⁴ and even then taking it in its most generic and abstracted sense, as a synonym for perspective or orientation. In short, the New Rhetoric, by virtue of its lack of critical concepts and consequent descriptive and heuristic uncertainties and indeed inadequacies, provides, I shall argue, the strongest possible available motive for the introduction of a concept of legal discourse as the analysis of the politics of legal language.

5.3.1 A Logic of Values

It would seem both inaccurate and ungenerous in the extreme, not to acknowledge the virulent polemical value and the impeccable motivational good taste of the New Rhetoric's attack upon formalist conceptions of logic. It may safely be stated that the major premiss of the New Rhetoric is precisely that of an anti-formalist view of all argumentative institutions, and so also of legal argument and of law applying acts. If a brief historical characterisation is permissible in terms of the outline account already provided, it may be said that Perelman implicitly takes up, although in the form of a considerably less extreme position, and attempts to build upon, the negative insights of the Nietzschean critique of rationalist philosophy.⁶⁵ At all events, Perelman's project may be

[64] Logic paras. 15,62,71.

[65] Nietzsche's position was, of course, somewhat thoroughgoing. Commenting, for instance, upon the fundamental logical law of non-contradiction, he states the following: 'We are unable to affirm and to deny one and the same thing: this is a subjective empirical law, not the expression of any necessity but only of an inability.' The Will to Power II (1913) Foulis no.516. at p.31 ff. In terms of the comparison mentioned earlier (n.62), D.N.MacCormick's position is not greatly different; the perspective of his enquiry is also that of practical reason or practical philosophy, although his mentor is Hume, and his approach is also less polemical by far in its anti-formalism. C.f. op.cit. pp.1-8, 265-278.

characterised at this level, in terms of two propositions. On the one hand, that of the denunciation of all attempts - be they Cartesian, Kantian or Saussurian - to reduce logic to formal logic⁶⁶ and on the other hand, correlatively, the attempt to open up a domain of non-formal logic which will answer to the categories of the theory of argumentation. The form if not the content, of this project may be dealt with succinctly.

At the level of methodology, the Treatise on argumentation is very explicit in attacking, as a matter of principle, all forms of what it terms dogmatism - particularly those which assert irreducible oppositions between objectivity and subjectivity, rationality and irrationality, fact and value - but is somewhat less than precise in its specification of the actual parameters of its object of attack: 'we will stay clear of that exorbitant pretension which would enthrone certain elements of knowledge as definitely clear and solid data ... independently of social and historical contingencies, the foundation of necessary and eternal truths.'⁶⁷ The motive and the modesty of these sentiments is clearly appealing, their generality will prove to be slightly less so. From the arguments that are provided, it appears that all the modern variants of formal, axiomatic or apodictic logical proof are equally to be avoided, their origin and exemplar being the concept of reason and reasoning introduced into Western philosophy by Descartes and basing itself upon an idealised mathematical model of proof. The later work on juridical logic confirms the point; the logic objected to is a formal logic which, if applied in an instrumental fashion to the juristic order, can provide no greater degree of heuristic benefit than that of the 'rather puerile satisfaction of showing that there is a method of fitting into the same syllogistic schema every possible argument whatsoever.'⁶⁸

I would suggest, very briefly, that an important qualifying clarification is needed. What constitutes the irrelevance of formal logic

[66] The work of Kalinowski op.cit. which makes use of a deontic logic and argues for a legal semiotics, is the exemplary antagonist; C.f. Logic at p.3. For a useful summary and overview of the various positions see G.Kalinowski: Logique et methodologie juridiques (1978) 23 Archives de Philosophie du Droit 59.

[67] Treatise at p.510.

[68] Logic at p.3.

to the study of law is its treatment as an independent discipline with its own homogeneous and separate criteria of proof, which are maintained in dualistic opposition to all other forms of linguistic and extra-linguistic validation. While it is of the utmost significance to argue that the instrumental and external application of formal logic is of little significance and frequently harmful to legal studies, that is certainly not to be taken as meaning that one cannot identify and formalise a structural logic implicit within the law, one which might provisionally be defined as that series of axiomatic or assumed meanings and connotations that provide the legal statement with its authenticity and power, its apparently autonomous ability to define and to exclude in the cause of maintaining the specificity or privilege of the legal. Rather than elaborate such a possible definition here, I shall observe instead that neither in the Treatise nor in the Logic does Perelman actually face the problem either of the theoretical status of the New Rhetoric or that of its relation to the rationalist tradition of logic which it seeks to denounce, although presumably it would not claim that it had no heuristic value whatsoever.⁶⁹ The claim rather appears to be that all forms of argument - be they formal or practical - are embedded within the system of their adaptation to a context or audience. On the one hand, the value logic of argumentation may be summarised negatively in terms of its relativity - rhetoric is the study of the probable not the necessary, the temporal rather than the universal, and generally, the use of non-compelling modes of proof. On the other hand, it is further argued that no argumentation can escape from a background of assumptions as to values and adherence to values, in which light, 'the renunciation of all practical philosophy is unsatisfactory because it simultaneously abandons to emotion, interest and ultimately to violence, the regulation of all problems of human action and especially collective action - all those problems which traditionally relate to politics, morals and law.'⁷⁰ What is needed, is the liberation of logic from its reduction to formal, mathematical logic and the simultaneous inauguration of what is rather enigmatically termed a 'logic of value judgments (whose) inspiration is

[69] Logic at p.5.

[70] Ibid at p.101.

the method used by the celebrated German logician Gottlob Frege to renew formal logic. ⁷¹ The analogy is a purely methodological one and refers to the fashion in which the broader logic would analyse the techniques and procedures of proof used in demonstrating the logic of arguments with value implications. It would be a logic or rhetoric that analysed the multiple value judgments inherent in the law and most particularly in the entire process of law application, a logic that would attempt to answer the question of why the particular decision can be made to appear as equitable, reasonable or acceptable. Which latter question, that of the rhetorical legitimacy of the law and the acceptability of legal value judgments, raises, crucially, a series of questions both as to the theoretical nature and critical status of this (assumed) acceptance, and also as to the specific context, subject matter or values which are in fact accepted or deemed reasonable. Such questions are intrinsic to the conception of a logic of values and the theory of argumentation formulates them half-heartedly in terms firstly of the techniques or forms of argument and secondly, to make a distinction for the purposes of exposition, in terms of the general and particular topics or discursive contexts of the argumentative practice.

5.3.2 Techniques of Argument

Anti-formalist criticisms of mathematically based conceptions of logic have tended to argue that strictly determinate concepts of logic are irrelevant if not erroneous to the description and explanation of the actual reasoning process of substantive decisions. Indeterminacies of context, ambiguities of language and of institutional assumptions as to values are but some of the factors which combine to preclude the manifestation or realisation of the categories of formal logic in any given instance of a decision-making process. It is by no means immediately clear, as a matter of principle, why a logic of values which bases itself upon an analogy with the methodological goals of formal logic should itself be free from or immune to a similar order of criticism to that levelled at the precedent formalism. It is certainly possible that analogous problems of abstraction and of idealisation will reappear in the

[71] Ibid at p.101.

broader, putatively non-formal logic, if its end product is to be no more than the substitution of generic categories of argumentative device and of argumentative technique, in place of their formal logical equivalents. The rhetorical syllogism and the proofs of the probable were for Aristotle inferior forms of logical demonstration. If the New Rhetoric is to transcend the limitations of the old rhetoric it must clearly define itself in terms of a substantive analysis of argumentation which is mediated by, but not subordinate to, the formal schemata of techniques that the term logic implies.

In one important sense at least the New Rhetoric wholly embodies the substantive concerns of a non-formalist conception of argumentation. Its primary object is the classification of the techniques and procedures of argumentative proof, a project which, as the development of contemporary semiotics clearly evinces, may rapidly become a formalist enterprise,⁷² but which is radically differentiated from other recent generalised and Saussurian rhetorics,⁷³ by virtue of its concept of the audience. The audience, in the perspective of the Treatise, is both a structural category - the precondition of any language use - and also a specific aggregation of addressees. In its most general elaboration, 'the object of the theory of argumentation is the study of the discursive techniques allowing us to induce or to increase the minds' adherence to the theses presented for its assent.'⁷⁴ Further, adherence is not a matter of truth but is rather explained in terms of subjectivity: it is a feature of the individual mind, and is an aspect of the notion of agreement and of communion or identification between speaker and audience.⁷⁵ Where Aristotle had dealt in Book II of the Rhetoric with the audience in terms of its likely composition and its political and moral affectations, Perelman is concerned to add a series of propositions, both as to the discursive category of the audience as such, and also as to the requisite mode of studying the audience. Argumentation is discourse defined in terms of its persuasive effects, the primary goal of such reasoning being the

[72] See e.g. A.J.Greimas: Semiotique et Sciences Sociales (1976) Paris.

[73] See e.g. Group U: Rhetorique Generalise (1970) Paris

[74] Treatise p.4.

[75] Ibid at pp. 14,20,51. Logic at pp.102-105.

constitution of an agreement or accord as to values or as to the desirability of a choice or course of action. All such considerations necessarily imply a determinate, or homogeneous audience or audiences. While the concept of audience itself is broadened, by Perelman, to include at one extreme the universal (and utopian) audience of the 'given' and at the other extreme the unique audience of introspection, it is the speaker and the intention of the speech that defines and circumscribes the actual audience.

The last point exemplifies with considerable clarity an ambiguity which may be traced throughout the entire ambit of the New Rhetoric's project. Communication, the substantive subject matter of the theory, is to be characterised in terms of a number of apparently self-evident facts. The discourse with which Perelman is concerned is a discourse premised upon consensus. This assumption is both crucial and erroneous. As with so much jurisprudence the presupposition of the substantive analysis is that of the self-evidence of an arguably fatuous and idealised discursive domain wherein order triumphs over conflict or contradiction, and pedagogy over coercion or constraint. Thus in the Treatise, argumentation-'intellectual contact' - comes after the self-evidence of a community of minds;⁷⁶ speech in general 'establishes a sense of communion centred around particular values recognised by the audience', and held in common by them. In terms of legal speech, it becomes the benign project of the speaker turned educator and exhorting increased adherence to values which are always already accepted.⁷⁷ There is, finally, a moral duty to dialogue as the means of recreating what the speaker has already presupposed as the subjective affinities or predilections of the hearers, their sense of the 'normal', which argumentation will reinforce and clarify.⁷⁸ As the Treatise proceeds, it becomes ever clearer that the array of discursive techniques, devices and patterns so exhaustively elaborated, are concerned entirely with a concept of persuasion whose referent is not simply the psychology of individual and collective adherence to values but the exorbitant project of quantifying the degree of adherence, the quality of acceptance

[76] Treatise p.14.

[77] Treatise p.53.

[78] Treatise pp. 68,72,74. C.f also, B.Ackerman: Social Justice in the Liberal State (1980) Yale U.P. pp.349-378.

and the extent and intensity of approval. Those hitherto ineluctable facets of value commitment are not however the object of any empirical survey, nor are they analysed as the implicit, covert or 'deep' semantic structure of the text; they are rather to be read as the explicit and intentional act of the speaker; they are self-evident in the figures and devices of the discourse, each figure - those of amplification, repetition, allusion, analogy and oratorical definition being highlighted - bearing within themselves a generic argumentative significance. The intentional subject, the speaker, the author or indeed the Book of the law all control and state their own meaning; meaning is a self-articulated, authorial entity, of which the New Rhetoric will in the end tell us no more than that the techniques of argument used to communicate this meaning were more or less appropriate to or transparent of its intention: 'the discourse itself is to be considered as the act of the orator (and) for which the orator is responsible.'⁷⁹ Elsewhere, the perspective is summarised in terms of an argumentative process constituted by a reciprocal desire relayed between the cranium of the orator and the heads of the hearers, 'a desire to realise and maintain a contact of minds; a desire, in the head (chef) of the orator to persuade, and in that of the audience, a willingness to listen'.⁸⁰ Discourse, in other words, is communicative or dialogic, but such dialogue is overdetermined by the peculiarly unidirectional character of the communication; however multiple the sources of the discourse are taken to be, the speech itself will formulate their final form and these it will give or hand down to a more or less willing audience and with a greater or lesser degree of persuasive skill and credibility.

5.3.3 Legal Argument

When it comes to legal authorship, the same principles and techniques appear to hold true although legal discourse is to be strictly differentiated as a genre of discourse by virtue of its predominantly textual character and also by virtue of the highly restricted institutionalisation of its authorship, a restriction mirrored in the

[79] Logic at p.132. See also, M.Foucault: Language, Counter-Memory, Practice (1977) Cornell U.P. pp.113-139; R.Barthes: Image - Music -Text (1977) Fontana pp.142-149.

[80] Logic at p.108.

specialised character of the legal audience. The New Rhetoric does, of course, recognise that the law has more than one audience: three to be precise, the legal profession, the litigants and the public,⁸¹ listed in what appears to be the descending order of their importance. Certainly, the primary feature of legal rhetoric, for Perelman, is its eventual formulation or reformulation and application by the judiciary.⁸² The project of a rhetorical analysis of law may thus be summarised in the dual terms of the need to provide an account, on the one hand, of the role of the judicial author as orator or as psychological cause of a particular law applying act, and on the other hand, an account and classification of the argumentative techniques and value logic that will best serve the credibility or acceptability of the exercise of judicial will. The rhetorician, in other words, is again in pursuit of the agreements as to value, the consensus and the identifications which will allow the law to be portrayed as non-arbitrary, persuasive and indeed as desirable.⁸³ The legitimacy of the law, in short, is a presumption which merely needs an explanation.

To grasp the key features, and indeed the underlying ambivalence of legal rhetoric from the perspective of the Logic, it is firstly necessary to briefly outline the general argumentative context of legal discourse. Just as the Treatise had contrasted argumentation - speech directed at an audience - to formal systems of proof - bereft of any context - so too legal argument is to be defined at its most abstract, and laudably enough in opposition to formalist accounts, as speech which 'necessarily inscribes itself in a psycho-social context which cannot be entirely separated from underlying military, economic, institutional or ideological forces.'⁸⁴ Ironically enough, however, a close examination of the substantive techniques of legal argumentation as presented in the Logic, would appear to suggest that the judiciary, and the legal audience generally, are to be defined precisely by their distance from and opposition to the forces listed. In the abstract, Perelman is quite happy

[81] Ibid at pp. 162-163, 173.

[82] Logic at p.8.

[83] Ibid at p.162.

[84] Ibid at p.163.

to allow the existence of vague generalities of a socio-political nature; we are even told that 'legal logic is guided by the ideological orientation of the judges, by the manner in which they conceive of their role and their mission'⁸⁵ but this admission is rapidly circumscribed not only by the likely homogeneity of its reference group but also by the strictly legal nature of this judicial self-conception. The problem is well illustrated by the formulation of the central issue of legal judgment and is worth citing at some length:

... judgment, being a decision, and not an impersonal and compelling conclusion from uncontested premises, presupposes the intervention of a will. How can one demonstrate that such an act of will is not arbitrary? ... It is quite possible that processes of a psychological nature have led the judge to take up a position which can perhaps be explained by interests of a social, moral or political order and, in the last instance, by the sympathy which, for reasons that are admissible or otherwise, he feels for one or other of the parties.⁸⁶

No explanation of this paradox is attempted. Proposed in such a manner it is of course unlikely that the latter set of motives listed would ever be stated in a judgment, and Perelman indeed continues with the view that 'such interests can never form the basis or the explanation of a reasoned judgment ... the role of the judge is to render the decision acceptable to jurists and, more particularly, to the higher courts.'⁸⁷

With echoes of Hart's secondary rules and, more specifically, MacCormick's requirements, of 'consistency' and 'coherence'⁸⁸ in the readers ears it remains to detail the precise characteristics of the most immediate and important of legal audiences, that of lawyers themselves. To fulfil its role in relation to its own specialist institutional audience, the judgment must be inscribed or inserted into the collective body or 'oeuvre' of jurisprudence, and must equally 'conform' to the law in force. A close examination of these jurisprudential and normative constraints upon the rhetoric of legal judgment evinces a variety of

[85] Ibid at p.124.

[86] Ibid at p.19.

[87] Ibid at p.19.

[88] H.L.A.Hart op.cit. pp.92-94; D.N.MacCormick op.cit. pp.119-128.

interesting if not wholly surprising institutional boundaries to legal reasoning or to the logic of legal values. Despite the volitional character of legal judgment; despite the psychological definition of legal argument as the act of a judicial orator; despite the passing acknowledgement of the various strategic, institutional and ideological forces or interests that play a role in the formulation of judicial sympathies, and include the desire to do particular justice to the actual litigants of the case; the overwhelmingly preponderant subject matter for rhetorical analysis transpires to be a series of legally stated normative imperatives or presumptions. These are variously treated under the headings of general and particular legal topics, systemic rules, and more familiarly, conventions, principles and maxims. Collectively, these probabilities or topics of legal tradition and argument, constitute the logic of legal values; it is these figures that the rhetorician will ideally catalogue and that the legal judgment will utilise to maintain its legitimacy in the face of the legal audience.

Beneath the camouflage of general assertions as to the psychological and sociological determinations of law application, we find cited a series of general legal principles - for example, those of natural justice, of non-retroactivity, the exclusion of arbitrariness - as well as common maxims and adages - notions of 'good morals', legal predictability, as well as the generic standards of various legal domains - all of which represent, for Perelman, the fusion of the normative constraints of the legal audience with the latitude necessary for particular justice. The topics of legal argument transpire to be marvellously vague: 'normative concepts function as 'givens' (donees) which can only be understood 'in relation both to their systemic role and to their ever changing social context; to which Perelman adds the perhaps unintentional paradox that, 'in fact ... the specificity of such normative concepts is that they vary from one society to another and from one epoch to another.'⁸⁹ It may thus be safely added that the generality of the legal arguments (topics and probabilities) is such that in any given instance it is never clear whether or not a particular topic will apply. The New Rhetoric is merely

[89] Logic at p.165.

prepared to allow the law its 'given' or accepted figures of argument, and further, it will offer no greater explanatory insight than that of accepting that the selection and application of these figures is to be subsumed hazily under the concept of the 'dictates of judicial psychology or interest.' Worse still, that final category of legal judgment cannot be opened to analysis or to criticism, it is rather to be summarised and precluded or foreclosed in the conception, ever present in the notion of 'givens', of judicial authority, in the judge as patriarch. All that can eventually be said is that any future decision will mysteriously combine the attributes of indeterminacy resolved by authority. There is indeed little pretence at rationality here - positivism (here the concept of legal 'givens'), one might say, is always faced by the danger, from the heuristic viewpoint, of saying nothing at all. At all events, we are asked to accept that it is analytically sufficient to assert that the legal audience is best satisfied by the invocation, refinement and argumentative reinterpretation of pre-existent legal topics; presumptions, conventions, principles and norms; rather than by their transformation. Authority and radicalism, to state the obvious, do not go hand in hand.⁹⁰

Towards the conclusion of the Logic, Perelman again observes that 'law, having a social function to fulfil, cannot be conceived realistically, without reference to the society it regulates. ' Insofar, however, as social functions of the legal system appear in the New Rhetoric, they do so in the form of an inexorable indeterminacy which serves the purpose of reinforcing the description of legal argument as being, in the final analysis, an inexplicable combination of individual volition and judicial authority, based upon a series of agreed or legally accepted topics of argument. Not only is the law an elaborated code or specialised lexicon and grammar, but the eventual application of the law can only be described - no real attempt is made to explain it - upon the basis of its hierarchical status and the authority of its orators: 'disagreements, both in legal doctrine and in case law, make it necessary, after the elimination of totally unreasonable solutions, to resort to authority for the imposition of a solution,'⁹¹ which is in turn described as the personal

[90] Ibid at pp.174-175.

[91] Ibid at p.6.; see also J.Lenoble et F.Ost op.cit. pp.205-206.

responsibility of the judge. Therewith, in one aspect at least, the New Rhetoric has turned full circle; from the psychological and dialogical starting point which asserted the centrality of the orator to the speech, it has arrived, via discussions and listings of argumentative techniques and topics, via general statements as to the social and political context of the law, at an end-point which is that of the judicial imposition of an authoritative solution directed at the looking glass audience of the law.⁹² As regards the latter point, that of the specialised nature and composition of the legal audience generally, and the depiction of its rhetorical role within the field of legal argumentation, such descriptions and partial explanations as the New Rhetoric proposes, provide, more than anything else I would suggest, an admirable set of data for an analysis of the form, or structural features, of legal ideology. The point is a complex one and a preliminary analysis of it will serve as a conclusion to the present consideration of the various traditional senses of the term rhetoric, both old and new.

5.4 CONCLUSION

Despite the apparently trenchant anti-formalism of the New Rhetoric and despite its frequent insights into the social psychology of legal discourse, it must nevertheless be concluded that its most lasting merit consists in its having sympathetically elaborated the restriction, obscurity and eventual closure (or circularity) of what has traditionally gone by the name of legal reason. From the perspective of the history of ideas, the New Rhetoric crucially embodies a large measure of the normative classificatory motive and methodology of the Aristotelian rhetoric, outlined earlier in terms of the privileging of those modes of rhetorical proof which come closest to demonstration. In full agreement with Aristotle, Perelman stresses the metaphorical and analogical figures of argumentation as constitutive of the genuinely argumentative, and

[92] The metaphor is that of K.Llewellyn and E.Hoebel: The Cheyenne Way (1941) Oklahoma U.P. p.41, well discussed in I.A.Stewart: Sociology in Jurisprudence: B.Fryer et al (eds.): Law, State and Society (1981) Croom Helm 107. See also the useful information provided in A.Paterson: The Law Lords (1982) MacMillan pp.9-11, 32-34.

equally resorts to a predominantly normative description of the topics and probabilities of the discursive field or domain of the law. Legal discourse, in short, is to be rendered 'rational' or 'logical' at the price, in this account, of broadening or generalising (though not transforming) the semantic and pragmatic reference of the term logic.

The methodology of formal logic is extended, in the New Rhetoric, to include the logic of values, but this exercise is very far from being conducted in the name of any substantive or indeed extra-legal set of considerations or functions. The logic of legal values assumes a consensus as to its own value, that of a series of generic probabilities, which are ideally typified in the self-perception of the legal audience itself. It is thus no coincidence that the New Rhetoric lays its greatest stress upon the 'givenness' of legal topics and upon the authority of legal judgment. These are precisely the assumptions that ground the claim to legal logic or rationality in a manner exactly and necessarily analogous to the assumption of the major premiss within the logical syllogism itself. Thus for example, when Perelman portentously claims that the law develops 'by balancing a double exigency', the duality is explicated in terms of one exigency 'of a systematic order - the elaboration of a coherent legal order - the other the search for acceptable solutions ... requiring conformity to what appears just and reasonable in the particular case.'⁹³ The exigency of a systematic order is primarily that of excluding impossible or absurd innovations to the legal code, but granted that the norms of this code are described as a series of generic, open textured and frequently ambiguous propositions, the problem is better formulated as that of reasserting a normative proposition which will adequately legitimate or otherwise satisfy the essentially traditional and pedagogic belief in the determinacy and rationality of legal method and legal reason. The discursive specificity of the legal must be maintained and indeed can also usefully function to obscure the pragmatic or ideologically motivated or structured choice of outcome that is actually realised.

[93] Logic at p.173.

The second aspect to the double exigency is that of particular justice, or the need to provide a decision. Here again, however, the privileged concern of the legal rhetorician is normative and prescriptive rather than substantive or specific. The decision must be made acceptable, but to those who would dare inquire as to how and to whom, the answer is straightforwardly that it must be made acceptable to the legal audience in the novel guise of the principles of equity, or at least of a series of more pragmatically orientated legal norms. To which it must be added that it is in relation to the categories of the 'case' and of the 'litigants' that the systematicity of legal rhetoric is momentarily punctured; even if such systematicity is eventually to be reasserted in the reasoning of the decision, it is nevertheless recognised that the process of decision making itself incorporates features of a psychological and social order. We are reminded that the legal order, in the abstract schema of the rhetoric at least, is but one of the audiences of the law, and that even the most legalistic of rhetoricians would allow that problems of policy and of an administrative or political order are, however vaguely, related to the legal. It is here then that the New Rhetoric makes a fatal choice; in momentarily allowing that the particular decision brings the law into direct confrontation with the social, it opens the way for a rhetorical consideration of the material determination of legal argument by the as yet excluded audiences of the public, non-legal, domain. Despite their theoretical presence, however, the non-legal audiences are not made the object of any extended discussion or analysis. The extra-legal audience is precisely assumed by the New Rhetoric: it is implicitly homogeneous; at any one given moment in time it exists in a state of equilibrium and consensus as to values or moral order; it not only accepts the law but even regards it as desirable and authoratitive, and it views its argumentation as convincing. In presenting the rhetoric of the law, in other words, the New Rhetoric also legitimates and prescribes it in large doses for the social body as a whole. The assumptions underpinning the probabilities of legal argument, both normative and pragmatic, are projected onto the economic and social relations of a society which is also conceived in terms of consensus: it too must have its probabilities and topics, although we are never informed as to what they are or to whom they belong, save that at the level of rhetorical analysis they in no way conflict with the logic

of values that underpin the law itself.

It requires, I would suggest, but an inkling of critical thought to view the above assumptions as unacceptable. Classical rhetoric, while it was certainly deficient in critical concepts, could at least claim with some plausibility that the city states of the Hellenic era and of the early Roman Empire were united in their unitary understanding of the virtues of political citizenship. As regards those whom the political system actually included, it might well be fair to perceive citizen and state, individual and collectivity, as complementary rather than opposed. To base a modern rhetoric upon a comparable assumption is manifestly absurd, or better, in terms of legal discourse, it is a highly effective political decision or strategy; the product of a very modern form of idealism, and of a jurisprudence determined, at any cost, to articulate and repeat an order and language of normative propositions whose extreme ideological power resides in the very fact that their reference to materiality is at best partial and obscure. In many senses the legal is thus a paradigm for the ideological; its very methodology, as we have seen, is that of an argumentation and normative rhetoric that is ever concerned to generalise beyond its pragmatic and material context; while appearing to describe a real object it leads us inexorably into the hermetic and circular play of legal norms; while the law is undoubtedly invested with a peculiarly 'concrete' force or function, its argumentative method and justificatory rhetoric encode a relation to the social in a manner that can never be either verified or falsified. We may conclude that insofar as the traditional rhetorics do encompass a logic of legal values, they also raise, in the clearest fashion, a choice of value: is the study of law primarily to accept legal relations as 'given' and consensual, or is it to treat the rhetoric of law as a primary datum to be evaluated and appraised against the background of the institutional power and social relations of inequality, of superordination and subordination, that underpin that rhetoric and determine its semantic content?

6. LAW AS SOCIAL DISCOURSE I: A TOPOLOGY OF DISCOURSE

6.1 INTRODUCTION

The project of delineating and presenting a concept of legal discourse or materialist rhetoric of law, as an alternative form, or political instrument for the analysis of legal relations, raises a series of problems. Not least the concept of discourse itself, and the various contemporary interdisciplinary uses of a method of discourse analysis as the appropriate tool of critical theory, have lent the term a certain fashionable if diffuse currency. The invocation of, or recourse to, the terminology of discourse or of discourse analysis, however, is unfortunately considerably more frequent than any systematic or indeed coherent examination of the requisite methodology or critical limitation of the concept itself. In the broadest and loosest of terms, the concept of discourse can be applied to any sequence of utterances at the level of the sentence or above.¹ In potential it thus ranges in scope from the seemingly universal problems of the structural features of culture, communication and ideology as the intrinsic problems of the theory of discourse, right the way down to the minute questions of the syntactic and semantic analysis of the specific, historically singular, text or utterance, studied in discourse analysis.

[1] Thus, for instance, the very broad definition in Z.Harris: Discourse Analysis Reprints (1963) The Hague at p.7 'Discourse analysis is a method of seeking in any connected discrete linear material, whether language or language-like, which contains more than one elementary sentence, some global structure characterising the whole discourse (the linear material) or large sections of it. The structure is a pattern of occurrence (i.e. a recurrence) of segments of a discourse relative to each other.' For more recent definitions of the discipline in terms of pragmatics, see, M.Stubbs: Discourse Analysis (1983) Blackwell; G.Brown and G.Yule: Discourse Analysis (1983) Cambridge U.P.

The most immediate and obvious of difficulties to be raised by the term discourse itself, are thus not only those of the multiplicity of its differing levels of usage, but, more ambitiously, are those of attempting to formulate and substantiate the complex relationship of the structural features, or regularities, of systems of communication as discursive formations, to their agency or manifestation in the specific, empirical practice. In terms of the state of the art, I shall indicate that the most pressing need facing the theories of discourse is precisely that of locating the specific linguistic and semantic tools which will enable the generation of as yet absent empirical and particular analyses of text and reception, of utterance and audience. Similarly, the putative concept of legal discourse must endeavour to provide some account or systematisation of a coherent relation between the problems of the analysis of legal communication as a cultural form and practice, problems occasionally hinted at in theories of legal semiotics, and the more traditional (though inadequate) concentration upon the minutiae of the legal text or judgment. It is in an endeavour to respond to these problems, that I shall devote the first part of this study of law as social discourse, to the presentation of a topology of discourse drawn from the context of the development of contemporary linguistics and will subsequently analyse legal discourse according to the topology outlined. By way of introduction, however, I shall offer a few general comments upon the peculiarities of legal discourse and the broad historical context and motivation of its analysis.

It is a familiar and consistent feature of all the major historical legal systems that, in their ascendancy, they have resorted increasingly to the written text. As the history of rhetoric, both general and forensic, amply evidences, the study of language as discourse, as social utterance or practice, or as the systematisation of the political contours and effects of a primarily spoken discourse, was both historically and geographically short lived. In terms of the history of the study of language, indeed, the democratic republican ethos of early classical rhetoric was thoroughly exceptional to the dominant, centripetal or unifying tendencies within the development of the European languages as a whole, and the corresponding centralisation or unification of the official discourses of an essentially hierarchical development of European

linguistic culture.² The predominant linguistic mode within the latter context was the study of language 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.

