LEGAL SEMIOTICS

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I. INTRODUCTION

Semiotics is the science of signs.[1] As mysterious as the word may seem,[2] semiotics has become a household term among inter-

[1] Any attempt at a definition of semiotics is at best preliminary and partial. Umberto Eco proposed an explanation of semiotics as "*the discipline studying everything which can be used in order to lie.*" U. ECO, A THEORY OF SEMIOTICS 7 (1976). Later Eco offered Saussure's definition of semiotics—"*une science qui étudie la vie des signes au sein de la vie sociale.*" *Id.* at 14 (*quoting* Saussure) ("a science that studies signs as they function in society"). For a discussion of Saussure's sign theory, see *infra* text accompanying notes 120-31. Eco is more satisfied with Peirce's definition of semiotics. "*[S]emiotic* . . . the doctrine of the essential nature and fundamental varieties of possible semiosis . . . ." C.S. PEIRCE, COLLECTED PAPERS 5:488 (C. Hartshorne & P. Weiss eds. 1958). By semiosis Peirce means an action involving "a coöperation of *three* subjects, such as a sign, its object, and its interpretant . . . ." C.S. PEIRCE, *supra*, at 5:484. For a discussion of Peirce's semiotic and the role of the interpretant, see *infra* text accompanying notes 79-85.

[2] Confusion surrounding the term semiotics is legendary. For Peirce the term was "semiotic" in the singular. For Saussure it was "*sémiologie.*" Americans now use "semiotics" in the plural, while the French have adopted the term in the singular, "*la sémiotique.*" *See* Sebeok, *The Semiotic Web: A Chronical of Prejudices*, 2 BULL. OF LITERARY SEMIOTICS 1, 8-15 (1976) (discussion of the terminological confusion that plagues the field of semiotics). This is due, in part, to the breadth of the subject matter and the subdivisions of the field into syntactics, semantics, and pragmatics. According to Umberto Eco, it was resolved at the International Association of Semiotics that the term

preters of art, music, literature and, now, the law.[3] Although sign theory is predominantly a European phenomenon, semiotics has developed internationally[4] especially in the field of literature. Curiously enough, despite the nexus between literature, law, and interpretive theories, only a handful of legal scholars have consciously adopted the principles of sign theory.[5] And yet, lawyers constantly make use of semiotics without knowing it in their everyday legal activities.[6] Reading, writing, interpretation of documents and cases, negotiation, interviewing, and juror selection are merely a few of the lawyerly tasks involving the fundamental elements of semiotics—an exchange between two or more speakers through the medium of coded language.[7]

Legal practice is a general exercise in interpretation.[8] Whenever a lawyer attempts to determine the meaning of a verbal exchange, he is faced with the semiotic task of unlocking a key to a legal code. To complete the task in a valid manner, the lawyer must know how to read and interpret the words or "signs" of the code that are governed by a particular convention.[9] This decoding process, better known as interpretation,[10] is lawyer's work and constitutes the very essence of semiotics. If the lawyer's goal is to communicate information persuasively, and to defend a certain interpretation contained in legal discourse, he will certainly benefit from a deeper understanding of semiotic theory that I have attempted to provide in this Survey.

I intend to explore the basic elements of semiotics, the role that sign theory has played in the law, and the potential use of the

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semiotics should be used as a translation of "semiology." *Id.* at 10 (citing Eco). Eco also reported in a humorous vein that until a few years ago Anglo-Saxons said "semiotics" and Continentals "semiology." In more recent times, however, Anglo-Saxons have come to prefer "semiology," and Continentals have adopted "semiotics" after the unanimous exclusion of "semeiotic," "semiotic," "semeiology," "sematology," and other lexical monstrosities. *Id.*; *see also* U. ECO, LA STRUCTURE ABSENTE 1 (1972) for a discussion of the difference in meaning between semiotics, the term adopted by the American school under the influence of Peirce, and semiology, coined by Saussure and adopted primarily by the French and European scholars.

[3] U. ECO, *supra* note 1, at 9-13.

[4] For a brief history and development of the international scope of semiotics, see Sebeok, *supra* note 2, at 2-8; U. ECO, *supra* note 1, at 5-16; Tiefenbrun, *The State of Literary Semiotics: 1983*, 51 SEMIOTICA 7 (1984) (containing an extensive bibliography of semiotic studies undertaken in the field of literary theory and practice); *see also* S. TIEFENBRUN, SIGNS OF THE HIDDEN: SEMIOTIC STUDIES (1980) (introduction to semiotic theory and its application to literary texts of the seventeenth century).

[5] *See infra* text accompanying notes 94-119, 132-39, 175-79, 186-90, 248-82, 311-31.

[6] *See infra* text accompanying notes 48-59.

[7] *See infra* text accompanying notes 40-47.

[8] *See generally* Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982).

[9] *See infra* text accompanying notes 90-91.

[10] B. JACKSON, SEMIOTICS AND LEGAL THEORY 19-21 (1985). Jackson makes a distinction between decoding and interpretation.

semiotic method yet untapped by the legal community. In Part I I shall broadly define semiotics,[11] propose a definition of legal semiotics,[12] and discuss some of its frequent uses in everyday legal practice.[13] In Part II I shall trace the history and development of semiotics as it grew out of the varied disciplines of medicine,[14] philosophy,[15] linguistics,[16] anthropology,[17] and literature.[18] The major thrust of this Survey is to determine the extent to which these disciplines have made specific contributions to the field of semiotics and the manner in which they have been applied to the law.

In Part II(B), which provides an overview of the development of semiotics in philosophy, I will sketch the basic principles of sign theory and the sign classification system proposed by Charles Sanders Peirce,[19] whose theories have influenced the legal academic community,[20] especially in the development of legal realism.[21]

Like philosophy, linguistics is a major branch of semiotics. Linguistics has undisputedly influenced the perceptions, creations, and communication skills of the legal world.[22] In Part II(C) I will discuss the semiotic theories of certain key figures in linguistics,[23] especially Ferdinand De Saussure, the father of modern linguistics, his view of the scope of semiotics, and its relation to the development of legal positivist theory.[24]

In the field of anthropology, which is discussed briefly in Part II(D), Claude Lévi-Strauss[25] adopted Saussure's semiotic principles and developed a structural method which has been applied with success to various aspects of the legal process by scholars mainly abroad.[26]

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11 *See infra* text accompanying notes 37-39.
12 *See infra* text accompanying notes 40-47.
13 *See infra* text accompanying notes 48-59.
14 *See infra* text accompanying note 68.
15 *See infra* text accompanying notes 69-119.
16 *See infra* text accompanying notes 120-73.
17 *See infra* text accompanying notes 174-79.
18 *See infra* text accompanying notes 180-306.
19 *See infra* text accompanying notes 79-93.
20 *See infra* text accompanying notes 94-119.
21 For a discussion of Peirce's role in the development of legal realism, see *infra* text accompanying notes 107-19.
22 *See infra* text accompanying notes 145-61.
23 *See, e.g.*, the linguistic theories proposed by: Charles Morris, *infra* text accompanying notes 162-66; Eric Buyssens, *infra* text accompanying notes 167-68; Louis Hjelmslev, *infra* text accompanying notes 169-71; and the Soviet semioticians, *infra* text accompanying notes 172-73.
24 *See infra* text accompanying notes 120-39.
25 *See infra* text accompanying notes 174-76.
26 *E.g.*, Arnaud, *Structuralisme et droit*, 13 ARCHIV. DE PHILOS. DU DROIT 283 (1968).

Semiotics has seen its most significant impact in the area of literary criticism. It is primarily through the fertile connection of literature and the law that the legal community has become aware of the potential of semiotics. In Part II(E) I will trace the sources of semiotics in the different schools of literary theory ranging from the Russian formalists to the post-structuralists and comment on their specific contributions to legal interpretive theory. I will explore in some detail the work of Roman Jakobson,[27] a member of the Prague School,[28] and his catalytic description of the six constituent factors of a speech event.[29] Jakobson is a major contributor to semiotics and to communication theory in general, and his work has significant implications for legal interpretive practice. Similarly, the literary schools of new criticism,[30] structuralism,[31] and post-structuralism[32] have each made a mark on American and European legal scholarship, especially in the development of the critical legal studies movement.[33] I intend to isolate and describe the specific semiotic influence of these literary schools on the law and on the critical legal studies movement in particular. I will also discuss the semiotic theories of three structuralists who have played an important role in the development of semiotics abroad and who will probably influence legal semiotics in the United States in the near future: Algirdas Greimas,[34] Tzvetan Todorov,[35] and Roland Barthes.[36]

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27 *See infra* text accompanying notes 195-202.

28 *See infra* text accompanying notes 191-94.

29 *See infra* text accompanying notes 201-02.

30 *See infra* text accompanying notes 203-07.

31 *See infra* text accompanying notes 243-93.

32 The post-structuralist movement, otherwise termed "deconstructionism," is associated with Derrida, Foucault, and others like Lacan, whose theories are discussed *infra*. *See* text accompanying notes 294-310.

33 *See* text accompanying notes 311-31.

34 Greimasian narrative structures have been applied to the law and analyzed in detail by Bernard Jackson in *Semiotics and Legal Theory*. B. JACKSON, *supra* note 10, at 31-143. For a brief discussion of Greimasian methodology, see *infra* text accompanying notes 186-90.

35 Todorov's theory of narrative grammar and his other related theories have been influential in the area of literary interpretation as it is practiced in the United States. His theories are applicable to the analysis of legal discourse. *See infra* text accompanying notes 283-88. Robin West, in *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985), has attempted to apply Northrup Frye's literary theories to the law on the assumption that law, itself, is a narrative. If we accept her assumption, then Todorov's theories on the grammar of narrative become eminently useful to the legal community.

36 Roland Barthes' little book, *Éléments de Sémiologie*, which appeared originally in 1964 as an article in the influential journal, *Communications*, was the gunshot that set the literary world off on a major quest for signs and their various manifestations in literary works. For a discussion of Barthesian semiotics and the law, see *infra* text accompanying notes 289-93.

Since semiotics is only at the infant stage in its adoption by the legal community as a workable theory and method, I will undertake as a major goal of this Survey the suggestion of future applications of semiotics to the law.

A. *Definition of Semiotics*

What is semiotics? Derived from the Greek word *semion* or sign, semiotics is the scientific study of communication and signification. It has been defined as "the exchange of any messages whatever and of the systems of signs which underlie them . . . ."[37] Words, the basic tools of communication, are at best mere representations of reality, signs of the thing itself, mediators between the perception and verbal expression of an event. Signs—be they words, gestures, dots and dashes of the Morse Code—are the means by which an exchange of information takes place.

Exchange, or the process of communication, is characterized by mediation. Signs, which can do no more than mediate between the perception and expression of an event, lead ineluctably to distortion. The distortion of an observed reality might occur during the communication process due to memory lapses, variations in the expressive competency of speakers reporting the observed event, perceptual interference, lying, or failure by speakers to properly interpret the observed reality. Since words are nothing more than signs that mediate between the observed event and our expression of that event, one can conclude that the fundamental linguistic basis of communication is mediation itself. Since mediation engenders distortion, it is easy to understand why meaningful communication is difficult to achieve. The fundamental mediational property of language allows speakers to mask their intentions by the mere manipulation of words possessing the potential for multiple meanings, metaphoric expansion,[38] and ambiguity. Because signs are indirect and intermediary, language is fraught with uncertainties inviting and necessitating interpretation. With its rich history steeped in linguistics, the theory of knowledge,[39] and literary interpretive techniques, semi-

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[37] Sebeok, *Semiotics: A Survey of the State of the Art*, 12 CURRENT TRENDS IN LINGUISTICS 211 (1974).

[38] *See infra* text accompanying notes 140-44 for a discussion of the incidence of metaphor in legal discourse, and in particular, Paul Robertshaw's study of the use of metaphor in a British case. *See infra* text accompanying notes 266-70.

[39] For a study of the philosophical sources of semiotics, see *infra* text accompanying notes 69-78.

otics can provide the tools for more defensible interpretations of signs systems based on mediation.

B. *Definition of Legal Semiotics*

The semiotics of law is a specialized study of sign systems underlying legal informational exchanges.[40] Law, like literature, art, music, mathematics, the Morse Code, or even traffic signs, is a communication system composed of elements called signs, or more familiarly words, which convey a coded message.[41]

A legal code is a language made up of signs and sign relationships governed by convention. There are many codes in the law, and the receiver of the coded message will understand its signs only if he is privy to the conventions of that particular code. The lawyer's attempt to understand the signs of a code is called interpretation, a process which is undertaken in order to resolve the problems of distortion and masked intentions created by the nature of language itself.[42]

Interpretation, known as decoding in semiotic terms, is the systematic process of finding keys to hidden codes that unlock the doors to meaning. Interpretation is a major part of the legal process because of the volume and complexity of its codes, and because of the indirect nature of legal language which, like ordinary language, merely represents reality through the mediation of words. Mediation, then, is a fundamental linguistic property of the law which is explored in semiotics.

The semiotics of law would attempt to identify, classify, and describe in a systematic fashion, and in standardized language, modes of signification present in legal discourse that give rise to interpretation.[43] But the semiotics of law is still in the process of formation.[44] Legal semiotics has been undertaken abroad only by a very courageous few[45] who have studied the language of the

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[40] *See* text accompanying note 7. This definition is adapted from Sebeok's basic definition of semiotics. Sebeok, *supra* note 37, at 211.

[41] *See* U. Eco, *supra* note 1, at 48-150 (detailed discussion of a theory of codes). "[C]odes provide the rules which *generate* signs as concrete occurrences in communicative intercourse." *Id.* at 49.

[42] Other sources of distortion are discussed in the context of evidentiary theory. *See infra* text accompanying notes 52-53.

[43] J. Culler, The Pursuit of Signs: Semiotics, Literature, Deconstruction 12 (1981) (definition adapted from Culler).

[44] "*La sémiotique du langage du droit est seulement en train de se former.*" G. Kalinowski, Introduction à la Logique Juridique: Éléments de Sémiotique Juridique, Logique des Normes et Logique Juridique 53 (1965) ("Legal semiotics is only in the process of formation.").

[45] J. Rey, L'Essai sur la structure logique du code civil français (structure of the language of the French Civil Code examined from a semiotic perspective), *cited in* G.

law and lawyers[46] as a system of communication. Legal semiotics is at the infant stage, but I predict, on the basis of its rapid development in the field of literature,[47] that the law will soon actively adopt the principles and methods of semiotics.

C. *The Role of Semiotics in the Legal Process*

Even though most lawyers are not consciously aware of the fundamentals of sign theory, semiotics does play an important but implicit role in many aspects of the legal system. In the legal academic community, the use of semiotics is more explicit. Legal hermeneutics[48] has been influenced by semiotic theory on an international scale.[49] The development of two major theories of legal interpretation—positivism and realism—has a direct parallel in the different semiotic approaches of Saussure and Peirce respectively.[50] More recently, the critical legal studies movement has adopted the semiotic theories that grew out of structuralism and post-structuralism.[51]

In legal practice, semiotics plays an active role in the courtroom. Juror selection, as seen through a semiotic lens, is a process by which a litigator reads the signs of prospective jurors—their words, gestures, verbal, and non-verbal communication acts. Using semiotic skills, the litigator determines whether or not the juror will work for or against the client. Moreover, semiotic principles of communication guide the use of interpreters in the courtroom in cases involving international law and speakers from different linguistic systems.

Semiotics directs the use and misuse of controversial terms

KALINOWSKI, *supra* note 44, at 53; *see also* A.J. ARNAUD, ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANÇAIS (1973).

46 *See, e.g.* B. WROBLEWSKI, JEZYK PRAWNY I PRAWNICZY (LANGUAGE OF THE LAW AND OF LAWYERS), *cited in* G. KALINOWSKI, *supra* note 44, at 53; J. WROBLEWSKI, ZAGADNIENIA TEORII INTERPRETACJI PRAWA LUDOWEGO (PROBLEMS OF THE THEORY OF INTERPRETATION OF POPULAR LAW), *cited in* G. KALINOWSKI, *supra* note 44, at 53 (European scholarly studies investigating the language of the law and lawyers).

47 *See infra* text accompanying notes 180-310 for a discussion of semiotics and literature.

48 *See infra* note 119 for a discussion of legal hermeneutics and the role that semiotics played in the work of Francis Lieber.

49 Among the primary contributors to the field of legal hermeneutics are: E. BEAL, CARDINAL RULES OF LEGAL INTERPRETATION (2d ed. 1908); R. ROSS, THE LAW OF DISCOVERY (1912); F. GÉNY, METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899) (J. Mayda trans. 1963); H.G. GADAMER, WAHREIT UNE METHODE (1960); E. BETTI, LE CATEGORIE CIVILISTICH DELL'INTERPRETAZIONE (1948); *see also* F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3d ed. 1880).

50 For a discussion of legal realism and the influence of Peirce, see *infra* text accompanying notes 107-19. In contrast, legal positivism, discussed *infra* text accompanying notes 221-42, has been allied with the theories of Saussure.

51 *See infra* text accompanying notes 311-31.

in the general practice of the law. The differences between the legal, medical, and lay definitions of "death," or "right to life," is a phenomenon rooted in the semiotics of code theory. Another important practical result of the application of semiotics to the law is the widespread use of computer systems like LEXIS and WESTLAW that have revolutionized legal research. The simple fact is that semiotics is a body of knowledge that has and will continue to play a quiet but major part in the everyday affairs of the law.

1. Semiotics and Evidentiary Theory

Evidentiary theory and hearsay rules are founded on the semiotic principle of mediation. In a seminal study on the derivation of hearsay objections, Professor Laurence Tribe has described the process by which information is communicated as a triangle whose two main legs are perception and expression.[52] When a witness perceives an event or hears an utterance, the witness develops a mind picture of that objective reality which is then relayed to a receiver (the jury) by means of the witness' own language. Distortion of this objective reality can result from ambiguity, insincerity, erroneous memory, or faulty perception. The receiver of the information (the juror) must decode the message sent by the witness in order to arrive at as accurate a reconstruction of the reality as words will allow.

The nature of this communication is indirect, and the distortion level increases as the link between the perception of the reality and its expression is weakened by mediation. When the linkage between the objective reality and the juror is further weakened by hearsay, distortion increases. The semiotic principle of mediation, which is the primary cause of informational distortion, constitutes the basis of hearsay objections.

2. Sign Theory and the Law

The words with which we give testimony, draft documents, negotiate deals, interview clients, and interpret legal texts are mere signs, only indirect expressions of a reality at least one step removed from the thing itself. Therefore, speakers and listeners in a legal context are constantly engaged in a kind of informal interpretation process which can be described as semiotic analysis. Interpretation enables the parties to decode the messages

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[52] Tribe, *Triangulatory Hearsay*, 87 HARV. L. REV. 957, 959 (1974).

and understand the explicit or implicit signs embedded in the legal discourse that confront them and produce confusion.

