In the Beginning was the Word: Paradigms of Language and Normativity in Law, Philosophy, and Theology

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And God said let there be light and there was light.[1]

> *Genesis* 1:3

When I say 'I do' (sic. take this woman to be my lawful wedded wife) I am not reporting on a marriage, I am indulging in it.

> J.L. Austin, 'Performative Utterances'

I. PREFACE

What, as lawyers and speakers, do we do with words? What are the modes of language used in legal argumentation (and in litigation in particular), and how can they be studied

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[1] My translation differs somewhat from the *King James Version* (1611) ('And God said, Let there be light: and there was light') as well as from the *New American Standard Bible* (1971) ('Then God said, "Let there be light"; and there was light'). The original Hebrew text contains no punctuation nor quotation marks to signify a subordinate clause (although it does feature a unique system of emphases for oral reading); also, the word "then" – framing time and sequentiality – does not appear in the original, whose six-word, fifteen-syllable-long structure forms a much tighter temporal phrase. Though dissimilar, this rendition is actually closer to the awkward formulation with which *Young's Literal Translation* (1898) struggles, ('And God saith, "Let light be;" and light is.') See also the *New International Version* (1978) and the *Revised Standard Version* (1952) ('And God said, "Let there be light"; and there was light').

and analyzed according to functional linguistic analyses developed by philosophers of language and by linguists, while grounded in culture? This essay, cursorily and with no claim to exhaustiveness, attempts to delineate, trace, and reconstruct the main features of three interacting language paradigms significant in legal practice and theory: rhetoric, representationalism, and performativity. The examples discussed are narratives of institutionalized and customary law that share linguistic attributes with literary forms and theological puzzles.

These and related questions presented themselves in different guises to thinkers as various as those of philosophy's Hellenic inception and the authors of Biblical narratives. Happily, language springs from culture and history rather than presupposes it, which furnishes as good as any an opportunity to begin this inquiry.

B.   RHETORIC *V*. REPRESENTATION: SOME PRELIMINARIES

Socrates: [T]he aspiring speaker needs no knowledge of the truth about what is right or good... In courts of law no attention is paid whatever to the truth about such topics; all that matters is conviction... Never mind the truth -- pursue probability through thick and thin in every kind of speech; the whole secret of the art of speaking lies in consistent adherence to this principle.

Phaedrus: That is what those who claim to be professors of rhetoric actually say, Socrates.

         Plato, *Phaedrus*

Perhaps the most intellectually engaging – as well as politically potent and morally outrageous – approach to language in the classical world was the rhetorical paradigm, taught by such formidable sophists as Gorgias and Protagoras.[2] According to this

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[2] At the outset the narrow sense of "rhetorical paradigm" employed here must be delineated, because "rhetoric" has come to mean very different things to different people. In the narrowest sense it means an array of techniques for effectively mastering social language, primarily through persuasion, or language's ability to serve as a

paradigm, the language most common and most effective in social interactions – notably in politics and in litigation – is persuasive language ("rhetoric" is used somewhat narrowly in this essay for the sake of making a precise point). Language is not and cannot be representational, as Socrates (and much later, Aquinas, Leibnitz and the early Wittgenstein) thought, and what's more important, representation of non-linguistic things – a cow in a meadow, an emotion, good and evil – is simply not the point about using language. Rather, the game of language is that of manipulating hearers to act in ways conforming with the speaker's interests. A linguistic interaction is first and foremost manipulative, and all the rest – conveying thoughts, making people laugh, representing facts (or states-of-affairs or what have you), must be interpreted in view of the general principle. Gorgias himself, a skeptic in matters epistemic, claimed that even if we do – by accident – stumble across some "truth" we could not convey it to others, not as a matter of competence but because of language's inherent shortcomings in representing anything extra-linguistic. In other words, before all else comes politics: the formation of society and manipulation within it through language, as an instrument of power, an exercise of the will. What one does with language is inducing people to act in certain ways – such as side with one in a debate, rule in one's favor, obey one's commands, etc. This is not a cynical view, because it does not follow that language masquerades as civic virtue, because the rhetorical capacity to effectively master language *is* civic virtue. Gorgias could have given as an example of effective manipulation of persuasive language the great anti-sophist himself, Socrates, a consummate performer of the persuasive arts masquerading in unavoidable representations of "truths". Language, claimed the sophists, has no inherent dependency on any non-linguistic metaphysics and its use is therefore independent from any concept of knowledge, except for that of rhetoric itself.

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manipulative agent. In a broader sense it means discourse: the social, intersubjective or crosscultural framework of meaning and of action. As such it claims to take over both representationalism and politics. While the two senses are inevitably linked, this essay employs the term in the narrower sense. Figure 1 (below, p. 26) clarifies the relations between rhetoric, representation and performativity as understood here.

In the middle-middle ages the understanding of language as rhetoric, was all but sidelined – as a scholastic approach – by a naturalistic paradigm, which aspired to perfect – as humanly possible – representation in all matters "natural", including the normative and the legal, which medieval philosophy considered not as matters given to social construction or convention, but primarily as matters of factual truths of universal, divine validity. Thus according to Thomas Aquinas' monumental *Summa Theologica* rules of law are *natural* much in the same way that the rules of the physical world are, and both kinds share the same divine source. They are to be discovered rather than created, inferred from the eternal law of divine origin rather than constructed.[3] Law is not about power but about justice and the common good, and language – as used by correct political institutions – is the for effectively applying and translating these metaphysical abstractions into civic and political practice. Inference, let us recall, is that narrative mode that pertains to guarantee that all that is present in a given argument's conclusion – in this case, propositions of human law – follows from the premises, namely natural law (being itself that subset of the eternal law that is subject and available to rational inquiry). Nevertheless, Aquinas' jurisprudence leaves room for contingencies, for construction, for internalizing context, and even for arbitrariness, as human law must apply – by ways of coordination, determination, and application – to factual contingencies. For instance, from natural law's sanction of the sanctity of life we infer that people must not be exposed to undue hazards, but whether this requires that motorists drive on one side of the road or the other is a question no inference can answer. Such action must be coordinated – that is what matters, not the regulation's specific content.[4] And while justice, perhaps, requires that litigants be granted rights of appeal, it has little to say

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[3] See Thomas Aquinas, 'Treatise on Law', in *Summa Theologica*, Benziger Bros., New York, 1947, SP QQ. 90-95.

[4] Interestingly, the "coordination interest" has in our times served Joseph Raz in putting together a "rational theory of authority", where "expertise" and coordination are the

concerning the exact length of the appeal period – a question of determination – although it perhaps does dictate a contextual "domain of reasonableness", ideally formed as an equilibrium of the respective interests of review and of *res judicata*.

However, can language be trusted to fulfill its representational function? The Renaissance's Francis Bacon grieved that to a large extent it doesn't, and would require a sort of radical purification in order to succeed. More than a means of understanding, language was an impediment: it imposed its own cultural biases, vocabulary and equivocal systems of meaning on our world-view in a manner that veils the world and obscures our perception. Kant would later speak of epistemological "categories" which are necessary, constitutive postulates of reason, but Bacon sought to rid science from "the idols of the market", as he termed pre-purified representational language in his search for perfect systems of representation and communication.[5]

Leaping a good historical distance and unpardonably overlooking much of what we pass by (such as Spinoza's use of multi-layered rhetoric, simultaneously conveying meanings on different levels to savants and to the multitudes, and Leibnitz's

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bases for justifying the particular mode of agency that is recourse to authority. See J Raz, 'Authority, Law and Morality', 68 *Monist* (1985) 295.