Law and in its earlier form religion, were no exception to such a tendency. Both relied exorbitantly, though clearly not continuously, upon writing, and upon the interpretation and control of their social practice in relation to a series of texts. 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 observe the continuity of the problem of textual interpretation. The code, or more informally, the written law, has invariably - though with a greater or lesser degree of practical or actual relevance - been the object of an elitist, revelatory or hierophantic, culture of interpretation. An intricate and exclusive system of disciplinary or dogmatic tools, the various forms of traditional exegesis and indeed of traditional and contemporary hermeneutics, were developed early and precisely to the effect of safeguarding and preserving the sanctity and general impenetrability of the written word as a system of social control, religious or legal.

Unsurprisingly, the features of the code; both interpretative (hermeneutic) and substantive (the actual norms); and the processes of what is currently termed encoding and decoding which constitute the communicational practice of religious and legal institutions, had been the object of venerable traditions of both the theological and jurisprudential analysis. It is not only or merely that the traditions

[2] These issues will be discussed in greater detail subsequently. For a broad and highly stimulating account, there is the incomparable work of M. Bakhtin: The Dialogic Imagination (1981) University of Texas Press, passim. Specifically on writing and power c.f. J. Derrida: Of Grammatology (1976) John Hopkins U.P. Part I; W. Ong: Orality and Literacy (1982) Methuen; G. Gillan: From Sign To Symbol (1982) Harvester ch.2 & 4; V. Volosinov: Marxism and the Philosophy of Language (1973) Academic Press pp.65-82; J. Derrida: Scribble (writing- power) (1979) 58 Yale French Studies 116; and finally J. Kristeva, in S. Heath and C. Prendergast (eds.): Signs of the Times (1971) Cambridge.

and institutions concerned had spawned their own justificatory literature; it was also the case that the predominantly elitist culture of scholarship itself, has historically been very much tied up with and dependent upon the systems and institutions of power that originally formed the practical object of historical, philosophical and, most pertinently, rhetorical, analysis. Such is to say that the concept of knowledge itself was traditionally, and is still, inextricably linked to the culture, and sociologically very restricted, community of power. The order of knowledge, secular, legal and religious, has a lengthy history of material dependence upon, and has largely been produced within, institutions either directly or indirectly financed and controlled by the hierarchy of religious and secular power. Secondly, and more specifically, the relation of dependency or of frustration between power and knowledge can do much to explain the nature and characteristic methods of such disciplinary traditions as are available for, and have concerned themselves with, the exegesis or hermeneutics upon which the exercise of legal power has, at least nominally, been based and justified.³ Such, at least, I will argue, is the general framework of dependency from within which the question of legal knowledge as social discourse is best approached.

6.1.1 Linguistics, Ethics and Method

At the level of legal theory or metalanguage, it is at least clear that, in terms of formal principle, there is nothing especially novel attendant upon the endeavour to characterise law in terms of its textual, discursive and indeed, on occasion, communicative and dialogic characteristics. As I have argued earlier,⁴ the substantive positivistic jurisprudence of the

[3] The image of knowledge, religious, philosophical or legal, and the self-evidence of its power, is amply and consistently expressed in the self-conception of the intellectual as social grouping and role. Knowledge is hidden, distant and isolated, it is the unhappy consciousness of the universal as yet unfulfilled, as yet inaccessible to all but the few. Its most dramatic representations are to be found in Nietzsche's awesomely solitary Zarathustra, in Schopenhauer's 'lonely star' whose light only becomes visible to the inhabitants of this earth many decades later. It is the truth value of the text that makes the written word sacred and removed as the ultimate justification of political will from Plato: Collected Works (1963) Princeton U.P., Republic VI 493 et seq., onwards.

[4] C.f. ante ch.3-5, or for a synoptic account P.Goodrich: Linguistics and Legal Analysis (forthcoming, 1984) 47 Modern Law Review.

late 19th, and of the 20th centuries, has in many ways been defined as a distinctive tradition or genre, precisely by its increasingly frequent and comprehensive resort to the normative methodology and terminology of linguistics, and to a lesser degree, by the reinvocation of the traditional Aristotelian rhetoric. In each case, both in relation to linguistics and to rhetoric, I have also argued that the use made of these 'external' disciplines has been methodologically and substantively inadequate, not least by virtue of being profoundly uncritical and ahistorical. In reliance, it may be suspected, upon a tradition that returns eventually to the classics and to the historical proximity of law to religion and to conceptions of the sacred text and writing (stasis), the more contemporary use made of the disciplines in question has been that of fostering an immanent analysis of the legal text, both as normative system and as substantive judgment. To put it more forcefully, the practice of legal analysis, and of textbook and casebook law, has been that of treating legal language as a self-sufficient object of study, and so effectively maintaining a descriptive concept of the legal text as the monologic and alien progression of an internal rationality peculiar to law.

Curiously enough, the self-same jurisprudential tradition has also increasingly acknowledged the conventional, institutional and social dimensions of legal doctrine and norms. For the whole range of positivistic jurisprudence, however, these terms have a specific 'artistic' or technical meaning. Even within a reformed positivism prepared to acknowledge law as a social fact, and equally prepared to elaborate theories of a New Rhetoric and of a practical reasoning, the conventions, institutions and sociality to which the theories refer, are purely normative and, sociologically, wholly non-empirical. The societal categories invoked are indeed of no greater empirical standing than that of passing references to the unargued assumption or presupposition that law, as form or as norm, 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 or, to use the entirely appropriate 17th century terminology, a social contract. Phrased in stronger terms; far from raising questions as to the actual social and historical form of life which law represents and in a measure perpetuates, the theories in question act as rationalisations of a conception of 'man'

and of a social and moral code, embedded in the ideals of classical liberal philosophy. The ethical foundations for such a project belong to the past. Certainly the concepts of 'proprietary individualism' and of 'social contract' or consensual order, act as defences or bulwarks against certain forms of irrationalism, arbitrariness and wanton destruction, but they are nonetheless helplessly dogmatic and anachronistic when faced with the contemporary sociological complexity and diversity of the actual relation of individual to society - the problems of agency, role, group, class and structure. In short, it is at least arguable that in the context of the growing crises, both national and global, of the capitalist economy, and the correlative breakdown of traditional patterns of legal order in the face of rising unemployment, crime epidemics and generalised and continuing inequalities of access, opportunity and distributed wealth, the reiteration of the normative coherence of legal rules and of the ideal cohesion of the society upon which they are based, becomes ever more explicitly an act of repression in itself. It is not the past which should be restored, it is the stark and terrible potentiality of what is to come which should impinge upon the theorising of even the lawyers of an increasingly militarised nuclear age.⁵

Provided that the concept of methodology is understood to be sufficiently broad to include, over and above questions of verification and quantification, the questions of the motivation of social inquiry, then the problems raised above may be formulated in terms of methodology.⁶ The problem is essentially that of what forms of sociological data and what species or aspects of conventional and institutional facts are to be deemed relevant to, and implicated in, the study of legal texts. Reserving for the subsequent sections, the development of the specifically linguistic and semantic arguments - inherent in the elaboration of the concept of discourse itself - upon which it is possible to argue forcefully against the notion of the autonomy or isolation of the legal text, the question raised may be seen initially, precisely as one of motive

[5] For a useful discussion of conceptions of methodology, c.f. P.McHugh et al. (eds.): On the Beginning of Social Inquiry (1974) R.K.P. pp.21-47. Comparable arguments may be found in T.Eagleton: Literary Theory (1983) Blackwell pp.194-217; J.Kristeva: Desire in Language (1980) Blackwell ch.1.

[6] See footnote 5. See also, M.Riffaterre (ed.): Languages of Knowledge and of Inquiry (1982) Columbia U.P.

and choice, or of an ethics of social, political, and historical responsibility. What is needed, from this viewpoint, is some kind of moral perspective or motivation, upon which to base the possibility of a critical evaluation of the textual and empirical, formal and informal, contours and limits to legal discourse in its relation to (and as) social practice.

If I have so far argued that the legal discipline as a whole is bathed in an aura of systematics which finds its most coherent expression in positivist jurisprudence and its correlative, linguistically based, theory of the immanent analysis of the legal text, then the ethical motive for proposing an alternative methodology for the analysis of legal discourse, may usefully be drawn from a text of Engels in 1893:

It is above all this semblance of an independent history of state constitutions, of systems of law, of ideological conceptions in every separate domain that dazzles most people. If Luther and Calvin "overcome" the official catholic religion, or Hegel "overcomes" Fichte and Kant, Rousseau with his republican Social Contract indirectly "overcomes" the constitutional Montesquieu, this process, which remains within theology, philosophy, or political science, represents a stage in the history of these particular spheres of thought, and never passes beyond the sphere of thought.⁷

It seems clear that Engel's objection is primarily and healthily directed to those forms of historical analysis which represent the development of ideas and of disciplines wholly in terms of their internal dynamics; their 'reaction to' or 'overcoming of' the preceding ideas. More interestingly, the motive for such a protest implicitly raises two sets of unmet methodological requirements, of specific relevance to the contemporary study of legal discourse.

It is first the case that the attack upon idealism raises the general requirement of a critical evaluation of the concept of a discipline and of its subject-matter. In this aspect, it seems to me to be extremely clear that what is involved is not merely a recognition that particular disciplines may and should be defined in terms of the material circumstances - economic, historical and institutional - of their

[7] Marx and Engels: Selected Correspondence (1964) Moscow pp.541-2.

production. It is also and further the case, that analysis is primarily concerned in this respect, to challenge the internal order and formal self-representation of the discipline in question, in terms of its actual discursive products and practices.⁸ To illustrate this point by reference to the discipline of law, it is necessary to raise a series of broad questions as to the internal structure, or self-articulation, of legal discourse itself, questions with which I will be later concerned in terms of legal 'intradiscourse'. The point to be made initially, concerns, in its most simple formulation, the relationship between the facts and outcome of a case, and the substantive legal categories invoked and elaborated in the actual formulation of the decision itself. At this stage, it is hopefully sufficient to point merely to the possibility of a systematic discrepancy or disjunction between what I would term the content and the justification of legal decisions. While remaining entirely within the ambit of the interpretative politics of the legal text, it is nonetheless possible to argue that the broad principles in which the substantive and procedural norms and rights of judicial reasoning are contained, bear no necessary or no direct relation to their substantive decision making practices, viewed as active interventions into material social relations. What the court says, is not necessarily the most accurate of descriptions of what it does; probing the content of case law is likely to provide a far deeper critique of the law of democratic states than does the analysis of the rules or norms regularly, though frequently only symbolically, invoked by way of legal justificatory argument.⁹

The second, less contentious, point implicit within the critique of conceptions of the internal development of disciplinary traditions, is that it ignores the effects of a discourse upon the institutional and social practices which the discourse either serves or regulates. Thus, for instance, the legal curriculum has tended, both explicitly (in terms of the ideals of freedom, equality and non-arbitrariness of the rule of law)

[8] Such I take to be one of the few points well made in D.Silverman & B.Torode: The Material Word (1980) R.K.P. pp. 6-8. C.f. P.Goodrich: Linguistic Practice (1981) Radical Philosophy 50.

[9] C.f. D.McBarnet: Legal Form and Legal Mystification (1982) 10 Int. Journal of the Sociology of Law 409, at p.415; a similar point is made in terms of the 'inadequacy' of the categories of judicial justificatory argument in W.T.Murphy & R.W.Rawlings: After the Ancien Regime (1981) 44 Modern Law Review 617, pp. 617-623, and (1982) 45 M.L.R. 34, at pp. 57-61.

and implicitly (by omission), to teach that the legal regulation of human affairs is natural, efficient and just. Based almost exclusively upon the systematisation of the formal normative aspects of the legal system and decision making processes, legal education is unconcerned - save in cases of the obvious breakdown of legal regulation - with any analysis of the actual extent or manner in which the norms of the system are realised. Of the sociological data available, both with regard to the legal institutions and personnel, and with regard to the legal regulation of socio-economic development generally,¹⁰ a significant proportion would tend to confirm the view that law both represents and serves to perpetuate the patterns of hierarchy and domination constitutive of a profoundly inegalitarian social system. Irrespective of whether or not such patterns of inequality are justifiable or eradicable, it is obviously a precondition for any account of law as both a form and a content, or as both a theoretical system and a use or practice of that system, that such social data as is available be at least deemed relevant to and implicated in the study of the normative discursive order itself. It is not only that norms, in the last instance, only bear a meaning by virtue of practice¹¹ but equally that any remotely critical account of legal regulation should be sufficiently acute to read behind the symbols or rhetoric of legal regulation and to analyse, to borrow a very broad formulation of R.M.Unger's :

... a background plan of social division and hierarchy. Such a plan provides (legal) dealings with a prewritten script. It makes the opportunities of practical exchange or passionate attachment respect the limits imposed by some established order. It assigns fixed roles to people according to the position that they hold within a

[10] Aside from general characterisations such as J.G.Griffith: The Politics of the Judiciary (1981) Fontana ch.1 and passim, or F.Burton & P.Carlen: Official Discourse (1979) R.K.P. ch. 3; the most interesting work is historical. The classic study is D.Hay et al (eds): Albion's Fatal Tree (1975) Allen Lane. See also, T.Mathieson: Law, Society and Political Action (1980) Academic Press, M.Foucault: Discipline and Punish (1979) Peregrine Books, or, for a recent study, summarising a considerable amount of empirical work, P.Cameron & T.S. Midgley: Contract, the Rule of Law and the Liberal-Democratic State (1982) 10 Int. Journal of the Sociology of Law 239. More detailed references will be provided subsequently and as relevant.

[11] A point which is accepted, although only momentarily and in a very abstract or restricted form, by Kelsen, in terms of the requirement that the system of norms be 'by and large efficacious', and by Hart in terms of the requirement that the rule of recognition reflect official practice. C.f. ch. 3.

predetermined set of social or gender contrasts.¹²

Walter Benjamin is more succinct, ' there is no cultural document that is not also a record of barbarism '.¹³

6.2 DISCOURSE ANALYSIS

I have so far made a somewhat unhappy or as yet ill-defined use of the term discourse to loosely refer, both to the processes that intervene and determine the relationship of a language to the formulation of utterances (discursive processes), and also to refer more generally to the relation of bodies of knowledge to social practice and structure (discursive formation). At both levels, those of process and of formation, the motive underlying recourse to what is still a very ill-formulated discipline, has been that of the desire to challenge the hermetic security of both legal language and its metalanguage, legal theory. The argument may usefully be restated in terms cross-cutting the distinction made, as that of an attempt to analyse law from outside legal culture and its privileging of the normative and conventional features of law, in terms, most simply, of its semantic functioning (regularities) and of its history, its relation to and representation of, power. Of the many levels of reasoning involved, the modern history of legal theory itself would seem to indicate clearly that there has at least been a strongly negative awareness within jurisprudence of the existence of these semantic and historical issues. Such, at all events, would appear to be the most credible explanation of the introduction into positivist methodology of tools drawn from linguistics and from rhetoric or practical reason, respectively utilised precisely to exclude the discursive and social issues or problems, whose grounding has nonetheless been implicitly recognised. It would seem appropriate then, to commence an analytic elaboration of the concept of legal discourse in terms of these two excluded or marginalised categories, those of semantics and of history.

[12] R.M.Unger: The Critical Legal Studies Movement (1983) 96 Harvard Law Review 561, at p.587.

[13] 13. W.Benjamin: One Way Street (1979) London pp.349-361.

6.2.1 Discourse

The development of discourse analysis as a discipline and the correlative definition of its object, discursive processes and discursive formations, has been consistently impeded by over-generalisation. It is one of the peculiarities of the theory of discourse that it has, as a whole, more frequently been studied in terms of logic and epistemology (within the English language tradition),¹⁴ or of literary theory and psychoanalysis (within the continental tradition),¹⁵ than it has been studied in terms of linguistics.¹⁶ To avoid the dangers of reiterating already numerous and laudable statements of intention, it is as well to resort to a negative strategy and to define discourse initially in relation to linguistics, and only later in relation to the particular social practices and ideologies which are the more usual contemporary terrain of its study.

One of the earliest and most accessible analyses of the term discourse to be found in post-Saussurian linguistics is that provided by the French linguist Emile Benveniste.¹⁷ To understand the crucial distinction which he makes between the units of language as conceived by linguistics - as signs - and the units of discourse - sentences - it is necessary to briefly recall the formal contours of Saussurian linguistics. The key feature of what has gone under the title of the 'science' of language, has been the invariable recourse to some variant of the opposition between language as a system (*langue*) and language as speech (*parole*).¹⁸ Equally consistent has been the need felt to privilege the former term of the distinction over the latter. The system of language is a normative ideal, the presupposition of a synchronic systematicity which alone renders language available to scientific study; whereas language as speech is

[14] C.f., e.g., M.C.Beardsley: Metaphor, in Encyclopedia of Philosophy (1967) 5 at p.284, M.Black: Models and Metaphors (1962) Ithaca, or P.Strawson: Individuals (1959) Methuen.

[15] C.f., e.g., R.Barthes: S/Z (1970) Paris, J.Lacan: Ecrits (1977) Tavistock, C.Metz: Psychoanalysis and Cinema (1982) MacMillan.

[16] C.f., generally, the remarks made in P.Ricoeur: The Rule of Metaphor (1978) R.K.P. pp. 66 et seq.

[17] E.Benveniste: Problems of General Linguistics (1971) Univ. of Miami Press.

[18] C.f. particularly, M.Pecheux: Language, Semantics and Ideology (1982) MacMillan at pp. 5-7, 37-8, 174-5. C.f. also J.Derrida: Positions (1981) Athlone ch.2., as well as the earlier discussion and references in ch.2.

indeterminate, to a degree irrational, and available only to the psychological study of subjective intentions. In terms of the units of language (signs/words) with which linguistics generally operates, the distinction reappears with a vengeance in the form of the opposition between signifier and signified, which categories together comprise the sign. Again, it is the former term of the distinction which is privileged. The sign is arbitrary or unmotivated, it exists notionally as a difference within a system of differences; it signifies, but what it signifies (the signified) is a matter of complete indifference. It is merely sufficient that the signifier has a signified, that it bears a value and only one value within the system of its differentiation. In short, the sign is a form not a content; in terms of the economic metaphor beloved of linguists generally, it can be argued that it is an exchange value (an equivalent) and not a use value, or, more technically, that it is a commodity in a system of circulation, set free of the process whereby it was produced.¹⁹

In a somewhat restricted sense, Benveniste could be said to have inverted the foregoing distinctions. Rejecting the term speech (parole) and replacing it with the term discourse - to indicate the consistency of the object of study - he introduces the distinction between the units of language and those of discourse. The distinction to be made is that between the sign, which remains arbitrary with regard to its referent though not its signified, and the sentence, which for Benveniste, constitutes a different level in the architecture of language.²⁰ The concept of levels of language is integral to Benveniste's analysis. It is specifically intended to indicate that any linguistic unit whatsoever can only be accepted as such if it can be identified with some higher level unit - the phoneme in the word, the word in the sentence. Language is constituted not by the word alone, but by the hierarchy of levels within which the word, the sign par excellence;

occurs in an intermediary functional position that arises from its double nature. On the one hand it breaks down into phonemic units,

[19] For a fuller discussion of such a theme and its implications, see J. Baudrillard: For a Critique of the Political Economy of the Sign (1981) Telos Press, ch.8. See also, U. Eco: Semiotics and the Philosophy of Language (1984) MacMillan.

[20] Benveniste op.cit. p.104.

which are from a lower level; on the other, it is a unit of meaning and together with other units of meaning, it enters into a unit of the level above.²¹

Further, the higher level or unit is to be distinguished qualitatively from the lower level, this unit 'is not a longer or more complex word - it belongs to another class of notions; it is a sentence ... A sentence constitutes a whole which is not reducible to the sum of its parts.'²² To put it differently there is, for Benveniste, a duality to the word. As a form, that is, as a signifier or lexeme - an isolated item in the lexical code - the word is not a constituent of the sentence. It is only as a meaning that the word is related to the sentence as 'a syntagmatic element, a constituent of empirical utterances', in turn defined by its capacity precisely as a meaning, to integrate the higher level unit.²³

The point which I wish to draw from this analysis concerns its potential, rather than its substantive elaboration in Benveniste's later work.²⁴ It is important, however, to be clear as to the status of this reformulation and reorientation of the earlier Saussurian oppositions between 'langue' and 'parole', and between signifier and signified. On the positive side, Benveniste certainly provides a profound insight into the weaknesses of the foregoing concept of the systematicity of language, its inbuilt inability, as a semiotics, to deal with the problem of meaning and the semantics of utterances. He then formulates the latter problem, that of semantics, in terms of the sentence which, he stresses, must be viewed as the life of speech in action: 'It is in discourse, realised in sentences, that language is formed and takes shape. There language begins. One could say, in imitation of a classical formula: nihil est in lingua quod non prius fuerit in oratione. ' (There is nothing in language which will not previously have existed in speech).²⁵ Discourse, in other words, is an object of study in its own right and is of an equal, or perhaps

[21] Ibid at p. 104.

[22] Ibid. 105.

[23] Ibid. 105, 107.

[24] The most notable later work being, E. Benveniste: *La forme et le sens dans le langage*. In *Le Langage* (1967) Neuchatel 27-40, where he develops the useful distinction between 'semiotics' as the science of signs, and 'semantics', as the analysis of discourse as an independent unity.

[25] *Problems* op.cit. p.111.

greater, status than the preceding concentration upon language as system, and sign as form. Furthermore, and to complicate matters slightly, discourse, as empirical utterance, is historical and is, in principle at least, to be understood diachronically. Discourse always occurs as an event, and as an 'instance of discourse', as 'the discrete and always unique acts by which the language is actualised in speech by a speaker.'²⁶

On the negative side, Benveniste does not dwell upon the historical character of discourse events, but rather, distinguishes the instance of discourse from its meaning, in the broadest sense of the term, its identity and repeatability, its 'auto-referential' character. While such a distinction may be analytically justifiable in that it maintains the separation of language system from discourse, it is also suggestive of the limitations and restricted theoretical scope of the concept of discourse in Benveniste's work as a whole. Such becomes apparent upon a closer examination of the concept of meaning itself. According to Benveniste, two features of meaning are of especial importance. Very briefly, the most basic unit of discursive meaning is the word understood as a content. Such a content is conventional or institutional, in that the word 'refers', or is referential to, a reality outside the sign. The word is depicted as an arbitrary denotative potential to be integrated into a higher level, that of the sentence as the unit of discourse, wherein it will obtain an 'actual' meaning based upon its combination or use. Combination, and the essentially propositional meaning appertaining to it, are the product of the speaker's intention in combining. Thus, 'in the sign we have reached the intrinsic reality of language, while with the sentence we connect up with things outside language ... the sense of the sentence implies reference to the discourse situation and the speaker's attitude.'²⁷ Without taking the matter further, it is hopefully apparent from the opposition of arbitrary reference to (transcendental) intention²⁸ that far from moving outside the ambit (problematic) of the Saussurian opposition of system to

[26] Ibid. pp.217-222.

[27] La forme op.cit. p. 36.

[28] C.f. Ibid. p.37: 'The meaning of a sentence is its idea, the meaning of a word is its use (always in the semantic acceptation). Based upon the idea, which is particular in every case, the speaker assembles words which, in this employment, have a 'particular meaning'.'

realisation or speech, the theory of discourse has so far attempted no more than that of performing for the category of 'parole' (as discourse), what Saussure achieved in relation to 'langue' (as system). The orders of language as system, and of discourse as utterance, stand opposed and separate; the order of discourse viewed as meaning is systematised psychologically, as a unity of discrete propositions whose ordering principle is that of the subjective idea, or of the speaker's intention. Finally, the extra-discursive reality to which the content of words themselves refer, is distributed across the sentence and is subject to the intentionality of meaning, its self-articulation, within the limit of the sentence conceived as a higher level semantic syntagm.²⁹

It is precisely because Benveniste, and those who have followed him on this point,³⁰ have accepted the Saussurian distinction itself, that they have been forced to attempt to develop and invert it in terms of what may be referred to as a 'linguistics' of parole, variously defined by later linguists in terms of 'enunciation', 'performance', 'message', 'text' and so on. At its root lies the inability to view the historical character of utterances historically, the failure to develop any non-normative concepts of the relationship between language system and language use - a failure best evidenced in Benveniste's conception of the arbitrariness of the word's reference to the extra-linguistic realm, a fundamentally idealist notion which continually threatens to define the extra-linguistic reality as a product of language itself. Rather than prolong the criticism of this early formulation of a theory of discourse, however, it is preferable to utilise its positive elements and its linguistic specificity to develop a concept of discursive processes, as a means, in turn, to formulating a genuinely socio-historical theory of language use as necessarily embedded in ideological processes and conflicts.

[29] To use Jakobson's terminology, the arbitrary reference of words to reality, is a paradigmatic (semiotic) function of language. One may thus note, that the problem of polysemy is located at the level of the system of language, of the lexical code, and does not enter the terrain of semantics. C.f. La Forme p. 37; and R.Jakobson and M.Halle: Fundamentals of Language (1956) Mouton pp. 72-77.

[30] Especially, Jakobson and Halle op.cit.; R.Jakobson: Linguistics and Poetics, in R.and F.De George: The Structuralists (1972) Anchor 89; R.Barthes: Elements of Semiology (1967) Cape; J.Kristeva op.cit. ch.1.

6.2.2 Discursive processes

The theory of discourse, as so far elaborated, has moved towards perfecting a properly structuralist, binary, opposition between language as system (as sign and code), and the elaboration of a descriptive concept of the semantic laws (or functions)³¹ which independently explain the meaning of the utterance itself. Both the forms of language are conceived as being, in the last analysis, autonomous or, in one terminology, the sign is subjugated to the axis and functions of selection, discourse to the axis and functions of combination. As the same author,³² however, comments, language, viewed as a totality, is neither systematic nor non-systematic precisely because speech implies both system and use, code and message. The question to be raised then, is that of the relationship between the two orders of linguistics and discourse; and rather than viewing the issue in terms of two analytically distinct levels or hierarchies, those of form and function, it will be posed in terms of the interdependence of different levels. More specifically, the problem is that of analysing the manner in which discursive processes, as practices of language, appertain to and cross-cut, the distinction between the levels of language.

The concept of meaning developed by the structural theories of discourse is both a useful starting point and an over-simplification. It is useful in so far as it indicates a duality to meaning which it relates both to the word and to the sentence, respectively viewed in terms of reference and of context or event. If we are to take Benveniste's claim seriously, both aspects to meaning have a socio-historical dimension. Thus, the referential content of a word (its meaning potential) is both conventional and also temporal, in that its store of socially 'given' potential references changes over time. More obviously still, the utterance itself is an empirical and historical unit of meaning. Even

[31] C.f. Benveniste: Problems op.cit. p.110 where he depicts the three modalities of which the sentence is capable - assertive, interrogative, imperative propositions. Jakobson: Linguistics and Poetics op.cit. pp.85-96, provides a more complex chart of the two axes of language and their corresponding vertical and horizontal functions. As regards discourse, the functions are those of the emotive (addressor), poetic/referential (message), and conative (addressee).

[32] Jakobson: Linguistics (1970) The Hague 458.

though the systematisation of this latter meaning has tended to be in terms of its universalisable, paraphrastic, unities of function, it is nonetheless the case that the instance of discourse itself implies speaker, society and temporality, as the necessary dimensions of linguistic practice. Such a general recognition, however, in no way answers the question of precisely what the socio-historical specificity of discourse is; nor in terms of the analytic distinctions made, does it provide any tools for the definition or analysis of the processes whereby the dimensions recognised actually produce changes in meaning. We are offered, in other words, little more than an analysis of end states or, in Wittgenstein's terminology, 'states of affairs', localised in the consciousness - the skull - of the speaker.

While it is certainly true that the intelligibility and the meaning of an utterance may be usefully depicted as being, by and large, dependent upon and governed by certain very general linguistic and discursive laws, the description of the utterance as a process is neither exhausted by, nor reducible to, such formal schemata. They provide no more than the set of minimum normative requirements (generally maintained and developed by a national system of primary and secondary education) whereby communication (intelligibility) is possible. Upon the basis of such requirements, or within the very broad parameters of a shared national language, communication as process and as practice, is marked precisely by its diversity. Furthermore, this variety of different possibilities contained within the very concept of linguistic practice, is logically the starting-point for any analysis of the socio-historical dimensions of discourse - it is fundamentally insufficient to merely acknowledge the existence of such a feature of language; it requires analysis and systematisation. Such, in essence, is the place ascribed to the concept of discursive processes: it refers to the manner in which diverse linguistic practices produce divergent meanings within and according to the (historical) context and (social) purposes, of group and class interaction within a society which is itself organised according to specific patterns of linguistic and political hierarchy.³³ The abstract unity of the common

[33] C.f. M.Pechoux op.cit. pp.10,58-60; V.Volosinov op.cit. pp.17-25; M.Bakhtin op.cit. pp.262 - 264.

linguistic basis (system) must be juxtaposed with a more concrete concept of discursive division - viewed as the necessary features of the actual role of language in social life.³⁴

Utilising certain of the distinctions made in the earlier discussion, it is possible to argue that the interdependence of the two orders of language and discourse, is highly specific. Both concepts require a substantial reformulation, which may best be exemplified in the initial terms of the distinction between word/code and utterance/meaning. From the perspective of linguistic practice as discursive process, the issue is, first and most simply, that of the extent and manner in which access to and use of the lexical and syntactic code is, in any given instance of discourse, governed by and only explicable in terms of, the extrinsic features of the social, institutional and ideological relations within which language becomes a 'form of life'. The linguistic code, as a practice, is always already embedded in its own historicity, it cannot be read as neutral ('given') or as an entity in itself.³⁵ Similarly, at the level of utterance and meaning, it is hopefully more obviously the case that the same extrinsic considerations largely determine the actual meaning - the historically available synonyms, paraphrases and substitutions - of the utterance conceived as event and as process. To which it must be added that in terms of 'embeddedness', that of both code and meaning within the complex network of socially recognised contexts, purposes, functions and equivalences generally, it would be quite false to view the social and ideological implications of code or meaning as being in any real sense autonomous of each other.