An explicit sign is an easy sign to read and to understand because a one-to-one correspondence exists between the word and the reality which the word is designed to represent. The letters "t-r-e-e," called a signifier, mean tree and not dog, and there is a conventional agreement about what the coded word tree means. The conventional agreement of the meaning is called the signified. The word "tree" is coded because its reality or referent is communicated by means of a fundamentally arbitrary[53] sign whose meaning is determined by convention alone. The sign "tree" belongs to a field of words—types of trees—of which the term "tree" is the abstraction and the types its variants.[54] This field of words is called the code, or more precisely the metaphoric code, whose sign is the substitute for the reality which the speaker intends to communicate. When I say tree, all of us know more or less what a tree is and communication is simple, unambiguous, and free from multiplicity of meanings necessitating interpretation. In other words, the sign is explicit. However, if the convention of the code "tree" is not understood, or if one speaker has in mind a spruce while the other is thinking of an elm, the intended meaning will not take place.

The problem in law is that some words look like they are explicit signs governed by universally accepted convention but, in fact, they are false friends, words that are governed by a hidden code known only to the initiated. A good example of this type of explicit sign is the layman's definition of a sale in the ordinary course of business which turns out to be otherwise accord-

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[53] For the meaning of an "arbitrary sign" elaborated by Saussure, see the discussion *infra* text accompanying notes 123-24.

[54] Structuralism involves the study of invariants and variants. The invariant is an abstraction, called a "structure," and the variants, are the concrete and variable manifestations in the text of the abstraction which is itself invisible. The structuralist, then, is constantly trying to determine how one or another form of the invariant structure is manifested, and how this individual manifestation fits into the pattern of the whole. Structuralists analyze textual variants of an abstract and hidden structure in order to determine (1) the relation of that particular variant to the whole picture or the system of the text, and (2) the specific quality of that variant which makes it different from the other variants of the structure. A structural analysis can be undertaken on different levels of the text—on segments of the text that are smaller than a sentence and on suprasegmental portions analyzing blocks of discourse. *See* S. TIEFENBRUN, A STRUCTURAL STYLISTIC ANALYSIS OF LA PRINCESSE DE CLÈVES (1976) (example of a structural analysis of literature that investigates structures within and beyond the sentence of a classical French novel). *Compare* Tiefenbrun, *Mathurin Regnier's Macette: A Semiotic Study in Satire*, 13 SEMIOTICA 131 (1975) for a more semiotically oriented approach to structural and stylistic analysis of a shorter segment, *e.g.*, a poem.

ing to the conventions of either the Uniform Commercial Code or the Internal Revenue Code.

Injustice can result from the failure to recognize a false friend or deceptive explicit sign. A case taken from the commercial law context will serve as an illustration. A buyer of sand paid for his goods, but left them at the premises of the seller who subsequently defaulted on a loan from a bank that had a security interest in the seller's inventory.[55] To protect his purchased property, the buyer actually placed signs on the sand piles that read that they were property of Martin Marietta Aggregates. Despite the explicitness of this sign, intended as an identification of ownership, the bank took over the seller's premises and sold the sand. According to the Uniform Commercial Code section 2-501(b), identification requires designation by the seller not the buyer. Since the buyer in this instance was not privy to the conventions of the Uniform Commercial Code and its own sign system, the buyer's sign had little if any meaning in a court of law.

When the correspondence between the word and the reality is either not clear or not limited to one immediately apparent meaning, the sign is implicit. The recent creche case[56] is an example of the multiplicity of meaning created by the use of an implicit sign. In that case the Court debated whether the creche, which is an iconical sign[57] customarily displayed around Christmas time, constituted a religious symbol or a sign of winter festivity enjoyed by all and not limited to a specific religious group.[58] Without expressly acknowledging the fundamentals of semiotic theory, the Court in its discussion of the distinction between sign and symbol was actually adopting a semiotic argument and contributing to a major debate that continues unresolved among Peircean and Saussurean semioticians today.[59]

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55 Martin Marietta Corp. v. New Jersey Nat'l Bank, 505 F. Supp. 946 (D.N.J. 1981).

56 Lynch v. Donnelly, 465 U.S. 668 (1984).

57 *See infra* text accompanying notes 89-93 for a discussion of icons, indices, and symbols as elaborated by Peirce.

58 *Lynch v. Donnelly*, 465 U.S. at 685-86. In his dissent, Justice Brennan spoke the language of semiotics when he drew our attention to the motivation of the sign, the creche. *Id.* at 708-13 (Brennan, J., dissenting). It is precisely because the creche here is not an arbitrary but a motivated sign that it should be considered as a symbol in Saussurean terms. A creche is tied to the concept of religion by its contiguous relation to the Christ figure which symobolizes Christianity. Justice Brennan in dissent said that to label the creche a secular element of Christmas is a corruption of the very concept of religion and would be tantamount to state support of religion. *Id.* at 725-26 (Brennan, J., dissenting).

59 *See infra* text accompanying notes 123-24 for a discussion of the contrast between Peirce's definition of the symbol and Saussure's more radical distinction between sign and symbol based on the notion of arbitrariness of the sign.

In the course of this brief attempt in Part I at a preliminary definition of semiotics and a proposal for a definition of legal semiotics, I have attempted to show that semiotics and sign theory play a significant role, if not consciously then indirectly, in the everyday practice of the law which involves verbal exchanges mediated by signs. Semiotics plays a particularly vital role in the lawyer's task of interpretation. Here a more conscious application of semiotic theory has been attempted by legal scholars whose work will be examined in Part II.

II. Sources of Semiotics

How did semiotics develop? At the turn of the twentieth century, Charles Sanders Peirce and Ferdinand De Saussure, two scholars in different fields of philosophy and linguistics, were investigating the elements of meaning or what is referred to as "signification." Peirce, who considered semiotics a branch of logic, studied "legisigns" or signs of the law as a special category of semiotics.[60] Saussure viewed "semiology"[61] as an all-encompassing science that would someday include linguistics, psychology, and anthropology.[62] Saussure did not specifically investigate signs of the law, but one can assume that he considered legal language, like literature, art, music, and dance, a complex variant of ordinary language.[63]

Semiotics is vast in scope.[64] Umberto Eco has proposed a list of the many areas of investigation undertaken in the name of semiotics: zoosemiotics, olfactory signs, tactile communication, codes of taste, paralinguistics, medical semiotics, kinesics and proxemics, musical codes, formalized languages, written language, unknown alphabets and secret codes, natural languages, visual communication, systems of objects, plot structure, text theory, cultural codes, aesthetic texts, mass communication, and rhetoric.[65] To this list Eco later added psychoanalysis, motor signs, grammatology, traffic signs, and semiotics of architecture

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60 *See infra* text accompanying notes 86-88.

61 For a detailed analysis of the different uses of the terms semiotics and semiology, see *supra* note 2.

62 *See infra* text accompanying notes 130-38.

63 For Saussure's famous definition of semiology, see *infra* note 121.

64 A brief excursion into the sources of semiotics which this Survey intends to provide will explain why semiotics has been applied to many different avenues of inquiry. Even though both Peirce and Saussure perceived the breadth of the field, neither possibly could have imagined that semiotics would someday include the study of linguistics, speech act theory, formalism, structuralism, semantics, stylistics, rhetoric, psychoanalytic approaches to discourse analysis, reader-response theory, and deconstruction.

65 U. Eco, *supra* note 1, at 13.

and literature.[66]

Legal language should be added as well, for it is a particular form of communication whose complexity attracted the attention of no less a prominent philosopher and semiotician than Charles Sanders Peirce.[67] In order to determine how semiotics developed into this broad-based, widely applied discipline, I will trace the sources of its development from such divergent fields as medicine, philosophy, linguistics, anthropology, and literature.

A. *Medicine*

1. Signs and Symptoms

Semiotics was one of the three main branches of Greek medicine. It constituted the study of detectable indications of changes in the human body. The modern equivalent of semiotics in medicine is the study of signs and symptoms. Although the word "semiotics" has almost totally disappeared from the basic vocabulary of the medical profession, at least in the United States, the study of signs and symptoms continues to be a fundamental course in the typical medical school curriculum.[68]

B. *Philosophy*

1. Sign, Signifier, Signified, Referent, and Context

The Greek philosophers, namely the Stoics, Epicureans, and Skeptics, studied theories of signs and considered semiotics a basic division of philosophy, including logic and the theory of knowledge.[69]

The early philosophers grappled with the basic elements of semiotic theory: the sign, the signifier, the signified, and its referent.[70] Aristotle conceived of the sign as a relation between words and mental events (the referent) rather than things. According to Aristotle, a word is the name of the referent or the mental picture the receiver has of the thing expressed in words.

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66 *Id.*

67 Informal discussions with Umberto Eco at a recent semiotics conference at the University of Indiana at Bloomington confirmed my belief that Eco would now add "law" to the fields of investigation undertaken in the name of semiotics.

68 The fact that the medical profession studies signs and symptoms without calling this "semiotics" is another illustration of the basic premise of Part I of this Survey: people in the law and in other fields are making use of semiotic theory without even knowing it.

69 G. BURSILL-HALL, SPECULATIVE GRAMMARS OF THE MIDDLE AGES (1971) (detailed discussion of the Greek philosophers as a source of semiotics).

70 *See* R. BARTHES, ÉLÉMENTS DE SÉMIOLOGIE 106-30 (1964) (elaborate discussion of signifier, signified, and referent).

Stoic theory differed in terminology and in context from Aristotelian semiotics. The Stoics believed that meanings are distinguishable from the referent or mental event.[71]

The Stoic, Sextus Empiricus, identified three aspects of the sign—the signified, the signifier, and the referent. The signified, or the thing itself to which the words refer, is often compared to the content level of a discussion or discourse. The signifier, the actual word or physical presence of letters on the page, is more akin to the style of a discourse. The referent is the speaker's own conception of the thing itself. Content analysis, which is the type most often performed by lawyers, deals primarily with the signified. Stylistic analysis, which literary scholars often undertake, mainly involves the signifier. The sign itself is the relationship of the signifier (*signifiant*—symbolically referred to as "Sa") to the signified (*signifiée*—symbolically refered to as "Se"). The sign is represented as the equation of Sa/Se. Since the sign is basically a relationship of form to content, both stylistic and content analysis should be undertaken in any interpretive endeavor in order to reflect the basic nature of the sign and to arrive at a valid description of the discourse under investigation. Thus, it is hoped that the reading of cases and the interpretation of legal discourse will take into account the interplay of style and content in the search for the hidden or intended meanings of a legal text.

It is in the intricate relation of signifier, signified, and referent that meaning as well as misunderstanding are located. A signifier devoid of a signified is a nonsense utterance having no conventional meaning, like the term Jabberwocky. A signifier whose signified varies greatly from the referent creates misunderstanding necessitating interpretation. For example, when I write dog in the sentence "she's a dog," one person may understand a furry animal as the referent and another may understand an ugly woman. The disparity here between the signified and the referent would be clarified by an examination of the context of the utterance. The interpretation, limited by an examination of the context, yields one of several possible solutions to the initial misunderstanding created by the relation of signifier, signified, and referent.

2. *Bedeutung* and *Sinn*: Denotation and Connotation

Semiotics continued to grow from the time of the Greek phi-

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[71] *See* C. STOUGH, GREEK SKEPTICISM: A STUDY IN EPISTEMOLOGY (1969) (offering an interesting view of the sign theories of the Stoics and Epicureans).

losophers up until the present.[72] In the middle of the nineteenth century, Bernard Bolzano, a Prague philosopher, broached a theory of signs,[73] in which he distinguished between *Bedeutung* (the meaning of a sign) and its *Sinn* (the sense of the sign obtained from the context). This distinction is vital to the law and relates to the notions of denotation and connotation often referred to by legal interpreters attempting to tease out of the use of a given word some implicit meaning.[74]

Umberto Eco defined the *Bedeutung* or meaning of a word in terms of denotation: "the *Bedeutung* is intended as the definition of a historical entity that a culture recognizes as a single person, and is therefore a denoted content."[75] He defined the *Sinn* or contextual sense of a word in terms of connotation: "the *Sinn* is a particular way of considering a given content, according to other

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[72] In the Middle Ages, a theory of signs developed known as "*scientia sermocinales*" including grammar, logic, and rhetoric. The scholars who proposed this theory followed one of two directions: either Aristotelian and Platonic metaphysics (Leibniz), or the assimilation of semiotics into empirical science and philosophy. C. MORRIS, SIGNS, LANGUAGE AND BEHAVIOR 286 (1946). This lead to the more specialized study of the syntax of sign structures and the eventual proposal of a universal system of signs. The British empiricists, notably John Locke, were more concerned with the semantic aspect of sign systems.

In the Renaissance, the English philosopher and empiricist, Hobbes, who drew the distinction between "marks" and "signs," developed a conceptualist theory of semiotics in which words have no similarity to things. But later in the nineteenth century, John Stuart Mill would argue strongly in favor of a referential view: "Names are names of things themselves and not merely our ideas of things." J.S. MILL, A SYSTEM OF LOGIC 24 (1851).

Following the line of philosophers engaged in semiotic theory (Aristotle, Sextus Empiricus, Ockham, Hobbes, and Mill), one should cite Gottlob Frege who, in his 1893 *Grundgesetze der Aritmetic* distinguished between what words actually express (their sense) and what these words stand for (their reference). This distinction is similar to the concepts of connotation and denotation often used in legal contexts.

In the middle of the seventeenth century, Jean Poinsot created the link between scholastic semiotics and the theory of John Locke. J. POINSOT, TREATISE ON SIGNS (TRACTATUS DE SIGNIS) 9 (J. Deely ed. 1986) (cited in Sebeok, *supra* note 2, at 3). John Locke greatly influenced the development of semiotics. In the final chapter of his *Essay Concerning Human Understanding* in 1690, Locke called the complex problem of the sign one of the "three great provinces of the intellectual world." He named this province "Metov" or the "doctrine of signs."

In the eighteenth century Jean-Henri Lambert, who was significantly influenced by Locke, devoted an entire section to semiotics in his two volume work *Neues Organon* in 1764. Joseph Marie Hoene-Wronsky, also familiar with Locke's work, wrote *La Philosophie du Langage*, in which he examined the nature of signs. J. HOENE-WRONSKY, LA PHILOSOPHIE DU LANGAGE (1879).

[73] Bolzano was familiar with the work of Locke and Lambert. He wrote a book about semiotics entitled *Wissenschaftslehre* in 1837.

[74] Eco defined the concepts of denotation and connotation in his *Theory of Semiotics*. "[A] denotation is a cultural unit or semantic property of a given sememe which is at the same time a culturally recognized property of its possible referents; . . . a connotation is a cultural unit or semantic property of a given sememe conveyed by its denotation and not necessarily corresponding to a culturally recognized property of the possible referent." U. ECO, *supra* note 1, at 86.

[75] *Id.* at 61.

cultural conventions, thereby including within one's consideration some of the connotated contents of the first denoted content."[76] The main point of this rather technical definition is that certainty of uniform interpretation is reduced because one person's sense of the meaning of a term, which is developed from the context and cultural convention of which he may or may not be a part, will not be the same as another person's sense of the meaning of that same term. To arrive at a more certain and uniform interpretation, connotational factors should be taken into consideration: the historical period in which the utterance is made, a special meaning the term might have had at the time it was first made, the intention of the speaker as evidenced by other related documents, and the linguistic context of the utterance itself.

The nineteenth and twentieth centuries saw inroads made in the theory of semiotics, especially in the area of the classification of signs. Bolzano, in his classification system,[77] distinguished between universal and particular signs, natural and accidental signs, arbitrary and spontaneous signs, visual and auditory signs, simple and complex signs, and signs and indices. Edmond Husserl made yet another attempt to classify signs,[78] but none would equal the great classification system proposed by Charles Sanders Peirce at the beginning of the twentieth century.

3. Charles Sanders Peirce

a. Peirce's Definition of the Sign and the Interpretant

Few would argue that Peirce is the father and "fountainhead" of modern semiotics.[79] Peirce's semiotic involves "a coöperation of *three* subjects, such as a sign, its object, and its interpretant . . . ."[80] Peirce conceived of the sign in terms of a dynamic process, a "referring back" of the signifier to the signified. His celebrated reformulation of the classical definition of the sign—*aliquid stat aliquo*—is the following. A sign is "something which stands to somebody for something in some respects or capacity."[81] Thus, the sign can only be a sign if it is taken to be one by a receiver.

The sign is always taken as "standing for" something in

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76 *Id.*
77 B. BOLZANO, WISSENSCHAFTSLEHRE (1837).
78 E. HUSSERL, ZUR LOGIK DER ZEICHEN (SEMIOTIK) (1890).
79 Sebeok, *supra* note 2, at 6.
80 C.S. PEIRCE, *supra* note 1, at 5:484.
81 *Id.* at 2:228.

some way which Peirce calls its "ground." A sign creates in the mind of someone an equivalent sign called an interpretant of the first sign. Whatever the sign stands for is its "object." A sign can have varying meanings to different people because the relation between the reality observed and the sign used to designate it is mediated by what Peirce calls an interpretant. The interpretant[82] is merely another sign that translates and explains the first one, but which is governed by the interpreter's personal conception of the observed reality.[83]

Peirce's concept of the interpretant has been misunderstood by many. The interpretant, not to be confused with the interpreter, is a sign itself. The interpretant "addresses somebody, creates in the mind of a person an equivalent sign, a more developed sign."[84] The fact that an interpretant or individualized conception of an event exists in every verbal exchange explains the need for interpretation.[85]

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[82] *See supra* text accompanying notes 79-85.

[83] Peirce conceived of the doctrine of signs as an integral part of logic. "Logic, in the general sense, is, as I believe I have shown, only another name for semiotic, the quasi-necessary, or formal doctrine of signs." C.S. PEIRCE, *supra* note 1, at 2:227.

Borrowing the term "semiotic" from Locke, Peirce then postulated a triadic relation for the sign:

> A Sign or Representamen, is a First, which stands in such a genuine triadic relation to a Second, called its Object, as to be capable of determining a Third, called its Interpretant, to assume the same triadic relation to its Object, in which it stands itself to the same Object. The triadic relation is genuine, that is its three members are bound together by it in a way that does not consist in any complexus of dyadic relation.

Id. at 2:274.

Peirce's emphasis on the triadic relationship constitutes a basic difference between Peirce's semiotic and Saussure's semiology. Peirce conceives of the semiotic system as a fundamentally triadic interaction of sign, object, and interpretant, whereas Saussure's conception is largely binary with a concentration on the interaction between signifier and signified and other binary oppositions that are inherent to the structure of language. *See* B. JACKSON, *supra* note 10, at 14-15.

Mediation or Thirdness is essential to the understanding of Peirce's semiotic theory and its processes, which he called semiosis:

> All dynamical action, or action of brute force, physical or psychical, either takes place between two subjects, or at any rate is a resultant of such actions between pairs. But by "semiosis" I mean, on the contrary, an action, or influence, which is, or involves, a coöperation of three subjects, such as a sign, its object, and its interpretant. This tri-relative influence not being in any way resolvable into actions between pairs . . . my definition confers on anything that so acts the title of a "sign."

C.S. PEIRCE, *supra* note 1, at 2:484. The sign is inseparable from semiosis or from the unlimited referring back of sign to sign. Mediation, then, is the source of the essentially dynamic quality of the Peircean semiotic which is conceived of in terms of a process.

[84] C.S. PEIRCE, *supra* note 1, at 2:228.