[5] "There are also idols formed by the reciprocal intercourse and society of man with man, which we call idols of the market, from the commerce and association of men with each other. For men converse by means of language; but words are formed at the will of the generality; and there arises from a bad and unapt formation of words a wonderful obstruction to the mind. Nor can the definitions and explanations, with which learned men are wont to guard and protect themselves in some instances, afford a complete remedy: words still manifestly force the understanding, throw every thing into confusion, and lead mankind into vain and innumerable controversies and fallacies." F Bacon, *Novum Organon*, Oxford University Press, Oxford, 1855 (1620). Bacon sought to retrieve pure representationalism from its contaminated cultural forms by way of a purification method he termed "induction" (which has nothing to do with the common

Characteristica Universalis which purported to delineate a perfect representational language and a "calculus of truth") we come to meet with representationalism as it is confronted by the emerging question of power. Friedrich Nietzsche, the *enfant terrible* of western philosophy, developed a philosophy (or "psychology", after his own appellation) according to which the "will to power" is the fundamental ontological fact, and language is an instrument in the service of the will's necessity to act in a social world, to exercise power over others.[6] Even when representational, Nietzsche saw language as culturally constructed and subject topragmatic needs. It stems from two interconnected concerns: a survival-and-attainment interest that depends on classifications,[7] and communication.[8] Classifications, Nietzsche argues, are both artificial and mistaken – but not arbitrary, and useful as such: they serve practical needs, such as distinguishing a class of edible articles from poisonous ones. As such the *truth* of classifications is irrelevant, indeed it must typically be ignored. Language is not about correctly representing the world but about laying the foundations for action (in the "reversal of values" terms of the will to power, contrary to both utilitarianism, Christianity, and its secular offshoots of deontological approaches to ethics). This position should also be distinguished from pragmatism, because Nietzsche regarded our reliance on and dependence upon linguistic classifications as a fault, a weakness, that a new psychology could overcome.

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use of the term). On the history on the quest for the perfect representational language see U Eco, *The Perfect Language*, Blackwell, Oxford, 1995.

[6] Nietzsche also argued that nothing valuable can be expressed in language because all deepness is individual, while language evolved as a social communicative device for the masses, thus becoming resistant to significant refinement. Nevertheless, he didn't seem to think that his expressible theses were valueless. Coming to terms – or not – with contradictory claims is a hermeneutic necessity when reading Nietzsche.

[7] F Nietzsche, *The Gay Science*, trans. Walter Kaufmann, Vintage Books, New-York, 1974 (1872), §355.

[8] *Ibid*., at §354.

It is intriguing to observe in Nietzsche's discussion of communication a clear precursory affinity to the later Wittgenstein. Language, Nietzsche claims, is to be seen first and foremost as a social, public phenomenon. It develops and lives in the social sphere (as opposed to the private). For sure, it is representational in that it serves to communicate content to others; but communication in the first place is a medium for the will to act in the world – it frames the social world of action. Thus language is rhetorical and performative first, and representational only instrumentally, with little concern for "truth" and subject to its primary functions.

III.   THE PRE-CRITICAL AGE: REPRESENTATIONALISM IN THE
        EARLY 20TH CENTURY

> Alice felt dreadfully puzzled. The Hatter's remark seemed to have no sort of meaning in it, and yet it was certainly English.
> Lewis Carroll, Alice in Wonderland

In the 19th and 20th centuries, the positivist and the Marxist movements have seeded change even within the parameters of the representational paradigm. In the latter approach especially, the vocabulary of social explanation shifted from the natural to the cultural, to artificial, constructed reality. As For the 20th century so-called "logical positivists", the problem of representation became acute. They thought of natural sciences, and physics in particular, as a model of all valid knowledge: ahistorical (sometimes misleadingly termed "analytical") propositions capturing empirically-verifiable (or later, falsifiable) regularities about those aspects of the world that may be thus represented. Such an approach inevitably centered around the question, how is representation -- and even "perfect representation" -- possible, and what are the conditions for it? This question was paramount for the positivists as much as it was for the early Wittgenstein, who answered it to his complete (yet transitory) satisfaction in the TRACTATUS LOGICO-PHILOSOPHICUS where segments of language are viewed as "pictures" of reality and a sentence, rather than

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referring, "shows" its meaning. Hence, Wittgenstein wrote, "A proposition is a picture of reality. A proposition is a model of reality as we think it to be".[9] No other approach, Wittgenstein argued, could explain how speakers understand sentences they have never encountered, let alone form them (from a different approach, this problem was later settled by Chomsky's theory of generative grammar).[10] Likewise, sentences or propositions cannot be explained, because every explanation merely puts forth another sentence, or proposition; they can only be "shown". (Wittgenstein's friend G. E. Moore recounts how, when Wittgenstein was a soldier in trenches of the First World War, he came upon an old magazine that contained an illustration that represented a car accident -- a fact – pertaining to a lawsuit. It occurred to Wittgenstein that in the same manner a proposition represents, or "pictures", in the vocabulary of the TRACTATUS, states-of-affairs.)

The "picture theory" features representationalism at its height. Interestingly, note Wittgenstein's inclination toward epistemological idealism expressed by pictures pertaining not to the world "as it is" but "as we think it to be," where "think" should take on the wider sense of *cogitum*, but -- in contrast to Descartes – in a collective plural tense rather than the monologic singular. We have not dealt with epistemology directly here,

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[9] L Wittgenstein, *Tractatus Logico-Philosophicus*, trans. G E M Anscombe, Routledge and Kegan Paul, London, 1922 (henceforth TLPH) §4.031; see also §§2.1-2.1512, 2.1513-3.01, 3.42, 4.01-4.012, 4.021, 4.03-4.032, 4.06, 4.462-3, 5.156, 6.341-2, 6.35. Wittgenstein, of course, has later come to change his mind on the matter of representationalism. Indeed he became a harsh critic of his earlier view, introducing into the discourse of linguistic theory the notion of *use* as one that in many paradigmatic cases stands for meaning or preempts other ways of conceiving of meaning. This is already a step – a seminal step – toward the performative paradigm. For Wittgenstein's own rejection of the representationalism of the "picture theory" (in favor of a theory of use) see L Wittgenstein, *Philosophical Investigations*, trans. G E M Anscombe, Blackwell, Oxford, 1953, §§ 6, 37, 59, 115, 191, 251, 295, 352, 374, 402, 422-7, 490, 519-20, 573, and at p 184.

yet it is important to emphasize that representationalism does not imply naive realism nor linguistic transparency: it does not imply that we have access to the world "as it really is", to the impenetrable ontological something that Kant called "the thing in itself". Even in the relatively early TRACTATUS Wittgenstein effectively tells us that as states-of-affairs are accessible only linguistically, our ways and manners of devising schemes of representation will preempt any possible knowledge of the world, or at least of those components of the world that are given to representation in the first place.

The logical positivists and the so-called "Vienna Circle" were greatly influenced by the picture theory. It helped them form the positivist postulate of representation, which is to ground it in some conception of *meaning*. Reiterating Alice's concern, they asked which segments of language are meaningful, and which not. Their solutions converged on propositions, or statements, subject to the so-called "verifiability principle" that, in a nutshell, claims that for a proposition to be meaningful it must be either analytic (i.e. tautological, "the ball is round") or empirically verifiable (or, as was later substituted by Popper, falsifiable, "the ball is red").[11] Using verifiability as a meta-semantic criterion for

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[10] See N Chomsky, *Syntactic Structures*, Mouton, The Hague, 1957.