In order to render the analysis of the issues raised more concrete, it is helpful, I believe, to recast the distinction between language system and linguistic practice in terms of a shared material and social base. The concept of discursive processes itself, to a degree refers to the

[34] M.Pechoux op.cit. at p.112.

[35] A point made dramatically by L.Althusser: Lenin and Philosophy (1971) N.L.B. p.24, 'Why does philosophy fight over words? The realities of the class struggle are "represented" by "ideas" which are "represented" by words. In scientific and philosophical reasoning, words (concepts, categories) are "instruments" of knowledge. But in political, ideological and philosophical struggle, the words are also weapons, the explosives or tranquillisers and poisons.'

unity of the orders of language and discourse and it is therefore primarily concerned to elaborate the 'regularities' of meaning, of function and of effect which subsist within and are implied by any realistic concept of language as totality. The regularities it seeks are, moreover, historical and conflicting rather than abstract and normative. Such is not, of course, to deny the relative value of the general concept of a linguistic system as a notional object of study. What it does do, however, is to shift emphasis away from studies of the structural laws (primarily lexical, syntactic and phonemic), and of meaning potential, towards the study of the crucial question of what processes actually condition and socially control the intelligibility and meaning of word, utterance and discourse, as realised in a specific linguistic practice. It is here, in the context of the relationship of power, or hierarchies of institutional control, to meaning, that the reformulation of the concepts of language and discourse is to be inscribed.

While there are a number of recent studies, primarily within the field of sociolinguistics,³⁶ that have more or less directly concerned themselves with the relationship of variously conceived concepts of 'power', 'control' and 'class' to language and meaning, the salient points and general themes of such work were admirably and succinctly anticipated in the work of the Russian linguist and critic, V.N.Volosinov as early as the 1920's.³⁷ I shall proceed by eliciting, first, two very broad themes regarding the interrelation of language and social life, and will subsequently develop these themes in the more contemporary linguistic terminology of the categories of 'intradiscourse' and 'interdiscourse', in

[36] C.f. B.Bernstein: Class, Codes and Control Vol.1. (1971) R.K.P. Parts I & II; P.Gigliopoli: Language and Social Context (1972) Penguin; M.A.K.Halliday: Language as Social Semiotic (1978) Arnold; R.Fowler et al (eds): Language and Control (1979) R.K.P.; R.Fowler: Literature as Social Discourse (1981) Batsford; M.Gurevitch et al (eds.): Culture, Society and the Media (1982) Methuen; D.Morley: The Nationwide Audience (1982) B.F.I.; H.Davis and P.Walton: Language, Image, Media (1983) Blackwell.

[37] V.Volosinov op.cit. Part I; also, under the pseudonym M.Bakhtin, op.cit., pp. 258-442. One might well suspect that Volosinov's use of a pseudonym (and in all probability three, P.N.Medvedev being the third) was a joke at the expense of formalist conceptions of determinate reference. I shall follow contemporary convention, and use the names interchangeably.

the wider context of the definition of discursive formations.³⁸

The most general theme, at all events, is probably also the simplest. If, in its broadest purview the theory of discourse takes as its object of study the analysis and explanation of the semantic regularities governing and sub-dividing any existent language system, then it necessarily implies the sociality of its object of study. Such is the case in two senses. Most abstractly, the language system itself presupposes language use. Any account of language use, in turn, must understand the language system as a social phenomenon, and as an empirically and historically existent practice or matrix of practices, because:

... form and content in discourse are one, once we understand that verbal discourse is a social phenomenon - social throughout its entire range and in each and every of its features, from the sound image to the furthest reaches of abstract meaning.³⁹

In such a context, it is precisely the diversity of differing usages or practices which must be the immediate focus of attention, and it is upon this basis that Bakhtin introduces his own, very broad, concept of discourse in terms of the internal stratification of language, viewed, in this instance, in terms of the contradictory linguistic unity of a national language. Accepting that a national language is a primary species of existent language system, Bakhtin's concentration upon the diversity of actually existent linguistic practice is as obvious as is it crucial:

The internal stratification of any single national language into social dialects, characteristic group behaviour, professional jargons, generic languages, languages of generations and age groups, tendentious languages, languages of the authorities, of various circles and of passing fashions, languages that serve the specific socio-political purposes of the day, even of the hour (each day has its own slogan, its own vocabulary, its own emphases) - this internal stratification present in every language at any given moment of its

[38] As I shall observe later, these two categories - drawn from M.Pecheux - are already available in Bakhtin's work in terms of the distinction between 'intra-language' and 'internal dialogism'. It is something of a mystery why Pecheux should resolutely ignore all previous attempts to formulate a materialist semantics, cf. P.Goodrich: Materialism and Linguistics (1982) 32 Radical Philosophy 34.

[39] M.Bakhtin op.cit. p.259.

historical existence ... is indispensable.⁴⁰

It is helpful, in the present context, to draw out the stated stratification of language in terms of the distinction made implicitly above, between the linguistic and the socio-political or ideological features of the multiplicity of social languages (heteroglossia).

a) The primary point is linguistic and generic. Any existent language system is first and foremost a heteroglot entity, stratified according to the actually existent social diversity of speech types (dialects, jargons, generic languages and so on). It is stratified or divided again according to the historical demarcation of divergent discourses, the requirements of communication and of dialogue generally. Within such a multiplicity of differing linguistic practices, the unitary concepts of language system and of code and sign are merely references to one aspect of any instance of discourse, and are to be located among the many forces which actually diffuse or subjugate meaning to its heteroglot context. Language and meaning are the products of a complex process of production, and while it may be admitted that the concept of a common unitary language implies a system of linguistic norms,

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 centralize verbal-ideological thought, creating within a heteroglot 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.⁴¹

To be more specific, the notion of heteroglossia captures and extends the sense in which formalist concepts of discourse had recognised that the abstract categories of sign, code and system represent a set of linguistic and semantic potentialities, rather than actualities. The point is made with considerable force in the earlier work of Volosinov. Attacking the formalist conception of the sign as arbitrarily and unequivocally referential to a signified (Saussure) or to an extra-linguistic chunk of reality (Benveniste), Volosinov argues that the sign necessarily bears a

[40] Ibid. 262-263.

[41] Ibid. 270-271.

multiple referentiality, governed by its potential, or the possibility of its bearing different 'accents' and divergent ideological connotations within the various contexts of its actual use; 'existence reflected in the sign is not merely reflected but refracted. How is this refraction of existence in the sign possible? By an intersection of differently oriented social interests within one and the same sign community.'⁴² The sense in which sign, code and system are the same for everyone is thus secondary to the sense in which its usage will, according to its context, give rise to divergent meanings and equally form the basis of differently oriented ideological discursive processes. Ideology indeed, for Volosinov, is the life force of the sign, and it is to be seen as the emergence of conflicting group affinities, or class struggles, within language itself:

Class does not coincide with the sign community, i.e., with the community which is the totality of the users of the same set of signs for ideological communication. Thus various different classes will use one and the same language. As a result, differently oriented accents intersect in every ideological sign ... This social multiaccentuality of the ideological sign is a very crucial aspect ... A sign that has been withdrawn from the pressures of the social struggle - which, so to speak, crosses beyond the whole of the class struggle - inevitably loses force, degenerates into allegory, becoming the object not of a live social intelligibility but of a philological comprehension.⁴³

What is at issue, in other words, is not a question of the functional or straight-forwardly instrumental reproduction of the world in language, but a question of a more complex and diffuse interaction or struggle, a struggle for mastery over discourse - over which kind of social accenting is to prevail and to win credibility.

[42] V.Volosinov op.cit. p. 23.

[43] Ibid. 23. To avoid misinterpretation, it should be stressed that in the passage cited and elsewhere, Volosinov consistently views the relation between class and language as complex and mediated. Class ideologies are not, therefore, born with an ideological language ready formed in their mouths; E.Laclau: Politics and Ideology in Marxist Theory (1977) London p.99, usefully emphasises: '.. ideological 'elements' taken in isolation have no necessary class connotation, .. that connotation is only the result of the articulation of these elements in a concrete ideological discourse. This means that the precondition for analysing the class nature of an ideology is to conduct the inquiry through that which constitutes the distinctive unity of an ideological discourse.'

b) The secondary point concerning the stratification of a language, already fully implied above, is historical and socio-ideological. Reverting to the crucial critique of the dualism of unitary system and individual speaking subject, the central issue, for Bakhtin, is, quite correctly, that of viewing these centralising and unifying linguistic forces in terms of their historical and ideological contexts. Very broadly, the context of such categories:

is conditioned by the specific socio-historical destinies of the European languages and by the destinies of ideological discourse, and by those particular historical tasks that ideological discourse has fulfilled in specific social spheres and at specific stages in its own historical development ... These categories arose from and were shaped by the historically aktuell forces at work in the verbal-ideological evolution of specific social groups, they comprised the theoretical expression of actualising forces that were in the process of creating a life for language.⁴⁴

A unitary language; be it, for instance, the Latin of medieval European intellectual culture, the language of a science, or the more dubious rhetoric of law and authority; is always to be understood not as something 'given' but as something 'posited' and specifically and functionally motivated. While the form, content and effects of such motivation are the material categories which specifically define the concept of discursive formations, the general point may be interpreted linguistically and semantically.

The problem - and it is one of some complexity - is in essence that of analysing how actual existence determines both sign and code, and in turn, how sign and code reflect and refract that existence in the process of the generation of utterances. Volosinov poses the problem in terms of the word as:

implicated in literally each and every act or contact between people - in collaboration on the job, in ideological exchanges, in the chance contacts of ordinary life, in political relationships and so on. Countless ideological threads running through all areas of social intercourse register effect in the word. It stands to reason, then, that the word is the most sensitive index of social changes, and what is more, of changes still in the process of growth, still without

[44] Bakhtin op.cit. p.270.

definitive shape and not as yet accommodated into already regularised and fully defined ideological systems.⁴⁵

Word and social life generally are clearly conceived as being inextricably linked. The concrete nature of their intersection has already been adverted to; it is to be delineated in terms of the economic and socio-political orders which shape and govern the full range of verbal contacts between individuals, groups and classes. In short, the material forces and corresponding affinities which determine the organisation of social life create the settings or typical contexts in which (ideological) communication occurs: 'each period and each social group has had and has its own repertoire of speech forms for ideological communication in human behaviour. Each set of cognate forms, i.e., each behavioural speech genre, has its own corresponding set of themes'⁴⁶ or connotative field. Each discourse proposes its own set of preferred meanings.

6.2.3 Discursive formations

While it would certainly be interesting to pursue Bakhtin's more detailed treatment of the discourses, discursive processes and heteroglossia generally, to be found within literary language and the novel as a specific genre, it would undoubtedly raise as many problems as it solved. In terms of the development of a methodology of discourse analysis appropriate to the study of law, the seminal character of Bakhtin's extensive lifework lay primarily in the broad categories of linguistic stratification, dialogue and heteroglossia whereby he opened the possibility of a rigorous discipline of general application. Clearly, the currently fashionable aspects of his work - the concepts of the polyphonic novel, of language as carnival, of indirect discourse or of the image of a language - are of a broader significance than that of literary criticism alone, but they are nonetheless marginal to the more recent developments of the theory of discourse. In concentrating upon what I take to be the key feature of the recent work in discourse analysis - the concept of discursive formations - I shall rely extensively upon Bakhtin's

[45] Volosinov op.cit. p.20.

[46] Ibid.19.

broader formulations while simultaneously adopting the more specific terminology of the later studies.

To recapitulate somewhat, Bakhtin's general perspective upon discursive processes may be formulated in terms of two principles. On the one hand, he regards it as essential that the language system be viewed from the perspective of its historicity. The entire ambit of the concept of heteroglossia may usefully be reduced in this respect to the proposition that the language has always already been the object of diverse social usages or linguistic practices. It bears with it the weight of its own past as a feature of social life and the 'accents' that such a history has constructed. The words we use are already imbued - both in their singularity and in their combination - with multiple meanings or ideological accents. At the same time as this material of linguistic practice is ideologically saturated, the instance of discourse, the utterance, is also to be explained sociologically. The word is dialogic, 'its specificity consists precisely in its being located between organised individuals, in its being the medium of their communication.'⁴⁷ Meaning is thus to be understood actively as an effect of the social and hierarchal organisation of communication, and to be explained in terms of the constraints and conditions of that interaction itself.

Obviously enough, the move from the principles to their application necessitates an attempt to specify linguistically precisely how, respectively, the stratification of language manifests itself in the division and subdivisions of the existent language system - as order of discourse - and similarly, how the hierarchical context and organisation of communication is realised in the unities of meaning that define and determine specific discourses. What is needed, to adopt a slightly different idiom, is an account of the appropriation of meaning and its restriction to specific institutional and discursive sites and modalities. It is here that we encounter the concept of discursive formations as the tool or means of such specification. Synthesising what I take to be of

[47] Ibid.12.

value in the available studies,⁴⁸ I would suggest that the discursive formation is best defined in terms of three aspects or levels; those of its material basis, or institutionalisation, its self-articulation or internal ordering, intradiscourse, and its relation to other discourses and discursive formations, its interdiscourse.

a) A primary and relatively obvious point to be made about the division of discourse in general into the plurality of actually existent discourses is a material one. It has already been argued that there is a close, if as yet unsystematised, correlation between institutional and social practices and their typical forms of utterance and discourse. Even classical rhetoric acknowledged such a point, in so far as it defined the concept of 'genre' not only in terms of a given subject-matter (deliberative, forensic or panegyric) but also in terms of the character, status and procedural forms of the institutions within which the genre was located. Thus, for instance, politics as a rhetorical genre was to be understood not merely as a concern with the 'deliberative' but was equally to be related to the republican assemblies within which such deliberation could have effect. Recent theories of discourse have rightly attempted to elaborate the point in response to the greater complexities of contemporary socio-political relations.

The most interesting issue to be raised, is one which Volosinov had already formulated in terms of the relation of meaning to communicative function. As was noted earlier, the forms and themes of verbal communication are to be interpreted as dependent, in the last analysis, upon the collective relations and interactions of groups or classes, 'determined by production relations and the socio-political order'.⁴⁹ A more detailed analysis examines the institutionalisation of such relations in terms of the hierarchical organisation of economic, social and communicative exchange generally. From the perspective of discursive processes, it can thus be argued, with some subtlety, that a material and immediate feature of the subdivision of discourse into discursive

[48] Principally, M.Pêcheux op.cit; M.Foucault: The Archaeology of Knowledge (1972) Tavistock; G.Thorburn: The Ideology of Power and the Power of Ideology (1980) Verso; D.Lecourt: Marxism and Epistemology (1972) London pp.187-214

[49] Volosinov op.cit. p.21.

formations is to be located in the affinity which particular discourses bear to particular institutions.⁵⁰ Those institutions, in turn, can then be analysed in the multiple terms of their role within the hierarchy of the social organisation of communication, and their ability to appropriate specific unities or regularities of ideological meaning for the purposes of particular socio-political and ideological interactions, functions and effects. Thus in broad terms, Pecheux defines the discursive formation in terms of its institutional form, as that which determines 'what can and should be said - in the form of a speech, a sermon, a pamphlet, a report, a programme, etc'⁵¹ to which might be added, a lecture, a claim, a plea, a judgment, or a Phd thesis.

More concretely, the material institutional site of a discourse may be outlined in relatively simple sociological terms. In opposition to the familiar, traditional, question of the subjective authorship of a discourse, it raises instead the question of the social authorship of specific linguistic practices. The distinction is a significant one, and it is usefully subdivided by Foucault. First,

Who is speaking? Who, among the totality of speaking individuals, is accorded the right to use this sort of language? Who is qualified to do so? Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least the presumption that what he says 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?⁵²

Second, and in a somewhat less laboured form, it is necessary to describe the specific institutional site and interrelationships from which the authorised subject or speaker makes its discourse, and from which the discourse derives its 'legitimate source and point of application (its specific objects and instruments of verification)'.⁵³ To summarise in slightly broader terms, the right to a discourse (serious speech) is

[50] 'It is as though each text has entered a secret pact with the social institution in whose name it speaks' J.Lenoble et F.Ost: Droit, Mythe et Raison (1980) Bruxelles p.83

[51] M.Pecheux op.cit. p.111.

[52] M.Foucault op.cit. p.50-51.

[53] Ibid.51.

organised and restricted by a wide variety of means, to particular roles, statuses, professions and so on. Similarly the institutionalisation of a discourse is limited in terms of its legitimate appropriation, and the restrictive situations of its reception - church, court, school, hustings and so forth. Together, these two facets of the material location of discourses are to be subsumed under the general principle of the social organisation of discourse, which, in turn, is aligned to the 'order' of discourse, or the hierarchy of discursive formations.

b) Linguistically, the self-articulation or internal structure of a discourse is more pivotal and more contentious. Obviously enough, the institutionalisation and social regulation of a discursive formation is closely, if not unambiguously, related to its self-definition - its internal ordering and development of concepts. Very broadly, the social authorisation of a discourse has its counterpart, or is replicated, in the self-authorisation of the discourse itself; characteristically, its delimitation of its objects, its elaboration of the rules and procedures appropriate to recognition or knowledge of such objects, and its privileging of specific terminologies, values and meanings in its systematisation. Fundamentally, discourse is always a production within the space of possible discourses or discourse as a notional whole. It is a continuous and generally consistent choice or selection whose coherence, in the abstract schema of the Archaeology of Knowledge,⁵⁴ lies precisely in its manifest regularities - its transparencies of meaning, of accents and of modality. While it would clearly be misleading to view these transparencies of articulated meaning - the self-evidence or self-reference of a discourse - as solely the product of its interior logic or self-articulation, it is nonetheless helpful, in terms of description or exposition, to treat them as a separate or isolable feature of the discursive formation.

Any sequence of utterances, be it at the level of the text or of the discursive formation, will typically propose its meaning as its own production; that is, as a relatively self contained, intended, syntagmatic unity. Text and discourse, of course, are traditionally perceived as

[54] Ibid.38.

implying or presupposing little in excess of their subjective authorship. What is more, linguistics has traditionally accepted and reinforced such an assumption. Saussure, it is true, managed to evade the issue to some extent by replacing the problem of meaning with that of linguistic value or signification, but the very opposition between unitary system and individual speaker of the language, left no room for semantics outside of the realm of speech and its subjective authorship. Nor did Benveniste, when he subsumed the 'discourse event' under the categories of intentionality (the assertive, the interrogative and the imperative) escape the underpinning of semantics by a species of psychology. It was, for Benveniste, the intended idea which determined the actual combinations (syntagms) used in an utterance and, in the last instance, explained its meaning, or provided the criteria by which it was possible for the utterance or text to be understood or read either correctly or falsely. In short, the traditional unities of discourse have largely been conceived immanently, that is, as internally defined 'systems' of meaning or, in Volosinov's terminology, as unmediated, monologic 'wholes'.⁵⁵

Even in its weakest formulations, as an analytical 'level' of meaning, there are two interesting problems inherent in the concepts outlined. The first has already been covered - they tend, necessarily, to preclude the historical dimension of semantics and ignore the manner in which specific meanings and accents are institutionalised and restricted to particular groups and to particular discursive formations. A more significant issue, however, concerns the sense in which meaning, conceived as a social - rather than simply an intentional - product, will consistently belie the self-articulated unities of discourse. Meaning; defined as the product or outcome of communication between socially organised individuals and groups; implies other meanings, other texts, other discourses, and will constantly exceed the boundaries of any given instance of discourse. Pecheux makes the point most forcefully in analysing the level of intradiscourse in terms of preconstruction and articulation.

Intradiscourse refers primarily to the axis of the linearisation (or syntagmatisation) of the units of discourse. It is,

[55] Volosinov op.cit. p.78-80; M.Foucault op.cit. p.23-27.

the operation of discourse with respect to itself - what I am saying now, in relation to what I have said before, and what I shall say afterwards, i.e., the set of 'coreference' phenomena that secure what can be called 'the thread of discourse' as the discourse of a subject.⁵⁶

Two features of this partial definition require elaboration. The initial point is to be developed linguistically: intradiscourse refers to what have more generally been termed the 'textual surface structure'⁵⁷ or 'text grammar',⁵⁸ the manifest, overt, aspects of text structure. What is at issue is the textual 'microstructure', and the endeavour to describe the linguistic and textual units relevant to, or determinative of, the wider structure and meaning of the text. In the first instance, the linguistic structure of the text encodes one level of its potential meaning. It is, obviously enough, the primary mode of access to meaning and is generally to be described in terms of the author's deployment of the surface organisation of language, its linguistic patterning, or arrangement of its own coherence. Following the work of Roger Fowler, it is, I believe, helpful to generalise the linguistic devices of most obvious significance to intradiscourse, in terms of the cohesive and the progressive or narrative aspects of surface text structure.⁵⁹ While avoiding too great a degree of detail at this stage, it should be admitted that a text may be cohesive by virtue of the arrangement of features at any level of linguistic structure. In the present context, however, it is in all probability easiest to define cohesion in terms of syntactic features of cross-sentence reference, traditionally grouped under the headings of relations of reference, substitution, ellipsis and conjunction. The issue is that of 'the overall effect by which the stable identity' of the 'referents' - what is at issue - comes to be guaranteed in the thread of discourse,⁶⁰ and the most obvious linguistic mechanism realising such an effect, is anaphora,⁶¹ 'the use in one sentence of an item which has the

[56] M.Pechoux op.cit. p.116.

[57] R.Fowler: Literature as Social Discourse op.cit. ch.4. especially pp.64-76.

[58] T.A.Van Dijk: Some Aspects of Text Grammar (1972) Mouton pp.1-12, 26-33.

[59] Additionally, c.f.: R.Hasson: Grammatical Cohesion in Spoken English (1968) Longmans; and more generally, M.A.K.Halliday op.cit. ch.7.

[60] M.Pechoux op.cit. p.117-118.

[61] C.f. O.Ducrot and T.Todoroz Encyclopedic Dictionary of the Sciences of Language (1981) Blackwell pp.281-285; M.Pechoux op.cit. pp.38-40, 116-120.

same referent as, or substitutes for, an item in the preceding sentence - or an earlier one if there is no intervening lexical material to which the anaphoric term could be taken to refer.⁶² More broadly, cohesion refers to the sum of syntactic devices which are prerequisites for the cognitive and narrative wholeness and fluency of a text. Among the effects of such mechanisms is the creation of the impression of the singleness of the text, and the image of autonomy, an image greatly reinforced by the progressive features of intradiscourse. Remaining again at the level of syntax or surface structure, 'progression has to do with the whole stock of features which contribute to a text's logical and temporal sequence: sequences of tenses and time adverbs, logical and temporal connectives (although .. nevertheless; when .. then, and etc), order of introduction of lexical items'⁶³ and narrative linearity generally.

While there is good reason for every caution, the notion of intradiscourse as linguistic surface or microstructure, to some degree implies its binary counterparts; respectively, interdiscourse, deep (semantic) structure (code or underlying system) and macrostructure. The logical point need not detain; what is of peculiar interest for the analysis of discourse and the concept of discursive formation, is the extension of the account of linguistic surface structure to include a critical analysis of the semantic problems and evaluations that emerge at the very level of intradiscourse itself. I have so far utilised an account of intradiscourse which depicts it as an intentionally determined form of syntactic organisation. Intradiscourse, however, in Pecheux's structuralist vocabulary is always the 'discourse of a subject'. Without entangling the analysis too deeply in the intricate and potentially confusing vocabulary of 'subject positioning' and of the 'subject-form' of all discourse,⁶⁴ it is possible to elaborate the point to be made in a more general terminology. Pecheux is concerned to argue that the concept and mechanisms of intradiscourse outlined above, are not purely and simply of

[62] R.Fowler op.cit. p.67.

[63] Ibid.72. To which should be added reference to a surface feature of great importance to legal texts, the absence of progression, or 'localising' features to the text.

[64] Issues in which formalist semiotics, materialist or otherwise intended, delight. C.f. the synoptic account and bibliography in R.Coward and J.Ellis: Language and Materialism (1977) R.K.P. ch.6 & 7.

a syntactic nature. If intradiscourse appears to imply the singularity of a text's authorship and an intentional explanation of its cohesive and progressive mechanisms of elaboration, it is only because no analysis or deliberation has yet been provided of the specifically semantic features of such linguistic operations. Even in its own terms, the syntactic features of intradiscourse imply the active subjectivity which has chosen the specific forms of selection and combination that render the text coherent and fluent. Unsurprisingly, the very concept of discursive formation implies a further, semantic and socio-historical dimension, to the choices or forms of coherence and fluency actually achieved; intradiscourse must be placed within its context, that of interdiscourse and of the social control and ordering of discourse and meaning (ideology) according to a hierarchy of genres, institutions and formations.

c) The syntactic features of intradiscourse raise a number of problems of a semantic nature, problems which Pecheux analyses according to an opposition between 'articulation' and 'preconstruction'. Intradiscourse refers, in the first instance, to a series of intra-text phenomena of cross-reference between lexical items. These items are brought together or linearised, they are articulated, and such articulation has generally been explained in stylistic or psychological terms; their coherence is viewed as explicable in terms of 'thoughts' or 'ideas'⁶⁵ that govern the choice of substitutions, equivalences and so on, actually made in the utterance or text. For Pecheux, however, the whole problem of intradiscourse is to be viewed as considerably more complex. Articulation, to put the point as simply as possible, is always articulation of a present lexical item (word, symbol, concept) with a pre-existent or anterior 'given'. The connection made - the thought or idea - will elaborate a property of the anterior item or, to utilise the idiom of discourse analysis, the articulation is embedded in previous statements, within and without the text, upon the basis of their assumed, recognised or known characteristics and connotations. Articulation, in other words, is to be understood as a primarily discursive (intra-linguistic) process, but as one which implies or, better, presupposes, an anterior, referential

[65] C.f. Benveniste, op.cit., n.28.

(extra-textual/extra-linguistic)⁶⁶ axis of language - that of the pre-given or preconstructed character of the items which the given text actually chooses (seldom fortuitously) to link. The category of preconstruction thus refers to the manner in which the semantic material of the utterance, or the statements and propositions implied by articulation, are in large measure predetermined or given by processes external to the text in question. That which is known or disputable about an object, in the various domains of its usage, is the precondition for, or the presupposition of, the coherence of any subsequent articulations. The preconstructed is the 'modality of the filling of the places of arguments in a predicate, the condition of the formation of the statement'⁶⁷ to which it needs to be added that the relationship between articulation and preconstruction is best viewed as one of potential opposition or disjunction rather than one of straightforward incorporation or resemblance. In which context, Pecheux comments that 'there is a separation, distance or discrepancy in the sentence between what is thought before, elsewhere or independently and what is contained in the global assertion of the sentence'. He concludes more broadly and interestingly that the material cause of the 'effect of meaning' resides in the 'asymmetrically discrepant relationship between two "domains of thought", such that one element from one irrupts in an element of the other in the form of what we have called the preconstructed, i.e. as if that element were already there.'⁶⁸

Two features of the analysis may usefully be elaborated; the first concerning the manner in which interdiscourse governs or shapes the 'preconstructions' mobilised and articulated in intradiscourse, the second concerning Pecheux's more contentious analysis of the manner in which the 'subject form of discourse' necessarily leads intradiscourse to 'simulate'

[66] The distinction between discursive and referential axes is taken from C. Metz: Psychoanalysis and Cinema op.cit. pp.183-191. The most obvious species of linguistic reference is indexical designation, where an understanding of an utterance necessitates information about the situation or context of its enunciation.

[67] M. Pecheux op.cit. p.83.

[68] Ibid.64.

interdiscourse.⁶⁹ Interdiscourse may be defined as the social order or legitimate hierarchy of discursive formations;⁷⁰ it refers, for Pecheux, to the sense in which 'every discursive formation ... is dependent on "the complex whole in dominance" of discursive formations,'⁷¹ and is, in the last analysis, to be understood as itself the expression of a specific hegemony, or of the ideological order of a given society in a particular epoch. Interdiscourse is thus to be seen as a category of mediation between ideology and the specific, historically localised, text. Pecheux's point, however, is more general. Inter-discourse; the relationships of inclusion and exclusion, of competition and collaboration, between different discursive formations (Law, Politics, Ethics, Religion, Psychiatry and so on); is to be understood as the material source of the evident or transparent meanings (preconstructions) and articulations of the discursive formation. In negative terms, firstly, the concept of interdiscourse is an attack upon positivist⁷² and other conceptions of the autonomy or internal development of disciplines and their illusion of self-identity of subject-matter, language and meaning. More than that, however, the concept of interdiscourse and all that it implies, attempts a positive and substantive elaboration of the concrete linguistic mechanisms that lead to what Volosinov was more boldly prepared to refer to as the 'ideological saturation' of the word. It is here that attention is to be focused upon the category of the subject - the imaginary conception of an individual ego or author as the sole explanation of the form that the text takes. Initially, the issue is far from novel; what is involved is a sharp movement away from traditional conceptions of meaning as intentionality, and from their correlative, the traditionally unmediated relation of subject (author/speaking subject) to universal (logic/the internal development of concepts). Meaning is to be viewed,

[69] Simulation refers to the process of hypothetical identification wherein one element or discourse acts or is articulated 'as if', respectively, it shared the properties of another element, or is reducible to another discourse. C.f. M.Pecheux op.cit. pp. 50-51, 57-58.

[70] C.f. G.Therborn op.cit. pp.81-87; M.Foucault op.cit. ch.5.

[71] M.Pecheux op.cit. p.113.