[85] Eco explained the relation of the interpretant to the sign in this way: "the fundamental characteristic of the sign is that I can use it to *lie* . . . . The fact that a sign can be used to lie means that it does not necessarily have to be explained by showing the thing, the object to which it corresponds; it can be explained by using another sign, and

b. Peirce's Classification of Signs

Peirce coined the phrase that all semioticians repeat: "the entire universe is perfused with signs, if it is not composed exclusively of signs."[86] In fact, "every thought . . . is in itself essentially of the nature of a sign."[87] Peirce tried to put some order in the universe perfused with signs by developing a classification system. He identified sixty-six different kinds of signs based on a trichotomy.

The first classification depends on the sign itself which can be either a duality, an existent, or a general law. In this division there are qualisigns (a qualitative possibility), sinsigns (an actual existent), and legisigns (a general or repeatable sign). All linguistic signs fall into the category of legisigns.[88]

1. *Icon, Index, and Symbol.* Peirce's second classification of signs is dependent on the type of relation that exists between the sign and its object or interpretant. In this division there are icons, indices, and symbols. A diagram is an example of an icon. The nature of the iconic relationship between the sign and its object is one of similarity.[89] The lawyer often makes use of diagrams and various types of iconical signs to illustrate a point on the basis of the undisputed truth that a picture is worth a thousand words. The use of iconical signs is particularly prevalent in products liability cases. Warnings on consumer products are often accompanied with illustrations of the product in order to avoid liability for the inadequacy of the warning and to prevent lack of comprehension by foreign language speakers or children who might use the product.

The index is a sign that stands in a physical relation to its object, like a weather vane, a shout, or the act of pointing. When I say, "where there is smoke there is fire," I am referring to the indexical sign of smoke which bears a cause and effect relationship to the fire. The relationship between sign and object here is based on contiguity rather than similarity. The indexical sign is

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so on and so forth. This is Peirce's theory of *interpretants* . . . ." Eco, *Looking for a Logic of Culture*, in THE TELL-TALE SIGN: A SURVEY OF SEMIOTICS 12 (T. Sebeok ed. 1975).

86 C.S. PEIRCE, *supra* note 1, at 2:448.

87 *Id.* at 2:594.

88 *See* U. ECO, THE ROLE OF THE READER 175-99 (1979) for a discussion of Peirce's use of the terms ground, interpretant, and object, as well as an in-depth exploration of Peirce's classification system.

89 The icon, which Peirce calls a sign, is based on a relationship of similarity that is derived from the platonic notion that the signifier imitates the signified. Peirce identified three subclasses of icons: images, diagrams, and metaphors. C.S. Peirce, *supra* note 1, at 2:277.

particularly important in evidentiary inquiries. Since the nature of the relationship of an indexical sign is more complex than the icon, the lawyer is required to offer a sufficient explanation for the basis of the contiguity in order to convince the court that the evidence is relevant. The explanation of the relevance of a shout to a case involving an alleged act of violence would involve incursions into the cause and effect, effect and cause, or part/whole relationship of the shout to the violence.

Unlike the iconical and indexical signs in Peirce's classification that are based respectively on relationships of similarity and contiguity, a symbol has only a conventional relation to the object it represents. According to Peirce, linguistic signs are symbols in as much as they represent objects by linguistic convention. The word "dog" means dog only because convention says so. It should be noted, however, that Saussurean semioticians prefer to distinguish the sign from the symbol more radically than Peirce has done.[90] According to Saussurean semiotics, the sign is arbitrary or non-motivated, whereas the symbol is motivated by relationships of contiguity or similarity.[91]

Peirce's third classification of signs is based upon the relation of the sign to its interpretant. He identified rhemes, dicents, and arguments. The rheme is a "Sign which, for its interpretant, is a Sign of qualitative Possibility, that is, is understood as representing such and such a kind of possible Object."[92] The rheme, then, is either a term or propositional function. A dicent is a "Sign, which for its Interpretant, is a Sign of actual existence," notably a proposition. An argument is a "Sign which for its Interpretant, is a Sign of Law."[93] These three types of signs are relevant to logicians and interpreters of legal texts.

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90 *See* O. DUCROT & T. TODOROV, DICTIONNAIRE ENCYCLOPÉDIQUE DES SCIENCES DU LANGAGE 124-25 (1972) for a discussion of the confusion between Peirce's and Saussure's definition of the sign. Peirce recognized the subtlety involved in a study of signs and symbols. He stressed the blending of index, icon, and symbol in a given sign. R. JAKOBSON, COUP D'OEIL SUR LE DÉVELOPPEMENT DE LA SÉMIOTIQUE 9 (1975). Peirce believed that the most perfect signs are those in which the iconic, indicative, and symbolic characters are blended as equally as possible. C.S. PEIRCE, *supra* note 1, at 4:448.

91 *See supra* text accompanying notes 56-59 (discussion of the creche as a religious symbol as it grew out of Lynch v. Donnelly, 465 U.S. 668 (1984)). According to the Saussurean conception of the symbol, *i.e.*, a motivated sign, the creche would constitute a symbol because of the contiguous relationship of the Christ figure to Christianity. The creche would also be a symbol according to Peirce because there is a conventional link between the creche and Christianity.

92 C.S. PEIRCE, *supra* note 1, at 2:250-52.

93 *Id.*

c. The Influence of Peirce's Semiotic on the Law

It is evident throughout Peirce's writing that he considered the concept of law to be a major issue in each part of his philosophy.[94] Peirce maintained that law is an element in every rational and meaningful experience. He defined law in different terms derived from sign theory. In phenomenology, law is the continuity of experience; in logic, law is an operative symbol; in metaphysics, law is efficient reasonableness or what Peirce calls "thirdness." Thirdness is the concept of mediation or representation which characterizes the indirect nature of the law and constitutes the very principle on which semiotics is built. Although some continue to question the validity of Peirce's typologies,[95] there is no doubt that Peirce was a pioneer who had considerable impact on the law.

The next section will investigate the influence of Peirce's semiotic on such key legal figures as Oliver Wendell Holmes, Jerome Frank, François Gény, and John Dewey. I will also propose the theory that Peirce's semiotic influenced[96] the development of the legal realist movement.

1. *Peirce's Influence on Oliver Wendell Holmes.* Few are aware of the extent to which the father of semiotics, Charles Sanders Peirce, has directly influenced legal theory and interpretive practice.[97] Scholars claim that Peirce had considerable impact on the development of a radically new approach to legal discovery and interpretation.[98] It is generally believed that Oliver Wendell Holmes

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94 W. HAAS, THE CONCEPTION OF LAW AND THE UNITY OF PEIRCE'S PHILOSOPHY 22 (1964).

95 Skidmore, *Peirce and Semiotics: An Introduction to Peirce's Theory of Signs*, in SEMIOTIC THEMES 33, 46-49 (R. De George ed. 1981). Even though some question Peirce's classification system, others recognize the significant influence Peirce's semiotic theory has had on many fields of investigation. Roman Jakobson described Peirce as "the most inventive, the most universal among the American thinkers." R. JAKOBSON, *supra* note 90, at 6, *citing* Jakobson, *A La Recherche de L'Essence du Langage*, 51 DIOGENE 346 (1965). Similarly, Charles Morris, another major contributor to the field of semiotics, remarked that Peirce's:

> classification of signs, his refusal to separate completely animal and human sign-processes, his often penetrating remarks in linguistic categories, his application of semiotic to the problems of logic and philosophy, and the general acumen of his observations and distinctions, make work in a semiotic source of stimulation that has few equals in the history of the field.

C. MORRIS, WRITINGS ON THE GENERAL THEORY OF SIGNS 340 (1971).

96 I am aware of the weaknesses inherent in any hypothesis concerning "influences" of one man's work on another. It is my goal merely to report the findings of researchers investigating Peirce's so-called influence on legal figures and legal movements.

97 Kevelson, *Comparative Legal Cultures and Semiotics: An Introduction*, 1 AMER. J. OF SEMIOTICS 63, 64 (1982) (discussing Peirce's influence on the law).

98 R. Kevelson, Semiotics and Methods of Legal Inquiry: Interpretation and Discov-

was profoundly influenced by his friend, Peirce, and his philosophy of signs and sign interpretation. In fact, Holmes and Peirce were co-members of the famous Metaphysical Club where legal debates and the burgeoning of legal theory are said to have taken place.[99] Scholars have sought to establish a link between Peirce's pragmatism and Holmes' prediction theory in law.[100] Holmes viewed the law as a "great anthropological document," the indicator of evolving social ideals, and the "morphology and transformation of human ideas."[101] Peirce held similar views regarding the dynamic nature of language.[102]

2. *Peirce's Semiotic and Jerome Frank.* Like Peirce, Jerome Frank supported the controversial theory that rules are not the law but only one source to which judges may turn in making law.[103] In fact, Frank went so far as to say that there was a myth of certainty in rules of law, and he opposed the legal absolutism of Joseph Beale, who had proposed the famous conflict of laws rules.[104] Without calling himself a semiotician, Frank defined decisions in distinctly semiotic terms referring to them as mere signs that point to future decisions. In other words, Frank conceived of legal decisions as Peircean indexical signs,[105] a concept that would have a profound effect on legal realist thinkers both here and abroad.[106]

3. *The Influence of Peirce's Semiotic on François Gény and Legal Realism.* Scholars have attempted to show a parallel between Peirce's semiotic logic and the jurisprudential concepts of François Gény.[107] Gény's influence on continental and Anglo-American law, especially on the school of legal realism, has just recently

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ery in Law from the Perspective of Peirce's Speculative Rhetoric 2 (Oct. 13, 1984) (unpublished manuscript).

99 M. Fisch, *Was There a Metaphysical Club in Cambridge?*, in STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE (E. Moore & R. Robin eds. 1964).

100 Fisch, *Justice Holmes, The Prediction Theory of Law and Pragmatism*, 39 J. OF PHILO. 85 (1942).

101 O.W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS (P. Smith ed. 1952), *cited in* Kevelson, *Peirce as Catalyst in Modern Legal Science: Consequences*, in SEMIOTICS 1980, 241, 249 (M. Herzfeld & M. Lenhart eds. 1982).

102 *See infra* text accompanying notes 117-18.

103 J. FRANK, LAW AND THE MODERN MIND 127-28 (1930).

104 Beale was of the opinion that one of the most important features of law is that "it is not a mere collection of arbitrary rules, but a body of scientific principle [sic]." 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 3.4, at 24 (1935); J. BEALE, *Summary of the Conflict of Laws*, in 3 CASES ON THE CONFLICT OF LAWS 501 (1902).

105 *See supra* text accompanying notes 89-90.

106 R. Kevelson, *supra* note 98, at 3.

107 F. GÉNY, *supra* note 49.

been recognized and explored.[108] The speculation is that Peirce was the connecting link between Gény, Holmes, and the legal realist movement in general.[109] Like Peirce, Gény believed in living law. Thus, for Gény a statute is only a provisional kind of law subject to reinterpretation and modification. Gény's "provisional law," stated in Peircean terms is a "legisign,"[110] or one of the major classifications of signs.

Gény applied his method to the French Civil Code, which is a body of fixed law deductively interpreted to solve legal problems. Before Gény breathed life into the Civil Code with his concept of provisional law, the whole system of "positive law," which was contained in a limited number of categories, was "predetermined in essence and regulated by inflexible dogma."[111] Anglo-American law was similarly ideal up to the end of the eighteenth century when the validity of the concept of discovering law, the "brooding omnipresence," was questioned. Gény's influence changed the conceptualization of the practice of Continental law from a nominalist to a realist system, a phenomenon that would be paralleled in Anglo-American law between 1870 and 1930 by the development of the movement of legal realism. Gény was no doubt a vanguard in the legal realism movement.[112]

4. *The Influence of Peirce's Semiotic on John Dewey and Legal Realism.* Both Dewey[113] and Peirce had a stong impact on the legal realists' belief that the logic of rigid demonstration is inadequate to account for legal decisions. Like Peirce, the legal realists sought out an experimental logic of search and discovery, a logic of inquiry, where rules were only provisional and where law was a system in the process of formation. Peirce, even more radical than Dewey, believed that traditional laws are inherently inadequate to describe evolving legal and social ideas. Law for Peirce is provisional, subject to developing doubts.[114] Only in its provisional nature can law account for the "contradiction and paradox"[115] inherent in language and in human relations.

Peirce's semiotic accounts for a legal system which, in its

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108 Kevelson, *supra* note 101, at 241.

109 *Id.* at 249.

110 *See supra* text accompanying notes 86-88 for a discussion of Peirce's classification system and the place of legisigns.

111 F. GÉNY, *supra* note 49, at 129, 195, *quoted in* Kevelson, *supra* note 101, at 244.

112 Kevelson, *supra* note 101, at 244-45.

113 J. DEWEY, PHILOSOPHY AND CIVILIZATION 126-34 (1931).

114 Kevelson, *supra* note 101, at 251.

115 *See infra* text accompanying notes 294-95 for a discussion of the role of contradiction and paradox in the post-structuralist movement.

evolution, is sensitive to social change. The legal realists have adopted this philosophy in their description of the law. Lon Fuller[116] holds a view of the role of the judge that is very close to the Peircean notion of the interpretant. For Fuller, the judge deliberately evolves rules so that the earlier rule is subsumed in the latter. Thus, the very notion of stability in law is threatened as every case carries the seeds of doubt that can develop into further inquiry and the establishment of new law. Fuller believes that through the interpretive process the judge plays an active role in shaping society and responding to the changing values of the community.

5. *Peirce's Semiotic and Legal Realism: An Historical Perspective.* What was Peirce's role in the development of legal theory as it progressed from the earlier Austinian view of law as a closed system to the legal realist's view of law as an incomplete, open-ended and dynamic process?[117] Rules for legal interpretation were developing in the nineteenth century in civil and common law countries to reflect the emergence of a social conscience as seen in Bentham's theory of utilitarianism and John Stuart Mill's theory of social and economic justice. Peirce played a part in the elaboration of a method of legal interpretation, proposing hermeneutics as the "method of methods."

Peirce maintained that in society the communication of social values results in a constant emergence of new values, new signs, and new sign-systems. For this reason, and in contrast to the more prevalent nineteenth century Austinian view of law as the inviolable command of the sovereign to be discovered and described, Peirce proposed a more open-ended view of the law. He envisaged the law as an incomplete code, prescriptive rather than descriptive, reinterpretable and essentially provisional. His method of methods was in consonance with what he saw as a dynamic process inherent in all systems of thought.[118]

Thus, this brief excursion into Peirce's contribution to semi-

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116 L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

117 *See generally* W. HAAS, *supra* note 94.

118 Peirce's work is found in the eight volume collection C.S. PEIRCE, COLLECTED PAPERS (vols. I-VI C. Hartshorne & P. Weiss eds. 1960, vols. VII-VIII A. Burks ed. 1958). The identification of Peircean semiotics with an open-ended system has resulted in the adoption of Peirce by the legal realists and the frequent but inaccurate association of the term semiotics with open-ended systems in general. In contrast the term "structuralism," or what some refer to as Saussurean semiotics, is sometimes identified with closed systems such as Austin's view of the law. Bernard Jackson draws interesting parallels between Saussure's semiotics, legal positivism, and legal realism. B. JACKSON, *supra* note 10; *see infra* text accompanying notes 258-64 for a discussion of Jackson's study.

otics and his influence on the law has demonstrated that Peirce established an elaborate sign classification system and a definition of the sign in terms of a dynamic process. The open-ended quality of Peirce's semiotic was in consonance with the theories of Holmes, Dewey, Gény, and Lieber[119] and influenced the development of the legal realist movement.

C. *Linguistics*

1. Ferdinand De Saussure

a. Semiology

Ferdinand De Saussure has been the leading force in European structuralism and semiotics. While Peirce was actively engaged in formulating a theory of semiotics, Saussure was posulating a dream of the future, a science which he named *sémiologie* from the Greek word for "sign."[120]

For the European world, Saussure is the father of modern linguistics who clarified the relation of linguistics to semiology.[121] Saussure conceived of semiology as the science that would investigate the nature and laws governing signs. These

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[119] An overview of the interplay of Peirce's semiotic and the law would not be complete without mention of Francis Lieber, an authority on domestic and international law and the author of the early code of the rules of war. Lieber spoke the language of semiotics when he expressed the view that law is a system of signs in which "[t]here is no direct communion between the minds of men . . . without resorting to the outward manifestations of that which moves us inwardly, that is, to signs." F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 13 (R. Mersky & J. Jacobstein eds. 1970). By drawing attention to the speaker's linguistic selection as an index of meaning, Lieber's semiotic concepts have had a lasting impact on the lawyer's everyday practice of interpretation. Lieber literally enunciated a theory of modern semiotics in 1839 when he declared that "[t]he signs which man uses . . . are very various, for instance, gestures, signals, telegraphs, monuments, sculptures of all kinds, pictorial and hieroglyphic signs, the stamp on coins, seals, beacons, buoys, insignia, ejaculations, articulate sounds, or their representations, that is phonetic characters on stones, wood, leaves, paper, & c., entire periods, or single words, such as names in a particular place, and whatever other signs, even the flowers in the flower language of the East, might be enumerated." *Id.* at 17.

Lieber, who wrote thirty years before Peirce, was unwittingly dependent upon semiotic principles for his work on legal and political hermeneutics. Moreover, Lieber's hermeneutic theory complements Peirce's semiotic and may even have contributed to major aspects of Peirce's thought. *See* Kevelson, *Francis Lieber and the Semiotics of Law and Politics*, in SEMIOTICS 1981 167, 193 (J. Deely & M. Lenhart eds. 1983).

Lieber defined and described the role of signs in legal hermeneutics. F. LIEBER, *supra* at 17-18. The use of signs implies a speaker's intention to convey a particular idea; the sign the speaker chooses is a key to the essence of that particular thought. In other words, interpretation is the process of discovery and recreation in different words of the true meaning of the speaker's chosen sign.

[120] F. SAUSSURE, COURS DE LINGUISTIQUE GÉNÉRALE 16 (1955) (COURSE IN GENERAL LINGUISTICS (W. Baskin trans. 1966)), *cited in* R. SCHOLES, STRUCTURALISM IN LITERATURE: AN INTRODUCTION 16 (1974) ("Since the science does not yet exist, no one can say what it would be, but it has a right to existence, a place staked out in advance.").

[121] "Linguistics is only a part of the general science of semiology: the laws discovered by semiology will be applicable to linguistics, and the latter will circumscribe a well-

laws would then be applicable to linguistics. Saussure's very conception of language was in semiotic terms as he compared language to writing, military signals, gestures, ceremonials, rituals, forms of etiquette, and other customs. Language is the most important system of signs that expresses ideas.[122] To communicate with signs one must understand the convention underlying their use. This is particularly true of specialized languages like law or literature. The primary goal of semiology, as Saussure conceived it, was to uncover the codes and conventions of language—the gateways to meaningful communication. Thus, Saussurean semiotics is a science in which language is the center of attention of a wider framework which he called semiology.

b. The Arbitrary Sign

Probably the most important feature of Saussure's theory of language is his conception of the arbitrary nature of the sign. Arbitrariness in linguistics means simply that there is no natural link between the signifier and the signified, only a relationship of convention. There is no particular reason why we use the letters "dog" to mean a furry little animal. Stated otherwise, there is no "motivation" between the signifier and signified. The obvious exception to this rule is the onomatopoeia in which the sound of the signifier imitates the signified.[123] The concept of motivation is essential to the distinction that Saussure makes between signs and symbols. A symbol is a motivated sign that is never entirely arbitrary. Thus, for Saussure conventional signs are arbitrary, whereas for Peirce these are labelled symbols or legisigns.[124]

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defined area within the mass of anthropological facts." F. SAUSSURE, *supra* note 120, at 16 (also cited in U. Eco, *supra* note 1, at 14).