[11] Analytic propositions are those whose truth-value is inherent. Typically, in subject-predicate sentences, this means that the predicate is contained in the concept of the subject, i.e. "balls are round". Analytic sentences are thus conceived to be non-informational (mathematics pose a special category). Their truth value is given a-priori, so experience plays no role in determining it. Non-analytic, or *synthetic* statements, are informative and generally – again with the exception of mathematics -- a-posteriori: "balloons are yellow". For a seminal rejection of the analytic-synthetic dichotomy in favor of a "net" of relatively-synthetic sentences (but no strictly analytic ones) see WV Quine, 'Two Dogmas of Empiricism', in *From A Logical Point of View* (Harvard University Press, Cambridge, Mass., 1961, p 20.
"Empirical verifiability" is a contingent characteristic of synthetic propositions that refers to some conceivable (not necessarily actual) means of verifying by recourse to experience pertaining to the predicative argument. Thus "balloons are yellow" is not

distinguishing meaningful propositions from nonsense, the logical positivists who introduced it proposed thus to dispense with many traditional philosophical questions as "pseudo-problems", for no conceivable proposition that would seek to represent any answer for them could conceivably be empirically verifiable – e.g., propositions of transcendental ethics.[12]

Different authors argued for different levels of force for the verifiability requirement. Waismann, representing that part of the Vienna Circle that originated the concept, stated the principle that a proposition that is not verifiable conclusively is not so at all, and thus meaningless; it is the aim of philosophy (although not its sole aim) to purge all discourse of such talk.[13] This extreme formulation received as much critique from within the school as from without. It excludes every universal statement, statements about experiences of

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empirically verifiable because it makes a claim about all balloons, including those that are inaccessible, such as balloons that do not yet exist.

[12] It is relevant to the discussion of rhetoric to note logical positivists' treatment of ethics, a subject on which they held no general view. While all rejected transcendental ethics, the status of normative statements was left unclear. Perhaps the most representative view is that held by Carnap and Ayer. Propositions of ethics, they argued, are not empirical assertions ("it is wrong to steal" is not an empirical assertion about stealing) but rather expressions of emotions about stealing or, in a different context, an attempt to dissuade ourselves or others from stealing (in Austinian terms, it is a perlocutionary utterance). See A J Ayer, *Language, Truth and Logic*, 2nd edn rev., Gollancz, London, 1946.

[13] See F Waismann, 'Verifiability', in A Flew (ed.) *Essays on Logic and Language* Blackwell, Oxford, 1951, p 117. Although nothing is "proved" in philosophy (as opposed to science), nevertheless Waismann actually depended on philosophy to supply "deeper insights" into various aspects of cognition and human experience; the view that philosophy was only a critique of language, an instrument for "dissipating fogs" he ridiculed as "only criticism and no meat" and wrote that "while logic *constrains* us, philosophy leaves us free", in 'How I see Philosophy', in A.J. Ayer (ed.) *Logical Positivism*, The Free Press, New-York, 1959, p 354.

others, etc.; it even has the odd effect that the opposite of many meaningful propositions (whether true or false), instead of being of the opposite truth value, is meaningless.[14] And even more annoyingly, the application of the verifiability principle to itself created the obvious problem that as a proposition it is obviously not analytical, nor is it in any conceivable way empirically verifiable.[15]

Philosophically, logical positivism has since lost much of its appeal as a theory of knowledge, as the very concept of knowledge shifted from analytical to historicist and sociological terms.[16] Nevertheless, it still seems to appeal to "common-sensical" approaches and retains some of its attraction, if not for many philosophers, then at least for quite a few scientists and a considerable body of lawyers – especially those preoccupied with projects of proper demarcations of "legal" propositions as opposed to

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[14] For instance, the proposition "there are golden things" $(\exists x)(Gx)$ is empirically verifiable, hence meaningful (and, as it happens to be, true to date) but the proposition "there are no golden things" $\sim(\exists x)(Gx)$ or $(\forall x)(\sim Gx)$ is not verifiable and hence, rather than being false is nonsense. Popper's falsifiability principle overcomes some of these problems, see below n. 15.

[15] Different treatments from within the school were offered to remedy this. Of the two main ones, Popper offered to substitute a *falsifiability* principle for the verifiability one ("a proposition is acceptable if it is, in principle, empirically falsifiable"). Note, that Popper kept emphasizing that the falsifiability principle be interpreted *not* as a criterion for meaning, but only as a demarcation criterion for discerning "scientific" propositions from other ones (such as metaphysical, religious, etc.). See K Popper, *The Logic of Scientific Discovery* Harper & Row, London, 1959, *Conjectures and Refutations,* Harper & Row, New York, 1965. From a different direction, Ayer proposed the adoption of a weaker verifiability principle that settles for a degree of *probability* rather than conclusiveness. See A J Ayer, above n. 12. For a collection of works by logical positivists and thinkers who influenced them see Ayer, above n. 13.

[16] A movement that generated much of its thrust from Thomas S. Khun, *The Structure Of Scientific Revolutions*, University of Chicago Press, Chicago, 1970.

propositions only masquerading as such while being expressions of moral or political commitments.

In view of the next linguistic paradigm to be discussed – performativity – it may not be misplaced to warn from confusing the early Wittgenstein with the logical positivists. What they shared, and where they both erred -- according the performative paradigm -- was not just in their approach to meaning as in the assumption that language is only a system of representations, a thesis that J.L. Austin dubbed "the descriptive fallacy".[17] Austin attacked logical positivism both by systematically developing the notion of "doing" things with non-representational l, as well as by invoking rhetoric, a class of "things which, treated as statements, were in danger of being dismissed as nonsense" by the positivists as they are "intended not to report facts but to influence people in this way or that."[18] Latter-day critics frequently remark that "many writers... in linguistics and the social sciences... have assumed that referential communication [a kind of representational talk – JY] is the only function of language".[19]

In view of legal theory we must note an important position shared by the early Wittgenstein and the logical positivists, as it influenced several legal positivists: the view of the world as the "totality of facts".[20] The legal relevance is that, accordingly, as long as

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[17] See Austin, below n. 36, at p 234 and passim. By this time Wittgenstein's posthumous *Philosophical Investigations* was already published, in which the "picture theory" is rejected and partially replaced by the "meaning as use" theory (which Austin criticized for other reasons).

[18] Austin, *Ibid*.

[19] Judith Irvine, 'When Talk isn't Cheap: Language and Political Economy', 12 *American Ethnologist* (1989) 214-235.

[20] On most other accounts Wittgenstein is wrongly confused with logical positivism. Specifically, Wittgenstein never subscribed to the positivist's views on verifiability as a criterion for meaningfulness nor to empiricism, and the TLPH doesn't deal with these concepts at all. Also, *contra* the positivists' project, the TLPH should not be regarded as

norms are inhabitants of the (social) world, they must also be considered and treated as (social) *facts*. This is a position relevant to the seminal jurisprudential question that Richard Posner paraphrased as "legal ontology" – whether law is all just a matter of facts, or can it not be properly conceptualized without recourse to normative categories that are not social facts (such as ethics or, under some understandings, interpretation and application). The relation of linguistic theory to this and other jurisprudential questions must be treated elsewhere.

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an anti-metaphysical work. Rather, it views language as limited in such a way that it cannot represent metaphysical insights; but this is (possibly) a thing to regret, and (certainly) a starting point for other ways of achieving those insights -- which Wittgenstein called "mystical" and that "make themselves manifest" (TLPH §6.522) -- rather than giving them up. The TLPH concludes with this famous proposition: "About what we cannot speak, we must be silent."(TLPH §7. This translation is preferable, for obvious reasons I think, to Pears and McGuiness's "What we cannot speak about we must pass over in silence." An *intentional* silence is quite the opposite of "passing over".) It is an intentional silence, a silence that asserts the existence of a realm of things non-expressible by language but perhaps not less significant. Nowadayds few, if not altogether none, post-"linguistic turn" philosophers hold that cognition of any sort can be nonlinguistic, or that anything our minds may form is inexpressible in language. This latter claim is sometimes called the "principle of expressibility", according to which "whatever can be meant can be said"; see John Searle, *Expression and Meaning*, Cambridge: Cambridge Universiy Press, 1979, p 134 reiterating Searle, below n. 35. Dummett's attention is turned more generally to thought:

> It is of the essence of thought, however, that it is transferable, that I can convey to you exactly what I am thinking... I do more than tell you what my thought is like -- I communicate to you that very thought.