[72] For the sake of completeness, positivism may here be 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) Athlone Press p.32.

rather, as socio-historical, as the end-product or effect of the relationships and organisational forms of language use within and between particular discursive formations. In Pecheux's terms, the theory of discourse requires the extensive development of a non-formalist, non-subjective, theory of subjectivity and so also of meaning. Bakhtin, who had already outlined the general requirements of a materialist concept of semantics, makes the point more eloquently;

no living word relates to its object in a singular way: between the word and its object, between the word and the speaking subject, there exists an elastic environment of other, alien words about the same object, the same theme ... Indeed any concrete discourse (utterance) finds the object at which it is directed already ... overlain with qualifications, open to dispute, charged with value.⁷³

6.2.4 Discourse and ideology

While the broad terms of the alternative concept of meaning have already been discussed, the specific terminology which Pecheux, in common with other recent theories of discourse and discursive processes,⁷⁴ advances as adequate for expressing the overall coherence of the 'complex whole' of dominant discourse, necessitates a number of comments. The prevalent term is that of the subject and of the subject-form of discourse - from the description of the text, indeed, to the definition of ideology as the human condition, it is the category of the subject that reappears and pervades each and every level of analysis. The point may be explained, initially, as a negative one; if the characteristic or dominant ideology of contemporary social relations within Western economies is still that of liberal individualism, then it would be surprising at the very least if such individualism were not reflected in the content and form of the various analytic levels mapped out by the concept of discourse analysis. More pertinently, if the theory of discourse is concerned to account for the 'complex whole in dominance' of discursive formations as a dialectic of

[73] Bakhtin op.cit. p.276, c:f. also 400-401; for a useful commentary upon the relation of Bakhtin to post-structuralism generally, c.f. T.Eagleton: Wittgenstein's Friends (1982) 135 New Left Review 64.

[74] To the works already cited I would add reference to: F Jameson: The Political Unconscious (1980) Cornell U.P.; and to J.Culler: On Deconstruction (1983) R.K.P. ch.3 and bibliography.

intradiscourse, interdiscourse and ideology, the question is clearly raised as to the form or structuration (the coherence) of such a dialectic. The answer to that question, though it is a partial one as yet lacking any fully satisfactory positive elaboration, is one most frequently drawn from the work of L.Althusser in terms of a conception of ideology as that element or feature of social structure which consistently reproduces and shapes the forms of human subjectivity at all levels of social interaction.⁷⁵ Thus, for Althusser, 'no human, i.e., social individual, can be the agent of a practice if he does not take the form of a subject. The "subject-form" is actually the historical form of existence of every individual, of every agent of social practices.'⁷⁶ In less all-embracing terms, it may at least be suggested that specific ideologies at specific times, variously shape, qualify and delimit the roles, perceptions and possibilities of the individual's relation both to him or her self and to social life. The point to be made in terms of traditional linguistics and its concept of the text, is that the substantive character of the subject form of ideology is realised in the continual legislation of the autonomy of the individual speaker and of the author of the text. It is worth citing Pecheux at some length:

... the operation of ideology in general as the interpellation of individuals as subjects (and specifically as subjects of their discourse) is realised through the complex of ideological formations (and specifically through the interdiscourse imbricated in them) and supplies 'each subject with his reality' as a system of evident truths and significations perceived - accepted - suffered. By saying that the ego, i.e., the imaginary in the subject (the place in which is constructed for the subject his imaginary relationship to reality), cannot recognise its subordination, its subjection, ... because this subordination-subjection is realised precisely in the subject in the form of autonomy, I am appealing to the socio-historical process by which the subject-effect effect is constituted - reproduced as an interior without an exterior, and by the determination of the real (exterior) .. and of interdiscourse as the real (exterior).⁷⁷

[75] It is no part of my intention to enter a discussion of ideology as such. The relevant texts on this point are L.Althusser: Lenin and Philosophy op.cit. pp.121 - 173; L.Althusser: Essays in Self Criticism (1976) London p.33-39; to which may be added the useful discussions in G.Therborn op.cit., and in J.Larrain: The Concept of Ideology (1979) Hutchinson pp.154-164 and passim.

[76] L.Althusser: Essays p.95.

[77] M.Pecheux op.cit. p.114. C.f. J.Lacan: The Four Fundamental Concepts of Psychoanalysis (1977) Hogarth Press p.188.

To interpolate somewhat in the interests of clarity, the subject form of discourse and its concepts of autonomy, of author and of speaker, are ideological precisely insofar as they function to exclude any concrete or empirical analysis of the socio-historical environment which both shapes the 'interior' or self conception of the individual and equally provides the explanation of the actual content of intradiscourse. In short, the ideological category of the subject is to be viewed as an abstraction defined in terms of general or universal properties; most notably, in the present context, those of the semantics of intentionality, of the unmediated relation of subject to meaning. On the one hand, the subject in and of discourse is by definition unique, in that it is its own cause or responsibility - a self-presence possessed of a metaphysical freedom of self-determination, which freedom, in the last analysis of individualist ideology, alone accounts for the differentiation and separation, or singularity of the subject.⁷⁸ In this aspect, the category of the subject implies a concept of meaning as a more or less direct⁷⁹ phenomenon of self-expression, and equally presupposes an instrumental perspective upon communication viewed, at its best, as the neutral medium of semantic exchange between subjectivities or 'minds', those of author and reader, speaker and hearer. While it might be legitimately imagined that the concept of communication as variously conceived - as speech act, enunciation, performance and so on - implied a certain rhetorical or dialogic valence to language, such a possibility is foreclosed by the other aspect of the subject, its universality.

Whatever the idiosyncracies of agency - and they are many - all subjects are alike in being subjects. The uniqueness of the subject logically implies its formal universality. The ideological oppositional couplet of 'interior' and 'exterior' adverted to by Pecheux, marks the characteristic relationship of subject to universal, within which relationship both subject and meaning escape from history, or more

[78] For a comparable discussion c.f. J.Derrida: Positions (1981) Athlone Press pp.17-36.

[79] C.f. J.L.Austin: How to do things with words (1962) Clarendon, and the various later elaborations within the philosophy of language do of course distinguish the phases of intention and reception (for instance, utterer's meaning, meaning of the 'uttering' and utterance meaning) but the distinctions are analytic and certainly yield no ground to any concept of the historicity of the utterance.

accurately, fail to break out of the circle of the subject form of ideology. To summarise the issue in the bluntest of terms, the concept of the subject, if taken seriously or literally, implies a myriad and chaotic world of unique and free linguistic agents, all equally possessed of the power to join the anarchy of speech. Within such a problematic, the defining characteristic of meaning (as opposed to linguistic value) will be that it cannot be systematised to any greater degree than can the notional uses of freedom. Saussure, of course, regarded the task as a hopeless one - speech was not to be the object of scientific study. Later endeavours to surmount the problem have tended to straightforwardly invert it and, as was argued earlier, have tended to attach themselves to those aspects of the subject form that are abstract and universal. Structural linguistics is translated into a structural semantics in which a series of essentially binary oppositions are put forward as explanations of the laws governing meaning potential. As a number of linguists have argued, and most clearly in relation to Jakobson's opposition of a metaphoric to a metonymic pole of meaning, the generality of such schemata - they are indeed frequently and explicitly presented as bearing an anthropological or 'omni-historical' status - is their greatest weakness.⁸⁰ Any given instance of language use is likely to display a plurality of different semantic features whose hybrid character and specificity are likely to underline the purely normative heuristic value of distant universal semantic imperatives or prescriptions. In short, the form of meaning can never be either verified or falsified.

There is, however, a final more concrete issue at stake. All the theorists of discourse analysis so far considered⁸¹ consistently argue that objectivist and universalising tendencies within the spectrum of linguistics (Saussure/Benveniste), logico-linguistics (Wittgenstein/Frege) and structural semantics (Jakobson/Greimas) are best understood as representative or symptomatic of a highly specific ideological effect. The simplest explanation is also the earliest; Volosinov postulates a volitional strategy on the part of the ruling

[80] C.f. particularly P.Ricoeur op.cit. pp.174-185; C.Metz op.cit. pp.174-193.

[81] C.f. particularly: V.Volosinov op.cit. pp.23-25, 77-83; M.Bakhtin op.cit. pp.271-3, 288, 305-7, 367; M.Pecheux op.cit. pp. 110-129. For a general overview c.f. M.Gurevitch et al. (eds.) op.cit. ch.3 esp. pp. 69-88.

class, whereby 'it strives to impart a supra-class, eternal character to the ideological sign, to extinguish or drive inwards the struggle between social value judgments which occur in it, to make the sign uniaccental.'⁸² A more developed and sophisticated, non-conspiratorial, position is to be found in the work of Bakhtin, and is indeed inherent in his conception of 'the dialogic orientation of discourse'⁸³ as being the essential property of any discourse. More explicitly, the dialogic orientation of discourse is to be understood in terms of a dual aspect. There is firstly the dialogic orientation of 'intra-language', by which highly proleptic term Bakhtin refers to the fact that language pre-exists the subject to the effect that both word and object are always already overlain with previous dialogues - utterances, meanings, genres and so on. The second aspect to dialogue is termed the 'internal dialogism' of the word - the word is actively shaped by interaction and by its orientation towards the listener.⁸⁴ To the two faces of the dialogic orientation of the word, can be counterposed, respectively, the historical and the sociological facets of meaning to the universalist conceptions of unitary languages and univocal meanings. First, and with characteristic precision in his selection of examples, Bakhtin argues:

Aristotelian poetics, the poetics of Augustine, the poetics of the medieval Church, of "the one language of truth", the Cartesian poetics of neo-classicism, the abstract grammatical universalism of Leibniz (the idea of a "universal grammar"), Humboldt's insistence on the concrete - all these, whatever their differences in nuance, give expression to the same centripetal forces in socio-linguistic and ideological life; they serve one and the same project of centralising and unifying the European languages.

What is at issue, I believe, is a seminal attempt to provide a political history of the stratification of national languages and of the actual struggles, of the unities and conflicts, that constitute the heteroglot reality and social life of discourse. In which respect, it is worth

[82] V.Volosinov op.cit. p.23.

[83] M.Bakhtin op.cit. p.278 ff.

[84] 'The word is born in dialogue as a living rejoinder within it; the word is shaped by dialogic interaction with an alien word that is already in the object. A word forms a concept of its own object in a dialogic way. But this does not exhaust the internal dialogism of the word ... every word is directed towards an answer and cannot escape the profound influence of the answering word it anticipates.' M.Bakhtin op.cit. p. 279-280.

invoking the continuation of the passage already cited:

The victory of one reigning language (dialect) over others, the supplanting of languages, their enslavement, the process of illuminating them with the True Word, the incorporation of barbarians and lower social strata into a unitary language of culture and truth, the canonisation of ideological systems, philology with its methods of studying and teaching dead languages, languages that were by that very fact "unities", Indo-European linguistics with its focus of attention, directed away from language plurality to a simple proto-language - all this determined the content and power of the category of "unitary language".⁸⁵

Elsewhere, Bakhtin further specifies the ideological role of the idea of a unitary language and its directly intentional view of semantics, in terms of a hierarchical and Ptolemaic conception of the linguistic world, 'from whose point of view other languages are perceived as objects that are in no way its equal'.⁸⁶ The Ptolemaic perception of language is expressive of an absolutism that acknowledges only one language as the sole verbal and semantic centre of the ideological world; it is language as myth, as an absolute form of thought,⁸⁷ in which word and concrete ideological meaning are fused or canonically bonded.

To translate the latter point into the more mundane terminology of contemporary discourse analysis, it is probably safest to follow Pecheux, and to argue that one feature of the subject form of discourse is that of its tendency to universalise (naturalise) historically specific, ideological meanings and accents. In the first instance, the argument is a negative one. In creating and imposing a reality for the subject, the universalising tendency of the subject form of ideology perpetuates a miscognition in the simple sense that it obscures or occludes the actual determinations that have created the place, role and freedom that the subject occupies. More interestingly, however, the form of this miscognition is that of the preconstructed, as a positive, imaginary, consensus. Ideology, in other words, replaces the empirical determinations of the subject with a series of speculative, general truths

[85] Ibid. 271.

[86] Ibid. 288.

[87] Ibid. 366-367.

which, in terms of Pecheux's topology of discourse, become:

Simultaneously "what everyone knows", i.e., the thought contents of the "universal subject", support of identification, and what everyone in a given "situation", can see and hear, in the form of the evident facts of the "situational context". In the same way, articulation corresponds both to "as I have said" (intradiscursive reminder), "as everyone knows" (return of the universal in the subject) and "as everyone can see" (implicit universality of every "human" situation). In short, every subject is subjected in the universal as an irreplaceable singular ..⁸⁸

Self-identification in the form of autonomy - as speaking subject, speech act, enunciation and so on - together with the terms or meaning of such self-identity - as the logic of propositions or some other variant of speculative consensus - are both alike interior to the subject form of discourse. More schematically, intra-discourse absorbs interdiscourse and systematises, in the notions of the unificatory consciousness and the freedom of self-expression as unmediated interiority, precisely those exterior determinations of interdiscourse which constitute the discursive formation as a pre-given or transparent system of utterances, forms, sequences and relations of paraphrase generally, which provide the subject as agent with its content. 'Every discourse', remarks Bakhtin correctively, '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 determines the word's actual meaning. All direct meanings and direct expressions are false.'⁸⁹

The questions raised, in short, are those which I initially formulated in the narrower terms of the institutionalisation of discourses and meanings, their restricted appropriation, which was in turn to be analysed according to a background plan of the socio-political hierarchies and divisions which order the discursive whole. It is now possible to take the issue further. In a terminology most often associated with the work of Foucault, power underpins and is expressed in the order of discourse, in the form of 'networks' of established or 'true' meanings. Truth itself is

[88] M. Pecheux op.cit. p.121.

[89] M. Bakhtin op.cit. p. 401.

to be comprehended as the attribution of social value to specific discourses and meanings:

Truth is a thing of this world: it is produced only by virtue of the multiple forms of constraint ... 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 by which 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.⁹⁰

Legal discourse, as I shall detail subsequently, is wholly imbricated within the interrelationships of power and truth or knowledge. Even in terms of its self-articulation, legal discourse is paradigmatically concerned with truth, both in terms of evidence or verification, and also, more generally, in terms of the definition or delimitation of power and powers in the discourse of the rights, duties, capacities and procedural forms generally of both public and private law.

[90] M.Foucault: Power/Knowledge (1980) Harvester at p.131.

7. LAW AS SOCIAL DISCOURSE II; LEGAL DISCOURSE

7.1 LEGAL DISCOURSE

My concern in what follows is to frame, to outline and exemplify, the general characteristics of a concept of legal discourse or, in the terms of the preceding chapter, a materialist rhetoric of law. Substantantively, my procedure, one which I will by and large assume to be self-explanatory, will be that of translating the topology of discourse already proposed, into a schematic account of legal discourse. There are, however, two preliminary points to be made, both of which may broadly be said to concern the scope and potential development of what is admittedly a nascent discipline.

7.1.1 The Underdevelopment of a Discipline.

The first point is a simple, negative, qualification to the concept of legal discourse to be proposed. It is not a concept of law. In one sense, of course, the specific object of a concept of legal discourse is precisely the discursive dimension of law, the definite bodies of discourse and discursive effects through which legal institutions work. In that sense, the study of law as discourse is only ever a partial analysis of law; it would be erroneous in the extreme to suppose that the entire ambit of legislation, legal institutions and juridical practice could, in their entirety, be reduced to an analysis of discourse. There is also, however, a point of substance at issue. Formalistic, and indeed naturalistic, legal philosophies, have consistently endeavoured to define law in terms of a common or single essence or content of the legal sphere, or of legality as such. Law is reduced, in other words, to a 'unitary

necessity or cause'¹ which exists outside it, in the form of an a priori reason, a concept of nature and of natural rights, or indeed a view of economic causality. As Paul Hirst has argued, ' laws have no necessary unity of content, form or function outside of that derived from the legislative processes and legal apparatuses. Laws can be divergent and inconsistent in form and function and remain laws.'² More simply, law is a social practice formally tied to particular institutions or apparatuses and primarily, though by no means exclusively, defined by its use of particular types of discourse. To which it may be added that the refusal to allow any intrinsic or essentialist definition of law opens the way to a view of law as a process or set of processes, and consequently also, as a discourse which is inevitably answerable or responsible, like any other discourse, for its place and role within the political and sexual commitments of its times. In short, law and legal texts are to be treated as accessible and as committed, precisely because they are in themselves contingent rather than universal - even if their historical variability is limited - and because the social or cultural value attributed to legal discourse changes - albeit slowly.

The second point is closely related to the first, and may usefully take the somewhat lengthier form of a comment upon the general characteristics of those few studies that have explicitly attempted an analysis of law as a species of discourse.³ The general point to be made concerns the fact that, while the studies in question provide a considerable amount of material of incidental interest to the analysis of law as social discourse⁴, they are uniformly to be differentiated from the instant study

[1] The terminology is that of P.Hirst: On Law and Ideology (1979) MacMillan pp.106-122 and Appendix 1.

[2] Ibid. pp.111-112.

[3] Most notably, in the present context, F.Burton and P.Carlen: Official Discourse (1979) R.K.P. ch.4 & 5, & passim. B.Edelman: Ownership of the Image (1979) R.K.P. pp. 19-35, 109-113. A.J.Greimas: Semiotiques et Sciences Sociales (1976) Paris pp. 79-128. J.Lenoble et F.Ost: Droit, Mythe et Raison (1981) Bruxelles pp.81-120. Other studies of specific aspects of legal language, analysed from a sociolinguistic or loosely discursive perspective, include J.M.Atkinson and P.Drew: Order in Court; the organisation of verbal interaction in judicial settings (1979) MacMillan/SSRC. P.Carlen: Magistrates Courts (1976) M.Robertson. W.O'Barr: Linguistic Evidence (1982) Academic Press. W.L.Bennett and M.S.Feldman: Reconstructing Reality in the Courtroom (1981) Tavistock.

[4] Such material will, of course, be referred to in the course of my own presentation.

in terms of divergent motive. Each of the studies in turn, though obviously for very different reasons, is primarily less concerned with any systematic description of law as a discourse, than with the elaboration of a set of extrinsic criteria to which legal discourse may be reduced. Thus, to take the most obvious example first, Bernard Edelman's elaborate and frequently highly perceptive account of legal discourse, is nonetheless best understood - in its own terms - as being concerned with legal discourse as an object of study only insofar as it expresses fundamental economic relations. ' This is because the juridical categories, just as much as the categories of bourgeois political economy, are forms of thought expressing with social validity the conditions and relations of a definite, historically determined mode of production, viz. the production of commodities.'⁵ For Edelman, then, legal discourse only has an identity as a function of economic relations, and as 'a discourse of the private appropriation of nature in its historico-social combinative.'⁶ The discursive processes, in other words, which actually make up 'juridical ideology' are not an object of interest or analysis in their own right, they are all and equally reducible to the capacity of the private ownership of property and its expression in the jurisprudential rights of the legal subject.

The remarkable and in many ways seminal work of Lenoble and Ost of the University of Brussels, to take another extreme example, moves in an opposite direction. Their concern with legal discourse is grounded in an attempt to construct a transcendental model of legal discourse as mythology (mytho-logic).⁷ Making a highly erudite use of recent,

[5] Edelman op.cit. p.26.

[6] Ibid. p.27.

[7] Lenoble & Ost op.cit. pp.8-9. 'Mytho-logic' refers to the dependence of the order of logic upon the order of the imaginary and ' denotes the closure of rational thought by virtue of its inscription in a horizon overdetermined by belief. Such belief acts as a reservoir of sacrosanct significations and produces the closure of discourse: dogma and, in the best cases, the ideal. This universe of phantasm is the source of juridical rationalisations ...'

anarchistic, developments within Freudian psychoanalysis⁸, they counterpose determinate (formal) models of logic and of legal logic to a transcendent model of a mytho-logic which, in turn, is utilised to explain the traditional philosophical and practical antagonisms both within legal theory and legal decision making practices themselves. Both the latter categories are to be viewed as more or less direct expressions of certain basic beliefs or articles of faith, whose impulse is to be found in the realm of the logic of myth. In many respects their study is both fascinating and successful - there are considerable advantages to be gained from the analysis of law as myth, or as a circular logic, to which advantages I will return - but the myth is also a social and historical practice, and our knowledge of the discursive dimensions of such a practice is not greatly enhanced by its immediate displacement in favour of an account of the 'meta-juridical' or the transcendental, internally co-ordinated, logic of myth.

In structure at least, Greimas' brief adventure into the territory of legal analysis is not dissimilar to the more elaborate and more critical work of Lenoble and Ost. Just as the latter authors, implicitly at least, reduce legal discourse to an instance of a 'mytho-logic' of a transcendent, anthropological status; Greimas is primarily concerned, in an analysis of one particular legal text (a codification of French commercial law concerning the formation of companies), with the exemplification of a structural model of semantic analysis within a novel domain⁹. Irrespective

[8] Ibid. pp.3-14, 219-294; for a useful summary see Ph.Gerard: *Compte Rendu* (1982) *Revue Interdisciplinaire D'Etudes Juridique* 181-192. The psychoanalytic model used is that of G.Deleuze & F.Guattari: *Anti-Oedipus* (1977) Viking Press. As to their characterisation of their methodology, it clearly takes its inspiration as much from Hegel as from any more substantive concern with the historical development of particular mythologies. Specifically, the study is schematised according to a tripartite division: the function of judgment and mytho-logical rationality; juridical logic and mytho-logical rationality; the philosophy of law and mytho-logical rationality. ' These three developments must be represented as three concentric circles whose centre is occupied by the theme of mytho-logic; or, even better, the link between the three should be conceived as a spiralling movement, ' (Ibid p.10-11) within which, significantly enough, judicial practice acts as the periphery, as the broadest and most opaque circle, while the philosophy of law is conceived as the central circle 'closest to the mytho-logical core.'

[9] A.J.Greimas 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. '

of arguments concerning the value or potential of structural semantic methodology itself¹⁰, the account actually provided of the legal text in question, manages no more than a brief comment upon the peculiarities of the legal lexicon, before it unleashes itself upon an analysis of the grammatical and narrative quadrants which will delimit the logical possibilities (the empty slots) of the discourse contained therein, for all time and for all purposes. From the perspective of legal theory, Greimas succeeds in introducing explicit concepts of semiotic code and of deep semantic structure, as a means of sophisticated entrenchment or further refinement of a view of the systemic determination¹¹ of legal language which I have earlier argued to be already implicit within the philosophy of legal positivism.

Suffice it to say that the value of this study is intrinsic to the linguistic refinements which it introduces into an analysis of legal discourse which does not in any way challenge the positivistic self-definition of the specificity of legal language as a systemic, self-referential, order of conventional and explicit legal norms. Thus, to take one key example, in discussing the nature of juridical practice, 'the production of law, of novel legal rules and significations,'¹² the validity of the legal-linguistic developments involved will determine their content, their content being in major part implicit or given within the structure of the legal grammar itself. Very loosely, the distinctive feature of legal language, for Greimas, is that it is a language of verification, taking the form, in practice, of an explicit set of rules for the construction of valid or 'verified' legal enunciations. For all its linguistic and graphic sophistication, Greimas' analysis of legal grammar

[10] C.f. F. Jameson: The Political Unconscious (1981) Methuen pp.46-49, 121-127, for a particularly acute account of the inadequacies of such a methodology. For a briefer and less effective treatment, c.f. J. Larrain: The Concept of Ideology op.cit. pp.132-140. J. Culler: Structuralist Poetics (1975) R.K.P. provides an account of Greimas' earlier work.

[11] C.f. Greimas op.cit. pp.88-90. Greimas here argues that the code (in its linguistic sense) which underpins the grammar of legal discourse is 'implicit' within the discourse itself. Its explanation is conducted in terms very similar to Kelsen's account of the necessarily logical character of the transcendental presupposition of legal systems' as such; it has the form of a fiat, the 'ensemble of juridical enunciations could not exist except by virtue of an original performative act', which takes the form of an 'originary' constitutional promulgation endowing the system of juridical grammar with its validity.

[12] Ibid. pp. 90-94, at p.91.

adds nothing of substance to the commonplaces of legal positivism, beyond the addition of a further layer of descriptive metalanguage. The peculiar feature of legal discourse is that it 'transforms' or 'translates' (corrects and verifies) ordinary language and ordinary meanings into the closed code of the legal system. The crucial question of how this process takes place, with what content and to what effect, is answered by stating (repeating) that the rules of the legal grammatical code are implicit within 'practical jurisprudence', which requires the conformity of judicial utterances to the law in force¹³.

In each of the cases reviewed, the omission to be singled out and emphasised in the present context is that of the failure to provide a substantive analysis of the discursive processes through which the categories of the 'economic', the mytho-logical' or the 'semantic structure' are realised or have their effect. Certainly the studies in question map out the generic contours which are seen to structure (in the main part functionally) the effects of the specific text, but they simultaneously omit to analyse the moment or instance of discourse itself, as that complex and historical mechanism whereby the utterance or text adopts or, better, constitutes, a practice and position (social, political and ideological) within the stratified whole of an existent language system. What prevents the development of such an analysis, of course, is not simply the absence of the requisite concept of discursive process, but the more general propensity of analysts of legal discourse to adopt, either explicitly or tacitly, a thoroughly structuralist concept of linguistic analysis. As I argued earlier, the adoption of a formalistic account of the language system is always prone to lead to a similarly motivated concept of discourse. I shall illustrate the point in some detail by turning to my final example, the study of 'Official Discourse' by Burton and Carlen, a work which in certain of its other features, provides an admirable if difficult introduction to some important sociological features of legal discourse.

[13] Ibid. p.92.

The specific difficulty which I wish to address¹⁴ concerns the distinction and opposition between linguistic system and linguistic practice, and may be posed in terms of the relationship of intradiscourse to interdiscourse. To begin with however, it needs to be briefly restated that discourse analysis is born of the belief that linguistic practice is the primary category in the resolution of the traditional opposition between language system and language use. Further, linguistic practice is central to the understanding of the dual existence of the language system, its virtual or normative systematisation (vocabulary, syntax, phonology) and its actual existence (its historicity and stratification). Suffice it to say that a concrete analysis and criticism of the discursive processes and semantic problems inherent in any given linguistic practice entails an analysis of the interrelationships of linguistic practice and linguistic system, in terms of both the normative dimension of the linguistic system and in terms of the historicity of the actually existent language system. An analysis of discourse which fails to account for the full linguistic complexity of language as the interdependent whole of system, existence and use, is likely to drastically oversimplify or overgeneralise its description of the relationship of intradiscourse to interdiscourse.

More concretely, Burton and Carlen begin this aspect of their study with the laudably motivated proposal that discourse analysis requires a 'non-normative and unpossessed (i.e. non-subjective) characterisation of meaning.'¹⁵ Their intention, in brief, is to adopt a methodology of discourse analysis which will be capable of explaining the semantics of the text in terms of the collective constraints and dialogic or rhetorical conditions under which it was produced.¹⁶ Difficulties arise, however, at the point when they endeavour to specify the linguistic basis or textual realisation of the 'extra-discursive' constraints which govern the meaning of the instance of discourse. Reformulating the traditional linguistic opposition of system to use, in terms of order to anarchy, they explicitly

[14] I shall not here rehearse the broader criticisms of the style and methodology of the study which I have detailed elsewhere; see, P. Goodrich: Review (1982) 10 Int. Journal of the Sociology of Law 448; P. Goodrich: Antinomies of Legal Theory (1983) 3 Legal Studies 1.

[15] F. Burton & P. Carlen, op.cit. p.27.

[16] Ibid. pp.16-23.

reject the concept of a language system and argue that 'discourse analysis can be thought without the law of rule (norm)'.¹⁷ They later state that 'in our analysis ... the concepts of metaphor and paradigmaticity, and metonymy and syntagmaticity, specify the discursive effectivities of the extra-discursive "desire" '¹⁸ producing the meaning of the text. In all probability the two statements are irreconcilable, at least in so far as the latter concepts referred to only bear a meaning or have a use by virtue of their prior inscription within rhetoric and linguistics.¹⁹

More sympathetically, however, Burton and Carlen are merely guilty of an enthusiastic overstatement of an intention to utilise a method of analysis which was pioneered by Jakobson and which superimposes the rhetorical terms of metaphor and metonymy onto the linguistic terms of paradigm and syntagm. Although their references are almost exclusively to secondary sources²⁰, their definition of the categories concerned bears a close resemblance to Jakobson's. In the first instance, in principle at least, paradigm and syntagm appear to refer to textual (intradiscursive) linguistic mechanisms of selection and combination.²¹ Metaphor and metonymy, on the other hand, are essentially secondary processes (interdiscursive); as in classical rhetoric, they correspond to relations of similarity and contiguity within the broader, referential, ambit or axis of the text. While it seems clear that Burton and Carlen at least imply a distinction of the sort outlined - paradigm and syntagm are seen as effects of code and syntax, metaphor and metonymy as semantic effects

[17] Ibid. p.28.

[18] Ibid. p.30.

[19] C.Metz op.cit. pp.152-153 comments most appositely with respect to current usages of those terminologies (metonymy, syntagm and so on): ' But as soon as you try to take it a bit further, you come up against the fact that in their respective areas of origin each of these notions has a fairly complex past of its own; and so, getting to grips with anything more than insubstantial cliches or fashionable catchphrases - since a concept always goes back to the place of its elaboration in the history of knowledge even, and especially if it is to be carried over to another field - requires some degree of willingness to work back through the problems, not to remain trapped in a position which knows nothing of its antecedents.'

[20] With the exception of a brief discussion of Saussure: Course in General Linguistics (1974) London. No great degree of elucidation is provided by their own explanation of their method: ' By a series of metaphoric and metonymic transpositions, we have been able to use in our analysis of official government publications some of the concepts which Saussure used in his investigations of linguistic signs. ' F.Burton & P.Carlen op.cit. p.28.