122 Roland Barthes expanded and reversed Saussure's conception of semiology in relation to linguistics by coining the notion of translinguistics:

> Linguistics is not a part of the general science of signs, even a privileged part, it is semiology which is a part of linguistics: to be precise, it is that part covering the great signifying unities of discourse. By this inversion we may expect to bring to light the unity of research being done in anthropology, sociology, psychoanalysis, and stylistics round the concept of signification.

Barthes, *supra* note 70, at 81 (author's translation).

Barthes' influence in bringing semiotics to the attention of the scholarly public cannot be stressed enough. His work, *Eléments de Sémiologie* is a good starting point for the understanding of basic principles of semiotic theory. Moreover, Barthes' applied semiotics demonstrates the bountiful fruits that a rigorous application of the semiotic method can reap. *See, e.g.*, R. BARTHES, SYSTÈME DE LA MODE (1967) in which Barthes uncovers the hidden mechanisms at work in the complex system of the fashion industry. Barthes' method is eminently applicable to the analysis of legal discourse.

123 There are, however, words with partial motivation such as "lawful" whose motivation is contained in the root "law." But the term "law," by itself, is arbitrary.

124 *Cf. supra* text accompanying notes 89-91 for a discussion of the symbol in Peirce's semiotic.

c. *Langue/Parole*: Language as Norm and Individual Speech Act; Legal Positivism

Saussure draws an important distinction between individualized speech acts (*parole*), otherwise termed "performance" by Noam Chomsky, and the system of language (*langue*), or abstract set of rules and conventions a speaker must know in order to communicate successfully. Noam Chomsky refers to this generalized awareness of language rules as "competence." Competence is both a "social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty."[125] Saussure considered competence (the law or general rules), not individual performance (the acts), to be the proper object of linguistics. The Saussurean conception of the language system—the code or semiotic of linguistic laws—can be compared to the Kelsenian grammar of legal structure.[126] Like Saussure's distinction between *langue* and *parole*, Kelsen distinguishes between legal validity (*langue*) and legal volition (*parole*, an individual act in deviation of the norm), or stated differently, between positive law and the judicial application of legal norms.[127] Saussure's interest in the general rules of language has allied him, in the minds of many legal scholars applying semiotics, with the legal positivist school.

d. Synchronic/Diachronic Study of Language

A synchronic study of language attempts to reconstruct the system as a whole, whereas a diachronic study traces the historical evolution of its elements through different stages. Since the sign is arbitrary, that is contingent, Saussure believed it could only be defined in its relation to other signs and, therefore, should be studied synchronically. One of the major features of Saussure's linguistic theory is his insistence on the relational quality of the sign, a point of view that will influence structural analysis in literature and the law. Structuralists in the Saussurean school would study a literary or legal phenomenon not from the historical perspective but as a system of interrelated parts that fit

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125 F. SAUSSURE, *supra* note 120, at 16.

126 Goodrich, *Law and Language: An Historical and Critical Introduction*, J. OF L. & SOC'Y 173, 181 (1984); *see also* B. JACKSON, *supra* note 10, at 225-62 (detailed analysis of Kelsen's legal theory and its semiotic underpinnings).

127 Goodrich, *supra* note 126, at 181, *citing* H. Kelsen, PURE THEORY OF LAW 349-52 (M. Knight trans. 2d ed. 1970).

together as a puzzle.[128] Saussure's departure from historical linguistics is one of the reasons he has been called the father of modern linguistics.

e. Semiology and Society

Saussure continually stressed the importance of seeing language as a system of socially determined values.[129] In fact, Saussure conceived of semiology as a "science that studies the life of signs within society; it would be part of social psychology and consequently of general psychology."[130]

f. Semiology and Linguistics

In Saussure's perception of the relation between semiology and linguistics, he viewed linguistics as a model for semiology:

> wholly arbitrary signs are those which come closest to the semiological ideal. This is why language, the most complex and widespread of systems of expression, is also the most characteristic. And for this reason, linguistics can serve as a model for semiology as a whole, though language is only one

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128 According to Saussure, language is an abstraction, a system of interdependent, related values characterized by form rather than substance. *See* J. CULLER, FERDINAND DE SAUSSURE 42 (1972). Language can be explained in terms of syntagmatic and paradigmatic relations. Within the linguistic system there are various levels of structure. At any given level, there are elements which differ or contrast with one another and combine with other elements to form units. The combinatory possibility of words and their contiguity constitute the syntagmatic relations of language. Paradigmatic relationships determine the possibility of substitutions.

129 "The ultimate law of language is, dare we say, that nothing can ever reside in a single term. This is a direct consequence of the fact that linguistic signs are unrelated to what they designate. And that *a* can not designate anything without the aid of *b* and vice versa, or in other words, that both have value only by the differences between them, or that neither has value, in any of its constituents, except through this same network of forever negative differences."

Id. at 49 (translating and citing Saussure).

130 Saussure's original and complete emunciation of the science of semiology and its relation to linguistics and psychology is cited below:

> On peut donc concevoir *une science qui étudie la vie des signes au sein de la vie sociale*; elle formerait une partie de la psychologie sociale, et par conséquent de la psychologie générale; nous la nommerons *sémiologie* (du grec semeion, "signe"). Elle nous apprendrait en quoi consistent les signes, quelles lois les régissent . . . . La linguistique n'est qu'une partie de cette science générale, les lois que découvrira la sémiologie seront applicables à la linguistique, et celle-ci se trouvera ainsi rattachée à un domaine bien défini dans l'ensemble des faits humains.
>
> C'est au psychologue à déterminer la place exacte de la sémiologie; la tache du linguiste est de définir ce qui fait de la langue un système spécial dans l'ensemble des faits sémiologiques . . . . si pour la première fois nous avons pu assigner à la linguistique une place parmi les sciences, c'est parce que nous l'avons rattachée à la sémiologie.

F. SAUSSURE, *supra* note 120, at 33-34.

of its systems.[131]

Unfortunately Saussure's proposals about semiology were not taken up until many years after the publication of the *Cours*. Anthropologists, sociologists, literary critics, and legal scholars slowly began to use linguistics as a model for their own disciplines, and it was in this way that structuralism was born.

g. Semiology and the Law

The sociological leanings of the Saussurean system have been understated by those who see Saussure as a mere positivist imbued with the scientific spirit. Some have characterized him as a "crude, early," semiotician able to provide a descriptive overview of linguistic and legal rationality and certainty that is "comforting to those within the legal institution who have a professional interest in the belief or mythology of legal determinacy."[132] Thus, Saussure has been linked with legal positivism whereas Peirce remains the fountainhead of legal realism.[133]

Saussurean semiotics has been particularly influential in Europe on a small but growing number of modern legal scholars who have readily adopted the structuralist approach to legal interpretation.[134] The legal profession's incursions into structuralism[135] are a natural and inevitable development because of the systematized nature of the law and the scientifically inspired systems' analysis approach that constitutes the very stuff of structuralist inquiry. It is my belief that the legal profession will also take the inevitable leap from structuralism to semiotics which has already occurred in the field of literature because structuralism

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131 J. CULLER, *supra* note 12, at 68 (citing Saussure).

132 Goodrich, *supra* note 126, at 181.

133 *See supra* text accompanying notes 107-19 for a discussion of Peirce and legal realism.

134 Jackson, *Towards a Structuralist Theory of Law*, 2 LIVERPOOL L. REV. 5 (1980) [hereinafter cited as Jackson, *Towards a Structuralist Theory*]; Jackson, *Structuralisme et "sources du droit,"* 27 ARCHIV. DE PHILOS. DU DROIT 147 (1982) [hereinafter cited as Jackson, *Structuralisme et "sources du droit"*]; Arnaud, *supra* note 26, at 283; A. J. ARNAUD, *supra* note 45; Robertshaw, *Structuralism and Law: Some Comments*, 2 LIVERPOOL L. REV. 31 (1980). For an American scholar's view of structuralism and the law, see Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984). For works devoted to semiotics and the law *per se*, with a Saussurean bent, see G. KALINOWSKI, *supra* note 44 (with a special chapter devoted to semiotics and the law at 41-69); Grzegorczyk, *Le rôle du performatif dans le langage du droit*, 20 ARCHIV. DE PHILOS. DU DROIT 229 (1974); Kalinowski, *La loqique juridique, la sémiotique et la rhétorique*, 20 ARCHIV. DE PHILOS. DU DROIT 455 (1974); Arnaud, *Autopsie d'un juge: Etude sémioloqique de la jurisprudence Aixoise en matière de divorce*, 20 ARCHIV. DE PHILOS. DU DROIT 197 (1974). The major work in the field which appeared felicitously as this Survey was in its final draft, is *Semiotics and Legal Theory*. B. JACKSON, *supra* note 10.

135 *See infra* text accompanying notes 248-82 for a discussion of structuralism and the law.

and semiotics are deeply intertwined.[136] Law is a system of communication and as such benefits from "whatever contribution structuralism has made to the science of semiotics . . . ."[137]

Saussure, then, was the modern thinking linguist who postulated a dream of the future which he called semiology, an all-encompassing science designed according to linguistic theory to investigate the laws of signs. Saussure's revolutionary notion of the arbitrary nature of the sign has drawn attention to the study of the conventions governing sign use. Insistence on language laws, rather than individual speech acts, has linked Saussure with the legal positivist school and its search for a grammar of legal structure.[138] This analogy between Saussurean semiology and legal positivism stops short of recognizing the considerable role that society played in Saussure's conception of language as a system of socially determined values. Moreover, those who see semiotics as a theory of communication cannot disregard Saussure's semiology which is eminently applicable to legal discourse.[139]

2. Ogden and Richards' Context Theory of Meaning

a. Metaphor and Legal Language

After Peirce and Saussure formulated a theory of semiotics, the science of signs continued to develop under the direction of Ogden and Richards.[140] They developed the notion of a context theory of meaning differentiating between scientific discourse, which is characterized by a predominance of referential or "symbolic" terms, and non-scientific discourse, which contains emotive or expressive terms. Included within expressive terms are rhetorical figures such as metaphor and metonymy.

The distinction between scientific and non-scientific discourse is important to the characterization and differentiation of literary and legal discourses. In legal discourse there is a conventional preference for referential terms. In contrast, literary discourse is characterized by a predominance of metaphor and metonymy. Students of law are taught early in law school to avoid the use of emotive or metaphoric language in legal brief

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136 Structuralism and post-structuralism, better known as "deconstruction," grew out of linguistics and its affiliation with semiotic theory. *See infra* text accompanying notes 243-47 for a discussion of this interdisciplinary relationship.

137 Jackson, *Towards a Structuralist Theory*, *supra* note 134, at 5.

138 *See* B. JACKSON, *supra* note 10, at 124-30.

139 U. ECO, *supra* note 1, at 14.

140 *See* C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING (1972).

writing. Despite the generally held belief in this convention, metaphors are commonly found in cases. Ironically, the use of metaphor is especially prevalent in the free speech area. For example, Justice Brandeis used the highly charged metaphor of slavery to describe the emotional state of fear: "[i]t is the function of speech to free men from the bondage of irrational fears."[141] Justice Harlan's metaphor in *Cohen v. California* is memorable: "[o]ne man's vulgarity is another's lyric."[142] Legal language, then, is not the scientific discourse ideally composed of referential terms that it is thought to be.

The courts are now sensitive to the emotive function of words. In *Cohen v. California*, the Court arrived at criteria for protected speech on the basis of semiotic theory. Cohen was convicted of violating the California Penal Code section prohibiting "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." Cohen publicly wore a jacket bearing the words "Fuck the Draft." The Court considered several issues in this case, all of which are distinctly semiotic concerns. Is it conduct or speech which is offensive? Is this a case of obscenity? Are these fighting words?[143] The Court finally reversed the conviction on the basis of semiotic principles, drawing attention to the distinction between content and expression (*i.e.*, signifier and signified in semiotic terms) and the emotive function of the chosen words of the communication.[144]

3. Law as a Sublanguage

Despite all efforts at achieving objectivity in legal language[145] through a general use of referential terms, there is no doubt that the language of law is a distinct sublanguage, a special case of ordinary language that can and often does baffle non-lawyers.[146] In *Semiotics and Legal Theory*, Professor Jackson draws interesting conclusions about the specificity of law achieved

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141 Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

142 Cohen v. California, 403 U.S. 15, 25 (1971).

143 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) for the elaboration of the "fighting words" doctrine in protected speech.

144 403 U.S. at 26 ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

145 Goodrich, *The Role of Linguistics in Legal Analysis*, 47 MOD. L. REV. 523 (1984).

146 Charrow, Crandall, & Charrow, *Characteristics and Functions of Legal Language*, in SUBLANGUAGE, STUDIES OF LANGUAGE IN RESTRICTED SEMANTIC DOMAINS 175 (R. Kittredge & J. Lehrberger eds. 1982).

through its language.[147] "It is neither the syntax nor semantics of legal statements which make them special, but rather the particular 'force' which is attributable to them."[148] Law has the peculiar trait of claiming to regulate its own creation[149] by what Greimas and other structuralists would call a grammar of law that seeks to be explicit. The law acquires the power to regulate its own meaning by enacting statutes that provide legal self-interpretation.

Legal language differs from ordinary language by the nature of the semantic changes that take place within it. Semantic change is institutionally controlled and immediate in legal language, whereas in natural language semantic change occurs gradually and almost imperceptibly.[150]

Scientific language in general, and legal language in particular, have a higher incidence of monosemicity—one word, one meaning—and an "appearance of restricted connotations" when the context is foregrounded.[151] However, judges have a higher degree of choice in their use of legal language by virtue of the flexibility that legal interpretation affords.[152]

Legal language is particularly puzzling in its inability to define its own crucial words in terms of ordinary factual counterparts.[153] Notwithstanding the beneficial effects of vagueness in legal terminology, William Charron has attempted to shed some light on the meaning of some particularly controversial terms by comparing their legal, medical, and lay usages in the light of semiotics. Charron claims that in the legal definition of death, priority is given to the folk psychology perception of a persistent vegetative state. In the debate on the definition of death—a debate that is carried over into the definition of life and the abortion issue—Charron believes that the "informed preference of the public" should be sought.[154]

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147 B. JACKSON, *supra* note 10, at 306-10.

148 *Id.* at 306.

149 *Id.*

150 D. CARZO, I SEGNI DEL POTERO 88 (1981), *cited in* B. JACKSON, *supra* note 10, at 307.

151 A. GREIMAS & J. COURTÈS, SÉMIOTIQUE ET SCIENCES SOCIALES 85 (1976), *cited in* B. JACKSON, *supra* note 10, at 308.

152 Wroblewski, *Semantic Basis of the Theory of Legal Interpretation*, in 21 LOGIQUE ET ANALYSE 414 (1963), *cited in* B. JACKSON, *supra* note 10, at 308.

153 H.L.A. HART, *Definition & Theory in Jurisprudence*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21, 23 (1983).

154 Charron, *Death: A Philosophical Perspective on the Legal Definition*, 4 WASH. U.L.Q. 979 (1976); *see also* Charron, *Some Legal Definitions and Semiotic: Toward a General Theory*, 32 SEMIOTICA (1980).

4. Linguistics and the Law: Peter Goodrich

The influence of modern linguistics on legal studies has been significant.[155] Law libraries contain works on phonetics, phonology, morphology, syntax, semantics, pragmatics, speech act theory, sociolinguistics,[156] psycholinguistics, and rhetoric. Linguists in the law have been particularly interested in the nature of legal language *per se*[157] and in the language of courtroom transactions, especially the reliability of eyewitness testimony, the effects of language variation in courtroom testimony, and the comprehensibility of jury instructions.[158]

Within the field of legal linguistics, there is a dichotomy that mirrors the split between positivists and realists existing in jurisprudence. Linguists advocate either a Saussurean, normative, empirical brand of linguistics, or a more open-ended Peircean brand of semiotics. This split is also manifested in the adoption of the Peircean view of semiotics by the post-structuralists in preference to Saussurean semiotics. Peter Goodrich summed up the conflict in approaches when he stated that his goal as a legal realist was to "criticise the dominant view within both linguistics and jurisprudence, that . . . language as well as legal communication are to be understood best as structurally determined activities, as specialised normative enterprises that can be studied scientifically according to the internal laws, or grammar, of a static, governing, code."[159] Instead, Goodrich urged a more flexible, interdisciplinary approach to legal studies, one which would "include the study of the rhetoric of law, the analysis of the context and pragmatics of legal speaker and legal institution, the empirical examination of the functions and affinities of law viewed as communication and as function."[160] Goodrich applied this interdisciplinary and eminently semiotic approach to the analysis of an English case, *Bromley London Borough Council v. Greater London Council*, and studied the interplay of stylistics and semantics, con-

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155 A bibliography on linguistic studies in the law has been compiled by Judith N. Levi. J. LEVI, LINGUISTICS, LANGUAGE, AND LAW: A TOPICAL BIBLIOGRAPHY (1982) (available at the Department of Linguistics of Northwestern University).

156 *E.g.*, Maynard, *Person-descriptions in plea bargaining*, 42 SEMIOTICA 195 (1982) (a semiotic perspective on sociolinguistics and the law).

157 The bible on this subject is D. MELLINKOFF, THE LANGUAGE OF THE LAW (1978); *see also* Charrow, *Linguistic Theory and the Study of Legal and Bureaucratic Language*, in EXCEPTIONAL LANGUAGE AND LINGUISTICS 81 (1982).

158 Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

159 Goodrich, *supra* note 126, at 191.

160 *Id.*

notations, and economic theories behind the decision.[161] His approach to case analysis is noteworthy and can guide the way toward future legal studies applying linguistics.

5. Charles Morris and Behaviorist Semiotics

Charles Morris has contributed significantly to the dissemination of Peirce's theory of semiotics and to the establishment of a behavioristic direction for the science of signs. Morris described semiotics as a behavioral process in which something takes account of something else mediately. The first element is the interpretant,[162] the second is the designatum, and the mediator is the sign—vehicle.[163]

In his *Foundation of the Theory of Signs*,[164] Morris identified the Peircean trichotomy of syntactics, semantics, and pragmatics as a useful division of semiotics. Syntactics is that branch of semiotics which studies the way signs of various classes are combined to form compound signs. Semantics is the study of the signification of signs. Pragmatics studies the origin, the uses, and the effects of signs. Legal semiotics often falls under the category of semantic analysis. Thus, indexes to legal studies will only contain indirect references to semiotic studies under the narrow heading of semantics.

Morris also distinguished between pure, descriptive, and applied semiotics which utilizes knowledge about signs for the accomplishment of various purposes. Legal semiotics would clearly fall into the category of an applied semiotics. Kalinowski's study of legal semiotics outlines the direction in which a semiotic analysis of legal language might be going: pragmatics, semantics, and syntactics.[165] He also stated categorically that law is like a science. It is not a language, it only possesses one that can be analyzed semiotically.[166]

6. Eric Buyssens and Functional Linguistics

Eric Buyssens, a Belgian linguist, continued to develop Saus-

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161 *Id.* at 192-200.