Michael Dummett, 'Frege's Distinction between Sense and Reference', in *Truth and Other Enigmas*, Cambridge, Cambridge Universiy Press, 1978, p 116. On this question, personal introspection may inform us differently.

IV. THE LINGUISTIC TURN

Perhaps more than any other streak of thought, thinking about language in the twentieth century has been influenced and challenged by what became known as the "linguistic turn" in philosophy and later in anthropology and linguistics. The fundamental idea was again Wittgenstein's. In its most basic, the linguistic turn is a thesis concerning how we know and construct the world as a product of cognitive activity. The mind's instrument is language: thinking, cogitating "about" the world is done in language and in language only – there is no thought without word. "About" here is parenthesized, because the linguistic turn's concept of "world-language" denies the mutual independence of language and world, thus the one cannot, strictly speaking, be merely "about" the other; "aboutness" is no longer a relation between presupposed entities and must be reinterpreted as *formative* rather than representational in the positivistic sense. The reason this matters is that language is not a neutral, or "transparent" device through which thought and cognition travel intact. Our thoughts are shaped by the device that is available to them, the language in which they occur. Our propositions, even if they purport to represent a non-linguistic reality, *are* linguistic. We have no direct, non-linguistic access to truths "about" the world (physical or social or normative). What we cannot say we cannot know, let alone communicate. According to the more extreme branches of the linguistic turn, the world and all its attributes and phenomena -- physical and social -- are constructions of linguistic cultures, committed not only to such things as the limits of linguistic structure but also to language's ideology and thematic character.[21] As the founder of modern linguistics, Ferdinand de Saussure, remarked, the very notion of linguistic meaning depends on differentiation of signs, i.e., on variance ("apple" is different than "pear" as a matter of the English language, not horticulture, and speaking through this realization is termed "metalinguistic awareness", the awareness of language's semiotic character – that it is a system of signification apart from the things it

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[21] See below n. 31.

signifies).[22] A noun-based language necessarily gives a somewhat different view of the world than a verb-based language, and perfect translations, as that "gentle deconstructionist" J.B. White shows, are impossible.[23] In English one may say "it's raining"; in Hebrew "the rain is coming down". In English "it's hot", in French "it's doing hot", in Hebrew "hot". If we're talking differently about the world -- and we are -- then we must be constructing different world-views as we go. We may "inhabit each other's world" in communication to formidable effects of sharing, but the prospect of a perfect, universal system of representation and communication is just not there. Linguistic pluralism is one thing, and enough of a challenge to communication. But a fragmentation of the Kantian categories of reason -- a plurality of irreducible and only partly translatable world-views -- seems a much more complex challenge to communication. Diversity does not challenge communication on account of faulty or imperfect competence, but as a matter of imbedded "linguistic ideologies", the grammatical infrastructure that underlies every language.[24] Some linguistic variances may indeed seem minor. But language is saturated with content, and with ideological content at that. Every descriptive utterance makes a claim, a response to the questions "what counts?" "what, of all the possible ways to talk in any given context about any given state-of-affairs, counts?" Kant's critique of pure reason – the notion that knowledge is shaped by necessary modes of cognition from which concepts emerge – was universal: all rational agents shared reason's building blocks such as causality, space, time, quantity, quality, number. Power and politics were sidelined. But in a pluralistic world of interests, passions and power discourse is shaped

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[22] See Elizabeth Mertz & Jonathan Yovel, 'Metalinguistic Awareness' in *The Handbook of Pragmatics*, Verschueren et al. (eds.), forthcoming 2001-2.

[23] See James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, Chicago, University of Chicago Press, 1990.

[24] See Michael Silverstein, 'Language Structure and Linguistic Ideology', in Paul R. Clyne et al. (eds.), *The Elements: A Parasession on Linguistic Units and Levels*,

by contingent, not universal factors, and those are political perforce. In different discursive contexts we ask, e.g., who counts by default as a paradigmatic person and who is alienated by standard linguistic practices? Who gets to determine what the "normal language", the standard, correct linguistic approach is in different social contexts?[25] Language has become, instantly, political. Using language is no more merely a matter of signification, a relation between a system of signs an signified "things". It is that, too, but it is primarily a matter of communication and also of power. Of communication because, as Jurgen Habermas put it in his dialogical notion of "communicative ethics", an initial level of consensus and cooperation – "inhabiting the other's world" and addressing her *qua* human -- is required in any linguistic exchange and is implied by the very act of talking to the other. Meaning and performance are not analytical definitions of clear-cut "sense and reference"[26] or performances of preordained "procedures",[27] respectively, but an ongoing, dynamic *intersubjective* practices: they are determined through-and-by practice and linguistic exchange, not presupposed by them.

Chicago, Chicago Linguistic Society, 1979, p 193; also Bambi B. Schieffelin et al. (eds.), *Language Ideologies*, Oxford, Oxford University Press, Oxford 1998.

[25] I use "normal language" as an ideologization, quite close to what Bakhtin termed "general language"; see Mikhail Bakhtin, *The Dialogic Imagination*, Michael Holkist ed., Caryl Emerson trans., Austin, University of Texas Press, 1981; Mikhail Bakhtin & Pavel N Medvedev, *The Formal Method in Literary Scholarship: A Critical Introduction to Sociological Poetics*, trans. Albert Wehrle, Baltimore, Johns Hopkins University Press, 1985.

[26] According to Frege, these are the two components of meaning. See Wolfgang Carl, *Frege's Theory of Sense and Reference : Its Origins and Scope*, Cambridge, Cambridge University Press, 1994.

[27] This is how Austin thought of language's "felicity conditions" of successful speech acts; see J L Austin, *How To Do Things With Words*, Cambridge, Cambridge University Press, 1962 and the discussion on performative language, bellow.

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Nietzsche's 20th century heir, Michel Foucault, rejected Habermas' notion and worked to examine the modes by which language-as-power is both free of any "discursive-ethical" presuppositions yet does not merely respond to the social sphere, but shapes it. Discourse itself, Foucault and his followers argued, is a shifting structure of power: who gets to speak? What do we speak of, and how? What counts as knowledge?[28] Whose voice counts and how did it get way? How do such classifications as between normality and perversion, health and sickness, sanity and lunacy emerge in history, not as a matter of language "capturing" any "natural" distinctions but as a matter of shaping and determining discourse in an eternal play of multiple power-centers? The ideology of representation frequently obscures language's manipulative functions and the ways in which it constructs itself: language users appear to refer to and represent some "transcendent" truths while manipulating concrete contexts through the manifest (and often innocent, if not entirely benevolent) representational claims.[29] Language in Nietzsche and in Foucault does not merely work within a presupposed cultural framework but is the main agent through which the cultural framework is shaped in and through history. Performativity – doing things with words -- thus gains a wider scope, relating not merely to moves within a game, but primarily to those which construct the tentative games and the consciousness that follow from them. Representationalism becomes an agent of obscuring rather than transparence: language performs through a semblance of representation of non-linguistic realities. But su, if we take the linguistic turn seriously,

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[28] This puts Francis Bacon's famous dictum, "knowledge is power" somewhat on its head. Power relations -- through discourse -- frame what counts as knowledge.

[29] According to Bourdieu, some institutions *must* obscure their true function in order to operate (e.g., we think about the awarding of gifts in certain societies as serving in what an observer may interpret – functionally, but not symbolically – as an exchange.) See Pierre Bourdieu, *An Outline of a Theory of Practice*, Cambridge, Cambridge University Press, 1977. Effective language-functions – such as certain types of performativity in their relation to reference -- may require similar guises to operate (I thank Michael Silverstein for this insight).

do not exist at all: realities are what language constructs and allows us to acknowledge (this thesis was later expanded and made popular by Benjamin Whorf and Edward Sapir, and is now labeled the "Sapir-Whorf thesis").[30] Epistemological idealism, relativized and somewhat turned on its head, has found its performative agent as well as its engine: language frames reality through a semblance of representationalism in an ironic play of power and domination. The problem with language is not that it does not have the power to represent things, but that its power is almost too strong: it constructs that which is its object. But it is also an out-of-control cultural and political play of masks. Some of the most significant work done by feminist, race and critical legal scholars aims at exposing domination: ideological biases and political bents codified by supposedly neutral, procedural, or formal language.