[21] Ibid. at p.31, 95-6, 103-104.

of the orientation of the discourse to the extra-discursive - it is equally clear that they are quite oblivious to the linguistic and semantic difficulties inherent in such a reductive, binary, schema. The difficulties may be summarised in terms firstly of the coherence of the schema itself, and, secondly, in terms of the potential and limitations of its application.

A lengthy tradition of structurally oriented linguistic analysis has made use of variously formulated versions of the Saussurian opposition between 'associative' and 'syntagmatic' relations.²² The key to the distinction lies in the fact that it refers to two ways of arranging signs - by combination and selection - which are intrinsic to the language system or code. The opposition, according to Saussure, concerns the functioning of language, or the characteristics of the sign, as such - its linearity and forms of differentiation - and is profoundly semiological (semiotic). Jakobson does not challenge the structural, semiotic, character of this distinction or supposed law, but projects it onto the divisions of rhetoric and suggests that the figures of metaphor and metonymy correspond to, and are determined by, the principles (linguistic) of combination/contiguity, and selection/substitution. While the semiotic character of the metonymic pole of the opposition is reasonably self-evident - it is stated to be straightforwardly a question of syntactic fact - the metaphoric pole is also, for Jakobson, a feature of the semiotic code: ' Let us, within the framework of synchronic linguistics, examine ... the difference between syntax and semantics. Language entails two axes. Syntax is concerned with the axis of concatenation, semantics with the axis of substitution.'²³ The rhetorical duality of metaphor and metonymy, in other words, corresponds to or represents, the duality of semantics and syntax within a structured, semiotic whole.

[22] F.de Saussure op.cit. pp.123 ff. L.Hjemslev: Prolegomena to a Theory of Language (1961) Wisconsin, distinguishes between relations in absentia and relations in praesentia; A.Martinet: Elements of General Linguistics (1964) London, between the now standard terms of paradigm and syntagm.

[23] R.Jakobson: Selected Writings II (1971) The Hague, Mouton 567, 565.

There are a number of interesting questions to be raised as to the linguistic and rhetorical viability of the latter opposition, the final product or achievement of Jakobson's structuralist zeal. On the one hand, it would appear implausible to regard all forms and levels of metonymic contiguity as syntactic; where contiguity/ metonymy is lodged at the level of relations between referents rather than signifieds, it involves a contingent, real, relation rather than any necessary syntactic liaisons. In the case of synecdoche (the part for the whole; e.g. crown for monarch), contiguity is but one aspect of a rhetorical figure which may equally be based upon relations of identification or symbolism which are largely metaphorical. On the other hand, the restriction of semantics to metaphor, conceived as substitution, is arguably both too narrow and too vague. It unduly limits semantics to selection between entities associated in the code, while at the same time it is arguably too broad in that it subsumes under the single figure of metaphor a wide variety of heterogeneous operations of substitution and selection at the various levels of the code, as lexis, grammar, metalanguage and semiotic system generally. The crucial point, however, is that the binary distinction between metonymy and metaphor is only made possible in Jakobson's work, by virtue of the privileging of semiotics over semantics and, more specifically, it results in the omission of any adequate concept of discourse. The structural linguistic basis of the series of oppositions elaborated, is nowhere clearer than in Jakobson's attempts to apply these model polarities to the domains of art, poetry, film and psychoanalysis.²⁴Faced with specific texts or instances of discourse, Jakobson provides a comprehensive analysis of the wholly formal aspects to their linguistic patterning as texts (literal or metaphoric) and then provides a generic label which classifies a text, genre or non-linguistic (but language-like) sign system, as evincing a preference for one or other type of rhetorical/semantic arrangement. Poetic realism, for instance, is predominantly metonymic; romanticism and symbolism are metaphoric. The

[24] R.Jakobson & M.Halle: The Fundamentals of Language (1956) The Hague, Mouton pp. 90-96. R.Jakobson: Linguistics and Poetics; R.Jakobson & C.Levi-Strauss: Charles Baudelaire's 'Les Chats'; both in R. & F. de George (eds): The Structuralists (1972) Anchor pp.95-120, 124-146. For an extensive treatment of the problems of treating cinema technique as a language, c.f. C.Metz: Film Language (1974) Oxford.

epic novel is metonymic; the comedy metaphoric. The examples could be multiplied, but the essential point is unaltered; the duality of syntax and semantics renders the analysis of intradiscourse far too narrow - it is to be treated as a question of linguistic functions only - and the analysis of the interdiscursive (or principally rhetorical) features of the text so broad as to be virtually non-existent - they are to be comprehended and subsumed under one of two rhetorical effects.

While it might be possible to defend Jakobson's analysis on the grounds that the discourses he actually analysed were primarily aesthetic²⁵, no such defence is available for the study of legal discourse. Burton and Carlen dramatically effect an inversion of Jakobson's methodology. Having, at the outset, jettisoned the concept of linguistic system altogether (and so presumably those of vocabulary and of syntax as well) they concentrate their attention wholly upon the rhetorical labels of metaphor and metonymy, to which the axes of paradigm and syntagm are unexplained parallels. Despite general statements of intention to the contrary²⁶, there is little evidence in the textual analyses which they provide, to suggest that they view intradiscourse as anything more than a series of functionally explicable interdiscursive, rhetorical, effects. The rhetorical categories (and so semantic axis of language) are primary, in other words, and are projected, in precise antithesis of Jakobson's procedure, onto a corresponding opposition of paradigm and syntagm, which are in turn enigmatically defined as 'the immediate ecosystemic constituents of a discourse's global (semantic) structure.'²⁷ More concretely, their analysis displays the following (metonymic) order of progression. A very useful analysis of the material place and role of law within the state apparatus as a whole, ends with the tabulation of the socio-political functions which Official Discourse is to perform: the functions of incorporation (the production of information utilisable for purposes of social control), legitimacy (the refutation of subversive interpretations of breakdowns of law and order) and, finally, confidence (the reaffirmation of images of the state's administrative rationality and

[25] For a convincing rejection of such a hypothetical defence, c.f. R.Fowler: Literature as Social Discourse op.cit. pp.129-141.

[26] F.Burton and P.Carlen op.cit. pp. 31, 51-52, 89.

[27] Ibid. p. 30.

democratic legality).²⁸ There follows a brief chapter on the specificity of legal discourse; its ability to fulfill its functions by virtue of a unitary - though theoretically incoherent - set of epistemological guarantees of its own truth and justification; the 'judicial stare'.²⁹ The authority of state and law are discursively maintained in legal texts by the combination and conflation, within the 'judicial stare', of empiricism (the reliance upon the unmediated facts of legal experience) and rationalism (the dogmatic privileging of the normative content of legal concepts). The judicial stare is the key then, to the analysis which is subsequently provided of judicial and official discourses on breakdowns of law and order. It is the dogmatic precondition both of the narrative structure of the discourse and is also its normative guarantee of objectivity.³⁰ It is the epistemological sovereignty of the judge (as author), which alone explains the stylistic and discursive processes of the discourses analysed.

The study proceeds, in other words, from a very creditable sociological elaboration of the institutional site of legal discourse, to an elaboration of certain interdiscursive properties and constraints contained within the unitary discursive function of the judicial stare. The level of analysis is explained as being that of 'modes of knowing', of the elaboration of the discursive conditions of a statements' possibility, but neither the substantive categories used (empiricism, rationalism, positivism and so on) nor the few analytic conclusions reached, differ in any significant respect from the traditional concerns of epistemology. Their concern is not with the language of the reports, nor do they provide any analysis of the discursive processes which realise, linguistically or intradiscursively, the socio-political motives of the legal form. Official Discourse is rather analysed from a perspective lodged at the level of interdiscourse, which is in turn conceived, first, as a technique or mode of knowing (empiricism), and, second, as a rhetoric or logic (rationalism) of justification. Towards the end of the study³¹, it is

[28] Ibid. p. 51.

[29] Ibid. p. 69, 57-58.

[30] Ibid. p. 69.

[31] Ibid. pp. 95-113.

true, the linguistic terminology or generalised labels of paradigm and syntagm, metaphor and metonymy, are briefly re-introduced as a means of characterising the essentially interdiscursive ordering of concepts within the texts analysed, but the use of such labels is itself metaphorical or rhetorical (figurative) rather than linguistic or intradiscursive.³² Nowhere in the study is a single metaphor or metonymy actually analysed or explained in its singular linguistic existence; nor, in terms of paradigms and syntagms, is any specific lexical or syntactic feature of the texts isolated or reviewed. Far from providing an analysis of discourse and discursive processes as forms of language use or linguistic practice, Burton and Carlen conceive of discourse analysis as a somewhat ill-specified set of generic oppositions within interdiscourse which somehow allow the analyst access to the 'deep structure' or semantic presuppositions (ideological universals) of a series of texts which apparently lack any coherent or relevant - mediating - linguistic surface.

Put somewhat differently, the most immediate difficulty with the study is that it attempts to do too much too rapidly. To a degree, it specifies the semantic effects of a discourse but it omits to evidence how those effects are achieved; it analyses the ideological dimensions of a discursive practice but refuses to regard the practice itself as a coherent or intelligible object of study, the practice is treated as being predetermined, or predestined to be no other than it is. In summary, I will argue that the analysis provided is both too easy and, in a more profound sense, contradictory. In the first place, legal and official discourse are conceived as ideological state apparatuses whose function is solely and simply - perhaps conspiratorially - that of appropriating and integrating material social and institutional conflicts (breakdowns of law and order), into the dominant paradigm of liberal democratic consensus. Creditably enough, discourse is thus to be viewed as a dialogic and rhetorical act of semantic appropriation³³, although, significantly enough, this is a point of principle and is not based on any

[32] Ibid. e.g. pp. 116-118. The end product of the analysis is that of inserting descriptions of epistemological operations - common sense, judicial satisfaction, empiricist subjectivism, positivist empiricism, natural reason, and so on - into the argumentative context of the texts reviewed.

[33] Ibid. p. 45.

sociolinguistic account of the actual register or audience of the texts under discussion. It is precisely because the discourses in question are to be viewed as simple effects of a series of essentially unitary, overarching, ideological motives or functions, that they can be so swiftly and simply described or dismissed as no more than semantic 'celebrations' of certain already known ideals or images (illusions) of how society and the individual work.³⁴ In this aspect the analysis of judicial discourse provided is relatively unsurprising in all but its language, and may be reformulated jurisprudentially as follows. Legal discourse is argumentative rather than necessary or scientific. In any given instance, the predominant ideological characteristic of legal argument is the highly selective manner in which it 'particularises'³⁵ or translates a series of sociological relations and conflicts into a narrow set of legally relevant facts or issues. As a number of studies have argued³⁶, this particularisation or decontextualisation of legal discourse is its most significant ideological hallmark: concrete social relationships and real (social) people are transmogrified into the abstractly free and equal legal subjects of the legal code. Burton and Carlens' contribution to this analysis is that of displaying, though not explaining, the extent to which this ideology of legal subjectivity and 'inter-individual' relationships penetrates the interdiscourse of the law: the meaning of a legal text is to be understood in terms of its imposition of an idealised order, or series of semantic preconstructions, onto a set of material issues and social conflicts which have in turn to be rewritten as the interrelationships of a series of individuals as legal subjects. Responsibility - praise and blame, innocence and guilt - can thus be distributed between the subjects of the legal text without threatening the social order or collective relations that produced these individuals and their conflicts.

While I have undoubtedly omitted a number of the details and refinements of the study, there is nothing in the analysis of legal

[34] Ibid. p. 95.

[35] C.f. W.Murphy and R.Rawlings op.cit. pp. 618-623.

[36] E.g. Z.Bankowski & G.Mungham: Images of Law (1976) R.K.P.; T.Mathieson: Law, Society and Political Action op.cit.; R.M.Unger: Law in Modern Society (1976) Free Press.

narrative³⁷ or of discursive selection³⁸ which could alter the level of descriptive abstraction at which the work is situated. The point remains throughout that the concept of legal discourse being put forward by Burton and Carlen is really no more than an analysis of a specific feature of an ideology - which ideology is itself conceived as a series of functions producing homogeneous effects. While their analysis does usefully illustrate the fact that ideology is primarily a discursive process, the analysis of the discourses themselves is epistemological and prescriptive: by adopting certain 'positions', by assuming certain idealised meanings, and by accepting certain correlative 'guarantees of objectivity', the legal discourse successfully negotiates a task of diffusing threats to order and consensus. More broadly, the discourse responds according to a very narrowly conceived set of imperatives to the extra-discursive functions it is to fulfill. Discourse is in that sense dialogic, but at the same time the actual character and means of the dialogue whereby the discourse achieves its functions as effects are implicitly homogeneous and are certainly unanalysed. If the term discourse is to avoid becoming no more than a catchphrase for the textual character of ideology, it is indisputably necessary to examine how it works as discourse, as a linguistic practice or as the taking up of a position in language. By failing to analyse the specific dialogic features and the actual language of the reports, and by ignoring the lexical and syntactic features of legal discourse, a great deal of the credibility of the study is, unfortunately, lost. On the one hand, there is a contradiction inherent in stating that discourse itself is necessarily dialogic if no attempt is made to analyse or exemplify the specific and linguistic forms of that dialogue. It is insufficient to assume that because a discourse has certain semantic effects, or responds to certain extra-discursive requirements, that the language of such discourse must necessarily and uniformly comply with the tasks or functions it is set. It is a gross oversimplification to suppose that because it is possible to define a correlation between the extra-discursive origin of a discourse and the 'preferred reading' or semantic product of the discourse as realised, that

[37] Op.cit. pp. 95-103.

[38] Ibid. pp. 69-77.

the intervening medium - language as intradiscourse - is self-evident and unproblematic, without recalcitrance and without oppositional tendencies of its own.

The point is an important one because what is at stake is not only the adequacy or otherwise of a description of the politics of legal intradiscourse but also the coherence and credibility of that entire array of substantive jurisprudential techniques and categories that serve precisely (as metalanguage or hermeneutic) to maintain the accepted and wholly antithetical account of the unity and closure of legal discourse. A critical concept of legal discourse, such as that proposed by Burton and Carlen, is too easy or insufficiently critical if it is simply prepared to rest at the level of ideology as interdiscourse. In reviewing no more than the effects of a discourse in the generalised terms of metaphoric and metonymic strategies, it fails to account for the actual reception or 'reading' of legal texts within the legal institution itself. It assumes, upon the basis of an unargued, structural, conception of semantics, that certain of the key meanings and strategies of the texts will necessarily force the the various audiences of the law to passively accept the ideology that the text presupposes and repeats. The point is that legal discourse is considerably more complex and multifaceted than its description as a set of partially substantiated semantic effects allows. It has its own history, its own interpretative techniques and its own metalanguage of methodology; it is contradictory, in other words, to suppose that the dialogic nature of legal discourse is solely a feature of its explicit semantic presuppositions and choices alone, without at the same time showing that legal language in its entirety is embedded in the history of its institutionalisation and in the complex interrelations of various languages, multiple audiences and frequently divergent communicative and practical effects. Legal language, I shall argue, is not purely and simply the malleable or transparent instrument of ideological purposes.

7.1.2 Legal Intradiscourse

I have argued in the foregoing section that an adequate account of legal discourse and of legal linguistic practice more generally, requires a recognition of the complexity and diversity of legal institutional practice. Further, I have argued that it is both undesirable and erroneous to define law in terms of a unity - discursive or other - and that such an argument applies with equal force both to traditional metaphysics of natural law and legal positivism, as well as to more recent structuralist elaborations. As regards the latter theories, the tendency to adopt a 'macrosociological' or structural definition of law as, for instance, the exercise of power, the dominant ideology or as the fetishism of commodities, is peculiarly damning to the radical purposes or alternative politics that generally underpin such analyses. The major problem is, I believe, that of a tendency to focus upon certain specific features of legal regulation and upon highly specific bodies of law, and then to generalise these local facets of, for instance, criminal law, property law or contract law, into an overarching theory of law as a form.³⁹ At all events, the extent, scope and discrepancies of legal regulation lend admirable support to the view that one of the attractive features of a concept of legal discourse is precisely its avoidance of the problem of the form of law, and its selection of a somewhat narrower object of study, that of law as a language and as communication. Even so, it is necessary to recognise the wealth and diversity of the various legal genres, and to cautiously admit that it may be problematic to generalise too rapidly from specific features of legal discourse, a theory of legal language as such. For that reason, together with more pragmatic limitations to the scope of the present study, I must needs stress that the following is only a preliminary analysis, an attempt to characterise and exemplify in a schematic fashion certain of the peculiarities of legal discourse without in any way claiming to be comprehensive or complete.

a) Institutionalisation. The institutionalisation of legal discourse is a multifaceted problem and raises a diversity of issues, ranging from

[39] C.f. in a slightly narrower context: H.Collins: Marxism and Law (1983) Oxford pp. 35-45, 52-74.

questions of a sociological and socio-linguistic character, to questions of a properly rhetorical and semantic nature, which problems cross-cut the distinction earlier made between intradiscourse and interdiscourse. Although I shall return subsequently to certain of the issues raised, the primary interest of the institutionalisation of legal discourse is to be treated as of a straightforwardly sociological nature: what are the key features to the institutions to which legal discourse is most closely tied, and how do those institutions ensure the 'social authorisation' of that discourse ?

In a generic sense, the problem is a familiar one. It is a commonplace of positivistic legal analysis that law is a social and institutional fact. Within the positivist analysis, of course, the question is rapidly subverted into an elaboration of the hierarchical normative and conventional status of law, and neither the social nor the factual character of its institutionalisation is long retained. It remains the case, however, that positivist analysis implies a substantive, institutional aspect to what is generally termed the 'concretisation'⁴⁰ of legal norms. Faced with the basic question of the validity or legality of a specific discursive practice - the issuing, for instance, of a ruling or court order - the analysis of the normative presuppositions of such a concrete norm also entails reference back to an institutional hierarchy of socially authorised or 'recognised' legal usages - texts, conventions and principles associated with specific social bodies. In other words, positivist analysis may be capable of reformulating the problems of institutionalisation in a normative terminology but it cannot wholly exclude them. More than that, however, the characteristic effect of the description of legal institutions in terms of conventions and norms is that of creating an image of legal discourse as being tied to institutions that are autonomous and impartial, by virtue of their internally defined, hierarchical, normative self-regulation. In the first instance, then, we may borrow from the work of the rhetoricians and regard the 'identification' of certain texts with an autonomous body of institutional practices as an activity of an obviously symbolic nature:

[40] H.Kelsen: General Theory of Law and State (1945) Harvard p. 216 ff.

we are clearly in the region of rhetoric when considering the identifications whereby a specialised activity makes one a participant in some social or economic class. "Belonging" in this sense is clearly rhetorical ... the very stress (within legal education) upon the pure autonomy of such activities is a roundabout way of identification with a privileged class, serving as a kind of social insignia promising preferment.⁴¹

The sociological point is that legal discourse is embedded, in a highly specialised and self-conscious way, in institutions of a high social status and prominence, to which access or professional entry is severely restricted. The most immediate phenomenon of 'recognition' of legality is in no sense intrinsic to the legal order - a matter of the 'internal attitude' of officials of the legal system - but straightforwardly extrinsic. Legal discourse is socially and institutionally authorised - affirmed, legitimated and sanctioned - by a wide variety of highly visible organisational and socio-linguistic insignia of hierarchy, status, power and wealth. It is, in an altogether familiar sense, the ritual trappings of the law - its theatrical institutional settings,⁴² the elitist character of its personnel,⁴³ and the extent of its power to punish,⁴⁴ that initially differentiate the legal institution and its discourse from the closely related domains of political, religious and ethical discourses.

If there is a unity to the institutionalisation of legal discourse, it is not a unity based upon any autonomy from socio-political and ideological affinities⁴⁵ but rather, the precise opposite, a paradigmatic unity of an ideologically saturated, elitist, professional practice. To fully substantiate such a broad characterisation would, of course, necessitate an extensive sociological analysis considerably beyond the

[41] K.Burke: A Rhetoric of Motives (1969) Univ. of California Press pp.27-28; c.f. also J.Lenoble et F.Ost op.cit. p.83 where they comment that '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.'

[42] C.f. e.g. P.Carlen: Magistrates Justice op.cit. pp. 18-38; T.Mathieson op.cit. pp. 77-111.

[43] C.f. e.g. J.A.G.Griffith: The Politics of the Judiciary (1981) Fontana pp.17-39; A.Patterson: Judges, A Political Elite? (1974) B.J.L.S. 118.

[44] D.Garland & P.Young: The Power to Punish (1983) Heinemann esp. ch. 1 & 9.

[45] P.Carlen: On Rights and Powers, in D.Garland & P.Young (eds): The Power to Punish (1983) Heinemann. I am tempted to extend the rather apposite formulation: 'The judiciary are only independent in one sense: they are independent of democratic control and review.'

scope of the present work. Certain features of this unity of legal institutionalisation, may, however, be singled out: its educational, methodological and imperative aspects in particular have, in differing ways, frequently been ignored by sociologists unfamiliar with the more bizarre and esoteric features of legal pedagogy and legal practice. Posed in terms of the social organisation of a discourse, the control over the selection and distribution of a knowledge, legal education is clearly an important facet to the highly restrictive process of institutionalisation. Entry into law school, the predominant mode of access to the legal profession, is, of course, itself a highly competitive process, which, in the wider context of educational success and failure⁴⁶, already lends an element of uniformity to the group of future professionals. More importantly, entry into law school is the start of an extremely lengthy process of socialisation into the techniques and languages of an authoritarian hierarchy:

This training is a major factor in the hierarchical life of the (law). It encodes the message of the legitimacy of the whole system into the smallest details of personal style, daily routine, gesture, tone ... and expression - a plethora of p's and q's for everyone to mind. Partly these will serve as a language - a way for the young lawyer to convey that she knows what the rules of the game are and intends to play them. What's going on is partly a matter of ritual oaths and affirmations ... and partly it is a substantive matter of value. Hierarchical behaviour will come to express and realise the hierarchical selves of people who were initially only wearers of masks.⁴⁷

Law school is, of course, only a preliminary stage, preparatory to later,

[46] For critical evaluations of the sociolinguistic and broad class contours of educational success and failure, viewed in the overall terms of socialisation, c.f. M.A.K.Halliday: Language as Social Semiotic (1978) Arnold ch.3 & 5. Also, B.Bernstein (ed): Class, Codes and Control vol.2. (1973) R.K.P. M.F.D.Young (ed): Knowledge and Control (1971) Collier MacMillan Pt.I.

[47] D.Kairys (ed): The Politics of Law (1982) Pantheon at p.53. C.f. also, R.M.Unger: The Critical Legal Studies Movement, op.cit. pp. 666-670: 'the real message of the (legal) curriculum is the (teaching) that a mixture of low-level skills and high-grade sophistic techniques of argumentative manipulation is all there is - all there is and can be - to legal analysis and, by implication, to the many methods by which professional expertise influences the exercise of state power ... The shared lesson (of legal teaching) is that the order of thought and society is contingent and yet for all practical purposes untransformable. They preach an inward distance from a reality whose yoke, according to them, cannot be broken. They distract people by enticing them into a hierarchy of smart alecks.' (p.669)

more specific, stages of professional training which culminate with entry into the most tightly knit form of socialisation of all, the legal system itself. At each stage it is the self-evident authority of the law and of the various levels of the legal hierarchy which is to be inculcated as an assumption underlying the interactions and self-presentation of the institution as a whole. Mathieson, for instance, usefully isolates five features contributing to the hegemony and authority of the legal superstructure.⁴⁸ The impression of independence or freedom of action and judgment in all contexts, including those where the reality of the context is that of adjustment to external material circumstances. The formality, ritual and pomposity of professional interaction and procedure. The sophistication and elegance of legal communication, the restricted and controlled character of its rhetorical settings. The stress laid upon the unity of the system and finally, and correlatively, the restriction of conflict within the system to conflict over norms and words rather than interests or motives, conflict of an anodyne kind which will ideally take the form of disagreement over legal relevance and the legal meaning of terms of art.

To formulate the point more broadly, in terms of legal discourse, it is a question of a socially institutionalised set of restrictions or limitations upon who may speak, how much may be said and upon what topic and in what contexts. In one aspect, the entire process of socialisation into the legal institution is a question of learning deference and obedience, a question of explicit and implicit education into the requisite modes of interaction - the forms, procedures and languages - of the different levels, functions and topics of the legal system. Very broadly; constitutional conventions, the doctrine of the separation of powers, the ideal of the rule of law and later developments and elaborations of the concept of natural justice, together with the obvious features of adversarial trial and criminal and civil laws of contempt of court (particularly rules relating to the reporting of matters sub

[48] T.Mathieson op.cit. pp. 89-111.

judice)⁴⁹ all, in different ways, institutionalise restrictions upon who may speak and the scope and topics that their discourse is entitled to. To such very generalised restrictions must be added the far more detailed rules of legal methodology in relation to the hierarchy of legal texts. Rules of statutory interpretation and the doctrine of precedent, together with the much more detailed and generally less than explicit features of the 'legal art' of interpretation and argumentation within specific legal disciplines or bodies of law (the role and status, for instance, of Equity or of specific principles, presumptions, customs and maxims), together combine to determine an institutional and discursive hierarchy of authorisation over who may think and speak and what may be thought or said. The apparently determinate ordering of legal texts according to an institutionalised, social ontology of sources of law, shields legal discourse from the potential threat of having to justify the form and content of the exercise and administration of power in terms of any discourse other than the traditional, patriarchal, and essentially a priori or given, legitimation internal to the legal hierarchy itself. The primary procedure for such legitimation is, as stated, the institutionalised restriction of authorised texts, which is combined with interpretative procedures which generally ensure that the only valid enunciation, apart from that of the authorised text, takes the form of exegesis, commentary and reinterpretation - all of which may be generically described as forms of citation and repetition; the law is said, remains said, and remains to be said.

I have so far focussed upon educational and methodological features of institutionalisation that fall within the general ambit of an ideological and symbolic manipulation, the organisation of consent and the internalisation of hierarchy or repression. Such processes certainly carry with them a number of highly structured ceremonial, ritual and discursive procedures of affirmation and sanction, but it remains finally

[49] The Contempt of Court Act 1981 ss. 1-7 provides a somewhat confused schema of a 'strict liability' rule which now governs statutory contempts of court. By s. 6, however, the common law rules of contempt are retained as intentional contempts, requiring proof of mens rea. The common law rules remain a powerful instrument for control of media reporting and criticism of the court, while, in more direct terms, the common law offence of 'contempt in the face of the court' remains (subject to s.12) to deal with those who scandalise the court in presentia.

to comment briefly upon the most basic and in many ways most obvious facet of legal institutionalisation, the imperative character of the legal system and so also of its discourse. In its most explicit and fundamental expression, law is the monopoly and codification of authorised and organised public violence. Violence and terror are a primary feature of the legal institution and of the social experience of it:

not merely because (they) remain in reserve, coming into the open only in critical situations. State monopolised physical violence permanently underlies the techniques of power and the mechanisms of consent: it is inscribed in the web of disciplinary and ideological devices, and even when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear.⁵⁰

The efficacy of law, in other words, is never that of pure discourse, the spoken word and the issuing of rules alone. It presupposes organised force and mechanisms of fear whose real basis far exceeds the bounds of the specifically legal institutions of the contemporary nation state, whose potential and capacity for violence and the monopoly of war, raises the spectre, the possibility, not merely of political and racial genocide, but also of the destruction of the species.

b) Lexicon and syntax. The institutional reality to which legal discourse is tied, is of a more than purely sociological interest alone. It also bears clear implications for the analysis of law as a form of communication with a specific discursive content. In the general terms of law as a structure of communication or as a specialised rhetoric⁵¹, two features of its institutionalisation would appear to be of especial importance. First, the unity of the legal system which, in sociological terms, refers to a complex of features already outlined; primarily the limitation of legal discourse to a restricted set of hierarchically

[50] N.Poulantzas: State, Power, Socialism (1978) London p.81. The point is also made less directly in F.Burton and P.Carlen op.cit. ch.4 and pp.78-85.

[51] I am consciously avoiding use of the term 'code' in its technical meaning, because of its semiotic derivation, although I am aware that certain recent elaborations, notably those of R.Barthes and of U.Eco, come close to the position here adopted; namely, that the code is socially produced for specific purposes of communicational and instrumental function. C.f. U.Eco: A Theory of Semiotics (1979) Indiana U.P. Ch.2. esp. pp. 139-151; & pp.276-314. R.Barthes: S/Z (1975) London.

defined speakers, together with the internal shielding or valorisation of specific 'authorised' texts and the strictly delimited rhetorical settings of legal communication and contact with the non-legal world. Combined, these features describe a tightly knit hegemony or process of institutionalisation and of socialisation in which the authority of law is an unchallenged precondition of interaction and self-presentation; it constitutes a paradigm of normal knowledge which emphasises, within the social practice of the institution, the essentially scientific or inexorably logical character of legal validity and of legal practice generally. To take the point further, the social organisation of legal discourse lends itself powerfully to the production of an apparently specialised discipline and discourse; a discourse which is context independent; monologic rather than dialogic; distanced and obscure in the sense of being presented as alien, both sociolinguistically and practically, from the commitments and values of the heteroglot social life which is the actual, material, context of legal control. It is indeed the latter mentioned heteroglossia of value and social division against which legal discourse and legal language continually fights to establish itself; law is in many ways defined as a specialised discipline, precisely by its constant, centripetal, endeavour to maintain itself by differentiation and by exclusion of the discourses and languages which surround it.