162 *See supra* text accompanying notes 79-85 for a discussion of Peirce's meaning of the interpretant.

163 *See* Rey, *Communication vs. Semiosis: Two Conceptions of Semiotics*, in SIGHT, SOUND AND SENSE 102 (T. Sebeok ed. 1978).

164 C. MORRIS, FOUNDATIONS OF THE THEORY OF SIGNS (1938).

165 G. KALINOWKSI, *supra* note 44, at 56.

166 *Id.* Moreover, Horovitz shares the view that legal logic is a pure semiotics of scientific language in the manner of Carnap which should be studied from the point of view of syntactics and semantics, excluding pragmatics. *See* Kalinowski, *supra* note 44, at 455 (Kalinowski's review of Horovitz's *Law and Logic* (1982)).

sure's concept of semiology by confronting language with other sign systems.[167] He introduced the term "seme," the basic element of meaning, and distinguished between intrinsic and extrinsic semes. For Buyssens the seme cannot be isolated. It can only be defined in terms of a semic function—hence the term functional linguistics.[168]

7. Louis Hjelmslev and Glossematics: Content and Expression

Hjelmslev, a Danish linguist, developed the glossematic theory.[169] According to glossematics, the semiotic system is based on a small set of primes, such as class and component function, necessary and non-necessary function, both/and either/or functions, content and expression, form and substance. Hjelmslev's distinction between content and expression, or style and substance, is particularly useful in the analysis of free speech cases. In the application of the "clear and present danger" test, for example, the Court has sometimes failed to identify the real source of danger which resides in the choice of a speaker's style rather than the actual content of speech.[170] On a more practical level, courts will distinguish between form and substance when considering whether or not a pleading fails to state a cause of action. Looseness, verbosity, and excursiveness (*i.e.*, form) are overlooked on a motion to dismiss if any cause of action (*i.e.*, substance) can be spelled out from the four corners of the pleading.[171]

8. Soviet Semioticians

Soviet scholars, the descendants of the Russian formalist movement, have made significant contributions to the field of semiotics, especially in the area of secondary modeling systems and the study of the poetic function of language. Much of the work conducted by Soviet semioticians has been inspired by Juri

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167 E. BUYSSENS, LES LANGAGES ET LE DISCOURS: ESSAI DE LINGUISTIQUE FONCTIONNELLE DANS LE CADRE DE LA SÉMIOLOGIE (1943).

168 Buyssens, as well as Prieto (in *Messages et Signaux*), view semiology as the study of voluntary messages transmitted by signals rather than indices. Functional linguists, like André Martinet, established the semiology of communication in contrast to the semiology of signification practiced by Roland Barthes. *Compare* R. BARTHES, *supra* note 70, *with* A. MARTINET, LE LANGAGE 93 (1968).

169 L. HJELMSLEV, PROLOGOMENA TO A THEORY OF LANGUAGE 80 (2d ed. 1963).

170 *See* text accompanying notes 142-44.

171 O. CHASE, CIVIL LITIGATION IN NEW YORK 495 (1983) (citing Siegel, *Introducing: A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 190, 205 (1963)).

Lotman.[172] To study art, music, literature, or the law, Lotman would examine the place and effect of these secondary modeling systems in and on the general system of culture. Lotman believed that culture is an interrelated semiotic system. Typologies of culture should be drawn up on the basis of norms, rules, and signs. A structural analysis of a secondary modeling system would account for the language level of the text, the structure of the writer's consciousness, and the structure of the world reflected in the text. A modeling system is therefore an apparatus through which a person perceives and actually models the world.

Lotman's interest in the effect of secondary modeling systems on the general system of culture has its analogy in the field of legal studies with the recent emphasis on the development of a social consciousness in the law. A work of art is as much a secondary modeling system as a carefully drawn contract or a curiously decided case of law which, when studied in detail from the point of view of its linguistic elements, can reveal a world view.[173]

In conclusion, this section on linguistics has attempted to tease out of this vast field of knowledge the semiotic elements that have influenced the thinking of legal scholars in the past and its potential uses in the law in the future. It is hoped that a greater awareness of the work done abroad by legal linguists imbued with the spirit and the laws of semiotics will inspire the more active application of this method to the law in the United States.

D. Anthropology

1. Claude Lévi-Strauss

a. Semiology and Structuralism

In his inaugural lecture at the College de France in 1961, Claude Lévi-Strauss defined anthropology as a branch of semiology. Lévi-Strauss was influenced by Saussure and conscien-

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[172] J. LOTMAN, LEKCII PO STRUKTURAL'NOJ POÈTIKE: VVEDENIE, TEORIJA STIXA (LECTURES ON STRUCTURAL POETICS: INTRODUCTION, THEORY OF VERSE) (1964); 1 J. LOTMAN, TRUDY PO ZNAKOVYM SISTEMAM (STUDIES IN SIGN SYSTEMS) (1964); J. Lotman, STAT'I PO TIPOLOGII KUL'TURY: MATERIALY K KURSU TEORII LITERATURY (ESSAYS ON THE TYPOLOGY OF CULTURE: MATERIALS FOR A COURSE ON THE THEORY OF LITERATURE) (1973); J. Lotman, SBORNIK STATE PO VTORICNYM MODELIRUJUSCIM SISTEMAM (COLLECTED ESSAYS ON SECONDARY MODELING SYSTEMS) (1973).

[173] In studying the British legal conception of woman revealed in the structural analysis of sex discrimination cases, Robertshaw makes reference to the "world-view" that is built up in the linguistic structure of the cases. P. Robertshaw, *Contemporary Legal Constitution of Woman: Categories, Classifications, Dichotomy*, in REVUE DE LA RECHERCHE JURIDIQUE and the OXFORD REVIEW OF LITERATURE (forthcoming).

tiously applied linguistic concepts as he set out to identify the elements of the rich and complex systems of anthropology. The main goal of his structural method is to identify constants in order to reduce the complexities of such seemingly diverse phenomena as cultural behavior, marriage laws, kinship relations, totemic systems, and cooking methods. The structural approach is applicable to most complex systems including the law.

Claude Lévi-Strauss viewed the constitutive elements of the system at issue as relational phenomena not intrinsic entities of substances. Thus, he examined elements in terms of their contrastive relationship to other elements. It is precisely this notion of a relationship that constitutes a "structure." Structural analysis is by definition a study of the relationship between two or more elements. According to Lévi-Strauss, "the error of traditional anthropology, like that of traditional linguistics, was to consider the terms and not the relations between the terms."[174]

2. Structural Anthropology and the Law

Lévi-Strauss' methodical approach to systems and his clear formulation of structuralist principles have had a catalytic effect on literary studies[175] and only a faint but lasting impact on legal studies.[176]

Arnaud's interesting analysis of matrimonial and family structure in Aix en Provence combines Lévi-Strauss' structural approach with a sophisticated linguistic analysis of legal discourse.[177] Arnaud studied divorce decrees during January 1968 and December 1971 in order to arrive at the latent structures of family relations. In his goal to discover the meanings or signification behind the divorce decrees, Arnaud has clearly caught the pulse of the law by studying its language and rhetoric.

In Arnaud's analysis of matrimonial and family structure, he observed that there is a basic difference between the written stylistic structure of divorce law and the logic of family relations.

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174 C. LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 46 (C. Jacobson & B.G. Schoepf trans. 1963).

175 Jakobson & Lévi-Strauss, *Les Chats de Baudelaire*, 2 L'HOMME 5 (1962), *reprinted in* INTRODUCTION TO STRUCTURALISM 202 (M. Lane ed. 1970). This text-centered analysis of Baudelaire's poem issued forth a steady stream of critical commentary which remains in the annals of literary history as a primary source of structuralist theory and praxis.

176 On the legal scene, several scholars mainly abroad have illustrated in their varied approaches to legal texts the extent to which Lévi-Strauss' structuralist theory, inspired by Saussure, has influenced legal studies. See the works of Arnaud, Kalinowski, Jackson, and Robertshaw cited *supra* note 134. *See also* Goodrich, *supra* note 145.

177 Arnaud, *supra* note 134.

He debunked the French concept of spousal equality,[178] and proved, by studying judicial metaphors, that judges do not really believe in spousal equality at all. Moreover, his study of judicial language reveals an unsettling oscillation between law and reality—a preference by judges for the image of the "*haus-frau*" balanced against their recognition of the legal equality of the wife.

Arnaud's study rests on the structural principle that relationships, not elements, are the key to uncovering the hidden mechanisms of complex legal systems. This principle concern with relationships is based on the nature of the sign itself which is a constant interaction between signifier, signified, and referent. As Arnaud aptly observed, a computerized study of French family structure as seen in the law could only identify key words.[179] The computer could not study the significant relationships that exist between the words used and the reality hidden within and below the rhetoric. Notwithstanding the vital function of the computer for certain kinds of data collection, one cannot help but agree with Arnaud that meaning is found through language study in the interstices of complex relationships like law and reality.

This Survey's study of structural anthropology and its application in the law has demonstrated the benefits of adopting a clearly defined system's approach to solving legal problems. Since law is moving in the direction of relational analysis with emphasis on law as social change, the structural and semiotic principles outlined by Claude Lévi-Strauss should prove to be of major importance.

E. Literary Criticism

1. Russian Formalism

Russian formalism flourished at the Moscow Linguistic Circle and the Petrograd Society for the Study of Poetic Language (OPOYAZ) from 1915 to 1930, and had a direct influence on the development of structuralism and semiotics in Western Europe and the United States.[180] The early Russian formalists were text-

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[178] *Id.* at 217.

[179] *Id.* at 224.

[180] *See* T. HAWKES, STRUCTURALISM & SEMIOTICS 59-73 (1977) (discussion of Russian Formalism). Roman Jakobson, Boris Eichenbaum, Victor Shklovsky, Boris Tomashjevsky, and Juri Tynjanov are primary contributors to Russian Formalism. Tzvetan Todorov's publication of translated formalist criticism in *Théorie de la Littérature* in 1965 is an indication of the importance of formalist theories to literary criticism of the Western world. It is also a sign pointing to the methodological relationship that exists between formalists and structuralists. *See* L. LEMON & M. REIS, RUSSIAN FORMALIST CRITICISM (1965); V. ERLICH, RUSSIAN FORMALISM (1954).

centered critics and wrote primarily about the specificity of poetic language and devices of style. They considered literature outside the realm of social consciousness and thereby continued the symbolists' emphasis on form over content. They believed that literature was fundamentally autonomous, self-expressive, and intrinsically different from ordinary language. Disassociating themselves from aesthetic theoreticians and philosophers, the formalists advocated a scientific, objective investigation of the facts in and of themselves. Excursions into extratextual matters were not within the purview of a formalist method. Like the structural linguists, their purpose was to study the laws of literary production, and they concentrated on the uses of phonemic devices. Unlike the structuralists who studied the relationship of form and content, formalists believed in the dominance of form. Echoes of the formalist text-centered approach to literature are heard in some rule-based legal circles by those who object to the study of law as a social phenomenon.

a. Defamiliarization and the Law

Victor Shklovsky's provocative notion of defamiliarization or "making strange,"[181] is of particular interest to lawyers analyzing and presenting a sequence of events or facts to a judge or jury. Shklovsky believed that the essential function of poetry or art is to attack routinization in the reader's modes of perception. Art shocks the way illegal acts shock because art deviates from the norm. In other words, art defamiliarizes that which is overly familiar and forces one into an awareness of its very existence. Shklovsky focused his attention on that aspect of a novel's narrative structure in which the process of defamiliarization was most obvious—the plot—and investigated the means by which the shock takes place.

Defamiliarization is a concept that applies on many levels of the law, not the least important of which is drafting a document and using words that shock the judge and jury into awareness without creating a sense of impropriety. This shock can be accomplished rhetorically, or simply gramatically, by contrast from a context.[182] Defamiliarization is also important in the interpretation of legal texts. Even though the immediate purpose of the

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[181] *See* T. HAWKES, *supra* note 180, at 65; V. SHKLOVSKY, OTEORII PROZY (ON THE THEORY OF PROSE) (1973).

[182] Echoes of this formalist concept can be heard in Brooks' *The Well-Wrought Urn* where he introduces the notion of stylistic contrast from a context. C. BROOKS, THE WELL WROUGHT URN (1947).

law is different from that of literature, both are analyzable discourses in which "shocking" or unexpected terms, "unconventional" language,[183] and non-normative constructions play a similar role. These defamiliarizing techniques in the law should be further examined from the point of view of their stylistic effects and persuasiveness.

b. Narrative Structures and the Law: Vladimir Propp and Algirdas Greimas

The full implications of Shklovsky's theory of defamiliarization and the conventions on which narrative structures are built are illustrated in Vladimir Propp's *Morphology of the Folktale*.[184] Propp's work is a major contribution to formalist theory and narrative syntax. In the course of his incisive analysis of the folktale, Propp identified thirty-one constant functions distributed among seven "spheres of action:" the villain, the donor, the helper, the princess, the dispatcher, the hero, and the false hero. This type of categorization is not without interest to lawyers intent on analyzing a fact pattern in criminal law. The particular function of each player in a criminal RICO (Racketeer Influenced and Corrupt Organizations)[185] action, for example, could be reduced to categories of actors performing a similar function in the pattern of activity or enterprise.

Greimas[186] made significant modifications on Propp's distribution of actors' functions.[187] In fact, Greimas applied his brand of semiotics to legal texts relying on the belief that semiotics is a method applicable to any discourse.[188] Greimas viewed legal language as a variant of natural language. When approaching a legal text, he considered the levels of its linguistic code, legal code (norms or grammar) and legal judgment.[189] Like Chomsky, Greimas is in search of a legal grammar, and his view of legal language as a "logic" is like that of the positivists. Goodrich has

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183 *See* R. DWORKIN, LAW'S EMPIRE 114-50 (1986) (discussion of the role of conventionalism and shared expectation in the law).

184 V. PROPP, MORPHOLOGIE DU CONTE (1965).

185 Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-1968 (1982)).

186 For a discussion of Greimasian structuralism, see *supra* text accompanying notes 186-90.

187 A. GREIMAS, SÉMANTIQUE STRUCTURALE: RECHERCHE DE MÉTHODE (1966).

188 *See* B. JACKSON, *supra* note 10, at 31-147 (detailed discussion of Greimasian semiotics applied to the law). Greimas, in collaboration with Landowski, analyzed legal discourse in a chapter entitled "Analyse sémiotique d'un discours juridique." A. GREIMAS & J. COURTÈS, *supra* note 151, at 79-128.

189 A. GREIMAS & J. COURTÈS, *supra* note 151, at 90-94.

commented on the limits of Greimasian semiotics as applied to legal texts: "Greimas' analysis adds nothing of substance to the commonplaces of legal positivism—it adds linguistic refinement and precision. In a sense it represents the apotheosis of positivism . . . ."[190]

2. The Prague School: The Development of Social Consciousness

The Prague School continued in the tradition of the formalists but attempted to integrate the study of sound and meaning into the social consciousness.[191] This development in literary theory is analogous to the movement in law from positivism to realism. Legal exegetes have profited from the notion of a social consciousness in the text, and a rich brand of legal interpretation known as law and society developed and flourished into legal realism.

Mukarovsky, who rejected the formalist concept of art as a solely autonomous sign, insisted on the semiotic function of art which he viewed as being both autonomous and communicative.[192] "It is the total context of so-called social phenomena—for example, philosophy, politics, religion, and economics that constitutes the reality which art must represent."[193] Mukarovsky believed that only a semiotic point of view could permit theoreticians to account for both the autonomous nature of art and its essentially dynamic structure. Semiotics, then, would help theoreticians understand artistic structure "which is imminent but in constant dialectic relation to the development of other spheres of culture."[194]

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190 Goodrich, *supra* note 126, at 183.

191 The *Theses* of the Prague Linguistic Circle contain the connection between linguistics, semiotics, society, and the study of literature. "Everything in the work of art and its relation to the outside world . . . can be discussed in terms of sign and meaning; in this sense aesthetics can be regarded as a part of the modern science of signs or semiotics." Stankiewicz, *Structural Poetics and Linguistics*, 12 CURRENT TRENDS IN LINGUISTICS 629, 630 (1974) (quotation omitted). The path toward social consciousness was laid by the early formalists in the 1920's when Tynyanov and Jakobson attempted to create a more integrated school of criticism belonging to the collective consciousness.

192 J. MUKAROVSKY, STRUCTURE, SIGN, AND FUNCTION (J. Burbank & P. Steiner trans. 1978).

193 *Id.* at 84. Realizing that the formalists needed a truly semiotic orientation, and by that he meant socially aware in both the Saussurean and Peircean senses, Mukarovsky proclaimed that "as long as the semiotic character of art is insufficiently illuminated, the study of the structure of the work will necessarily remain incomplete." *Id.* at 87. Like the new critics, who follow the formalists both chronologically and philosophically, Mukarovsky rejects purely formal analysis. He will also reject analysis that considers the work a direct reflection of either its author's psyche, or the ideological, economic, social, or cultural milieu.

194 *Id.*

The development of a social consciousness grew out of the Prague School and its insistence on the dynamic nature of artistic structure. These ideas are shared by legal realists who, like Mukarovsky, would greatly benefit by the adoption of a semiotic orientation in their legal analyses.

3. Roman Jakobson

a. Metaphor, Metonymy, and the Law

Roman Jakobson's linguistic and literary theories grew out of his affiliation with the Prague School, and he has played a major role in orienting literary interpretation toward linguistics and semiotics. Jakobson attempted to describe the poetic function of language.[195] He pursued this goal as a formalist, linguist, and semiotician. His two basic notions of "polarity" and "equivalence"[196] are derived from Saussure's concepts of the syntagmatic and paradigmatic planes of linguistic performance. Extending these ideas to literary language, Jakobson identified metaphor and metonymy as the basic rhetorical figures in poetry and prose.[197]

Today we recognize the ever-presence of metaphor in ordinary language as well as in poetry and prose.[198] Reflecting on Jakobson's discovery, some legal scholars observe that legal discourse is predominantly denotative (referential rather than emotive).[199] The time has come to debunk the notion that legal language is ordinary, objective, and ideally non-metaphoric. Like ordinary language, legal language cannot escape metaphor, and much of its inscrutable ambiguity is the result of metaphoric usage. Words are freighted with political, ideological, cultural, and literary overtones which aid in a speaker's subconscious selection

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195 *See* R. Jakobson, *Closing Statement: Linguistics and Poetics*, in STYLE IN LANGUAGE (T. Sebeok ed. 1960).

196 *See* R. SCHOLES, *supra* note 120, at 19 (discussion of Jakobson's study of language loss among aphasiacs in which the concepts of equivalence and polarity in linguistic performance are elaborated).

197 R. JAKOBSON & M. HALLE, FUNDAMENTALS OF LANGUAGE 69, 75 (1956). These modes of binary opposition correspond respectively to the process of selection and combination. *See* R. Jakobson, *supra* note 195, at 370. The combinative or syntagmatic process proceeds by contiguity, that is, one word is placed next to another. This mode, which is metonymic, is more frequently associated with prose. The selective or associative process is characterized by similarity and occurs more frequently in poetry than prose.