What, in turn, of legal language? For legal realists such as Oliver Wendell Holmes language rests as what manipulates a legal agent -- notably a court -- to act in a certain way. Whether language pretends to represent something (such as legal doctrine) was useful, but that is not it's specifically *legal* usage: in court, claims of representation are one more mechanism of manipulation. Which takes us away from representationalism and through rhetoric to the most fascinating aspect of language, its use for *doing* things in the social world.

V.   PERFORMATIVITY, RHETORIC, AND INTERPRETATION: THE
         LAWYERS' LANGUAGE

All along the years, like a clandestine society guarding a secret heritage, lawyers preserved the rhetorical paradigm while not fully professing it. For in the histories of

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[30] See John B. Carroll & Benjamin L. Whorf (eds.), *Language Thought and Reality: Selected Writings of Benjamin Lee Whorf*, Cambridge, MIT Press, 1964; Edward Sapir, *Language: An Introduction to the Study of Speech*, New Yok, Harvest Books,1955; see

legal process, even when the judges of old were the decision-makers who counted, the language belonged to the lawyers. All lawyers ever do in courts of law is linguistic, and lawyers always thought of language as being primarily a device for manipulating courts to distinct courses of action.[31] In the modern era the relations between players and language in the legal game has shifted: language, through textualization, to a growing degree and in several key areas of practice, was seized by the judges, as this class intensified its institutional production of canonical texts.[32] Official court reporting came into the world, both co-existing with and replacing the reports based on documentation by agents of commercial publishing houses, as was the British custom of yore.[33] In order to seize the language, lawyers must pass through the judges, must infiltrate textuality. The principle itself is not new, only intensified: quite early in Western history the legal canonical text ceased to be identified with the guild of Cicero's heirs in favor of Sir Edward Coke's siblinghood of judges. Legal language, in the generic form of the *judicial opinion*, made its appearance on the stage of history *as a text*. These texts we cannot understand by means of either representationalism or rhetoric alone. They do not represent action, they *are* the action; and they do not merely manipulate agents to act by way of persuasion, they do so by constituting a validating reason for action, namely, a command. The

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also John A. Lucy, *Language Diversity and Thought: A Reformulation of the Linguistic Relativity Hypothesi*s, Cambridge, Cambridge University Press 1992.

[31] The *Texas Law Review Manual on Usage and Style* states that "the only tool of the lawyer is words" (Forward to 2nd ed., 1967). The point is not whether this is correct or not, but that lawyers think of themselves in this way.

[32] This description suits appellate and other non-jury procedures better; however, in jury trials judges, too, use representational, rhetorical, and even performative language in instructing jurors. See below, text to ns. 40 and 42.

[33] The rise of law reporters was a recognized and documented process already in the 19th century. See J C Wallace, *The Reporters, Arranged and Characterized with Incidental Remarks*, Soule and Bugbee, Boston, 1882; W T S Daniel, *The History and Origin of the Law Reports*, W. Clowes & sons, London, 1884.

performative paradigm gave both representationalism and rhetoric such a twist as to alter them forever.

According to the performative paradigm the basic unit of speech is not a such-or-such grammatical entity (such as a word or a sentence), nor is it conceived in terms of meaning, whether according to semantic or pragmatic or other approaches. Speech is as an *act*, and language is something you *do* things with. Representing facts is one thing you can do, but you can also promise, swear, assert, and otherwise constitute reality rather than merely report it. When I say, in proper settings, "meeting adjourned" or "I name this ship the *Titanic*" I do not represent a fact and I do not merely manipulate others do act in some way; I create a fact in the world, a reason for action, in Razian terms: the meeting is adjourned, a ship is named.[34] These facts can afterwards serve as reasons for action -- the gatherers will go home, the maritime agent will use the name for denotation -- but that is generally true of facts of the world. It is also true that as a by-product a speaker may simultaneously report the act she is performing.[35] Of course, that reality will be of a peculiar nature, for you cannot -- other things being equal -- effect nature in the comfortable way in which Joshua commanded the sun to stand still over the endangered Giv'on. Barring magic – the radical performative action that through the ages served many a legal function -- the realm of performative language is the social, normative world. (Unlike the early Wittgenstein's definition "the world is the totality of facts" it

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[34] According to Raz, first-order reasons are facts that have a force to direct action, either considered or deliberately ignored by decision-makers according to second-order reasons. Exclusionary rules (and, according to Raz, any rule at all) are paradigmatic cases. See J Raz, *Practical Reason and Norms*, Hutchinson, London, 1975.

[35] Thus Searle distinguished utterances' "propositional content" from their performative force: "Is the meeting adjourned?" "the meeting is adjourned." "meeting adjourned!" "I promos to adjourn the meeting" all share a propositional content – that of a meeting being adjourned – while performing different speech acts. See John Searle, *Speech Acts: an Essay in the Philosophy of Language*, Cambridge University Press, Cambridge, 1969.

appears that the world consists of, if not things that are not facts, at least different classes of facts, which include norms.) Note, that norms are special in that there is an important sense in which they are available to us only through language. But that doesn't mean that they are "just linguistic" entities. The laws of nature are also given to formulation only through language and, while these formulations certainly are linguistic entities (such as the equations describing gravity), nature itself is not. Norms, too, exist in a non-linguistic sense: if you owe me five dollars, that is a fact – a normative fact – even if its implications depend upon the language that describes it. I will not renounce the debt if, in the historical ways in which semantics changes, the phrase "X owes Y five dollars" will no more refer to an obligation of payment.

The Oxford philosopher J.L. Austin was the first to provide a more or less comprehensive discussion of the performative paradigm. According to Austin's colorful tongue, "When I say 'I do' (sic. take this woman to be my lawful wedded wife), I am not reporting on a marriage, I am indulging in it."[36] Language thus conceived has a constitutive role in both maneuvering in as well as shaping the social universe, and language users do things with language somewhat like they do things in general. To promise, according to the performative paradigm, is akin to chopping a tree: these are both acts, and both constitute facts: one a physical effect, the other a normative effect. Yet there is an important difference, in that chopping a tree is not done with signs, and arguably needs therefore no interpretation. Everything done with language consists in manipulation of signs -- phonetic, textual, body gestures etc. -- so the constitution of speech acts, unlike some other acts, is dependent upon interpretation.[37]

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[36] J L Austin, 'Performative Utterances', in *Philosophical Papers*, 3rd edn., Oxford University Press, Oxford, 1979 [1961], p 235.

[37] Concerning both the illocutionary act (what manner of act was performed) and the locutionary (what does the propositional content of the speech act -- if there is one -- mean?). In the following example both dimensions are found to be interpretation dependent: 1) was there a performance of a promise; 2) what was the promise about.

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What manner of performance is interpretation? Let us take the inquiry to a faraway, cool wood, where Peer Gynt has just returned to the solitary hut after a day's labor (given Peer's tastes, this example appears to be a counterfactual). Solveig greets him and asks how he has employed his time. "Why, I've chopped down a tree" he answers, pointing to the object in question which he barely manages to carry behind him. "Have not" -- Solveig indignantly replies -- "I see no trunk, only branches and needles; this will never do to warm our home in the chill of the night. Furthermore, it is yet green and will not burn well. 'Tis not a tree at all." Peer is furious. "I never knew you wanted it for burning, anyway" says the impractical youth. "But you promised to bring a tree! Did you not utter the very words 'I'll be bringing a tree when I come back'? Thus did you promise." "Aye, those words I said, but that was merely an expression of my inclination on the method of passing the time of the day, not a promise at all. And anyway, a tree it is!"