The precision of legal intradiscourse which I will analyse below, or the highly determinate (relexicalised) character of its vocabulary and syntax is not, as positivism, and legal analysis generally, argue, simply and necessarily a feature of the casuistic and constrained interpretative procedures of a normative legal code; nor is it merely a precondition of the logical elaboration of novel concrete norms. It is also a declaration of a unitary language and of a monologic (closed) discourse; a justification in itself for the exclusion of dialogue or of the refusal to admit any (semantic) intertextuality which might challenge the legal use of a stratified and value laden, existent, language system. On the one hand, the self presentation of legal language as unitary, and the correlative exclusion of dialogue from a rhetoric or discourse crucially concerned to express and convey authority, creates the social image of a language which is, familiarly enough, putatively rational and universal, a science - precise, certain, predictable, repetitious and also and

importantly, alien to any specific context. As communication, the monologic character of legal discourse suggests that, exactly in proportion to its unity and authority, its artistic status, it will act functionally as a species of non-communication, as occlusive and opaque, to the myriad of other languages and discourses within the society it regulates. It is not merely or simply that the specialisation of legal discourse, in all but its most general forms of prohibition and specification, is impenetrable to those outwith the incestuous verbalism of the legal code, but further, that the very social organisation and form of that discourse powerfully justifies - by means of linguistic and discursive exclusion, by means of distance and non-communication - the actual hierarchy and the specific content and functions of the semantic (social, political and ideological) choices which that discourse expresses and perpetuates.⁵² It is precisely by avoiding or excluding the semantic implications of its own institutionalisation, communicative forms and language, and by treating legal problems as problems of syntax or of a lexico-grammatical kind, that the law manages and controls the individual's place - the hierarchy of social and political relations - while apparently doing no more than prohibiting and facilitating certain generic and inherently uncontroversial, legally specific, activities and functions.

Recalling the earlier characterisation of communication, as communication between hierarchically organised individuals in concrete social settings, I have so far proposed the importance of viewing legal discourse as being tied to specific social institutions and have suggested that those institutions imply or explain certain of the general features of legal language and discourse as expressed in the commonplaces of legal positivism. To analyse the point in its linguistic detail also requires recollection of the entailments of the definition of communication. Briefly, I am concerned with a view of linguistic structure which treats it as embedded in, and motivated by, the social and inter-personal needs it

[52] For a general characterisation c.f. N.Poulantzas op.cit. at pp.89-90: ' No-one should be ignorant of the law - that is the fundamental maxim of the modern juridical system, in which no-one but State representatives are able to know the law. This knowledge required of every citizen is not even a special subject of study at school, as if everything were done to keep him in ignorance of what he is supposedly obliged to know. '

is to perform. ' All parts of language are functional in this sense ... It follows for the analysis of discourse that any choice of words and syntactic constructions can have some significance assigned to it.'⁵³ In the present context, the point, in principle, is that of evidencing the semantic effects bound up with legal intradiscourse, the legal lexicon and syntax, and of further analysing what, within the recent discipline of communication studies⁵⁴, are termed the control of topic and production of preferred readings, which such a lexicogrammatical system will tend to represent.

The general features of the legal lexicon have already been commented upon. To learn the law is in large measure to learn a highly technical and frequently archaic vocabulary, a professional argot which makes frequent lexical use of specialised legal meanings (relexicalisations), medieval English (aforesaid, witnesseth, etc) and French (chose in action, demurrer, fee simple, etc) as well as a pervasive use of Latin. That legal vocabulary and the syntactic forms tied to it, are a peculiarly specific stratification of linguistic heteroglossia can hardly be doubted. In this respect the status of legal language in many ways replicates the relationship of Latin to the vernacular national languages of the Middle Ages, and it is, I believe, useful to pursue the analogy, and to characterise legal intradiscourse not only in terms of communication and non-communication, but also in terms of a cross-cutting distinction between authority and persuasion. The authority of legal language is its

[53] R.Fowler: Literature as Social Discourse op.cit. pp. 28 ff. C.f. also M.Bakhtin op.cit. at p.284 ' 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. '

[54] C.f. H.Davies & P.Walton (eds) : Language, Image, Media op.cit. esp. ch.3,5 & 14. It should here be noted that a relatively shortlived tradition of conversational analysis, ethnomethodology, was in many ways the precursor of contemporary communication studies. In a frequently uncritical and linguistically ill-specified manner, ethnomethodology attempted to analyse the highly selective discursive forms of the social - though more frequently individual - constructions of reality or order. C.f. e.g. H.Garfinkel: Studies in Ethnomethodology (1967) Prentice Hall; H.Sacks, in D.Sudnow: Studies in Social Interaction (1972) N.York pp.31-74. Certain of the concepts and methods developed in these frequently entertaining studies; the notions of indexicality, turn-taking in conversation, societal membership categorisations; have been taken up in a rather limited context in M.Atkinson & P.Drew: Order in Court op.cit. and applied in desultory fashion to the language of trials.

predominant formal characteristic, and the initial question to be posed is that of the lexical and syntactic forms which, viewed as vehicles of expression or of meaning, combine to construct a sociolinguistic belief system of extreme social significance.

In the first instance, legal language, as a professional stratification of language, is marked by the precision of its lexicalisation. As a facet of the surface structure of legal language, it is obviously not possible to provide anything approaching a comprehensive account of legal vocabulary. The significance of a specialised vocabulary lies in its expressive and intentional dimensions, its implications in respect of classification, coherence and articulation. The linguistic phenomena referred to are obviously lexical and syntactic (lexicogrammatical) but it is nonetheless helpful to begin by attempting to clarify certain lexical characteristics. To the commonplace that law is differentiated by the arcane nature of its vocabulary, it can immediately be added that such differentiation takes a linguistically specific form. Indeed, in this respect it may be observed that whereas most professional vocabularies are, in their surface structure at least, of a strongly denotative character and, as with those of medicine, psychiatry, business or education, tend to be subsumed under the classification and relational taxonomies of extra-linguistic, real, processes, the legal vocabulary may be defined as predominantly rhetorical. It is a system of superimposition or of connotation in the sense first defined by Hjelmslev⁵⁵, and subsequently developed by R.Barthes.⁵⁶ If it is the level of expression that is a language in its own right, we are confronting a connotative language. Connotation is in fact found ... when the signifying element is the actual utilisation of a given language.⁵⁷ Barthes, of course, greatly extends the significance of connotation by viewing it as a level or plane of language, aligned directly with rhetorical and ideological functions. For the present, however, I would wish to limit my remarks to viewing the legal vocabulary as a primarily symbolic lexicon which places great stress upon the legal signifier or legal word as an entity in itself, as a

[55] L.Hjelmslev: Prolegomena op.cit. ch.2.

[56] R.Barthes: Elements of Semiology (1967) Cape pp.89-95.

[57] T.Todorov & O.Ducrot op.cit. p.21.

paramount terminology by virtue of its membership of a lexical and connotative system rather than by virtue of any simple denotation; it is a vocabulary of possibilities purportedly comprising a comprehensive system of meanings that are internal or latent within the lexicon itself.

In the terminology of legal positivism, the legal definition of words, and legal language generally, are to be seen as self or auto-referential, the internal discourse or monologue of a metaphysics. This, we are told, is a feature of the normative character of the legal system. What I am concerned to argue here is that, in the first instance, this characteristic of legal language is a product of a specific form of lexicalisation. I will later argue, that far from being a simple and impartial facet of normativity as such, this lexical and syntactic feature of legality bears specific semantic overtones and performs a complex of socially and ideologically significant functions. For the moment, the basis of legal lexicalisation can be viewed best in terms of its historical and stratifying dimensions. To begin with, it hardly needs to be stressed that the law is the language of time honoured tradition. In at least two senses, the law is already 'written'; it has its primary basis in custom, and its vocabulary is correspondingly governed by doctrines of memory, recognition and usage, defined in turn by reference to extensive and obscure etymologies, inert and calcified meanings and procedures, and finally an epistemology, in the last resort, of 'sources' of law in which words are transmitted by a dogmatics of quotation, reference, citation and specialised and restricted commentary:

The authoritative word demands that we acknowledge it, that we make it our own; it binds us, quite independent of any power it might have to persuade us internally; we encounter it with its authority already attached to it. The authoritative word is located in a distanced zone, organically connected with a past that is felt to be hierarchically higher. It is, so to speak, the word of the fathers. Its authority was already acknowledged in the past. It is a prior discourse. It is given (it sounds) in lofty spheres, not those of familiar contact. Its language is a special (as it were, hieratic) language. It can be profaned. It is akin to taboo, i.e., a name that must not be taken in vain.⁵⁸

[58] M.Bakhtin op.cit. p.342.

The thematic of authoritative discourse clearly transcends the domain of lexicon and syntax; the functions of distance and indivisibility (the fusion of word and authority) are also interdiscursive and ideological, but they equally provide an orientation for the analysis of intradiscourse. The features of intradiscourse most closely corresponding to and facilitating the authoritative functions, may be summarised, I shall argue, in terms of three aspects; those of a generic and intentional vocabulary (lexicalisation/relexicalisation), abstraction or generalisation (nominalisation/articulation) and finally surface narrative structure and characterisation (modality/transitivity).⁵⁹

If the generic character of the legal vocabulary is a distinctive and important feature of the language of the law, it is for the reason that it facilitates a number of significant syntactic and semantic operations. Prior to examining such operations, however, it is worth stressing the character of the lexicon as a system of a predominantly connotative kind. Looking, for instance, to the vocabulary of the law of contract, it is, in the first instance, to be characterised as a series of very broad and very loose terms of art - the categories of intention, agreement, consideration, privity, express and implied terms, mistake, misrepresentation, breach and so on. Each of the terms is generic and acts as the centre of a prescriptive, connotative, field of systemic associations and rules which will frequently belie, in part or in whole, the specific definition of the term itself. To use only the most commonplace of examples, intention and agreement have a very precarious and frequently fictional life in view of the development of contradictory supervening categories of normative 'presumptions as to intention', 'unfair terms', 'economic duress' and so on. Similarly 'promissory estoppel', 'privity' and 'adequacy' in fact, severely limit the scope of the doctrine of consideration. The examples could be multiplied and detailed - the contemporary development of the law of negligence, the administrative concept of natural justice or the interpretation of the Race Relations Acts providing good examples - but the lexical point concerns the fact that the words at issue bear no very

[59] I am here making use of a much more general set of linguistic categories elaborated in R.Fowler: Literature as Social Discourse op.cit. pp.24-46; R.Fowler et al. (eds.): Language and Control op.cit. ch. 2,6,7, & 10; G.Kress & B.Hodge: Language as Ideology (1978) R.K.P. ch. 4, 6, 7.

clear meaning; they are generic and subject to contradiction, exception and limitation, as well as to extension, multiplication and relexicalisation generally, as and when occasion requires. Far from being bound by any extra-linguistic content or denotative meaning, the terms are connotative and symbolic: they lend themselves to an obfuscating, rhetorical or symbolic usage, to figurative and analogical manipulations within which their actual meaning or referent is obscure. In any given instance the mobilisation of the vocabulary of contract is both a semantic and symbolic adventure in its own right, and equally the beginning of a professional or judicial utterance which is predominantly defined by the latitude or freedom which it allows the authorised speaker. Lacking any clear denotation, the legal lexicon facilitates the directly intentional possibilities of the language it uses, its concrete instancing is intentionally rather than lexically determined. In short, it offers its authorised users the greatest possible scope or power of judgment, of relexicalisation and of assimilation of situation and of other languages and vocabularies. The authority of the law, its power to directly determine meaning, might be said to rest, in this respect, upon a wholly lateral use of a symbolic vocabulary.

Vocabulary also implies certain syntactic forms. While it is tempting to associate the legal lexicon directly with certain argumentative and persuasive forms; for instance, with the metaphoric use of language, which in one famous example illuminatingly defined a trade unions' 'threat' to break a contract as an act of physical violence in its own right, directed presumably towards the material fabric of the social contract⁶⁰; it would be incorrect to wholly omit reference to, and discussion of, the mediation of vocabulary and semantics through syntax. The legal vocabulary, as a dictionary of apparently precise, generic and symbolic words, is closely tied to a syntax of generalisation; of nonagentive

[60] Rookes v Barnard (1964) 1 A.E.R. p. 400 A - D, 405-406 E - H, A - E.

[61] The nonagentive passive form inverts the order of the direct declarative sentence and deletes its subject. It is the syntactic paradigm of distancing, from the simple replacement of I by you (generic), we, the law and so on, to more elaborate formulations in which an impersonal pronoun becomes the subject-agent of a process. See, also, D. Crystal & D. Davy: Investigations of English Style (1969) Indiana U.P. ch.2.

passives,⁶¹ nominalisations (frequently postmodified or relexicalised),⁶² thematisations⁶³ and automatic figurative registers,⁶⁴ whose overall tendency is that of establishing distance, impersonality and the possibility of rapid generalisation or exit from a concrete and unique instance of material conflict or dispute, to the universals of a normative rhetoric. The syntax of generalisation deletes the context and specific identity of the agents of the processes described and judged, and assumes a straightforward, unproblematic, continuity between concrete instance and abstract norm. I shall take an example from a case in which Lord Diplock is endeavouring to relexicalise breaches of contract into a vocabulary of primary, general secondary and anticipatory secondary obligations. Thus, for instance, 'the secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party.'⁶⁵ The key nominal is 'obligation'. It is derived from someone or some group being obliged to do something; in this instance, the contract breaker (object) is obliged (process) by the common law (agent) to pay compensation (instrument). I shall comment briefly upon both the form and the content of this fairly typical syntactic construction. Although the statement is intended to explain and control specific behaviour, it lacks any directive speech act. Rather than regulating in a direct way, the stylistic impersonality of the utterance controls by means of attitude, it depicts a depersonalised state of affairs in which the significant syntactic constructions are nominalisation and passivisation; there is no explicit command structure, no request or imperative from a speaker to an

[62] Nominalisations are a specific form of nonagentive passive. A process, or verbal action, is expressed by a noun rather than a verb and assumes the identity of the participants in the process or action; e.g. obligation, declaration, termination and so on, where the specific identity of the entities or persons acting is only, at best, analytically recoverable. Synechdochic and metonymic reification are further variants of a similar syntactic process, e.g. Court for judge, Law for Court and Parliament for Statute etc, c.f. P.J. Jalbert, in Language, Image, Media op.cit. pp.288-290.

[63] Thematisation; again a form of passivisation and objectification where the nominal designating the object is placed in the position of theme, the position normally associated with the agent. The noun-phrase is shifted to first place in the sentence.

[64] Automatic figurative register (metaphor) refers to a more general process of distancing, the speaker/author avoids direct formulation by reverting to standardised descriptions or utterances or, more directly, uses quotation or citation from authority to distance self and utterance from discourse.

[65] Photo Production v Securicor (1980) 1 A.E.R. 556, at pp. 556-557.

addressee, but rather, a familiar legal objectification of behaviour which generalises beyond the context and institutionalisation of the utterance. In so far as the multiplication of obligations constitutes a series of interpersonal regulations, they are euphemised or obscured, in that their objectification renders who is doing what to whom, somewhat less than immediately apparent⁶⁶, although in the context of the example given, the subjects of the utterance are easily recoverable.

What is interesting about the surface structure described and briefly exemplified is that it facilitates particular forms of legitimation. In the first instance, what is involved is a specific form of articulation which lends itself to unimpeded generalisation. Particular noun-clauses will introduce preconstructions which can then be elaborated and extended through relexicalisation and other processes of appropriation, assimilation and accenting of the professionally shared language. Impersonality or objectification operate through stereotypes and typifications or, in the terms of the rhetoric of persuasion, membership categorisations and identifications. Bakhtin singles out a process of 'pseudo-objective motivation'⁶⁷ common to authoritarian discourses, which process refers to modality and to attribution of qualities or characterisation. Again, what is here significant is the interactive dimension of the surface text, although the processes in question clearly imply more substantial, semantic, operations. Modality; modal auxiliaries (might, could, can, etc), adjectives expressing certainty or uncertainty (possible, likely, certain etc), verbs expressing mental and logical processes (seems that, thinks that, feels that and etc); is a key feature to the legal text and, as has been recognised⁶⁸, the prevalent forms of modality within legal texts are imperative and axiomatic. ' Gives rise by

[66] R.Fowler et al. (eds.) op.cit. p. 41 remarks upon the formality, ritual and impenetrability which is frequently associated with a heavily nominalised style. The impersonality generates an unquestionable authority: ' This is style as censorship ... although it is quite frank about the authority it claims, the style itself allows the details of the exercise of the mechanisms of control to be obscured, mystified.'

[67] M.Bakhtin op.cit. pp.305-308.

[68] C.F. particularly W.Murphy & R.Rawlings op.cit. pp. 634-651 - their examples being assertion, repetition and inadequate motivation generally. See also, R.B.Ferguson: The Horowitz Thesis and Common Law Discourse in England (1982) Oxford Journal of Legal Studies pp.42-46.; and F.Burton & P.Carlen op.cit. pp. 104-107.

implication of the common law', for example, expresses an unproblematic, nonagentive, certainty. A prior discourse is articulated to cohere the instant utterance and will find 'pseudo-objective' expression elsewhere in the text in corresponding subordinate conjunctions and link words (thus, because, for the reason that) as well as in words used to maintain logical sequence (therefore, consequently, etc).

Finally, particular forms of modality and of agency, are associated with specific characterisations and stereotypes mobilised in the instancing of discourse through surface narrative structure.⁶⁹ Certain roles and participants are systematically associated with specific kinds of process and action. Particular vocabularies and markers increase status or remove legitimacy, in which respect, I can think of no better example than that of the description of rioting in the spring of 1981 in Lord Scarman's Report on the Brixton disorders.⁷⁰ The narrative sequence of the report systematically opposes a vocabulary and syntax of rationality in the narration of police activity; to a syntax of emotion and irrationality when the actions of 'blacks' are reported. The police 'take decisions' (para.3.18), 'properly and reasonably' reach a viewpoint, 'exercise judgment' (para.3.23), 'see dangers' (para.3.26), 'make imaginative innovations', 'establish liaison' (para.4.17), have 'good intentions and efforts' (para.4.43.) and are generally characterised throughout in terms of objective 'behaviour' (para.4.64). Blacks, on the other hand, are 'driven by despair', feel and 'have feelings' (para.2.35), have a 'sense of rejection' and of 'insecurity' (para.2.36), are subject to 'rapidly circulating rumours' (para.3.19), are 'distrustful', 'imagine' and have 'popular attitudes and beliefs' (para.3.24.), are 'hostile' and 'suspicious' (para.4.17), 'shipwreck' liaison, suffer 'storms of distrust' which reach 'galeforce' (para.4.43) and bare 'beliefs', 'images' and 'myths' (para.4.64). In short, an unshakeable standard of rationality grounds the purposive action of the police, while the very language and narrative form of the black actions are embedded in a lexicon and modality of exclusion, of

[69] R.Fowler et al. (eds.) op.cit. pp. 120-131; R.Fowler op.cit. ch. 2 appendix B. H.Davis & P.Walton (eds.) op.cit. pp.40-43.

[70] Cmnd. 8247. See also A.Norrie: Freewill, Determinism and Criminal Justice (1983) 3 Legal Studies 60. M.Barker & A.Beezer: The Language of Racism (1983) Int. Socialism 108. J. Wren-Lewis: The Story of a Riot (1982) Screen Education 15.

collective emotional myths generated by a life lived on the streets (para.2.11).

The Scarman Report is clearly an extreme example and is of a quasi-judicial status.⁷¹ It does, however, provide a very precise illustration of the manner in which a linguistic analysis of intradiscourse or surface text, can evidence, at the primary level of lexicogrammatical system, the typical features of the language of control. A series of features of vocabulary and syntax can be elicited from the particular text and analysed in terms of the rhetoric or discourses which they imply and facilitate. Rather than starting from an analysis of ideology and then reading the structural categories of legal ideology into the legal text; it is more consistent, more accessible and less arbitrary to commence with the text itself, and to analyse the specific linguistic devices whereby choices, readings and meanings are engendered⁷².

7.1.3 Legal Interdiscourse

The distinction between intradiscourse and interdiscourse is analytic rather than substantive; it concerns levels of analysis rather than levels of the text, although a useful distinction can be made between the self-articulation of a discourse (ego-discourse) and the relationship of a discourse to other, competing and non-competing, discourses (alter-discourse).⁷³ While legal intradiscourse is primarily to be understood as a

[71] In legal terminology, of course, it is 'extra-judicial'.

[72] C.f. H.Davis & P.Walton (eds.) op.cit. pp. 95-99 where C.L. Lerman usefully analyses 'dominant discourses' into four thematic processes of topic transformation. Although she does not distinguish intradiscourse from interdiscourse, the mechanisms and effects classified are primarily those of textual self-articulations, viewed rhetorically as a process of topic transformation. The themes and devices which she singles out are: fragmentation of topic (particularisation/decontextualisation), a process of linguistic and semantic exclusion; institutionalisation, according to a network of 'loyalties', a process of inclusion and statement of the norm; identifications, the rhetoric of consensus, which is again, in the first instance, lexical and syntactic (it considers lexicalisation, implicatures, personal pronouns, modality and so on); finally, the power to define, the analysis of 'speech forms' which suppress discussion and replace it with statements of moral judgment, the 'ritual soliloquy' which facilitates protection of a 'closed discourse system' (p.99). See R.Fowler et al. (eds.) for a similar, though broader, analysis, pp.198-213.

[73] I am here somewhat misusing a distinction made by G.Therborn op.cit. pp.27-29, between ego-ideologies and alter-ideologies. E.g. 'Male chauvinist sexist ideology should be seen as both an ego-ideology of maleness and an alter-ideology of femaleness.' (p.28).

process of the textual self-definition of legality in terms of a unitary and exclusive language, legal interdiscourse specifies the hierarchical relationship - the relations of inclusion and exclusion - between law, other discourses, and the social whole. The two faces of legal discourse are closely related; they share the same semantic motives and the same institutional characteristics and if they are to be consistently differentiated it is not because of any intrinsic separation of self and other to legal discourse, but rather because of a methodological and stylistic intention to analyse both the monologic and the dialogic dimensions of the discourse in question.

In describing the institutional and semantic implications of legal intradiscourse, I laid stress upon a number of general features of the self-presentation, or image of a language, which that discourse is likely to represent. The authority and distance, as well as the predominantly monologic and alienating facets of the law's self-articulation, were emphasised as essential characteristics of the internal definition of a unitary language. Such characteristics, of course, also bear a wealth of dialogic or rhetorical implications. The image of authority and of distance, for instance, is both a mechanism for excluding challenges to legal language, and also a specific strategy or manner of relationship to other discourses and audiences. The authoritative, unitary, language is not only a means of presenting a discourse as a species of science, or 'thing in itself' - that is, as an alien and reified use of words - but also a rhetorical play, in that a language of authority is also, of itself, a particular strategy of persuasion. It is a dialogic form which endeavours to predetermine the conditions and contexts of its reception. In what follows, I shall be principally concerned with the semantics of this oblique form of dialogue, with the interdiscursive appropriation of meaning which attempts to exclude from the ambit of legal authority the possibility of alternative meanings and other discourses. 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 of identification: that is, of a stratification of language which is of sufficient social power to intentionally determine the language and discourses exterior to it. By subordinating surrounding discourses to the authority of legal semantics, legal interdiscourse will

also exclude and stigmatise - define out - all such discourses as are inherently recalcitrant to the basic belief system and preconstructions of legal language⁷⁴.

To recall the topology of section II, law constitutes a discursive formation, a site of reformulation and paraphrase which defines both the 'already asserted' and the 'assertable' (transparencies of meaning) as well as an exterior, a relationship of exclusion towards differently oriented paraphrases and accents within or produced by other discourses. The point is made more concretely by Bakhtin in a series of comments upon the semantics of professional languages and their specific powers of appropriation:

What is important here is the intentional dimensions, that is, the denotative and expressive dimensions of the "shared" language's stratification. It is in fact not the neutral linguistic components of language being stratified and differentiated, but rather a situation in which the intentional possibilities of a language are being expropriated: these possibilities are realised in specific directions, filled with specific content, they are made concrete, particular, and are permeated with concrete value judgments ... Every socially significant verbal performance has the ability ... to infect with its own intention certain aspects of language that had been affected by its semantic nuances and specific axiological overtones; thus, it can create slogan-words, curse words, praise words and so forth.⁷⁵

It is my hope that the analysis of legal intradiscourse has moved some way towards describing the form that such semantic appropriation is likely to take, and it remains therefore to analyse the broad contours of its content.

a) Sovereign and subject. The categories of sovereign and subject are intrinsic to legal discourse and have long been recognised within jurisprudence as essential features of legal semantics. Theories of law,

[74] F.Burton & P.Carlen op.cit. make the point well in relation to the Official Discourses analysed; ' The main problem for Official Discourse on law and order is that all problems have to be discussed in terms of an ideal of distributive justice which cannot admit to the material conditions which render that ideal impossible. A discourse has to be developed which will both pre-empt and foreclose any theory within which questions could be posed which might destroy the pre-givens of that discourse; ' (at p.95).

[75] M.Bakhtin op,cit. pp. 289-290.

from Hobbes to Austin and, to a lesser degree, Kelsen, have frequently been theories of sovereignty (defined either literally or metaphorically) and have viewed the specificity of the legal in terms of a sovereign power to command the subjects of a legal system. On the other hand, a slightly different emphasis can be found within certain naturalistic and analytic accounts of law, wherein legal subjectivity and subjective rights define the legal form of human relation and to varying extents endow it with an ethical value. The two categories are not mutually exclusive, to a great extent they imply each other as the twin poles within a hierarchy of command or authority.⁷⁶ The sovereign power of a legal system both creates, and enables the creation, of subjective rights and duties, while, at the same time, sovereignty - be it legislative or judicial - is itself frequently seen to be itself restricted and legitimated by being, both directly and indirectly, the subject of rights and duties and the recipient or nodal point of a subjective right. Very broadly, the concepts of legal order and of the rule of law, have generally been formulated in such a manner as to encapsulate not merely the normative but equally, the underlying ethical connotations of the restraint of sovereignty in terms of subjective right and particularly the generalised right to fair and impartial trial, as an equal before the law, in its various legislative, administrative and substantive contexts.

In view of the fact that the concept of legal discourse is not, and should not attempt to be, a theory of law, but is rather concerned with the preconstruction and production of legal meaning, it is fortunately unnecessary to enter in any depth into the various debates over the correct denotation of the terms sovereign and subject or subjection as definitions of the intrinsically legal. It is sufficient to recognise that legal theory and legal practice have consistently and with reason - though with differing ethical stress or motive - utilised these categories as integral features of the description and analysis of legal relations. For the sake of clarity it should also be noted that critical theories of law and attacks upon the liberal concept of legal order have also

[76] For a recent analysis, c.f. D.N.MacCormick: Legal Right and Social Democracy (1982) Oxford ch.1, or, for a more critical account, R.M.Unger: Law in Modern Society op.cit. pp. 106-181.

generally accepted the centrality of the concepts of sovereign and subjection. At their best, the critiques of legal order have concentrated upon the historical relativity of the liberal notions of the freedom and equality of legal subjects and the correlative notions of the impartiality or generality of legal rules and their application. Viewed historically, it has been forcefully argued that the norms of the legal order have a specific, hierarchically based, genesis, and that the ideals of freedom and equality to which the concept of the legal subject is ineluctably bound, have never and can never be realised within the context of the liberal state.⁷⁷ Other, reductionist, critiques, have taken the issue much further and have argued that legal subjectivity is the passive reflection or effect of economic value, and that law in its complex entirety can be explained as the direct expression of an historically specific economic form⁷⁸.

While it would seem incontestable that aspects of the content of law are only explicable in terms of their expression of economic relations - the conflicting interests of labour and capital, and the formation of antagonistic class positions - the more general reduction of law to a model of the circulation of commodities is less warranted. At all events, whether or not the legal subject is the direct expression of the commodity form, the relation of subject and sovereign within legal discourse is a more specific problem. What is at issue in the analysis of legal interdiscourse is not, I would argue, a question of cause and effect, nor of function and determination, but rather of the preconstructions and impositions of meaning (the creation of a world of 'things', of evident facts and delimitations of possibility) whereby legal discourse differentiates itself from other discourses and discursive formations, and defines itself as a political practice in endeavouring to control its users and reception, its relation to the various codes and contexts of its audiences. In terms then of interdiscourse, meaning, and control over meaning, are to be viewed as processes or networks of semantic relation, rather than being simplified, for whatever reason, into a substantive

[77] C.f. T.Mathieson op.cit. pp.140-145; N.Poulantzas op.cit. pp. 86-92.

[78] E.B.Pashukanis: Law and Marxism (1978) London pp.109-134; B.Edelman op.cit. ch.1. A useful analysis of this debate is found in M.Foucault: Power/Knowledge op.cit. pp.78-133.

concept of politico-juridical power as a one to one relationship between a sovereign and subject wherein power emanates, as of right, from a point exterior and 'above' to an instance of control or coercion 'below'. ' The analysis, made in terms of power, must not assume that the sovereignty of the state, the form of the law, or the overall unity of a domination are given at the outset, these are only the terminal forms that power takes.⁷⁹ Power, in Foucault's analysis, is to be distinguished from the juridical concept of sovereignty as the necessary form and legitimacy of control; it is to be understood as an interlinked set of 'conditions of possibility':

Power's condition of possibility ... must not be sought in the primary existence of a central point, in a unique source of sovereignty from which secondary and descendent forms would emanate; it is the moving substrate of force relations which, by virtue of their inequality, constantly engender states of power, but the latter are always local and unstable ... One needs to be nominalistic .. power is not an institution and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategic situation in a particular society.

⁸⁰ In short, power is to be identified as a specific relationship, an historical and local process or inequality tied to the particular spheres or domains of its usage and the resistance that such exercise engenders.⁸¹ Similarly there is no singular form or discourse of power; ' to be more precise, we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies. It is this distribution that we

[79] M.Foucault: The History of Sexuality (1981) Pelican Books p.92

[80] Ibid. p.93 ff. For a useful summary c.f. H.Dreyfus & P.Rabinow: M.Foucault: Beyond Structuralism and Hermeneutics (1982) Harvester pp. 71-78, 184-204; also C.Gordon: Other Inquisitions (1979) 6 I&C 23-44.