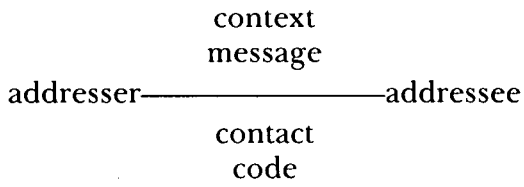
198 *See supra* text accompanying notes 140-44 for a discussion of metaphors in the law.

199 *See* G. KALINOWSKI, *supra* note 44, at 52: "*Il est évident que le langage du droit n'est pas appelé à remplir la fonction d'expression, mais celle de communication.*" ("It is obvious that the purpose of legal language is not to fulfill an expressive function but rather one of communication.").

of one word over another. In the sphere of international law this freighted language is even more complicated due to cultural diversity which increases the possibility for interference with communication or understanding.[200]

b. The Act of Communication

Jakobson's work on the nature of the communicative act is probably the starting point for any introduction to semiotics. From his diagram of the six constituent factors that make up a speech event,[201] one can plot the direction that studies in legal semiotics might take in the near future:



Communication consists of a message sent by an addresser to an addressee. The message, sent in code, requires a contact between addresser and addressee. This contact may be oral, visual, or made otherwise. If the message does not refer to a context which is mutually understood between the addressee and the addresser, who presumably share the convention upon which this code depends, then the message will not make sense.

The meaning of a text can be found by considering the total act of communication and each of the six elements possessing its own special function. The nature of a particular message will depend on the functional character of the dominant element.[202] If the communication is mainly concerned with the addresser of the message, the emotive function will predominate. This is rare in legal language which is primarily concerned with the communication of the message to the addressee. However, emotive language is used for emphasis and persuasion in argumentation.

If the message is oriented toward the addressee, the conative

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[200] During an informal discussion held on March 26, 1985 with Thomas Franck, Professor of International Law at New York University School of Law, Professor Franck confirmed that the frequent and unavoidable use of metaphor in international legal contexts was of legitimate semiotic concern for the accurate transmission and reception of information.

[201] R. Jakobson, *supra* note 195, at 353.

[202] *Id.* at 357.

function will dominate. The conative function is manifested by the vocative or imperative mode of address ("Look," or "I say," or "Oyez"). For a communication oriented toward its context, the referential function will dominate; the phatic function is designed to establish contact with the addressee, like small talk that does nothing more than establish a rapport between speakers.

When speakers want to make sure they are using the same code, the metalingual function will dominate, as in: "Do you see?" or "Understand?" In legal contexts the frequent presence of the adverb "clearly" or "obviously" performs a subtle metalingual function when lawyers are communicating with lawyers. When lawyers are communicating with lay people, the metalingual function is more direct because the conventions of the legal codes are not shared by all laymen.

If the communication is dominated by the message for its own sake, then the poetic or aesthetic function dominates. Since legal language is designed to communicate a message, less for its own sake than for the sake of the addressee, legal language has a reduced poetic function. Thus, semiotics and the dominance of certain constituent functions making up a speech event enable us to identify in a more precise manner the major difference between literary and legal language.

4. The New Criticism

a. The Text-Centered Approach and its Application to the Law

In Britain and America around the 1930's and 1940's, the new critics rose up in arms against traditional literary criticism which was then oriented toward such extratextual matters as biography, the author's psyche, and literary history. But like the formalists before them, the new critics viewed the work of art as autonomous. They coined the phrase "the intentional fallacy" and rejected hypotheses about what an author really meant.[203] They argued that the literary work is "bounded," self-sufficient, and free of authorial intention, historical necessity, and reader prejudices. Therefore, the literary text should be examined in and for itself, on its own terms, without any special method or

[203] For a discussion of the intentional fallacy, originally proposed by Wimsatt and Beardsley, and its use or misuse in literary interpretation, see Tiefenbrun, *The Secret of Irony: Apollo and Isis in Rabelais*, XI OEUVRES ET CRITIQUES 15, 18 (1986).

system.[204] Art, they argued, is separate from science, and only natural intelligence is necessary to fathom a text's hidden meanings. Interpretive legal theory has never thoroughly adopted this anti-scientific view because of the significant role that history and authorial intention play in both positivist and realist interpretive techniques.[205]

b. The New Criticism and Semiotics

Despite an almost wholesale rejection of sign theory by the new critics, some active participants of this school were important contributors to the development of semiotic theory.[206] Early structuralists[207] opposed the new critics arguing that their conception of a totally objective reader devoid of subconsciously held ideological principles is an impossible goal.[208] Structuralists say that the new critics turned literature into an abstraction divorced from reality. An infusion of semiotic orientation into this school of literary interpretation would have avoided these criticisms, which are no doubt shared by the legal realists against the text-centered approach and false purity of the positivists.

c. Semiotics and the Opening Up of the Text

Semiotic theory focuses attention away from the literary work as a divinely inspired "book" to be discovered. The semiotician studies, instead, "the text" which is considered, for the most part, as open and incomplete. Semioticians are very much at home with the goal of demystifying literature and the law. Many semioticians, like the legal realists who object to the closed system of legal positivism, welcome the indeterminacy of legal language and attempt to fill in communication gaps with refer-

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204 The new critics were particularly interested in questions of ambiguity, irony, paradox, and wit. Their primary thrust was the sanctity of the text and the informality of its interpretive process.

205 *See generally* Dworkin, *supra* note 8, at 536-39.

206 I.A. Richards wrote not only about the psychological complexities at work in poetry and in experience, but he produced *The Meaning of Meaning* with C.K. Ogden, in which I.A. Richards studied the influence of language upon thought and the science of symbolism. Cleanth Brooks and William Empson, refusing the idea of a single meaning for a poem, investigated the notions of beneficial ambiguity and multiplicity of meaning, concepts which are critical to the broad interpretation of legal texts. *See supra* note 140.

207 An example of the early structuralist approach is found in the works of Roland Barthes and Serge Doubrovsky. *See, e.g.*, S. DOUBROVSKY, POURQUOI LA NOUVELLE CRITIQUE (1966).

208 Robert Scholes called new criticism a "scandal" because critics subconsciously use cultural codes to interpret texts while insisting that these codes are irrelevant for analytical purposes. R. SCHOLES, SEMIOTICS AND INTERPRETATION 15 (1982).

ences to sociologic, psychologic, and anthropologic phenomena that aid in the establishment of meaning.

There are some semioticians, however, who are closely allied to the traditions of new criticism, and who retain the notion of the bounded, self-sufficient, self-referential, and non-mimetic text. With the help of a rich background in literary conventions, these semioticians produce insightful and innovative interpretations.[209] Saussurean legal semioticians, like Kalinowski[210] and Arnaud,[211] would be representative of this group of semioticians who retain the notion of the bounded text, but who rely on a background of legal conventions rooted in reality to inform their insightful exegeses.[212]

d. Objectivity and Subjectivity in Legal Interpretation: Ronald Dworkin

Semiotics teaches us that words are merely arbitrary.[213] Applied to legal language, this concept threatens the very stability of the legal system. If the words used have no rational basis other than convention, where does the lawyer look to determine the meaning in a legal text? For some, like the legal positivists allied with the Saussurean brand of semiotics, the text has objective, determinate meaning within it and needs only to be identified.[214] For others, more in line with Peirce's notion of semiotics as an open-ended process, the law is not a system of rules or commands having an invariable meaning. Rather, a rule is a range of culturally possible results that lawyers and judges must argue out.[215] For these legal realists, law is the culture of legal argument.[216] Thus, we have two camps in legal interpretive theory: one which is objective and limits interpretation to that which

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209. Riffaterre, *The Self-Sufficient Text*, DIACRITICS 39 (Fall, 1973).

210 *See supra* note 134.

211 *See infra* text accompanying notes 271-72.

212 "When a semiotician starts examining laws as a patterned system of meaning, their insubstantiality becomes evident and the inquiry presses on both jurisprudence and epistemology." Graff, *"Keep off the Grass," "Drop Dead," and other Indeterminancies: A Response to Sanford Levinson*, 60 TEX. L. REV. 405 (1982) (quoting Douglas, The Future of Semiotics (1982) (unpublished manuscript)).

213 *See* discussion of the arbitrary sign, *infra* text accompanying notes 123-24.

214 H.L.A. HART, THE CONCEPT OF LAW (1961).

215 *See* Boyd, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 436 (1982).

216 A good example of the culture of legal argument is found in Chief Justice Marshall's interpretation of the meaning of the word "necessary" in *McCulloch v. Maryland*: "This word, then, like others, is used in various senses; and in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

is strictly in the text, and one which is subjective and relatively free.

Ronald Dworkin holds the intermediary position that legal and critical practice is not totally free. Law is "deeply and thoroughly political . . . [but it] is not a matter of personal or partisan politics . . . ."[217] Law is like a "chain enterprise," both objective and subjective, and dependent on history.[218] Dworkin's theory of literary interpretation begins with the "aesthetic hypothesis" that "[a]n interpretation of a text should attempt to show *it* as the best work of art *it* can be . . . ."[219] He then proposes the analogy between legal interpretation, which is a social practice involving judicial decisionmaking, limited by principles of fitness, and the writing of a chain novel.[220] Implicit in Dworkin's conception of law as interpretation is a view of judicial authority that is grounded not in rules as the positivists would have it, but in an articulate consistency epitomized by the global rationality of a Herculean judge.

1. *H.L.A. Hart: Legal Positivism and Semiotics.* H.L.A. Hart is the positivist who proposed the theory that law is an interplay of primary and secondary rules.[221] Unlike the naturalists who claim that mankind, through a common human nature, perceives certain basic norms as universals in the law, the positivists adhere "to the view that there is no necessary connection between law and morality."[222] Law is, rather, a matter of human choice for the positivists. The source of that element of human choice is located in the interaction between primary and secondary rules in Hart's legal theory. "Primary rules concern the behaviour of the subjects of the [legal] system . . . ." Secondary rules take into account the recognition and change of primary rules as well

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217 Dworkin, *supra* note 8, at 527.

218 *See id.* at 542-43.

219 *Id.* at 531 (emphasis in original).

220 *Id.* at 542.

> Deciding hard cases at law is rather like this strange literary exercise . . . . Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges collectively have done, in the way that each of our novelists formed an opinion about the collective novel so far written . . . . Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on that day . . . .

Id. at 542-43.

221 H.L.A. HART, *supra* note 214.

222 *See* B. JACKSON, *supra* note 10, at 5.

as the manner of dispute adjudication.[223] Since secondary rules for Hart depend on convention and not nature, their content reflects the positivists' view that law is based on human choice.[224]

According to Bernard Jackson, who has studied Hart's legal theory from the point of view of semiotics,[225] Hart is the contemporary positivist and legal philosopher that has dealt most explicitly with law as a semiotic system.[226] Hart is interested in communication as an intentional act, not as signification.[227] His account of a central " 'core of settled meaning'[228] is predominantly pragmatic rather than semantic" in nature, and it assumes an activity of interpretation.[229] It is in Hart's concept of the penumbra of linguistic uncertainty[230] that his communicational model is most clearly demonstrated. Hart identifies two principal devices that are used "to communicate general standards of conduct which multitudes of individuals could understand"—legislation and precedent.[231] In order to communicate these general standards of conduct, there "must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."[232]

Although most cases fall within the core of settled meaning according to Hart, legal language is at times indeterminate and suffers from multiple meanings or polysemy. Hart aptly called the cases that fall outside the core a crisis in communication requiring judicial discretion.[233] Judicial discretion is the result of what Hart called the "open texture" of legal language. To limit the problem of polysemy, Hart created the model of core and penumbral cases. While meaning is generally determinative for Hart, he recognized that in certain penumbral cases judges will have to use their subjective decisionmaking powers.[234]

Few would consider Hart to be allied in any way with the theory of semiotics, and yet he spoke the language of signs as

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223 *Id.* at 6.
224 *Id.*
225 *Id.* at 147-66.
226 *Id.* at 148.
227 *Id.*
228 *Id.* at 147; *see* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).
229 B. JACKSON, *supra* note 10, at 147.
230 H.L.A. HART, *supra* note 214, at 12.
231 *Id.* at 121.
232 *Id.* at 123.
233 *Id.* See Dworkin's account of positivism and Hart's notion of judicial discretion. R. DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1978).
234 H.L.A. HART, *supra* note 214, at 123; *cf.* Dworkin, *supra* note 217, at 536-39.

early as 1952.[235] Communication for Hart is the intentional transmission of a message. In a penumbral question, the plain meaning does not generate certainty of the intention and the judge must decide this question. Often this judicial discretion will be facilitated by a semiotic argument. For example, in *Griswold v. Connecticut*,[236] Justice Douglas found the right of association hidden in the penumbra of the Bill of Rights. He also discovered the right of privacy lurking in the third amendment. These discoveries, which have had profound effects on the development of constitutional law, have come about, probably without conscious attempt to do so, in accordance with the most basic semiotic principles. *Griswold* is a case that was decided semiotically, and there is no surprise that one of the last words in it refers to "telltale signs."[237]

Hart appears to have been well-informed about speech act theory, another branch of semiotics.[238] He looked into the role of performatives in the famous article in which he proposed the theory that man is responsible for his acts and that the language of rights is attributive rather than descriptive.[239] Hart explained that when a man says, "I did that," this language is not a description of a physical act but an attribution of the man's responsibility for the act. Attribution of responsibility for an action is a "performative utterance."[240]

Thus, this Survey has attempted to draw an analogy between the open-ended approach of Peircean semiotics and the reality-based perspective of the legal realist tradition that has been identified as subjectivist. I have also shown that a goal of objectivity is shared by legal positivists and the text-centered approach of the new critics. But labels are misleading. A brief look at Hart's evolution from objectivist to subjectivist,[241] the unexpected role that semiotics played in the elaboration of his legal positivist the-

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235 Before we speak of a person meaning something by a statement, it must be true not merely (i) that he uttered 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 the listener not merely to believe or to do something but to recognise [sic] from the utterance that *he intended* the listener to believe or do something.

H.L.A. HART, *supra* note 214, at 62.

236 381 U.S. 479, 484 (1965).

237 *Id.* at 485.

238 *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); J. Searle, *What is a Speech Act?*, in PHILOSOPHY IN AMERICA 223 (M. Black ed. 1984) (introduction to speech theory).

239 Hart, *The Assumption of Responsibility and Rights*, in LOGIC AND LANGUAGE 145 (A. Flew ed. 1951).

240 *See* Grzegorczyk, *supra* note 134, at 229.

241 B. JACKSON, *supra* note 10, at 155.

ories, and his enunciation of the "open texture" of language,[242] which allies him with the ideology of the realist school despite his explicit criticism of the realist position, demonstrates the dangers of applying labels to legal theories. Analogies are at best fraught with distortions. But categories and analogy are the cornerstones of survey studies of the type undertaken here. It is hoped that these inevitable distortions will somehow be corrected by reference to the specialized studies cited. The identification of a harmonious interdependence of many disciplines at work in the quest for validity in interpretation and meaning may even justify the distortion.

5. Structural Poetics

a. Structuralists vs. Deconstructionists

Structural poetics is the application of the basic principles of structuralism to the analysis of literary texts.[243] Early in the development of this literary theory, which was firmly rooted in linguistics and anthropology,[244] structuralists branched out into several schools differing either as to their conception of literary language or their allegiance to the principle of a bounded text. This proliferation of schools of structuralist persuasion accounts for the confusion surrounding the term "structuralism." The confusion is exacerbated by the fact that many call structuralist theory what is now referred to as post-structuralist or deconstructionist theory.

Deconstructionists both accept and reject structural analysis. As Jonathan Culler put it:

> structuralists take linguistics as a model and attempt to develop "grammars" [to] account for the form and meaning of literary works; post-structuralists investigate the way in which this project is subverted by the workings of the texts themselves. Structuralists are convinced that systematic knowledge is possible; post-structuralists claim to know only the impossibility of this knowledge.[245]

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242 *Id.* at 161, *citing* H.L.A. HART, *supra* note 214, at 121.

243 According to Edward Stankiewicz, structural poetics is a "trend in modern literary theory and practice which tries to apply to the study of literature strict and objective methods and which starts with the premise that literary works, as verbal art, cannot be studied without reference to the linguistic material of which they are made." Stanckiewicz, *supra* note 191, at 629.

244 *See* text accompanying notes 174-76; *see also* note 54 which discusses the fundamentals of structuralist theory.

245 J. CULLER, ON DECONSTRUCTION. THEORY AND CRITICISM AFTER STRUCTURALISM 22 (1982).

Thus, a self-critical awareness has punctuated the development of structuralism from the very start and may have reinforced the scientific spirit of the whole enterprise.[246] The same self-critical awareness is characteristic of semiotics in general.[247] This similarity may explain why both structuralists and post-structuralists, despite their philosophical differences, have adopted semiotics as a theory with which to approach the analysis of discourse.

b. Structuralist Theories and the Law

Diversity among structuralists is legion. Some are deviationists, others are pragmatic, and still others are neo-formalist. Deviationists believe that the essence of poetic language is its violation of the norm.[248] This theory is particularly suited to the analysis of legal discourse and has been expressed by Kelsen in the distinction he drew between legal validity and volition, the latter being likened to the deviation by an individual in the creation of norms.[249] Those who object to the deviation theory because of the ill-defined nature of the norm propose a more flexible approach based on stylistic and semantic contrasts from a context.[250] This approach is particularly suited to the interpretive legal theory that views the law as prescriptive rather than descriptive. Thus, the legality of an act, viewed not as a deviation from black letter law, but rather as a contrast from the context, might depend on the degree of contrast, the manner in which the contrast is executed, and the effect of the contrast on the public. This approach would retain some of the certainty associated with a rules-based system and promote justice for the individual.

Some structuralists view the structures of the text and its underlying codes as residing within a hermetically closed system.[251]

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246 Lewis, *The Post-structuralist Condition*, DIACRITICS 2, 8-9 (Spring, 1982).

247 Julia Kristeva, one of the pioneers in literary semiotics, remarked in the development of structuralist criticism that:

> semiotics cannot develop except as a critique of semiotics. At every moment in its development semiotics must theorize its object, its own method, and the relationship between them; it therefore theorizes itself and becomes, by thus turning back on itself, the theory of its own scientific practice . . . . It is a direction for research, always open, a theoretical enterprise which turns back upon itself, a perpetual self-criticism.

J. KRISTEVA, SEMIOTIKÈ: RECHERCHES POUR UNE SÉMANALYSE 30 (1969) (author's translation).

248 Todorov, *Les Poètes devant "le bon usage,"* 314 REVUE D'ESTHÉTIQUE 301, 305 (1965); *see also* P. GUIRAUD, LA SÉMIOLOGIE (Que sais-je edit. 1971).

249 *See supra* text accompanying note 126.

250 M. RIFFATERRE, ESSAIS DE STYLISTIQUE STRUCTURALE 64-94 (1971).

251 Riffaterre elaborates a literary theory based on a closed text but which incorporates an interpretive method rich enough to produce rather extraordinary insights into the hidden mechanisms of literary texts. Riffaterre, *supra* note 209, *passim*.

Others conceive of the text as open and ready to be completed by the reader.[252] The same dichotomy exists in legal theory. Legal structuralists, like Arnaud, who have adopted a Lévi-Straussian model are perplexed by the closedness of the system and seek ways to justify it.[253] Arnaud has incorporated semiotics in his structuralist approach to legal texts. He believes that law can be studied as the development of underlying structures and not of a conscious construction. Since law is included within a general theory of communication, the understanding of the structures of the legal system will come about only through an attentive examination of signs.[254] Arnaud perceives semiotics as providing the link with society that can open up the fundamentally closed system of the structuralists.