Solveig and Peer do not agree on two things (at least). One, is whether or not Peer has performed the act of delivering a *tree*. The second is, whether or not he committed himself to doing so by performing the speech act of promising. They both agree that some distinct words were indeed said (a "rhetic" act, as it were), but for some reason that doesn't settle the issue. In the matter of the tree, the word "tree" seems important, but the agreement on the word is not an agreement on meaning or on denotation. Solveig's act of requesting a tree was made in a particular communicative context and for a particular reason (in the sense of *purpose* or *interest* that needs be promoted). In that context a tree must be something that burns lengthily, and anything else is not a tree, the botanical dictionary be damned. Indeed, Solveig *relies on this context to do the work of constituting the meaning* of her speech-act. Peer, ever engaged in daydreaming of grandeur and distinction, missed that point. He is a forest man, and trees are those tall evergreens which the forest holds in abundance. They are very pretty, Peer thinks, and so he chops one down for embellishing their home. But the trunk is but a colorless, heavy bulk. The branches, on the other hand, are beautiful with their fresh green needles, and so he brings his tree home to Solveig, and both will freeze for it at night.

What about the promise? I think that the interpretation of whether Peer performed an act of promising or not should be approached in a similar manner: that is, relying on communicative context to do much of the work of constituting the performative effect. The constitution of a speech act, thus, cannot be wholly dependent upon the words employed, nor on the intentions of the person who performs it. Like other acts, one may attempt to do one thing, and in reality (fallible as we are) do the other: context does its work whether we aim for it or not, correctly predict it or not. One might attempt to promise, marry, curse, name a ship, say the truth or sing the Blues, yet fail. The failure may be due to a speaker's incompetence or ignorance (e.g., making a wrong assumption about what singing "the Blues" requires, or what is true etc.), yet many times a speaker will find that failures are due to an interpretation she did not expect. That is because the interpretation does not depend on her anymore. The outcome might be that, unwillingly, Peer has indeed performed a different act than he promised to. That act is real and valid as any he may have intended. It seems that interpreting is activity very much dependent upon context and conventions, and even when it *does* attempt to treat language as a representational device and uncover intentions (as it may do but is not confined to doing), it is the outcome of the interpretation that matters in social interactions, whatever the actual, historical intentions were. Communication thus takes on a life of its own. Moreover, the speech act interacts with its normative medium (which is the relevant "context" in the case of performatives) to produce a normative fact (such as an obligation) or a state-of-affairs, arranged according to Hohfeldian matrices. Indeed that is the manner in which the common law understands speech acts. In the infamous case of *Bardell v. Pickwick,* Dickens, with all his mépris for the law, quite accurately captures his times' revolution in the law of contracts, from a subjective "meeting of the minds" rationalistic doctrine to an interpretative, "objective" one.[38] This means that the formation of a contract was no more subject to an inquiry of mental states -- "I did not intend to

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[38] See C Dickens, *The Posthumous Papers of the Pickwick Club*, Chapman & Hall, London, 1837.

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promise", as Peer says -- but to the conventional interpretation of the *acts* of the parties, and primarily their linguistic performances.

From promises let us move to the formation of contracts. Consider Dickens' unhappy Mr. Pickwick, entrapped in an outrageous lawsuit, one he regards as completely absurd. We recall that it was brought by the matronly widow Mrs. Bardell for breach of an alleged promise of marriage. Such an intention never crossed Mr. Pickwick's mind, yet the ruling "objective" doctrine of contract formation does not, as a rule, ask whether it had. Note that Mr. Pickwick's conduct in respect to Mrs. Bardell was *not* the event that constituted a legal obligation for him to pay her the ℑ1,200 in damages that he ended dispensing with (to, as it turned out, the sole advantage of her solicitors, the industrious Messrs. Dodson and Fogg). This act was within the scope of the *court's* jurisdiction: Mr. Pickwick's behavior (for it can scarcely be called "action") created a *reason* for the court to act the way it did, a "claim". Dickens' sarcasm accurately describes that which it pinches: the objective theory of contract formation, according to which the pivotal question was whether Mrs. Bardell was entitled to interpret Mr. Pickwick's actions as constituting a promise of marriage, which under the circumstances as they appeared in court indeed seemed to be the case.

In the normative universe people generally have the power to create certain types of norms -- obligations and rights, etc. (that is why contracts, wills, torts etc. are usually classified as areas of "private law" -- not because they deal distinctively with individuals, but because their ontology is of discrete persons that are the source for norms, rather than one based on positions of *authority*, such as a legislature, administrative agency or other "public law" body). Let us be introduced to Ed, who at one time wishes to present Susan with a gift, the wonderful Cézanne purchased in that auction at Vince so long ago. Being a contemplative person he ponders the situation and concludes that in some way he inhabits a position that enables him to change several peoples' normative universes -- their arrays of normative relations, such as duties and rights -- and to that he refers as a *power*. For one thing, he is about to give something away, thus renouncing any "title" to it, and creating rights concerning that object whose new bearers did not hold prior to the

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act. Ed may decide to give away the coveted painting under condition that it be exhibited some of the time at the local YMCA, and both Susan and the Y will suddenly have rights and obligations they did not have before, pertaining to the object, to each other, and to third parties. But there is potential trouble: Susan may refuse to accept the gift, whether conditioned or not, and thus exercise what we may term (following the legal theorist Wesley Hohfeld) an immunity from Ed's power of giving.[39] Instead, she may offer to buy it, or co-found a corporation to which it be transferred, in which she and the museum will hold half of the shares save one each, and Ed will keep the remaining two shares to decide possible disputes; and so on. However, whatever they choose to do, they will do it with language. That language does not represent action, it *performs* it. Nor does it serve merely as a rhetorical device to drive or motivate players to designated action. It does not (or not merely) report or describe reality (cf. the representational paradigm) -- nor used just as an instrument of persuasiveness, as a device for manipulating others, themselves inhabiting positions of power, to act (cf. the rhetorical paradigm); rather, it primarily *constitutes* reality. To be precise, it will constitute realities of a specific nature: those of the social-normative universe. It will hardly do for the chopping of trees (for that, the rhetorical paradigm, as in language addressed to a woodchuck, is preferable) yet the normative universe is as much a part of our reality as trees or woodchucks.

In litigation (which is not exhaustive of legal practices but only the one most exposed to mass media), lawyers hold very restricted performative powers in the sense described above. The genuine masters of the performative functions of language are the judges, or juries, who use it within the context of institutional power. Their language creates and unmakes normative facts. While many things that matter to people happen in courts, *institutionally* what matters primarily is the judicial or jury decision. To get a piece of the

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[39] See Wesley N Hohfeld, 'Fundamental Legal Conceptions As Applied in Judicial Reasoning', 26 *Yale L J* (1917) 710; various editions were published in book form. The American Law Institute based the conceptual system of the Restatement of Property (1936) on Hohfeld's conception of property; see §§ 1-4.

cake, the lawyers resort to the rhetorical paradigm, and try to manipulate judges and juries to apply their institutionally-mandated performative language in accordance with the interests they represent. This is far from the complete picture, because lawyers do posses some performative powers, and judges and even juries both represent and persuade they instruct juries or write for their multiple audiences (which may consist also of appellate judges).[40] Language is thus said to be *multifunctional*: it anchors meaning, it performs, and it reflexively reaffirms and at times alters the conventions of its own use and its own structure (a level denoted "metapragmatic" by the linguist and anthropologist Michael Silverstein).[41]

Juries may also produce texts, such as when they are asked to render a Special Verdict or a General Verdict Accompanied by Answer to Interrogatories.[42] In the former case juries are required to "return only a special verdict in the form of a special written finding upon each issue of fact." In the latter case of the court itself submits written queries on matters of fact, and "direct[s] the jury both to make written answers and to render a general verdict". However, it is erroneous to consider the verdict as strictly performative

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[40] In the USA juries may also produce texts, such as when they are asked to render a Special Verdict or a General Verdict Accompanied by Answer to Interrogatories, FRCP R49(a) and R49(b), respectively. In the case of Special Verdicts juries are required to "return only a special verdict in the form of a special written finding upon each issue of fact." In the case of General Verdict Accompanied by Answer to Interrogatories the court itself submits written queries on matters of fact, and "direct[s] the jury both to make written answers and to render a general verdict". However, it is erroneous to consider the verdict as strictly performative and the answer as wholly representational and rhetorical, because in cases where the answer does not sit with the verdict – i.e. the verdict obviously does not follow from the jury's own statement of fact – the answers may control the verdict (as long as they are consistent among themselves).