[81] A point which needs to be emphasised because of the tendency of critical theories of law to accept the view that legal power is a unitary form of domination, and so to discount the extent to which specific areas of legal domination act against or limit the dominant form and interests of legal power. The problem is always specific and it is necessary to analyse the content of substantive areas of legal regulation - welfare rights, consumer protection, administrative self-regulation and so on, as well as, antithetically, the development of informal justice systems - to establish the precise effectivity of oppositional or progressive movements within the law. C.f. P.Hirst: Law, Socialism and Rights, in P.Carlen & M.Collison (eds): Radical Issues in Criminology (1981) M. Robertson pp. 58-105. On informal justice, c.f. e.g. S. Henry: Private Justice (1984) R.K.P.

must reconstruct,⁸²

Two points of specific interest for the analysis of legal interdiscourse follow from the critique of sovereignty and of the theory of power provided by Foucault. The initial point is a negative one. It reinforces the earlier argument against the essentialist view that legal discourse is reducible to any one set of unitary ethical, normative or ideological features. It is necessary, in other words, to distinguish the rhetoric of legal interdiscourse, that of a systemic coherence, from the related though independent problem of a substantive semantics of the content of actually existent legal discourses. On the positive side, the denial of any singular liberal or critical theory of legal discourse, allows for the elaboration of a more fecund set of substantive hypotheses concerning the construction (as well as preconstruction) of meaning within historically particular legal texts and discourses. The specific differentiating features of legal interdiscourse are to be located by reference to a series of characteristic linguistic and semantic techniques or mechanisms which work precisely to perpetuate the social image or rhetoric of an authorised discourse, a univocal and closed control of meaning, which is persuasive in large measure by virtue of the success with which it systematically denies or excludes its intertextuality, its embeddedness or imbrication within surrounding discourses and socio-political practices. Authoritarian, distanced and closed; legal discourse, the language of an objectifying and reifying use of legal words, emanates towards linguistic heteroglossia in the form of a Ptolemaic linguistic consciousness which acknowledges only its own hegemony of a single and unitary language, the myth of the fusion of word and meaning, which will come as rhetorical hero - as axiom and judge - and as nemesis - as dispersion - for the socio-political diversity of speech and meaning. This general semantic motivation of legal interdiscourse is variously present in the discursive processes of legal practice. It is to be characterised differently according to the differing discourses with which legal discipline interacts, and it is best understood in terms of a variety of relations of discursive inclusion and exclusion, and in terms

[82] M.Foucault loc.cit. p.100 ff.

consequently of the differing substantive characterisations and contents of legal subjectivity within the various branches of the law.

To relate the above reservations to an active understanding of legal semantics is to realise that the prevalent forms of legal expression - the processes of instancing/inscribing legal discourse in terms of sovereignty and subjectification are best formulated critically as a wide variety of complementary justificatory and persuasive techniques of both explicit and tacit argumentation. Thus I would argue that, far from being the singular ideological dynamic or form of legal legitimation, sovereignty is rather to be understood as a semantic principle, as a residue term for a wide variety of semantic (connotative) fields. Even in the general terms of constitutional principle, sovereignty refers to a disparate group of generally applicable justificatory norms concerning the separation of powers, the role of different institutions within the framework of the legal system and the validity or legality of a variety of interpretative and loosely hermeneutic devices and desires within the normative body of legal rules. More specifically and critically, sovereignty may be regarded not simply as a general, unifying, category of legal regulation but as a series of techniques and meanings within legal interdiscourse. Viewing sovereignty as a diffuse yet generally available rhetoric raises the question, in other words, of its actual usage in the instancing of legal discourse or the application of general norms. In textual terms, the role of sovereignty can be formulated as a mobile set of axiomatic meanings resident within the hierarchy of legal dialogue. For instance, sovereignty designates both the overall, assumed, legitimacy and authority of legal language - the adequacy of its normative depiction of what is socially, economically and politically possible - and also refers to the actual hierarchy of speaking subjects, utterances and audiences of the legal text as a narrative and as a judgment.

That sovereignty is multiple means that the latter mentioned, plural, sovereignties of the legal text are quite as important, as specific principles for privileging the legal, as any general, unifying denotation. To borrow again from the Dialogic Imagination⁸³, a work of inexhaustible

[83] M.Bakhtin op.cit. pp. 336-342.

suggestion, the actual meaning, and equally the persuasive content, of the specific discourse is manifested in the internal dialogue of the text, in the first instance, in the relations of inferiority and superiority which it constructs between the various languages, the socially significant and insignificant speaking subjects, around whose utterances the communicative potential of the text circulates.⁸⁴ Although there are numerous discrepancies in actual usage, legal discourse as authoritative discourse is pre-eminently represented as a language of the past, a philological unity from which meaning is produced through recollection and through the privilege accorded to pre-existent sovereignties. There is the sovereign, linear, continuity of legislative intention over time (univocality); the general sovereignty of past decisions and of specific judges; the hierarchy of privilege between the various courts and more pragmatically, the dominance of legal discourse and language over all other, non-legal, discourses, utterances and speaking subjects. In one sense legal interdiscourse operates as a monologic development of meanings conceived as things, as the reified produce of abstract states of affairs which are cited, repeated and commented upon because of their axiomatic status in relation to other contexts, codes and subjects.

Sovereignty, however, is never something in itself. It is both a relation and a process directed towards the contemporary instance of regulation and the audience that such regulation implies. Remaining, however, within the legal text and the politics of its interpretation, the objectification of legal meaning within the authority of its language, is replicated in the subjectification of its spheres of application. Although the opposition has been somewhat overplayed and overemphasised, the relation of sovereign and subject can nonetheless be usefully redefined as a discursive process introducing and instancing substantive legal meanings by virtue of an opposition between objectification (unity/universality) and subjectification (dispersion/singularity), inclusion and a correlative process of explicit and tacit exclusion. On

[84] For a useful analysis of related points in the context of courtroom language, c.f. W.O'Barr: Linguistic Evidence op.cit. pp61-93 where he broadly elaborates a model of linguistic strategies and inequalities of power between speakers in terms of socially significant and legally significant styles of oral presentation.

the one hand, I have argued, there is the social language of the law, a concrete sociolinguistic belief system and semantic field which defines a distinct identity for itself in the form of its notional or abstract unity, its rhetorical status. Within the textual development of this legal image of a language, the predominant figure is that of sovereignty, the image of the legal speaking subject represented in the authorial discourse of judgment, a discourse which characterises the legal speech as the intentional and logical manipulation of an ahistorical set of peculiarly legal meanings both recalled from a disciplinary past constituting a set of sacrosanct utterances, and written into the present or, better, rewriting the present to conform to the dictates of the authorial legal intention as medium and giver of the instant text. Not only is legal meaning given according to the principle of authorial sovereignty, the law made flesh, but more importantly the image of a narrowly judicial discourse incarnating legal reason by formulation, analysis and interpretation of a wide variety of precedent discourses also determines the image and content of the legal and socio-political meanings that are admitted and incorporated into the law. The sovereignty of legislation and of the interpretative legal discourses is equally grounded in a religious and ethical concept of freedom, a freedom of choice and moral autonomy, most generally formalised in the principles of Equity.⁸⁵ Just as religious discourse is founded upon the precept that God made 'man' and the word in 'his' own image, legal discourse has tended to presuppose that the law makes the individual according to the model of sovereign discourse, namely as a similarly formal or artificial unity; as an independent, responsible and active speaking subject. The ethical image of speaking person or of a unitary and unique subjectivity pervades substantive legal discourse; legal inquiry and evaluation devolve around fundamental categories of speaking person as intentional author, as conscience (innocence, guilt and mens rea of the inner word), repentance (free admission or voluntary confession of wrongdoing), truth and

[85] C.f. J.Lenoble et F.Ost op.cit. pp. 115 - 120 for an incisive analysis of the inherent contradiction between the Kantian methodology implicit in the systemic, deductive, conception of legal reason and the principles of Equity conceived as the individualised treatment of particular cases. C.f. also D.N.MacCormick: Formal Justice and the form of legal argument in Etudes de Logique Juridique (1976) Bruxelles p.110 et seq.

falsehood, as well as the capacity of being liable and not liable, having a right to vote and so on throughout the entire domain of substantive powers, subjective rights and their exercise. The discourse of the ethical and legal human being carries an inordinate weight within the constructions of legal interdiscourse - challenges to subjective authorship, provocations of it, interpretations and assessments of it, interventions establishing the boundaries, forms and implications of its exercise and activity, the juxtaposing of various wills and divergent discourses, are all essential to the interpretation of testimony, declarations, contracts, legal documents and other forms of legally recognised utterance. After the event, the law arrives to reconstruct the discourse of others - after it has been uttered, after the context of its uttering has become cold or alien to its author - and endows it with significance, relevance and meaning, superficially if not always wholly determined according to the various formal procedural and evidential techniques developed specifically for establishing authenticity and degrees of veracity, as well as according to the substantive hermeneutic techniques which enable the imputation of intentions and the more general elaboration of legally implied meanings, narratives and discourses.

While the content or legal definition of subjective rights and legal statuses varies widely; companies cannot make wills, private citizens cannot declare war and so on; the interdiscursive mechanisms of subjectification bear a broad similarity of a compositional, stylistic and semantic kind. Specifically at the level of interdiscourse, the semantic preconditions of legal discourse, the legal world view, may be summarised in terms of procedures of individualisation and generalisation - both narrative and justificatory - which work to manipulate and transpose existent human beings and groups - the diffuse, complex and changing, biographical and social entities of motivated interaction - into the ethical and political - rhetorical - 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. It does so for the purposes of a legal characterisation of personality as responsibility, whose most basic precondition is generally though not unambiguously, the utopian liberal conception of an ethical and legal order, cohesion and consensus in which

the individual is compelled to choose to accept the roles and rules of a profoundly inegalitarian and frequently irrational political game - the name under which analytic legal philosophy suppresses the realms of actual experience and of the socio-economic determinations of individual actions. In the last instance, in other words, the legal subject has very little choice; the law endeavours to condemn its subjects to choose, at best, between joining the ranks of a society for which they are not in fact responsible or destroying themselves, rhetorically if not always literally, in the authentic pursuit of fundamental social change.

In conclusion, the dialogic and persuasive features of the legal text are to be viewed in terms of the preconstruction and construction of the unitary and notionally coherent legal personalities which constitute and instance the hierarchy of sovereign and subject within the legal text. The meanings attached to this dialogue are primarily ethical and, in the formal sense of rights, political. They include, in other words, the reasons and intentions that are of interest to the legal discourse and doctrine of responsibility, excuse and choice, and generally exclude any such arguments as could disassociate or ambiguate the actual relation of the individual to its acts or deeds. Returning to the example used earlier of Lord Scarman's Report of the Brixton riots, the paradigm form of legal justice is made peculiarly clear. I commented earlier upon the hierarchically differentiated status of the two main participants in the riots, the police and the blacks, in terms of vocabulary and syntax used, respectively, to include and to exclude the groups in question from the realm of social rationality and consensual identification as legally conceived. The various linguistic mechanisms used to characterise the social significance of the subjects involved in the riots is only fully co-ordinated, however, when the legal meaning and responsibilities of the situation are explicitly stated. The information, both general and specific, as to the causes of the riots, depicts the general social conditions which prompted or precipitated them, in the bleak but familiar terms of unemployment, discrimination, poor housing, deprived environmental conditions and lack of adequate or relevant educational provision. At one point Lord Scarman even remarks that where 'deprivation and frustration exist on the scale to be found among young black people of

Brixton, the probability of disorder must ... be strong. ¹⁸⁶We are informed in the same paragraph, however, that such general determinations are not to be understood as causes of the disorder for legal purposes. The social conditions described are only conditions, they do not ' provide an excuse for disorder. They cannot justify attacks upon the police in the streets, arson or riot. All those who in the course of the disorders ... engaged in violence .. were guilty of grave criminal offences, which society, if it is to survive, cannot condone. Sympathy for and understanding of, the plight of young black people .. are no reason for releasing young black people from the responsibilities for public order which they share with the rest of us. ¹⁸⁷The characterisation of the conditions and relative status of the actors constitutes the persuasive context for the introduction of the univocal legal meaning of their actions, those of the blacks are inexcusable, while those of society, its police and the law are, in their most basic substratum, inviolable.

b) Semantic appropriation. I have defined the general conditions of legal interdiscourse in terms of a notional system of authority - of sovereignty and legitimate authorship - which both assumes and produces subjects and their rights. Legal method, legal interests and legal relevancies are largely to be found and defined in terms of their insistence upon discursive schemata and analyses which are structured by the isolated unity of human acts and their subsequent categorial or normative qualification. Human personality becomes an apparently external and formal device, which supposedly incidental and unwitting textual creature the law utilises for its own purposes, for its self-evident representations of 'crime', 'exchange', 'rectitude' and so on without, save in certain exceptional and arguably anomalous

[86] Lord Scarman op.cit. para. 2.38.

[87] Ibid. par.2.31.

circumstances⁸⁸, being required to explicitly relate either the law itself to the actual political life of its rhetoricians, or the acts of its subjects to the life - the fears, desires and needs - or actual conditions - influences, constraints or determinations - that form its material context. The image of legal interdiscourse is that of the production and circulation of meaning between social and political amnesiacs who would prefer that the painful task of reconstructing the real world that has been forgotten were never undertaken. The archaic and crude psychology of the law not only nails the law to individual acts, but further, continually emphasises the ethical, political and metaphysical freedom of such actions. While it would be tempting to pursue the social and psychoanalytic dimensions of this process of repression⁸⁹, a more accessible procedure is that of elaborating its interdiscursive implications.

The interdiscursive rhetoric of sovereignty and power, of rights and duties, 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 with 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

[88] Exceptions being, the concept of duress in penal law, e.g. Lynch v D.P.P. (1975) A.C. 653; the concept of undue influence, and the recently developed concept of economic duress in Contract law, e.g. Universe Tankships of Monrovia v I.T.F. (1982) 2 W.L.R. 803 - though in contract, it is the unlawful character of the compulsion rather than the motive of acceptance that is stressed. The law of Torts falls between the two, in that malicious motive founds the basis of the tort of malicious prosecution (c.f. Glinski v McIver (1962) A.C.726) and overrides the defence of qualified privilege in defamation actions (Horrocks v Lowe (1975) A.C.135). Otherwise motive is purportedly irrelevant to tortious actions (Allen v Flood (1898) A.C.1) although it is now generally recognised that it plays some role, albeit confused, in nuisance actions and in the tort of conspiracy.

[89] C.f. J.Lenoble et F.Ost op.cit.; M.Pecheux op.cit. pp.123-126, 216-218; J.Lacan: Ecrits (1977) Tavistock ch. 3 & 9; R.Jacoby: Social Amnesia (1975) Harvester pp. 119-151.

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. The point may usefully be developed by means of exemplification, for which purpose I shall examine in some detail the recent case of Bromley London Borough Council v Greater London Council⁹⁰, a contentious yet apparently unanimous decision within administrative law.

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.⁹¹ 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 the subsidy of 69 million pounds 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

[90] (1982) 1 A.E.R.129.

[91] Ibid. 131-132. My discussion of the asserted 'facts' of the case will concentrate on 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.

50 million pounds to the cost of the transport subsidy, which additional cost 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 preliminary 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 the 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.'⁹² 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

[92] Ibid. 149.

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.'⁹³ 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 coordinated 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 Hopwood⁹⁴ and Prescott v Birmingham Corporation⁹⁵ 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

[93] Ibid. 159.

[94] (1925) A.C. 578.

[95] (1954) 3 A.E.R. 698.

charging of such fares ' as they may think fit'.⁹⁶ 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. '⁹⁷ 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

[96] Ibid. 706-707.

[97] (1982) 1 A.E.R. p. 135.

consideration should be given to ratepayers as a separate category, many of whom cannot vote. The duty owed to the electorate 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'.⁹⁸ 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'.⁹⁹ 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'.¹⁰⁰ Elsewhere the court 'must recognise' that such debate exists¹⁰¹. Aside from an incidental and brief quotation from the Labour Party manifesto, mentioning how 'better

[98] Ibid. 160; see also Lord Wilberforce at p. 154.

[99] Lord Diplock, *ibid.* 158.

[100] *Ibid.* 164.

[101] *Ibid.* 157.

services, less congestion, better housing, more jobs, and a safer, cleaner environment ¹⁰² 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.¹⁰³ 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. ¹⁰⁴ 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. ¹⁰⁵ 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'.¹⁰⁶ At this point I shall merely note the apparent mutual exclusion of the categories of the economic and policy.

[102] Ibid. 132.

[103] Ibid. 158.

[104] Ibid. 174. Lord Scarman comments, 'it is a very useful word: chameleon-like, taking its colour from its surroundings.'

[105] Ibid. 174.

[106] Ibid. 177.

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'.¹⁰⁷ 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. '¹⁰⁸In 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%'.¹⁰⁹ 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'¹¹⁰.

[107] Ibid. 155.

[108] Ibid. 134-135.

[109] Ibid. 135.

[110] Ibid. 139; 141.

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 preconstructions 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 case¹¹¹ 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.'¹¹² Upon even the most elementary comprehension of economics, it is clear that there are numerous

[111] The strongest of which are probably the procedural arguments, although it is impossible to view them as wholly isolated from the broader issues.

[112] P.M.Morriss: Should we subsidise Public Transport? (1983) 54 Political Quarterly 392, at 398.

plausible economic arguments in support of subsidies, and further, that in terms of an overall analysis of cost-benefit¹¹³ 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. Forty percent or less of ratepayers use the public transport facilities; sixty percent 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 moments 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

[113] Several recent studies have suggested that on a cost benefit analysis, subsidies of urban public transport are justified/economic. C.f. S.Glaister: subsidies of urban public transport are justified/economic. C.f. S.Glaister: Fundamentals of Transport Economics (1981) Blackwell pp. 86-91; A.Grey: Urban Fares Policy (1975) Saxon House ch.6; C.A.Nash: Economics of Public Transport (1982) Longmans ch.2.

centre of cities, insofar as most people who travel to city centre shops do so by public transport.¹¹⁴ 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.

[114] P.Morriss op.cit. p.394.

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 arguably an economically more efficient and desirable use of resources than raising prices.

7.2 CONCLUSION

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 its 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 exclude 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, rhetorical and ideological dimensions 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.

8. CONCLUSION; LEGAL THEORY AND LEGAL PRACTICE

Surprise at resistance: because we see through a thing we think that in future it will be unable to offer us any resistance whatsoever - and we are surprised at finding that we are able to see through it, and yet unable to run through it. This foolish sensation and surprise are similar to the sensation which a fly experiences before a window pane.¹

In the final analysis I suspect that the major obstacle in the path of the development of an adequately critical and transformative rhetoric of law is not so much one of intellectual coherence as of academic and institutional politics. For all its obviousness, the displacement of the exegetical tradition of jurisprudence and the concurrent elaboration of a concept of legal discourse - a deviant theory of the legal text and of its reading or reception - faces debilitating rhetorical problems of its own: to diagnose an illness is merely the precondition to the possibility of a cure. In the ensuing analysis I will briefly recapitulate the substantive goals of the theory of law as social discourse and the institutional opposition to them, and will then proceed to tabulate the various contexts within which this account of legal language and of law as communication may contribute - as one aspect among many - to the furtherance of what has come to be known as the critical legal studies movement.²

In the first instance, the concept of legal discourse is a methodology for the reading of legal texts which places the communicative or rhetorical functions of law within their institutional and sociolinguistic contexts. As against the dominant view of legal language as a discrete and unitary genre of written authorities constituting a

[1] F.Nietzsche: The Dawn of Day (1903) London, aphorism 444.

[2] For diverse formulations of this movement, see, D.Kairys (ed.): The Politics of Law (1982) New York: R.M.Unger: The Critical Legal Studies Movement (1983) 96 Harvard Law Review 563. See also, F.Burton and P.Carlen: Official Discourse (1979) R.K.P., pp.119-139; B.Edelman: Ownership of the Image (1979) R.K.P., pp.21-26, 109-112; T.Mathieson: Law, Society and Political Action (1980) Academic Press, passim.

grammar or code, which, if correctly attributed and interpreted, forms a series of necessary truths, an oppositional, contingent, reading is suggested. It is argued first that the dominant paradigm of legal language and legal text cannot account for the semantic content of the legal text as judgment or linguistic practice - the diversity of meanings and usages which are actually realised. It is further claimed that a critically adequate reading of the law should take account of the various levels of law as social discourse, as a series of institutional functions and rhetorical effects, a project which requires reading within the legal text precisely those facets or meanings of legal regulation and discipline which its self-protective doctrines of unity, coherence and univocality have traditionally endeavoured to exclude. For precisely this reason, the legal text should be read linguistically in terms of a theory of deconstruction, that is in terms of the order of discourse or social and political context which it systematically endeavours to deny or obscure: an adequate account of the legal text would read it in terms of an 'outside' (hors-texte) which is present, even if it is presented as an absence, by omission. At this point, however, where the positive discourse of the law is reconstructed the project of such a reading faces the formidable opposition of what may be termed the legal institutions 'resistance to theory': its privileging of the grammatical or logical decoding of the text and its simultaneous resistance to the rhetorical or tropological indetermination which can be revealed in any verbal event, its denial of the properly semantic dimension of any linguistic practice. In explicitly political terms the various doctrinal representations of the coded unity of jurisprudence and of the univocality of legal language constitute an institutional programme or strategy of furtherance of legal professionalism and its inherent belief in the discrete, distinctive and expert character of legal practice as an elite occupation. By contrast, the analysis of law as social discourse would imply, at the very least, a different, less specific character to professional expertise in law: to view the legal text as an historically and rhetorically organised construct implies the continuity of legal doctrine with other modes of normative argument and equally the inseparability of legal institutional practice and experience from other branches of government and political

administration.³

Resistance to theory has several further connotations. If theory in its broadest sense may be characterised as openness to context, dialectic or dialogue, then legal doctrine is the antithesis of theory and may be represented as the most stringent of contemporary closures of knowledge, as a disciplinary mythology seeking to canonically bind legal sign to legal meaning in a series of fixed and intransigent equations. While even the most marginal practical knowledge of the law will tend to create an awareness of the frequently equivocal nature of the bond between sign and meaning, such an awareness has seldom been given any coherent theoretical expression and still less any adequate political representation. It is first the case that legal doctrine, as an objective idealism, is least of all concerned with practical knowledge, a fact which is well reflected in the further observation that in chronological terms too, practical knowledge comes second to the theoretical construction of the correct institutional meaning of law. It is only after the 'cognitive' object of legal science has been fully stated - as system of norms, rules or institutional conventions - that the more liberally orientated versions of jurisprudence will condescend to acknowledge the complementary yet subordinate dimensions of the anthropological, historical and sociological study of law. These disciplines are not philosophical, but for all their inadequacies they may occasionally throw empirical light upon certain of the more curious features of the normative order. Similarly, it is only after socialisation into the singular dimension of legal discipline has been achieved, it is only after the stringent corpus of exegetical or 'expository' jurisprudence has been inculcated and assimilated, examined and absorbed, that sufficient distance has been achieved to make practical knowledge of the law in its conventional sense (as knowledge of procedure and proof) possible.

It is indeed in relation to legal pedagogy that the method of reading legal texts here proposed is at its most radical and is most likely to be

[3] R.M.Unger (1983) *op.cit.*, pp.666-670; D.Kairys (1982) *op.cit.*, ch.3; J.Lenoble et F.Ost: *Droit, Mythe et Raison* (1980) Bruxelles, part III; also, P.de Mann: *Resistance to Theory* (1983) 63 *Yale French Studies* 3; M.Riffaterre (ed.): *Languages of Knowledge and of Inquiry* (1982) Columbia U.P.

unequivocally resisted.⁴ To begin with, the very existence of a legal system as a system is, more than anything else, the product of educational practice. From the founding of the law school at Bologna to the contemporary proliferation of law schools, the Western legal tradition has consistently placed the task of the systematic conceptual elaboration and justification of the legal order in the hands of the university. The discipline of law as a science, as a comprehensively textual discipline, is not a product of philosophical research nor of professional or practical knowledge, it is fundamentally no more than a pedagogy - an authoritarian mode of teaching. For all the dubious conceptual sophistication that jurisprudence as philosophy of law has acquired over the past centuries, it remains a peripheral discipline parasitic upon the substantive jurisprudence of legal educational practice. It is precisely as educational practice that the unity of law takes its most concrete form in the territory of the text and the systematic commentary of the text-book. That is where the law is to be found and it merely needs to be learned and applied, in which respect it is interesting to observe that for the law teacher the second order of rationalisation represented by positivist philosophy of law is to be viewed as a somewhat irrelevant body of knowledge which, on the periphery of legal studies, either repeats what is already (intuitively) known and practiced or indulges in a primarily aesthetic abstraction of little instrumental value. Substantive jurisprudence is conceived as an a-theoretical enterprise - its theory is organic, self-evident and largely commonsensical. In such a context, the proposal of a rhetoric of law which poses the question of the legal text and of its reading as explicitly theoretical and practical problems has both an immediate and radical relevance of a kind to which jurisprudence as philosophy of law has not traditionally aspired. What it requires is the reversal of the prior order of precedence and privilege, the re-reading of the law and the rewriting of the legal textbook in the space opened by the concept of law as social discourse. In the terminology of the previous chapter, the language and text of the law must be studied not simply as a discrete logic of intradiscourse but as an accumulation and crystallisation of interdiscursive meanings. In this aspect, the proposal

[4] F.Burton and P.Carlen (1979), pp.133-136; T.Mathieson: The Politics of Abolition (1974) Martin Robertson, pp.11-28.

of a rhetoric of law is not, however, intended as a contribution to the doctrinal debate as to the abstractly 'correct' theory of law, adjudication or interpretation. Rather its value is practical, if it is to make a contribution it will be as a specific methodology of legal study and as a reformulation of the appropriate mode of legal education, which allows for, and allows for the reality of, oppositional readings of legal texts. In an endeavour to provide a more systematic account of the broader implications of (and likely resistances to) this project, I shall proceed to examine certain of the contexts within which the rhetoric of law is to be located.

8.1 THE IDEOLOGICAL CONTEXT

Contemporary developments within the materialist theory of ideology have tended to distinguish two aspects of the concept of ideology.⁵ One meaning of ideology is specific and negative; it refers to a system of ideas which falsely represents or mystifies individual and collective relations to the material conditions of existence. To analyse ideology in this sense is both to attempt to expose or unmask the process and organisation of forms of consciousness in discourse, and simultaneously to propose the possibility of alternative forms of practice in relation to materiality - to the structural conditions of community or collectivity seen from the perspective of their transformation. In this latter aspect, ideology gains a broader positive connotation. Ideology may here be viewed as a programme or strategy in relation to the terms of social life. Ideology represents - although frequently in an unconscious form - a set of unrealised ideals as to the nature of collective existence, a prospective agenda predicating and limiting general attitudes, prescribing and enforcing ways of life or modes of being. It should finally be observed that in both aspects, ideology is primarily a form of social organisation, a collective practice and mode of belonging. It is only secondarily or peripherally that ideology can be taken to mean a set of mental representations.

[5] Particularly, G.Thorborn: The Ideology of Power and the Power of Ideology (1980) London; F.Jameson: The Political Unconscious (1981) Cornell U.P., ch.6; R.Debray: Critique of Political Reason (1983) London.

The latter point is of peculiar importance in relation to the analysis of the ideological dimension of law. It may be noted firstly that it is precisely the organisational capacity of an ideology which is its most enduring and socially resilient feature. The critique of ideology has all too often taken an idealist form - that of the denunciation of false ideas. Denunciation is inadequate to practice, it is no more than therapeutic and as has been aptly commented by one of the more controversial ideologists of the left: 'Specialists have torn all the ideological systems to shreds, laid bare all the shameful messianisms and exposed all the nonsense to pitiless ridicule - yet "ideology" buries its philosophical gravediggers one after the other.'⁶ It is tempting to draw an analogy with the 'intimidating endurance' of positivist jurisprudence, its ability to deflect its detractors, provided that it is understood that it is not simply the philosophical doctrine but equally the organisational practice from which and to which that philosophy leads that is the object of critique. It is imperative that in its negative aspect the critique of legal ideology moves beyond denunciation of legal doctrine to the re-reading of substantive law in the light of theory. It is legal practice after all that is ultimately the object of the critique of legal ideology and in one suitably strident account it is legal practice that must 'make amends'. To make amends is to provide an analysis of the history of the legal institution and of its functions, an analysis of the categories, discourse and doctrine within which the legal institution has developed and takes its effect:

It (is) necessary to set about the task of deciphering rulings and sentences. It is necessary to take seriously the juridical categories, the discrepant reasonings of jurists, the technical formulas of the courts, and the false rigour of doctrine. Taking them seriously does not mean taking them for what they claim to be. It means taking them for what they are in their necessary functioning.⁷

To see through something, in other words, is not to pass through it. It is not the theory but rather it is the practice by which critical legal studies will eventually be judged.

[6] R.Debray (1983) op.cit., p.116.