In keeping with the rejection of early formalism and its static text-centered perspective, some structuralists began to view the reading process as one involved in history and society.[255] Thus, Marxist critics,[256] psychoanalytic critics, and sociologic critics, whether their text is literary or legal, are still classified as structuralist if their perception of the text is a fundamentally relational one in which individual elements have no significance in and of themselves, but take on significance in relation to other elements in the text's structural system.

Before discussing the particular contribution of scholars applying structuralist methods to the law, it might be useful to summarize the somewhat confused global picture of structural theory. Without oversimplifying the diversity of structuralist persuasions, let us say that there are basically two waves of structuralist thought. The first group of text analysts remain formalistic, stressing style over content. They concentrate on either a bounded or unbounded text as a phenomenon of linguistic game playing or as the disruption of a particular norm or con-

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252 Umberto Eco and Roland Barthes are structuralists who envisaged an open text.

253 Arnaud, *supra* note 26, at 300.

254 *Id.* at 299.

255 The confusion of identity between structuralists and post-structuralists began when the reality-based structuralists questioned the closedness of the systems analysis traditionally undertaken by Saussurean structuralists. This confusion has led Jonathan Culler to conclude that "the distinction between structuralism and post-structuralism is highly unreliable." J. CULLER, *supra* note 245, at 30. Paul De Man described the changes that were taking place early in the development of structuralist thought. "The spirit of the times is not blowing in the direction of formalist and intrinsic criticism . . . . [W]e do continue to hear a great deal about reference, about the non verbal 'outside' to which language refers." De Man, *Semiology and Rhetoric*, in TEXTUAL STRATEGIES 121 (J. Harari ed. 1979).

256 A.J. Arnaud studies the relationship between Marxism and structuralism in the analysis of legal discourse in *Structuralisme et Droit*. Arnaud, *supra* note 26, at 300.

vention. The second group, adopting the notion of an open text, is interdisciplinary. These text analysts attempt to reach into the fields of psychoanalysis, Marxism, anthropology, and philosophy in order to determine how meaning is conveyed through a structural system. This group's emphasis on language as a social phenomenon has had particular appeal among the legal realists and the critical legal studies movement.[257] Both groups of structuralists are united by their adoption of semiotic theory.

1. *Bernard Jackson.* What has structuralism contributed to legal studies? As Bernard Jackson put it, "legal philosophy cannot remain immune from the structuralist approach for two reasons: first, law partakes . . . of a system of communication and . . . is subject to whatever contribution structuralism has made to the science of semiotics; second, structuralism [is] a challenge to the positivist metaphysic . . . underlying legal philosophy."[258]

Jackson has attempted a systematic analysis of the relationship between contemporary semiotic theory and modern jurisprudence in his new and challenging book, *Semiotics and Legal Theory*,[259] which is weighted toward structural semiotics of the Saussurean or European school. Jackson juxtaposes Greimasian structural theory and the mainly positivist legal theories of Hart, Dworkin, MacCormick, and Kelsen in order to lay the foundation for a semiotic theory of law. The intriguing parallels he draws between the jurisprudential divisions of naturalism, positivism, and realism,[260] and their counterparts in semiotics, reflect the implication of language in the legal process and a grammar of language common to both ordinary and legal language.[261] Jackson manages to crack through the barriers of conventional wisdom by demonstrating with conviction and persuasiveness that Greimasian methodology, long since considered by most to be a bastion of restrictive normativity that is isolated from a socio-cultural context, has an affinity to the legal realism movement.[262] Similarly striking is Jackson's attempt to uncover the semiotic basis of

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257 Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). For a discussion of the role of semiotics in the criticial legal studies movement, see *infra* text accompanying notes 311-31.

258 Jackson, *Towards a Structuralist Theory*, *supra* note 134, at 5.

259 *See supra* note 10.

260 *Id.* at 4.

261 For an interesting account of the relationship between literary theory and jurisprudence, see West, *supra* note 35. West relies on Northrup Frye's literary theories and applies them to the law as narrative.

262 B. JACKSON, *supra* note 10, at 137.

Hart's positivism,[263] and "[t]he [s]emiotic [c]haracter of Dworkinian logic."[264]

2. *Donald Hermann.* In his overview of meritorious legal structuralist studies, Jackson draws our attention to the work of Donald Hermann,[265] who views such legal phenomena as electronic surveillance, monopolization, and products liability in terms of Saussure's binary oppositions. Hermann's aim is purely structuralist, that is, he tries to distinguish the limited number of constants from the multiple variants in a complex field.

3. *Paul Robertshaw.* Of particular interest is Paul Robertshaw's structural analysis of a single House of Lords' case.[266] In attempting to apply the structuralist method to the facts of the case, Robertshaw has succeeded in elucidating the otherwise inexplicable or hidden. Robertshaw has also applied Piaget's basic laws of transformation[267] to the evolution of the concept of an "equitable mortgage" in the Chancery Courts and in the Common Law Courts[268] relating legal changes to societal transformation.

In Robertshaw's structural analysis[269] of all of the reported British sex discrimination cases, he made an important distinction between legal discourse and "folk talk."[270] He identified the latter as the organizing mode of the legal outcomes. "Folk talk" consists of references to tigers, fables, parables, and proverbs occurring in the cases which share a zoological unity. Robertshaw's structural analysis of the zoological unity of the "folk talk" in these cases reflects the approaches of both Saussure and Lévi-Strauss. He studied the surface and deep structures of the figures, identified five different levels of inquiry, and provided real insights into the British perception of "equality" between the sexes. Furthermore, Robertshaw was able to define the na-

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263 *Id.* at 147-66.

264 *Id.* at 192-224.

265 Hermann, *A Structuralist Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131 (1975).

266 Robertshaw, *Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case*, PUB. L. 113 (1975) [hereinafter cited as Robertshaw, *Unreasonableness and Judicial Control*]; *see* Robertshaw, *Structuralism and Law: Some Comments*, 2 LIVERPOOL L. REV. 31 (1980) (critique of Jackson's essay on structuralism and the law).

267 J. PIAGET, STRUCTURALISM (1971).

268 Robertshaw, *supra* note 266, at 36.

269 For Robertshaw's post-structuralist development in semiotics and the law, see *supra* text accompanying notes 303-06.

270 Robertshaw, *supra* note 173. This article is a reworking of Robertshaw's original study of metaphor in the sex discrimination cases. Robertshaw, *Semantic and Linguistic Aspects of Sex Discrimination Decisions: Dichotomised Woman*, in SEMIOTICS, LAW, AND SOCIAL SCIENCE, LIVERPOOL L. REV. 203 (D. Carzo & B. Jackson eds. 1984 spec. issue).

ture of "woman" in contrast to "man" as constituted in seventy-six printed items called Law Reports. Through a study of the binary opposition of the male to the female paradigm, and the relations among the paradigmatic elements, Robertshaw observed that females are characterized in the "folk talk" by reproduction, consumption, leisure, play, passivity, and preoccupation with the past (chivalry). In contrast, males are characterized by production, work, activity, and preoccupation with the present (equality).

4. *A.J. Arnaud.* Arnaud, another structuralist in the Lévi-Straussian tradition, has drawn our attention to the difference between the surface (explicit) structures of legal writing and the implicit or subconscious structures that are hidden in the legal text.[271] While remaining faithful to the structural method, Arnaud also managed to stress the role of reality located at a level even deeper than the implicit abstractions he sought to extract from the text. Arnaud incorporated Foucault's theory of signification with the theories of Lévi-Strauss, Althusser, Barthes, and Lacan in a curiously modern, post-structuralist, and eminently semiotic approach.[272] Arnaud's approach to legal analysis mirrors the imperceptible passage from structuralism to semiotics that has taken place in the literary scene.

5. *Thomas Heller.* In a recent comprehensive study of structuralism and the law, Heller equates structuralism with "objectivism" and "pure scientific positivism" tempered only by the rare post-structuralist assertion that unexplainable events sometimes do exist.[273] Heller's view of structuralism takes into account the very early split that took place among structuralists.[274] His linking of the structuralists and post-structuralists supports this Survey's contention that post-structuralism is a movement that both accepts and rejects the doctrines of structuralism.

In Heller's view, the structuralist is so purely objective that the individual subject ceases to exist as the collective is stressed. Since the structuralist is intent on finding the constants beneath the variants, discontinuity is stressed over evolution. Heller classifies the structuralist as a rational materialist sometimes labelled

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271 Arnaud, *Du bon usage du discours juridique*, 12 LANGAGES 123 (1979).

272 *See* Arnaud, *supra* note 26, at 283.

273 Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 147 (1984).

274 For a discussion of the diversity among structuralists, see *infra* text accompanying notes 248-57.

as antihumanist. Post-structuralists reintroduce the liberal image of the subject, injecting more flexibility into the analysis of discourse.

Heller then relates the phenomenon of the loss of the subject to structural analysis of the law. Heller views the law as predominantly subjectivist. Thus, he considers that the analysis of American legal categories as a structural discourse is an undertaking that would put order in an orderless "chronicle of aggregated wills."[275] "Any purely structuralist account of a uniform production of legal practices would miss the complexity of the legal landscape, and paint so false a picture of the reproduction of theory in practice that it would strain the credibility of the entire account."[276]

Although structuralism gets some rather bad press in Heller's view of its application to the law, few could argue with Heller's desire for a more integrated view that would incorporate both subjective and objective approaches to discourse analysis. Semiotics, "a science that studies the life of signs within society,"[277] would no doubt breathe life into the objectivist approach of the structuralists that Heller criticizes. In other words, semiotics would incorporate extratextual factors from reality into the analysis of legal discourse.[278]

Prior to a discussion of post-structural theory, the contributions of three particular structuralists who have significantly advanced and applied semiotic theory to literary texts will be noted: Greimas,[279] Todorov, and Barthes. Of these three, only Greimas[280] has actually applied his structural semiotic approach

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275 Heller, *supra* note 273, at 173.

276 *Id.* at 184.

277 *See* F. DE SAUSSURE, *supra* note 120, at 33-34.

278 Heller, *supra* note 273, at 189.

279 For a discussion of Greimasian theory applied to the law, see *supra* text accompanying notes 186-90.

280 In his books, *Sémantique Structurale* and *Du Sens: Essais Sémiotiques*, Greimas developed a theory of narrative structures in terms of an established linguistic model derived from Saussure. Greimas and other structuralists like Claude Lévi-Strauss relied on the Saussurean concepts of *langue* and *parole* and upon Jakobson's notion of binary oppositions. R. JAKOBSON & M. HALLE, *supra* note 197, at 75. Following in the footsteps of Vladimir Propp, and inspired by the Prague circle's orientation toward functional linguistics, Greimas perceived a story as if it were a sentence having a semantic structure. When analyzing the structure of a story, Greimas made use of spheres of action which he reduced to three pairs of opposed categories called *actants*. Many *acteurs* can perform one function or action. The functions are the following: (1) subject vs. object; (2) sender vs. receiver; and (3) helper vs. opponent. Algirdas Greimas and Bernard Jackson have reported on the application of Greimasian narrative structures to the law. They have shown how these categories and their combination can be useful for the description of a series of events in a legal setting. B. JACKSON, *supra* note 10, at 31-143.

to legal texts.[281] Bernard Jackson's detailed study of Greimasian structural semantics as applied to legal discourse is a convincing demonstration of the manner in which Greimas integrated three different jurisprudential theories: positivism, naturalism, and realism in order to produce new insights into the specificity of legal language.[282] It is hoped that the theories of Barthes and Todorov, broadly sketched in below, will provide legal interpreters with finer tools with which to approach their endeavor.

c. Tzvetan Todorov's Grammar of Narrative and its Application to the Law

Todorov was in search of a grammar of narrative from which all stories can be derived. Legal realists would object to this view as overly determinant and static, similar to the grammar of legal structure proposed by Kelsen[283] in response to social studies of law that threatened to uproot "the scientific status of legal dogmatics."[284] Todorov described the workings of the universal grammar to which not only all languages but all signifying systems conform.[285] Legal language is a signifying system that is governed by this universal grammar. Todorov's grammar, which is on the level of syntax, is complex and almost totally detached from the content level of the text. Legal science studies the law as a grammar, as a "system of norms," as a structure free of any reference to historical, political, or ethical values.[286] In the grammar of law, meaning is conceived of in terms of a syntax. In other words, what "should be" is the positive law (*langue*) and what deviates from that norm is the illegal act (*parole*).

According to Todorov, interpretation should not be the mere servile application of the instruments of textual analysis to a particular discourse. Instead of engaging in a futile search for hidden meanings, the interpreter should be concerned with the relationships between the various levels of meaning within the text, that is, with the multiplicity of meanings within the text as a system.[287]

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281 A. GREIMAS & J. COURTÈS, *supra* note 151.

282 B. JACKSON, *supra* note 10.

283 H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945); H. KELSEN, WHAT IS JUSTICE? (1957); H. KELSEN, PURE THEORY OF LAW (1970) [hereinafter cited as PURE THEORY].

284 Goodrich, *supra* note 126, at 180.

285 T. TODOROV, GRAMMAIRE DU DÉCAMÉRON 15 (1969).

286 PURE THEORY, *supra* note 283, at 191.

287 Todorov, *The Analysis of Literature: The Tales of Henry James*, in STRUCTURALISM, AN INTRODUCTION 73 (D. Robey ed. 1973).

Todorov, like many theoreticians of discourse analysis, was interested in what constitutes a literary act. The mere examination of the contents of literary writing cannot bring us closer to the understanding of the literary phenomenon itself. The essence of literature is found in its difference from ordinary language—"literature is like a deadly weapon with which language commits suicide."[288] The simile of literature to an illegal act is not fortuitous and points toward the applicability of Todorov's theories to legal discourse. Legal language is highly specialized, coded, and dependent on a separate set of conventions from that of ordinary language. One of the critical differences between law and literature is that literature seeks out difference consciously, whereas law resists it, striving with frustration both to uphold legal precedent, certainty, and predictability and to communicate its coded language to the layman for whom it is intended to apply.

d. Roland Barthes' Structural Semiotics and its Application to the Law

There is a constantly operating contradication in Roland Barthes' work which mediates between the hermeneutic and structural approaches to the languages of literary and non-literary texts.[289] His style is both scientific and poetic, like legal discourse at its best. Since Barthes' writing contributes to furthering the development of the philosophy, sociology, and psychology of language, it naturally fulfills Saussure's conception of semiology.[290]

Barthes' semiotic theory[291] stressed the importance of the

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288 T. TODOROV, INTRODUCTION À LA LITTÉRATURE FANTASTIQUE 91 (1970) (author's translation).

289 *See* Kristeva, *Matière, Sens, Dialectique*, 44 TEL QUEL 17, 33 (1971).

290 For a discussion of the social function of Saussurean semiology, see *supra* text accompanying notes 129-30.

291 *See* Tiefenbrun, *The Third Degree of Language: Mediation and Roland Barthes' Semiotic Productions*, 34 SEMIOTICA 143 (1981). Around 1954, Barthes envisaged a science of signs intrinsically involved with sociology and with the theories of Sartre, Brecht, and Saussure. Barthesian semiotics varies in response to political and social changes that were taking place at the time of the 1968 events in France. At that point, semiotics became a passionate return to the text. Of particular merit is Barthes' early study of Racinian tragedy which literally overturned the views of Racinian dramaturgy held by the French literary establishment for centuries and provoked a scandal. *See* R. BARTHES, SUR RACINE (1963); *see also* R. BARTHES, CRITIQUE ET VÉRITÉ (1966) (response to R. PICARD, NOUVELLE CRITIQUE OU NOUVELLE IMPOSTEUR (1965)).

Despite the threatening effect that Barthes' literary criticism had on the French in the early sixties, his espousal of the self-contained text, its plurality of meaning, and the beneficial effects of textual ambiguity were already quite familiar to the American school of new criticism. Barthes added a rigorous method and a semiotic dimension to the principles of new criticism. Barthes' responsiveness to social change, his iconoclastic

signifier. He claimed that the purpose of semiotic analysis is to move beyond the level of mere content analysis (the signified) to the level of form and style (the signifier). This point of view will engender a revision by the deconstructionists of the traditional definition of semiotics as the interplay between signifier and signified: "Semiology, as opposed to semantics, is the science or study of signs as signifiers."[292] Peter Goodrich elaborated on this distinction in his introductory study of law and language. Semiotics does not:

> study meaning as actually realised or manifested in text or utterance as historical and local events. Semiotics studies the *internal* coherence of the object utterance, or the *immanent* logic of the text . . . . The predominant characteristic of post-Saussurian semiotics has indeed been precisely the development of numerous and diffuse metalanguages or second order descriptive theories of semiotic systems.[293]

Barthes occupies a special place in the history and development of semiotics. He was one of the early structuralists who was influential in issuing forth a more generally open-ended approach to textual analysis.

6. Post-Structuralism

The period of literary critical thought dominated by Derrida and the Yale School is characterized by diverse approaches united only by the common name of post-structuralism.[294] The

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approach to the interpretation of classical texts, and his flirtation with the notion of textual indeterminacy, should make his work particularly appealing to the critical legal studies movement.

Of particular interest is Barthes' analysis of the interplay of codes at work in literary texts, a notion that is eminently applicable to legal discourse. *See* R. BARTHES, S/Z (1970). In *S/Z*, Barthes identified and described the function of at least five codes at work in the novel: the hermeneutical, the code of semes or signifiers, the symbolic code, the proairetic code, and the cultural code. *See* R. SCHOLES, *supra* note 120, at 148-57 (discussion of the meaning of these codes).

292 De Man, *supra* note 255, at 123.

293 Goodrich, *supra* note 126, at 181.

294 The post-structuralists include: reader-response critics (*e.g.*, H. JAUSS, LITERATURGESCHICTE ALS PROVOKATION (1970); Jauss, *Literary History as a Challenge to Literary Theory*, in NEW DIRECTIONS IN LITERARY HISTORY 11-41 (R. Cohen ed. 1974); H. JAUSS, AESTHETISCHE ERFAHRUNG UND LITERARISCHE HERMENEUTIK (1977); S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); N. HOLLAND, FIVE READERS READING (1975); M. RIFFATERRE, *supra* note 250, at 87); *Rezeptionsaesthetik* critics (*e.g.* Iser, *The Reading Process: A Phenomenological Approach*, 3 NEW LITERARY HISTORY 279 (1972)); and feminist critics (*e.g.*, R. LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975); Elshtains, *Feminist Discourse and its Discontents: Language, Power and Meaning*, 7 SIGNS 603 (1982); D. SPENDER, MAN MADE LANGUAGE (1980); J. CULLER, *supra* note 245, at 43-64. To this list we can add phenomenological, Marxist, and psychoanalytic critics. Hermeneutics and pluralism also compete with traditional approaches to text

bond that unites these apparently warring factions in the post-structuralist school is their perception of literature as signification and/or communication—in short, semiotics. Nothing like this quagmire of literary critical approaches exists in legal interpretive theory, but it may be on its way. An excursion into the history of the literary tradition that produced the quagmire may relieve the effects on legal scholars.