[41] See Michael Silverstein, 'Metapragmatic discourse and metapragmatic function', in J A Lucy (ed.) *Reflexive Language: Reported Speech and Metapragmatics*, Cambridge University Press, Cambridge, 1993, p 33.

and the answer as wholly representational and rhetorical, because in cases where the answer does not sit with the verdict – i.e. the verdict obviously does not follow from the jury's own statement of fact – the answers may control the verdict (as long as they are consistent among themselves).

It is not surprising that in common-law cultures legal scholarship focuses not so much upon the somewhat abstract concept of "Law" as it does upon the actual practices of the courts and other legal institutions. This approach, that falls under the general heading "legal realism" (it is one perspective of legal realism, not the exclusive one) is perhaps still best represented by Oliver Wendell Holmes, according to whom the "Law" is not a code or a set of rules but, essentially, no more than what the courts end up doing.[43] The lawyers, who always suspected if not overall believed this, see it as their business to maneuver the courts -- *rhetorically* -- to act -- *performatively* -- in manners agreeable to the interests they represent. Of course, the game has metarhetorical rules (or strategies), a central one being that effective rhetoric should mask as representational speech -- that it be delivered in forms of assertions about the law "saying" or "being" so-and-so, that the evidence "shows" such-and-such, etc. That is one of the ways of rhetoric: it is not what you say that matters, but what you achieve by saying it. The lawyers' influence on the normative universe *qua* lawyers typically indirect -- they need to manipulate the holders of the institutional, performative power, who are the courts. Their work is mainly rhetorical, and in this they are heirs to the ancient sophists.
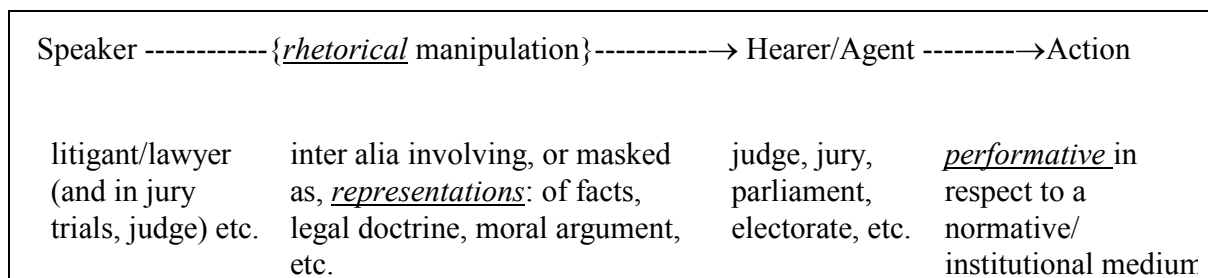
A schematic rendition of the lawyer's view of these linguistic interactions can be presented thus:[44]

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[42] See FRCP R49(a) and R49(b), respectively.

[43] See O W Holmes, *The Common Law*, Little, Brown & Company, Boston, 1881.

[44] This "scheme" does not approach a different question, namely, the nature of the causal relation between rhetorical advocacy and judicial performance. In jurisprudence, that question was dealt with to some extent by the school known as "Scandinavian Legal Realism". See K Olivecrona, 'Legal Language and Reality', in E Newman (ed.),

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figure 1

Speaker ------------{*rhetorical* manipulation}------------→ Hearer/Agent ---------→Action			
litigant/lawyer (and in jury trials, judge) etc.	inter alia involving, or masked as, *representations*: of facts, legal doctrine, moral argument, etc.	judge, jury, parliament, electorate, etc.	*performative* in respect to a normative/ institutional medium

VI. WHEN LANGUAGE OBSCURES DISTINCTIONS: LAW IN SOCIAL AND SUPERNATURAL CONTEXTS

Before concluding I wish to examine another deeply entrenched medium for performative language, one that nevertheless concerns legal practices in intriguing ways. For this let us go to Genesis 1, where the role of language in the creation of the world is every bit as fascinating as the act itself and goes all the way back to the original and most radical act of creation – that of making being over nothingness through an utterance.

"And God said let there be light and there was light": What exactly did the biblical God *do* when he pronounced his first and most radical *fiat*?[45] How was it possible for him

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Essays in Jurisprudence in Honor of Roscoe Pound, Bobbs-Merill, New York, 1962, p 151. Nevertheless this remains a fundamental riddle: what convinces people? For a powerful narrative approach to the question of persuasion see B Jackson, *Law, Fact and Narrative Coherence*, Deborah Charles Publications, Merseyside UK, 1988. See also C Rose, *Property and Persuasion*, Westview Press, Boulder, 1994.

[45] The Biblical creation of light is rare, if not altogether unique, among myths of creation. The Biblical god does not merely *shape* a world from a presupposed mess of existence, but *creates existence*. Separating the water and the earth was also performed

to use a word for light prior to the creation of *light*? Before there was something for the word "light" to refer to, not temporally and contingently as a historical matter, but as a matter of ontological impossibility? And why did God choose language, of all means at his omnipotent disposal, to create a world by? Why didn't he just *will* it? And what can be the relevance of this radical narrative to conceptions such apparently-distant linguistic performances as the practice of trial litigation, forming contractual relations, and writing this text?

In the Biblical creation narrative the performative paradigm is employed to break down the distinction -- maintained above as crucial -- between the "natural" world and the social, normative one. Is that a definition of mystical action, the ability to blur distinctions by use of performative language? Other puzzles demand our attention: "God said" -- why had he to actually *pronounce* the words? What need for articulation to perform in the service of an omnipotent will? Why was there a need for language at all? After all, what the creator sought to perform was *doing* something (such as chopping a tree), not *saying* something (such as talking about it or manipulating someone to do it).

The world could not have been created by physical means because physical mediums (such as space and time) and physical stuff (such as matter and energy) are parts of the world, and these by definition did not exist prior to creation. "All things were made by him; and without him was not any thing made that was made" (John 1:2). Existence there was -- God existed – but as what latter-day physicist may term by analogy a "singularity", not as a generally applicable principle. His was an act of radical creativity: he did not *form* the world from pre-existing stuff, as several European myths narrate (e.g. the Greek and the Norse ones) but *created* it over utter *nothingness* save His own existence. That is the radical aspect of Biblical creation, and the reason that it cannot conceive of any mean other than a pure act of will for creation.

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through a speech act (*Genesis* 1:6,7), but the earth and the water were, after a fashion, already there. See discussion below.