[7] B.Edelman (1979) op.cit., p.22

Which last point raises the question of the broader, positive, dimension to legal ideology and its comparison with the ideological role of the oppositional reading of law. The positive dimension of legal ideology is generally formulated in terms of the ideal of the rule of law and the concept of legal right, ideals which have been the object of a considerable amount of frequently ill-tempered debate.⁸ Provided, however, that ideology is understood as organisational practice and as mode of belonging, it is I believe arguable that these categories or ideals do not have any inherent or intrinsic meaning beyond that of their rhetorical effect within specific discursive contexts. The issue is not that of whether an ideal such as that of the rule of law can contribute to the abstract elaboration of a socialist order or to the concept of the good life generally but is rather that of whether the essentially theological role of that concept can be displaced or secularised within an oppositional ideology of critical legal studies and critical legal practice. The legal institution still awaits the 'twilight of the idols' and for the secularisation of the law to be possible requires that the goals of its proponents be rhetorically effective. Whatever the form that the new organisational goals may take - be it those of socialist legality, popular justice, informal law or communitarian anarchism - they are never completely justified in theory alone. On the one hand they represent incomplete alternatives, competing strategic goals which are progressively constituted by practical realisation. On the other hand they comprise a vocabulary and syntax, a language of opposition, a language which is urgently needed in the context of increasingly conservative ideologies of law and order in the political sphere. It is precisely rhetorically effective goals that socialists require, and where better to start than with the notion of a law that could actually be understood? At the same time some partial answer might be provided to the question which, in its most concrete form, asks why one should be an activist when it is more normal, acceptable and profitable to be lazy, timid and politically

[8] A useful guide to some of these issues is provided by, Z.K.Bankowski: Anarchism, Marxism and The Critique of Law, in D.Sugarman (ed.): Legality, Ideology and the State (1983) Academic Press. See also, P.Carlen and M.Collison (eds.): Radical Issues in Criminology (1980) M.Robertson, ch.4; D.Garland and P.Young: The Power to Punish (1983) Heinemann; T.Campbell: The Left and Rights (1983) London.

introverted, or at best, complacently hedonistic.

8.2 THE CONTEXT OF THEORY

I have argued that there is no adequate theory of law. Certainly the legal institution itself does not make great use of theory. Substantive jurisprudence is a matter of legal technique, a question of reading and teaching the law in terms of vague and dubious notions of interpretation and analogy, authority and precedent. Jurisprudence as philosophy of law is also somewhat resistant to theory. It has tended to operate upon the model of a philosophy of science and to rationalise the products of its science's practice, legal discipline, into a grammar of law or hierarchy of legal validity. It has by and large been able to assume the determinacy of law and the value of its practical functions and has concentrated upon the logical presuppositions that make law as a coherent system of rules - as a set of unproblematic institutional facts - possible.⁹ The question posed is that of how genuine knowledge of the law is possible - a question which is posed within the Neo-Kantian tradition of philosophical positivism and its philosophy of science, a question which seeks the foundations of knowledge and endeavours to systematically justify a particular order of discourse by arming it with the coercive rhetoric of universals, of necessity, logic, objectivity and truth.

Positivist philosophy of law has hitherto been a closed discourse, consumed by the circular endeavour of providing an epistemology of law it has been self-absorbed in the attempt to construct law as an 'object of cognition', as a 'thought' process, and has arrogantly or absent-mindedly assumed that the world will come to respond to the dictates of this particular thought process. It has straightforwardly ignored the possibility that the project it outlines - that of working backwards from the law as it is 'given' to the normative procedures that guarantee its 'givenness' - is not the only feasible or desirable project for a philosophy of law. The ideological grounding of the positivist project is

[9] For a strident statement of this form of jurisprudence, see, D.N. MacCormick: Contemporary Legal Philosophy (1983) 10 Journal of Law and Society 1.

ultimately to be found in the value that it attributes to a social order based upon hierarchy (the sources of law) and authority (adjudication) as the meaning of order. The choice to pursue that project is a political one. In theoretical terms it privileges epistemology and subordinates ontology, it favours knowledge as the study of ideal states of affairs and dismisses the historical and social construction of being. In the last instance that order of precedence is one of political preference, it is a defence of faith in large measure based upon the confusion of linguistic with natural reality, of reference with phenomenism.

The present study has argued that legal theory begins by throwing the possibility and status of law into question. What is in issue in a rhetoric of law is precisely the modalities of the production and reception of law as legal meaning. Rather than attempting to construct a grammar or indeed a semiotic which would justify abstract claims to knowledge of legal norms, the study of law as social discourse conceives law to be pre-eminently a practical category, a mode of social being and belonging which largely lacks justification. To view law as primarily an ontological, practical, category, is to refer philosophy of law to the study of law in terms of social ontology, that is to its existence as social practice - to the influence it actually exerts, to the functions it performs and to the meaning effects it realises.¹⁰

It may be noted finally that the latter, somewhat abstractly formulated, point has considerable implications with regard to the development of a critical legal studies. Its implications are best stated in terms of the need to read law dialectically, that is in terms of the functions it performs within a complex political and social totality. Rather than reading the law according to its internally defined criteria of validity - which in Anglo-American jurisprudence generally means its mental reflection in the cerebra of legal officials - and its intradiscursive assertions of meaning, the law should be defined as primarily constituted by the connections between legal practice and the social whole. There is no guarantee, in other words, that the internal

[10] See, G.Lukacs: The Ontology of Social Being (1978) Merlin, vol.3; usefully commented upon in Cs.Varga: An Analysis of Lukacs Ontology (1981) 9 Int. Journal of Sociology of Law 159.

criteria of legality in any sense reflect the actual practices (formal and informal) of the legal institution and legal actors. Nor is there any overriding reason to suppose that the textual discipline of the law is best read in its own terms. On the contrary, the analysis of law as a rhetoric clearly indicates that the law is not a uniquely privileged discourse. Its specialism is in many aspects arbitrary, in the sense that, like any other discourse, the predominant modality of its production and reception is interdiscursive. The legal text as discourse is comprised of the network of its relations to other discourses, its dialogic, intertextual, functions and effects. It has been the object of this study to argue that the appropriate mode for the study of this discourse is, in the most serious of senses, interdisciplinary. In view of the potential for and indeed the history of misinterpretations of this point, it deserves emphasis.¹¹ The interdisciplinary study of law is the correlate of a conception of legal expertise and practice which aligns and articulates specialism in legal discourse with knowledge and experience of other disciplines and practices. The purpose of this interdisciplinary study would not be that of juxtaposing legal knowledge with that of other, essentially separate, knowledges (pluridisciplinary), nor would it be that of absorbing other disciplines or sciences into legal expertise (transdisciplinary) for the purposes of providing a further technical dimension of legitimation to legal discourse. The interdisciplinary study of law is aimed rather at breaking down the closure of legal discourse and at critically articulating the internal relationships it constructs with other discourses. An interdisciplinary philosophy of law does not exist to make the legal text speak in a monologic and univocal way, it exists to analyse the interdiscursive status of legal texts and to conduct a critical and constructive dialogue with the law.

[11] See particularly, F.Ost: Questions methodologiques a propos de la recherche interdisciplinaire en droit (1981) 6 Revue Interdisciplinaire d'Etudes Juridique 2.

BIBLIOGRAPHY

- Ackerman, B.; Social Justice in the Liberal State; (1980); Yale U.P.
- Adler, M. and Asquith, S. (eds.); Discretion and Welfare; (1980); London.
- Althusser, L.; Pour Marx; (1965); Paris.
- Althusser, L.; Lenin and Philosophy and other essays; (1971); London.
- Althusser, L.; Essays in Self-Criticism; (1976); London.
- Aristotle; Collected Works (ed. W. Ross); 1950; Oxford.
- Arnauld, A. and Lancelot, C.; Grammaire Generale et Raisonnee; (1669); Paulet.
- Arnauld, A. and Nicole, P.; Logic; (1685); London.
- Assiter, A.; Did Man Make Language?; (1983); 34 Radical Philosophy 25.
- Atkinson, J.M. and Drew, P.; Order in Court; (1979); Macmillan.
- Austin, J.; The Province of Jurisprudence Determined; (1954); London.
- Austin, J.L.; How to do Things with Words; (1962); Clarendon.
- Austin, J.L.; Philosophical Papers, (1961); Oxford U.P.
- Baker, G.P. and Hacker, P.M.S.; Language, Sense and Non-sense; (1984); Blackwell.
- Bakhtin, M.; The Dialogic Imagination; (1981); Texas U.P.
- Baldinger, K.; Semantics; (1980); Blackwell.

- Balibar, E.; *Positivism and Irrational Thought*, (1973); 107 *New Left Review* 3.
- Bankowski, Z. and Maher, G.; *Ordinary Language and Judicial Discretion*; (1981); 12 *Rechtstheorie* 1.
- Bankowski, Z. and Mungham, G.; *Images of Law*; (1976); R.K.P.
- Barthes, R.; *L'Ancienne Rhetoric*; (1970); *Communications* vol. 16.
- Barthes, R.; *S/Z*; (1974); Cape.
- Barthes, R.; *Elements of Semiology*; (1976); Cape.
- Barthes, R.; *Image - Music - Text*; (1977); Fontana.
- Baudrillard, J.; *Oublier Foucault*; (1977); Paris.
- Baudrillard, J.; *For a Critique of the Political Economy of the Sign*; (1981); Telos Press.
- Baul, F.; *Varieties and Consequences of Medieval literacy and illiteracy*; (1980); 55 *Speculum* 277.
- Benjamin, W.; *One Way Street*; (1979); London.
- Bennett, W.L. and Feldman, M.S.; *Reconstructing Reality in the Courtroom*; (1981); Tavistock.
- Benveniste, E.; *L'Origine de la formation des Mots*; (1935); Paris.
- Benveniste, E.; *Le Langage*; (1967); Neuchatel.
- Benveniste, E.; *Problems in General Linguistics*; (1971); Univ. of Miami Press.
- Berman, H.J.; *The Origins of Western Legal Science*; (1977); 90 *Harvard Law Review* 394.

- Bernstein, B.; Class Codes and Control; (1974); R.K.P.
- Bhasker, R.; A Realist Theory of Science; (1978); Leeds.
- Black, M.; Models and Metaphors; (1962); Ithaca.
- Blum, A.; Theorizing; (1974); Heinemann.
- Brown, G. and Yule, G.; Discourse Analysis; (1983); Cambridge U.P.
- Burke, K.; A Rhetoric of Motives; (1969); California U.P.
- Burton, F. and Carlen, P.; Official Discourse; (1979); R.K.P.
- Cameron, D.; Sexism and Semantics; (1984); 36 Radical Philosophy 25.
- Cameron, P. and Midgley, T.S.; Contract, The Rule of Law and the Liberal-Democratic State; (1982); 10 Int. Journal of the Sociology of Law 239.
- Campbell, T.; The Left and Rights; (1983); London.
- Carlen, P.; Magistrates' Justice; (1976); Martin Robertson.
- Carlen, P. and Collison, M. (eds.); Radical Issues in Criminology; (1980); Martin Robertson.
- Chomsky, N.; Cartesian Linguistics; (1965); Harper and Row.
- Chrystal, D. and Davey, D.; Investigations of English Style; (1969); Indiana U.P.
- Cicero; The Orator; (1952); Chicago.
- Cicero; Topics; (1952); Chicago.
- Cohen, J.; The Political Element in Kelsen's Pure Theory; (1973); Yale Law Journal 1.

- Cohn, G.; *Existentialism and Legal Science*; (1967); New York.
- Collins, H.; *Marxism and Law*; (1933); Oxford U.P.
- Coward, R. and Ellis, J.; *Language and Materialism*; (1977); R.K.P.
- Culler, J.; *Structuralist Poetics*; (1975); R.K.P.
- Culler, J.; *Saussure*; (1978); Fontana.
- Culler, J.; *In Pursuit of Signs*; (1981); R.K.P.
- Culler, J.; *On Deconstruction*; (1983); R.K.P.
- Davis, H. and Walton, P.; *Language, Image, Media*; (1983); Blackwell.
- Dawson, J.; *The Oracles of the Law*; (1968); Yale.
- De George, R. (ed.); *The Structuralists*; (1972); Anchor.
- De Mann, P.; *Allegories of Reading*, (1979); Yale U.P.
- De Mann, P.; *Resistance to Theory*; (1983); 63 Yale French Studies 3.
- Debray, R.; *Critique of Political Reason*; (1983); London.
- Deleuze, G. and Guattari, F.; *Anti-Oedipus*; (1977); Viking Press.
- Della Volpe, G.; *Critique of Taste*; (1978); London.
- Della Volpe, G.; *Rousseau and Marx*; (1978); London.
- Della Volpe, G.; *Logic as a Positive Science*; (1980); London.
- Derrida, J.; *The White Mythology: Metaphor in the text of Philosophy*; (1974); VII New Literary History 5.

- Derrida, J.; *Of Grammatology*; (1976); J. Hopkins U.P.
- Derrida, J.; *Signature, Event, Context*; (1977); 1 *Glyph* 172.
- Derrida, J.; *Scribble (writing-power)*; (1979); 58 *Yale French Studies* 116.
- Derrida, J.; *Positions*; (1981); Athlone Press.
- Dingwall, A. and Lewis, P. (eds.); *The Sociology of the Professions*; (1983); MacMillan.
- Ducrot, O. and Todorov, T.; *Encyclopedic Dictionary of the Sciences of Language*; (1981); Blackwell.
- Dworkin, R.; *Taking Rights Seriously*; (1978); Duckworth.
- Eagleton, T.; *Walter Benjamin*; (1981); Verso.
- Eagleton, T.; *Wittgenstein's Friends*; (1982); 135 *New Left Review* 64.
- Eco, U.; *A Theory of Semiotics*; (1976); Indiana U.P.
- Eco, U.; *Semiotics and the Philosophy of Language*; (1984); MacMillan.
- Edelman, B.; *Ownership of the Image*; (1979); R.K.P.
- Elshtain, J.B.; *Public Man, Private Woman*; (1981); Princeton.
- Elshtain, J.B.; *Feminist Discourse and its Discontents*; (1982); 7 *Signs* 603.
- Engler, R.; *Cours de Linguistique Generale*; (1968); Wiesbaden.
- Febvre, L. and Martin, H.J.; *The Coming of the Book*; (1976); London.
- Ferguson, R.B.; *The Horowitz Thesis and Common Law Discourse*; (1982); 2 *Oxford Journal of Legal Studies* 42.

- Feyerabend, P.; *Science in a Free Society*; (1982); London.
- Finnis, J.; *Natural Law and Natural Rights*; (1980); Clarendon.
- Foucault, M.; *The Archaeology of Knowledge*; (1972); Tavistock.
- Foucault, M.; *The Order of Things*; (1974); Tavistock.
- Foucault, M.; *Language, Counter-Memory, Practice*; (1977); Cornell U.P.,
- Foucault, M.; *The History of Sexuality*; (1978); Allen Lane.
- Foucault, M.; *Discipline and Punish*; (1979); Peregrine.
- Foucault, M.; *Power/Knowledge*; (1980); Harvester.
- Fowler, R.; *Literature as Social Discourse*; (1981); Batsford.
- Fowler, R. et al.; *Language and Social Control*; (1979); R.K.P.
- Fryer, B. (ed.); *Law, State and Society*; (1981); Croom Helm.
- Garfinkel, H.; *Studies in Ethnomethodology*; (1967); Prentice Hall.
- Garland, D. and Young, P. (eds.); *The Power to Punish*; (1983); Heinemann.
- Geach, P. and Black, M.; *Translations from the Philosophical Writings of G. Frege*; (1972); Blackwell.
- Gellner, E.; *Thought and Change*; (1964); London.
- Gellner, E.; *Words and Things*; (1980); London.
- Genette, G.; *Figures of Literary Discourse*; (1982); Blackwell.
- Giddens, A. (ed.); *Positivism and Sociology*; (1981); London.

- Gigliopoli, P. (ed.); Language and Social Context; (1972); Penguin.
- Gillan, G.; From Sign to Symbol; (1982); Harvester.
- Godel, K.; Les Sources Manuscrites du Cours de Linguistique Generale; (1957); Geneva.
- Goodrich, P.; Materialism and Linguistics; (1982); 32 Radical Philosophy 34.
- Goodrich, P.; The Antimonies of Legal Theory; (1983); 3 Legal Studies 1.
- Goodrich, P.; Law and Language; (1984); 12 Journal of law and Society 137.
- Goodrich, P.; Linguistics and Legal Analysis; (forthcoming, 1984); Modern Law Review.
- Gouldner, A.; The Dialectic of Ideology and Technology; (1975); MacMillan.
- Grassi, E.; Rhetoric as Philosophy; (1980); Pennsylvania State U.P.
- Greimas, A.J.; Semiotiques et Sciences Sociales; (1976); Paris.
- Greimas, A.J. and Courtes, J.; Semiotics and Language; (1982); Indiana U.P.
- Grice, P.; Meaning; (1957); 66 Philosophical Quarterly 377.
- Grice, P.; Utter's Meaning and Intentions; (1969); Philosophical Quarterly 147.
- Griffith, J.G.; The Politics of the Judiciary; (1981); Fontana.
- Group U; Rhetorique Generalisee; (1970); Paris.
- Gurevitch, M. et al.; Culture, Society and the Media; (1982); Methuen.

Habermas, J.; *Communication and the Evolution of Society*; (1979);
Heinemann.

Halliday, M.A.K.; *Language as Social Semiotic*; (1978); Arnold.

Hamburger, M.; *The Awakening of Western Legal Thought*; (1942);
New York.

Harris, D.; *The Development of Socio-Legal Studies within the
United Kingdom*; (1983); 3 *Legal Studies* 315.

Harris, J.W.; *Kelsen's Concept of Authority*; (1977); 36 *Cambridge
Law Journal*.

Harris, J.W.; *Law and Legal Science*; (1979); Oxford U.P.

Harris, J.W.; *Olivecrona and the Search for Legal Culture*;
(1981); 40 *Tidsskrift for Rettsvitenskap* 625.

Harris, R.; *The Language Myth*; (1981); Duckworth.

Harris, Z.; *Discourse Analysis Reprints*; (1963); The Hague.

Harrison, B.; *An Introduction to the Philosophy of Language*;
(1978); MacMillan.

Hart, H.L.A.; *Signs and Words*; (1952); *Philosophical Quarterly*
59.

Hart, H.L.A.; *Definition and Theory in Jurisprudence*; (1953);
Oxford.

Hart, H.L.A.; *Analytic Jurisprudence in Mid-Twentieth century
Jurisprudence*; (1957); *Univ. of Pennsylvania Law Review* 953.

Hart, H.L.A.; *Positivism and the Separation of Law and Morals*;
(1958); 71 *Harvard Law Review* 595.

Hart, H.L.A.; *The Concept of Law*; (1961); Clarendon.

Hart, H.L.A.; *Problems of the Philosophy of Law*; (1967); 5
Encyclopedia of Philosophy 264.

- Hay, D. et al.; Albion's Fatal Tree; (1978); Allen Lane.
- Heath, S. and Prendergast, C.; Signs of the Times; (1971);
Cambridge.
- Hervey, S.; Semiotic Perspectives; (1983); London.
- Hillel-Ruben, D.; Marxism and Materialism; (1973); Harvester.
- Hindess, B.; Philosophy and Methodology in the Social Sciences;
(1977); Harvester.
- Hirst, P.Q.; On Law and Ideology; (1979); MacMillan.
- Hjemslev, L.; Prolegomena to a Theory of Language; (1961);
Wisconsin.
- Husserl, E.; Logical Investigations; (1970); R.K.P.
- Ionesco, E.; Fragments of a Diary; (1968); Faber.
- Israel, J.; The Language of Dialectics and the Dialectics of
Language; (1979); Harvester.
- Jackson, B.S.; Sources du droit; (1982); Archives de Philosophie
du Droit 147.
- Jackson, B.S.; Semiotics and Legal Theory; (forthcoming, 1984);
R.K.P.
- Jakobson, R.; Linguistics; (1970); Mouton.
- Jakobson, R.; Selected Writings; (1971); The Hague.
- Jakobson, R. and Halle, M.; Fundamentals of Language; (1956); The
Hague.
- Jameson, F.; The Political Unconscious; (1981); Cornell U.P.
- Kairys, D. (ed.); The Politics of Law; (1982); New York.

- Kalinowski, G.; Introduction a la logique Juridique; (1965); Paris.
- Kalinowski, G.; Logique et Methodologie Juridique; (1980); 23 Archives de Philosophie du Droit 59.
- Kalinowski, G. and Landowski, K.; La Recherche en Sciences Humaines; (1981); CRNS, Paris.
- Kant, I.; Critique of Pure Reason; (1887); London.
- Kant, I.; The Critique of Judgment; (1952); Oxford.
- Kantorowicz, H.; Savigny and the Historical School; (1937); 57 Law Quarterly Review 326.
- Kelly, M.; Modern French Marxism; (1982); Blackwell.
- Kelsen, H.; The Pure Theory of Law, Its Methods and Fundamental Concepts; (1934); 50 Law Quarterly Review 474.
- Kelsen, H.; General Theory of Law and State; (1946); Harvard.
- Kelsen, H.; What is Justice?; (1957); California U.P.
- Kelsen, H.; The Pure Theory of Law; (1970); California U.P.
- Kelsen, H.; Essays in Legal and Moral Philosophy; (1973); Reidel.
- Kelsen, H.; The Communist Theory of Law; (1976); Aalen.
- Kelsen, H.; On the basis of legal validity; (1982); American Journal of Jurisprudence 178.
- Kennedy, D.; Form and Substance in Private Law Adjudication; (1976); 89 Harvard Law Review 1635.
- Kennedy, G.; The Art of Rhetoric in the Roman World; (1972); Princeton.

- Kevelson, R.; Comparative Legal Cultures and Semiotics; (1982); 1
American Journal of Semiotics 63.
- Knowles, D.; The Evolution of Medieval Thought; (1962); Yale.
- Kortian, G.; Metacritique; (1980); Cambridge U.P.
- Kress, G. and Hodge, R.; Language as Ideology; (1979); R.K.P.
- Kristeva, J.; La Revolution du Langage Poetique; (1974); Seuil.
- Kristeva, J.; Desire in Language; (1980); Columbia U.P.
- Lacan, J.; Ecrits; (1977); Tavistock.
- Lacan, J.; The Four Fundamental Concepts of Psychoanalysis; (1977);
Hogarth Press.
- Laclau, E.; Politics and Ideology in Marxist Theory; (1977);
London.
- Larrain, J.; The Concept of Ideology; (1979); Hutchinson.
- Lecourt, D.; Marxism and Epistemology; (1972); London.
- Legendre, P.; L'Amour du Censeur; (1974); Paris.
- Legendre, P.; Jouir de Pouvoir; (1976); Paris.
- Lenoble, J. and Ost, F.; Droit, Mythe et Raison; (1980); Bruxelles.
- Lepschy, G.; A Survey of Structural Linguistics; (1982); Deutsch.
- Levi-Strauss, C.; Structural Anthropology; (1976); New York.
- Levi-Strauss, C.; The Elementary Structures of Kinship; (1979);
Boston.
- Lewellyn, K. and Hoebel, E.; The Cheyenne Way; (1941); Oklahoma
U.P.

- Liebniz, G.W.; *The Monadology*; (1873); London.
- Locke, J.; *An Essay Concerning Human Understanding*; (1979); Oxford U.P.
- MacCormick, D.N.; *Law as Institutional Fact*; (1974); 90 *Law Quarterly Review* 102.
- MacCormick, D.N.; *Challenging Sociological Definitions*; (1977); *British Journal of Law and Society* 39.
- MacCormick, D.N.; *Legal Reasoning and Legal Theory*; (1978); Clarendon.
- MacCormick, D.N.; *Law, Morality and Positivism*; (1981); 2 *Legal Studies* 131.
- MacCormick, D.N.; *H.L.A. Hart*; (1982); Arnold.
- MacCormick, D.N.; *Contemporary Legal Philosophy*; (1983); 10 *Journal of Law and Society* 1.
- MacCormick, D.N.; *Legal Right and Social Democracy*; (1983); Oxford U.P.
- Maine, H.; *Ancient Law*; (1981); London.
- Maitland, F. and Pollock, F.; *The History of English Law*; (1891); London.
- Malinowski, B.; *Coral Gardens and their Magic*; (1955); Allen and Unwin.
- Martinet, A.; *Elements of General Linguistics*; (1964); London.
- Marx, K. and Engels, F.; *Selected Correspondence*; (1954); Moscow.
- Marx, K. and Engels, F.; *The German Ideology*; (1965); London.
- Mathieson, T.; *The Politics of Abolition*; (1974); M. Robertson.

- Mathieson, T.; Law, Society and Political Action; (1980); Academic Press.
- McBarnet, D.; Legal Form and Legal Mystification; (1982); 10 Int.Journal of Sociology of Law 409.
- McHugh, P. et al.; On the Beginning of Social Inquiry; (1974); R.K.P.
- McKluskie, L.; Women's Language and Literature; (1983); 14 Feminist Review 51.
- Mellinkoff, D.; The Language of the Law; (1963); Yale U.P.
- Metz, C.; Film Language; (1974); Oxford.
- Metz, C.; Psychoanalysis and Cinema; (1983); MacMillan.
- Michaels, W.B.; Against Formalism; (1979); 1 Poetics Today 23.
- Midgley, T.S.; The Role of Legal History; (1975); 2 Brit.Journal of Law and Society 153.
- Miers, D. and Page, A.; Legislation; (1982); London.
- Milton, P.; Reason and Criticism in Legal Theory; (1980); 2 Liverpool Law Review 75.
- Moore, M.S.; The Semantics of Judging; (1981); S.California Law Review 151.
- Morley, D.; The Nationwide Audience; (1982); B.F.I.
- Morris, H.; Verbal Disputes and the Legal Philosophy of John Austin; (1960); 7 Univ.of California Law Review 27.
- Morriss, P.; Should we subsidise Public Transport?; (1983); 54 Political Quarterly 392.
- Murphy, J.J.; Three Medieval Rhetorical Arts; (1971); Univ.of California Press.

- Murphy, W.T. and Rawlings, R.W.; After the Ancien Regime; (1931) (1982); 44 Modern Law Review 617; 45 Modern Law Review 57.
- Musgrove, A.; Criticism and the Growth of Knowledge; (1980); Cambridge U.P.
- Newman, R. (ed.); Essays in Jurisprudence in Honor of Roscoe Pound; (1962); Bobbs-Merrill.
- Nietzsche, F.; The Dawn of Day; (1903); London.
- Nietzsche, F.; The Birth of Tragedy; (1905); Foulis.
- Nietzsche, F.; Early Greek Philosophy and other Essays; (1908); Foulis.
- Nietzsche, F.; The Case of Wagner; (1911); Foulis.
- Nietzsche, F.; The Will to Power; (1913); Foulis.
- O'Barr, W.; Linguistic Evidence; (1982); Academic Press.
- Ogden, C.K. and Richards, I.A.; The Meaning of Meaning; (1929); R.K.P.
- Ong, W.; Ramus, Method and the Decay of Dialogue; (1953); Harvard U.P.
- Ong, W.; Orality and Literacy; (1982); Methuen.
- Ost, F.; Questions Methodologiques a propos de la Recherche interdisciplinaire en droit; (1981); 6 Revue Interdisciplinaire d'Etudes Juridiques 1.
- Pashukanis, E.B.; Law and Marxism; (1973); London.
- Pateman, T.; Linguistics as a branch of Critical Theory; (1981); 14/15 U.E.A. Papers in Linguistics 1.
- Paterson, A.; The Law Lords; (1982); MacMillan.

- Paulson, S.; Material and Formal Authorisation in Kelsen's Pure Theory; (1980); Cambridge Law Journal 172.
- Paulson, S.; Subsumption, Derogation and Non-Contradiction in Legal Science; (1981); Univ.of Chicago Law Review 802.
- Paulson, S.; On the Status of the Lex Posterior Derogating Rule; (1983); 5 Liverpool Law Review 5.
- Pêcheux, M.; Language, Semantics and Ideology; (1982); MacMillan.
- Perelman, Ch.; Logique Juridique; (1976); Dalloz.
- Perelman, Ch.; The Empire of Rhetoric; (1980); Notre Dame U.P.
- Perelman, Ch. and Olbrechts-Tyteca, L.; The New Rhetoric; (1971); Notre Dame U.P.
- Plato; Collected Dialogues; (1978); Princeton.
- Poulantzas, N.; State, Power and Socialism; (1978); London.
- Raz, J.; The Concept of a Legal System; (1980); Clarendon.
- Reynolds, R.J. and Wilson, W.G.; Scribes and Scholars; (1978); Oxford.
- Ricoeur, P.; The Rule of Metaphor; (1978); R.K.P.
- Rifaterre, M.(ed.); Languages of Knowledge and of Inquiry; (1982); Columbia U.P.
- Rose, G.; The Melancholy Science; (1978); MacMillan.
- Rose, G.; Hegel contra Sociology; (1981); Athlone.
- Rousseau, J.J.; Essai sur l'origine des langues; (1761); Paris.
- Sachs, A. and Wilson, J.H.; Sexism and the Law; (1978); M.Robertson.

- Sampson, G.; Schools in Linguistics; (1980); Hutchinson.
- Schulz, F.; History of Roman Legal Science; (1946); Oxford U.P.
- Searle, J.; Speech Acts; (1970); Oxford U.P.
- Shklar, J.; Legalism; (1964); Harvard U.P.
- Silverman, D. and Torode, B.; The Material Word; (1980); R.K.P.
- Southern, R.W.; The Making of the Middle Ages; (1967);
Hutchinson.
- Southern, R.W.; Medieval Humanism; (1984); Blackwell.
- Stein, P.; Regulae Iuris; (1966); Edinburgh U.P.
- Stewart, I.A.; Kelsen and the Exegetical School in Jurisprudence;
(1981); Proceedings of the U.K. Association of Social and Legal
Philosophy, Edinburgh.
- Stone, J.; Legal System and Lawyer's Reasoning; (1964); London.
- Strawson, P.; Individuals; (1959); Methuen.
- Stubbs, M.; Discourse Analysis; (1983); Blackwell.
- Sugarman, D. (ed.); Legality, Ideology and the State; (1983);
Academic Press.
- Summers, R.S.; The New Analytic Jurists; (1966); 4 New York Univ.
Law Review 861.
- Sumner, C.; Reading Ideologies; (1979); Academic Press.
- Therborn, G.; The Ideology of Power and the Power of Ideology;
(1980); London.
- Thomas, Y.; Le Langue du droit Romain; (1974); 19 Archives de
Philosophie du Droit 103.