Post-structuralists, obsessed with the inherent paradoxes of language, are convinced that systematic knowledge is impossible. Although they are united in their opposition to a strictly scientific approach to textual analysis, post-structuralists have not refused the tools of semiotics.[295]

a. Deconstruction and Semiotics

The distinction between the scientific approach of the structuralists, who are allied to semiotics by tradition, and the anti-scientific approach of the deconstructionists might leave one with the false impression that semiotics is the adversary of post-structuralism. Nothing could be further from the truth. The interplay between semiotics and deconstruction is tense and highly productive. Based on the unresolvable paradoxes inherent in language—paradoxes which deconstructionists believe can only be revealed by a systematic semiotic analysis of signs and significa-

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analysis in this highly diversified "school" of literary criticism. The theory of communication or "hermeneutic" is contained in the celebrated work of Hart. Hart, *Signs and Words*, 2 PHILO. Q. 59 (1952). For a discussion of pluralism, see Knapp & Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 737-42 (1982) (they attack Stanley Fish's pluralistic view of interpretation: "There are as many plausible readings of the United States Constitution as there are versions of Hamlet . . . ." Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982)).

295 Turning away from the positivistic approach in Saussure's *Cours*, the post-structuralists now rely on Saussure's *Anagrammes* for advice and direction in their search for meaning. Lotringer, *Introduction, Saussure's Anagrammes*, in 2 SEMIOTEXT(E) 7 (1974). Hillis Miller explained the difference between structuralists and post-structuralists in rather colorful terms:

> Socratic critics are those who are lulled by the promise of a rational ordering of literary study on the basis of solid advances in scientific knowledge about language. They are likely to speak of themselves as "scientists" and to group their collective enterprise under some term like "the human sciences". . . . Such an enterprise is represented by the discipline called "semiotics," or by new work in the exploration and exploitation of rhetorical terms. Included would be aspects of the work of Gérard Genette, Roland Barthes, and Roman Jakobson . . . . This would be a discipline bringing literature out into the sunlight in a "happy positivism". . . .
>
> Opposed to these are the critics who might be called "uncanny" . . . . One feature of Derrida's criticism is a patient and minutely philological "explication de texte." Nevertheless, the thread of logic leads . . . into regions which are alogical, absurd.

Miller, *Stevens' Rock and Criticism as Cure II*, 30 GA. REV. 330, 335-36 (1976) (cited in J. CULLER, *supra* note 245, at 23).

tion—deconstructionists adopt the curiously ambivalent position of both accepting and rejecting the principles and practice of semiotics.[296]

Derrida has explained the conflict inherent in the deconstructionists' simultaneous acceptance and rejection of semiotics.[297] For Derrida, semiotics is the logical culmination of the faith that the Western culture has placed in science and rationality. He called that faith "logocentrism." Logocentrism is based on the assumption that concepts exist independently of their expression and can be examined as logical representations. Derrida admits that semiotics began as a critique of the very notion of logocentrism. Saussure, the founder of semiotics, was the first to insist that the sign is a relational union between signifier and signified, an arbitrary phenomenon at best. However, Derrida concluded that semiotics cannot escape logocentrism because it assumes that expression depends on conventions and the prior existence of a system of signs. Literature and the law, for example, are constantly accepting and rejecting pre-established conventions and codes. According to Derrida, it is precisely this paradox which makes the goal of semiotics—the establishment of a theory of signification and communication—virtually impossible.

b. Deconstructionist Notion of Difference and its Application to the Law

Deconstructionists define the act of writing as semiosis. Writing is made up of signs that facilitate the recreation of reality. This recreation is possible only with the help of a reader or receiver of the message. If the message is in the form of literary discourse, the reader must simultaneously remember and then temporarily forget the conventions and codes that constitute expectation. It is only by virtue of the trait of forgetfulness that the writer as well as the reader can experience the "difference" that characterizes the literary act. Literary discourse thrives on differ-

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296 Barbara Johnson, one of Derrida's most faithful translators and interpreters, defined deconstruction as "the careful teasing out of warring forces of signification within the text itself." Johnson, *The Critical Difference*, DIACRITICS 2, 3 (Summer, 1978).

297 Derrida, *Sémiologie et grammatologie*, in POSITIONS (1972) (trans. 1981) (good discussion of the theory of signs and Derrida's critique of it). Derrida's readings of Rousseau, Saussure, Freud, Austin, Hegel, and Husserl can be found in J. DERRIDA, DE LA GRAMMATOLOGIE (1967) (OF GRAMMATOLOGY (G. Spivak trans. 1976)); *see also* J. DERRIDA, L'ÉCRITURE ET LA DIFFÉRENCE (1967) (WRITING AND DIFFERENCE (A. Bass trans. 1978)); J. DERRIDA, MARGES DE LA PHILOSOPHIE (1972); J. DERRIDA, *"Differance" and Form and Meaning: A Note in the Phenomenology of Language*, in J. DERRIDA, SPEECH AND PHENOMENA 107-60 (1973).

ence or contrasts from a context or convention made possible by the reader's temporary abandonment of a past tradition.

Like literature, the law also depends on shared expectations, but legal analysis resists the abandonment of convention. Precedent and stare decisis are pervasive forces aimed at promoting predictability and uniformity in the law. In response to this resistance to the abandonment of past tradition, deconstructionists would insist that the very act of writing:

> destabilizes words, in the sense that it makes us aware at one and the same time of their alien frame of reference (they are words of the other or come to us already interpreted, trailing clouds of meaning, each one a *representamen*) and of the active power of forgetfulness (a kind of silencing) which it enables and which, in turn, enables us to write.[298]

Derrida's notion of difference[299] and his theory of signs is firmly rooted in Saussurean semiotics. Although Derrida found in Saussure a compatriot, a critique of the "metaphysics of presence," or logocentrism, he and other post-structuralists criticized Saussure's theory of the sign, objecting in particular to the necessary relation of signifier to signified.[300]

c. Michel Foucault, Literal and Figurative Language, and the Law

Foucault has a unique perception of language which has come to be shared by post-structuralists. For him language is "catachresis," abuse and misuse, or deviations from the norm. Foucault maintained that language is a conscious failure to live up to shared expectations.[301] On the theory that all language is by nature catachretic, Foucault rejected the traditional distinction between literal and figurative language.

Applying Foucault's conception of the nature of language to the law, I believe that he would reject the notion of two competing types of language in legal discourse, one based on similarity

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[298] G. HARTMAN, SAVING THE TEXT: LITERATURE/DERRIDA/PHILOSOPHY xxi-ii (1981) (emphasis added).

[299] For Derrida the notion of "differance" [sic] is key. He defined it in terms that remind us of Saussure's concept of the arbitrary and relational nature of the sign. No element can function as a sign without relating to another element which is itself not present. J. DERRIDA, WRITING AND DIFFERENCE, *supra* note 297, *passim*.

[300] For example, Foucault stated "there is no distinction between signifier and signified, subject and object, sign and meaning." M. FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE 86 (trans. 1972).

[301] Foucault's own style is a demonstration of catachresis in which a profusion of rhetorical figures, like oxymoron, paradox, chiasmus, antiphrasis, hyperbole, and others, are designed to communicate information.

and the other on difference. The first type of legal language, the approved kind directed toward the signified or the communication of content in and for itself, simply does not exist in Foucault's theory. This ideal type of language, which never shocks due to its conscious similarity to the defined norm, is designed to promote prediction by adherence to convention. The other type of language based on the principle of difference is directed toward the signifier in and for itself. This form of discourse is designed to persuade by the careful manipulation of signifiers, words chosen for their formal and stylistic effects. Rhetorical figures such as metaphor are only one of a myriad of devices which lawyers may resort to in order to persuade.[302] Lawyers, then must balance the goal of content-based discourse with the reality of the persuasive effects of style or catachresis.

Following in the post-structuralist tradition which saw metaphor as a natural phenomenon of language itself, Paul Robertshaw has been particularly successful in adopting semiotic principles in his study of metaphors in the law.[303] Professor Robertshaw has proposed an important method for the analysis of metaphors occurring in British cases. He deconstructs the language of the case in order to expose a deep design hidden by the use of style or surface structures such as metaphor, metonymy, or simile. He calls these the signals of deeper realities within. Robertshaw studies judicial metaphors as semantic transformations of a hidden reality, an abstraction, a rule. The basic proposition of the method, which stems from Nietzche, is that language is constitutive of reality. Since language is intrinsically metaphoric, a study of metaphor will necessarily reach to the core of meaning.[304] Nietzche is the patron saint of close textual analysts and interpreters of legal texts who do not move far from the words themselves for the source of hidden meaning.[305] Robertshaw studies the audience in legal decisions and concludes that in

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302 See Foucault's study of figuration which he limits to metaphor, metonymy, synechdoche, and irony. M. FOUCAULT, LES MOTS ET LES CHOSES (1966) (THE ORDER OF THINGS (trans. 1970)).

303 P. Robertshaw, Hierarchies, Metaphors and Judicial Decisions (1986) (unpublished manuscript).

304 *Id.* at 1.

305 See Sanford Levinson's discussion of strong and weak textualists who interpret the Constitution. Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378-84 (1982). The weak textualist emphasizes the plain words of the text. The strong textualist will emphasize the meaning to be given to the words of the text by historical reconstruction. This approach is limited by the validity of authorial intent. John Hart Ely is an example of a weak textualist who attempts to crack the code of a text by considering the overall structure in which individual words fit. *See* J.H. ELY, DEMOCRACY AND DISTRUST (1980). Strong textualists do not discover hidden meanings. They create meanings. As Stanley

cases which are fully reported and have a large perceived audience, the court is more likely to use language figures and tropes which attempt to bridge the various audiences.[306]

d. Post-Structuralism and Psychoanalysis

Jacques Lacan is a psychoanalyst who had roots in the early structuralist movement.[307] Modern psychoanalytic critics cannot disregard the impact of this controversial figure who concentrated on the linguistic intricacies of his patients' speech. Lacan believed that the unconscious, which is structured like a language, is governed by the principle of paradox. Language is overdetermined and polyphonic, like poetry. Lacan believed that studying the overlapping and interweaving of signifiers within a written chain of words can lead to the discovery of the very nature of the unconscious and how it is structured. Lacan's major contribution to psychoanalytic theory is his insistence on a close linguistic analysis of the patients' words themselves. In this regard Lacan was indebted to the semiotic theories of Saussure.[308]

In a language unique in its own combination of art and science, Lacan advocated the supremacy of the signifier and the quest for the signified in its pure form. This concept of hidden meanings and the distortion which comes about by the use or misuse of words is the very stuff with which lawyers grapple on a daily basis. Legal scholars have made significant inroads into the psycholinguistic effects of legal language on the layman. Studies have been undertaken to determine whether jury instructions are clear enough to promote meaningful communication and justice.[309] The law, which has begun to adopt if not a Lacanian then a psycholinguistic approach to legal issues,[310] could benefit from more explicit applications of semiotic principles.

Fish put it, "[i]nterpretation is not the art of construing but the art of constructing. Interpreters do not decode poems, they make them." S. FISH, *supra* note 294, at 327.

Fish's pluralism has been criticized as nihilistic; *see* Fiss, *Objectivity and Interpretations*, 34 STAN. L. REV. 739 (1982).

306 *See* P. Robertshaw, *supra* note 303, at 17.

307 J. LACAN, ÉCRITS (1966).

308 *See* Charrow & Charrow, *supra* note 158.

309 *See* J. LEVI, *supra* note 155, at 3 (studies relating to the reliability of eyewitness testimony), 3-4 (issues in memory acquisition, retention, and retrieval for courtroom use), 4-6 (the social psychology of courtroom behavior-forms of questioning and their psychological effects), 6-7 (other related psycholinguistic research done on legal matters).

310 *Id.* at 6-7.

7. Critical Legal Studies and Semiotics

The critical legal studies (CLS) movement has been characterized as "one third legal realism, one third anarchism, and one third Marxism."[311] Proponents of the CLS movement are direct descendants of legal realism[312] and share with them three basic tenets: skepticism about the pretensions of legal institutions,[313] belief in the indeterminacy of law, and belief in the inseparability of law and politics. The CLS movement is attempting to carry out in an even more radical manner the reformist ideals of the legal realist movement that somehow got thwarted in the 1970's.

Like the realists, the CLS scholars deny that law is either autonomous or determinate. Legal doctrine exists, but it is not a system and, therefore, cannot provide definitive answers to all the variants of the pattern of cases.[314] "[W]hen you situate law in a social context, it varies . . . in that context . . . . law is indeterminate at its core, in its inception, not just in its applications. This indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds, that are fundamentally contradictory."[315]

Like the realists, the CLS scholars "regard law *primarily* as a social institution rather than *primarily* as a normative study."[316] Since law is indeterminate, the CLS scholars believe that it cannot be analyzed by means of the empirical, scientific, behaviorist model elaborated by the positivists.[317] While the positivists attempt to predict how courts will decide cases on the basis of social science, the CLS movement seeks out the social values expressed by the law.[318] This anti-normative attitude could preclude the application of a Saussurean brand of semiotics to the law and explain why the CLS scholars have adopted the post-structuralist theories of Jacques Derrida, Michel Foucault, and Roland Barthes[319] who, despite their roots in Saussurean struc-

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311 Norman Dorsen reported this description at a session of The Federalist Society of New York University School of Law devoted to the critical legal studies movement (Feb. 20, 1986).

312 Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626 (1984).

313 Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247, 261 (1984).

314 Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 578 (1984).

315 Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114 (1984).

316 Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 365 (1984).

317 Trubek, *supra* note 314, at 579-80.

318 Kornhauser, *supra* note 316, at 367.

319 The CLS scholars "draw on critics of the feminist, structuralist, and deconstructionist schools." Frug, *Henry James, Lee Marvin and the Law*, N.Y. Times, Feb. 16, 1986 (Book Review), at 1, col. 1.

turalist tradition, are more in league with the openness of Peircean semiotics. Even though the CLS scholars reject normative study and empirical models, they use the language of structuralist semiotics in their interpretivist investigation of legal issues.[320] For example, in order to determine what the role of law in society is, the CLS scholar would investigate how this "complex cultural code . . . explains the social world[,] how it fits together, and [how it] forms part of the structure in which action is embedded."[321] Willingly or not, this is a systems approach to discourse and one envisaged by Saussurean semiotics. Moreover, in order to determine what constitutes valid social knowledge about the law, the CLS scholar would decode or explicate "the deep structures of law and demonstrat[e] the relationship between these structures[,] action[,] and order in society."[322] This approach, rooted in a concept of law as social institution, is derived from the Saussurean structuralist branch of semiotics which Claude Lévi-Strauss applied in his structural anthropology[323] and which Noam Chomsky later developed into a normative grammar.

Since law is inseparable from politics in the CLS tradition, proponents of this movement, along with the realists, deny that law is formally analyzable[324] by means of a neutral mode of legal reasoning.[325] The attempt by a legal scholar to apply doctrine to hard cases in an objective manner which is independent of personal ideals, passions, or political persuasions is simply impossible in the CLS perception of the law. The interpretation of law must, therefore, engage people's passion, politics, as well as their reason.[326] Law is not inseparable from society but is a product of and a contributor to the way people understand themselves and their society. This point of view, which is at the heart of the CLS movement, is in consonance with the semiotic system envisaged by Saussure, practiced by Barthes, and continued by the reality-based post-structuralists. The CLS scholars have, therefore, adopted the liberalizing theories of Barthes and the post-structuralists in preference to text-centered literary theorists, like E.D.

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320 Trubek, *supra* note 314, at 605.
321 *Id.* at 601.
322 *Id.*
323 *See supra* text accompanying notes 174-79.
324 *See* Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 RESEARCH L. & SOC. 3 (1980); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973) (principle of indeterminacy of legal doctrine), *cited in* Trubek, *supra* note 314, at 578.
325 Trubek, *supra* note 314, at 578.
326 Frug, *supra* note 319, at 28.

Hirsch, Wayne Booth, or the new critics. The more traditional legal scholars have followed the text-centered literary theorists who emphasize the limits of interpretation rather than the openness of the text.[327]

Critical legal scholars believe that legal doctrine reflects the basic contradictions in human relations and as such does not constitute a coherent body of knowledge.[328] Their emphasis on contradiction and paradox in law, and their attempt to demystify the law, which they consider to be a marginal factor in social behavior,[329] allies the CLS movement with the post-structuralist theories of Derrida and Foucault. And like post-structuralism, the CLS movement is often accused of anarchy and nihilism.[330] If an interpreter engages in an open-ended interpretive approach to the meanings of an utterance in legal discourse, without invoking the restraints imposed by the linguistic, historical, or social context in which the utterance is embedded, this method can produce a limitless number of interpretations. Such an approach is creation, not "interpretation" in the traditional sense,[331] *i.e.*, an attempt to uncover hidden meanings textually rooted and verifiable as existing both in the text and in the mind of the observer. Semiotics, which orients the investigator toward a close and concrete study of language as a sign system in society, provides beneficial boundaries of interpretation. The CLS movement would, therefore, greatly expand its potential by a more conscientious adoption of the minutely philological and semiotically based explications that Derrida's deconstructionist method requires.

III. CONCLUSION

In reviewing the sources of semiotics, its relation to literary criticism, and the application of semiotics to the law, I have attempted to show that semiotics is an ancient discipline stemming from pre-Socratic sources and branching off into at least five different fields: medicine, philosophy, linguistics, anthropology,

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327 *Id.*

328 Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

329 Trubek, *supra* note 314, at 585.

330 Hutchinson, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 236 (1984).

331 Dworkin makes the distinction between creation and interpretation, between interpreters who interpret and those who invent, between artists and critics. An inventor is the skeptic who believes that there are limitless interpretations possible and no right answer. "The artist can create nothing without interpreting as he creates . . . . The critic, for his part, creates as he interprets . . . . A judge's duty is to interpret the legal history he finds, not to invent a better history." R. DWORKIN, *How Law is Like Literature*, in MATTER OF PRINCIPLE 146, 158-60 (1985).

and literature. The interdisciplinary nature of semiotics has promoted dialogue among researchers from many different areas of knowledge and has helped to breathe life into the interpretation of literary and legal texts. The most important contributors to the development of semiotics are: Saussure, in linguistics; Peirce, in philosophy; and Lévi-Strauss, in anthropology. Each of the major schools of literary theory from Russian formalism to the most recent deconstructionism has adopted semiotic principles in various ways to further particular goals. These literary applications have served as a catalyst for the analysis of legal discourse. Examining the history and development of various semiotic approaches to literary interpretation provides insight into the source of certain parallels that exist between literature and the law. This Survey has attempted to draw analogies between the structural method of Saussure and empirical models adopted by the legal positivists, the open-ended semiotic process proposed by Peirce and espoused by the legal realism movement, and the role that contradiction and demystification play in the deconstructionist and CLS movements. This Survey has tried to show how each of these legal movements has adopted the semiotic theories of Saussure, Peirce, and the post-structuralists respectively.

Semiotics has and will continue to play an increasingly important role in the everyday practice of law and in the elaboration of legal interpretive theory. Semiotics is the link between the system of law under investigation and the reality that produced it. A better understanding of the elements of semiotics will provide the lawyer with the key to the communication and discovery of meaning hidden under the weight of coded language and conventions that go beyond the four corners of the legal text.