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And yet, puzzlements concerning the role of language appear to persist: according to the Biblical narrative, the language of creating existed prior to creation. "The Word" -- the divine principle later incarnated according to the Christian narrative[46] -- was not the only thing that existed "in the beginning," as the word or concept "light" preceded the phenomenon (however, didn't the Biblical God create the concepts as well?). Thus the word "light" could not have been accounted for by anything we understand by a theory of reference, and according to radical creation it could not have a sense, either -- because as far as concepts can be said to "exist" they too were not yet created. (Platonism has answers to the latter difficulty – the atemporal existence of the ideas independent from divine or human creation). Shouldn't we then put the emphasis on "let there *be* light"? Armed with our arsenal of talk about language we now realize that this is not a puzzle that concerns representation but performativity. The linguistic performance created the *entity*. When God "said" (sic. "let there be light") He did not "talk" -- the emphasis here is not on articulation -- He *acted*. It was the performance of creation, not one of reference or representation, that is the point of the first speech-act ever uttered.[47]

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[46] See *John* 1:1, 1:14

[47] As an aside, we may note that the problem of reference -- the relation between words or language segments and what they stand for, their "referents" -- so baffled linguistic philosophers as to become a predominant problem of philosophical discourse. However, the scope of reference, it has been argued, is limited. The phrases "the third world war" or "the king of France" currently have no referents, but they are not meaningless, because we understand their *sense* even if we cannot point to a suitable referent to accommodate our conventions (see M Dummett, above n. 20 at p 116). Arguably, the performative paradigm proved fruitful in understanding reference as well: the philosopher Saul Kripke (also Hillary Putnam, and P.F. Strawson before that) offered to shift the emphasis from the relation between a "type"-word and a class of referents to the question of how the connection has been established, to the act that constituted it -- a performance that underlines representation, instead of the opposite. See S Kripke, *Naming and Necessity,* Harvard University Press, Cambridge, Mass., 1972.

Thus interpreting the Biblical narrative on its own terms requires the hermeneutics of the performative paradigm of language, albeit applied here to different realms then the social-normative one we usually associate it with.

God lost the monopoly over blurring this distinction faster than you can say *Tractatus Logico-Philosophicus*. Humans practiced magic from times immemorial (and still do); and that is what magic is about: linguistic manipulations that effect realms other than the social-normative ones. For a short while, let us play along with the uses of magic as manipulation of power on this premise (that is, not as a mere superstition reducible to psychological explanations). Certainly, we are more used to external points of view that rationalize what some people refer to as magical practices. We explain them in terms of psychology, sociology, politics, economics, literature and so on.

Interpreting social practices is tricky -- and magic is a social practice, even if it presumes to involve natural and supenatural forces in those aspects of human life that are generally understood as social. The interpretation of social practices differs from understanding natural phenomena mainly in that we attempt to understand something that is already interpreted by the practitioners themselves (this is a point made by the philosopher Jürgen Habermas). This doesn't mean that we must accept their views, but we must realize that their interpretation is part of the phenomenon we examine.

On the rising slopes of mount Kiliminjaro in Kenya lives the Chagga nation. The anthropologist Sally Falk Moore recounts how, when a Chagga person seeks justice from another (such as compensation for an injury or the return of an object of contested ownership) she may go to a Kenyati civil court, or to a local chief's court, but she can also engage in a self-executing procedure, which consists in casting a ritualistic malediction on her antagonist. The curse is conditional: it will take effect unless the other party redresses the wrong that the curse indicates. The linguistic formula consists usually of calling upon spirits to avenge the wrongdoing. If the cursed party has no blame, she will be immune to the spirits' malevolence, and could not care less for the curse. If however she does consider herself subject to the malediction she will most probably

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contact the maledictant and negotiate the removal of the curse. The practice has a political dimension too: finding recourse in magic and refraining from relying on an institutionalized court is also an enhancement of one's autonomy and personal power, even an act of defiance and sometimes resistance directed at institutionalized power. Among the Chagga (although not everywhere where magical practices are used for dispute resolution) not very much is needed to engage in ritual malediction. The language is ritualistic, but the vocabulary, given the context, is rather ordinary and every competent adult is capable of performing it (of course, to different levels of formidability). No "professional" competence is necessary, and so no lawyers are is not required.

The relevant point for our discussion is realizing the centrality of performative and rhetorical functions in "legal" malediction. The rhetorical paradigm is absent (according to the internal point of view), because the "plaintiff", so to speak, doesn't need to persuade anyone of the merits of her case. Her antagonist, it is assumed, knows of her fault or innocence (this may be true, I think, only in rather simple disputes). Nevertheless, a strong rhetorical performance may intimidate and drive a person to consider the risks she is taking by her opposition; it may be instrumental in negotiations for compromise. Representationalism here takes a back seat, as producing evidence while addressing the spirits is unnecessary, because unlike judges they are omniscient and will not adhere by an unfounded claim.

VII.   CONCLUSION: LAW AND LANGUAGE: A BEGINNING

The case of this discussion is the normative universe (of which law and legal discourse are subsets). This means that as far as this discussion is concerned normativity is the relevant phenomenon, irreducible to either mental or linguistic constructions. If a person holds a right or claim to a certain object, that in itself is a fact of the case as much as anything else about that object – that it exists, that it is green, that circumstances exist that do not allow that person to exercise her will in accordance with the extents of the right she holds, etc. Rights are intersubjective facts – they depend on discourse and emerge

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from it – but that is their nature *qua* normative facts, not a reductive critique of their phenomenological status. Nevertheless, I fully accept that communicative apparati and linguistic interactions (broadly conceived) are the typical, if not sole, agents of action, in the normative universe in general and in law in particular. How is this possible? How can language be the medium through which phenomena that are not reducible to linguistic terms are constituted and manipulated? Obviously, only a full, intersubjective theory of performative language, freed from the confines of standard speech act theory, may address that concern – a project yet to be undertaken.[48]

A main theoretical claim employed in this article is that the paradigms of language examined are aspects of language's *multifunctionality*, and that according to all three, speech acts work in dependence on the social context of their inception, which in turn constitutive of their *normativity*. That is hardly a novel claim, although several studies of legal language make it only in passing, neglecting to analyze what linguistic *performance* exactly does in those contexts, concentrating almost exclusively on different approaches to linguistic *meaning*. The question addressed here was, in what sense rhetorical, performative, and representational linguistic acts are distinct, not morphologically but functionally, i.e., how meaningful legal language-segments perform in different modes even though the performance cannot be attributed to single or distinctive linguistic units alone – when speech acts are not so-called "morphologically differentiated".

This essay followed a phenomenological approach, according to which linguistic paradigms are not mutually-reducible. Interesting efforts that follow different strategies – e.g., to ground performativity in representationalism (by some philosophers) or in rhetoric (by some literary theorists) -- are at best brushed by here, not because they do not matter but because they respond to a different question, namely "what is it about language that

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[48] An outline is provided in Jonathan Yovel, *The Language Behind Law: an Inquiry of Linguistic Performativity in Legal Context*, SJD Dissertation, Northwestern University

allows for these functional paradigms to work?".[49] No doubt, every scholar of language will have chosen somewhat different sets of dilemmas and examples to discuss. This essay makes very modest claims as to what the proper canonical components of the study of social language are. It uses discussions of language to present three linguistic paradigms as aspects of language's *multifunctionality*, with perhaps some priority to performativity when social action is considered.[50] We saw that by "performativity" we mean something distinct enough to claim for its relative independence from rhetoric, yet argued that performativity is intimately connected with normative media and with interpretation, even when the basis for interpretation is not representational (e.g. the fact of a promise v. its content). Not less significant, language is performative, but intentions or the will are not; and like any intentional action language operates in the world in modes that may or may not concord with the intentions or will of its speakers. Even the omnipotent Biblical God did not create a world merely by willing it, and resorted to speech acts. At least in this we are made in his image -- or He in ours.

School of Law, Chicago, 1997.

[49] I address that question summarily in Jonathan Yovel, 'What is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises"', 94 *Northwestern U L Rev* (2000) 937. function apart, ver little is said here of language's *structure*.

[50] Nowhere is it argued that these aspects are exclusive -- for instance, they do not include the emotive aspect and do not explain poetics, as Jakobson justifiably demands from every theory of language. The failure to deal with poetics is somewhat justified by the wish to confront only the most essential views on language in social action.