

Rights and Rites: Initiation, Language and Performance in Law and Legal Education

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ABSTRACT

Jonathan Yovel's article, *Rights and Rites: Initiation, Language and Performance in Law and Legal Education*, represents a sophisticated examination of the role language plays in legal education and law more generally. In doing so, Yovel draws upon a wealth of resources, including perhaps most centrally, traditions emerging from the philosophy of language and critical linguistics. Yovel argues that law school education fosters a complex orientation toward language, which involves the active cultivation of a "rhetoric through representation." An important observation made in this discussion is the fact that language does more than operate on the semantico-referential realm, but rather, serves as a crucial mechanism of performance. Yovel's central argument is that paradigms of language in law and legal education reflect aspects of language's multifunctionality (i.e., the performative, the rhetorical, and the referential). Rejecting an analysis that would concentrate exclusively on the meaning of linguistic acts, Yovel instead exposes the multifunctionality of language, demonstrating how speech acts depend upon the contexts of their production for meaning to be generated. In exploring this "performative paradigm," Yovel highlights the ideas we have about language, its properties, and its intersection with moral agents and actors within the world. As such, the article offers a powerful critique of the way in which often unrecognized ideas about language inform much of legal pedagogy and legal practice.

Sink every impulse like a bolt. Secure
The bastion of sensation. Do not waver
Into language. Do not waver in it.

Seamus Heaney, *Lightenings*¹

I. PREFACE

This essay is about how language functions in law and how prospective legal agents - young lawyers, law students - are initiated into a complex linguistic culture through various modes of instruction that are, more often than not, nontransparent as to the linguistic ideology that underlies them. Thus, it confronts two approaches to legal education: one, which cuts across both lay and certain "professional" approaches to legal instruction, approaches law as a discipline, a body of knowledge to be mustered and mastered in the form of rules, precedents, policy arguments and the like. The other approaches legal practice and instruction as a complex

linguistic culture, where the forms enumerated, rather than the “essence” of law, are offered as profitable to master because they tend to constitute the culture of communication of legal discourse, on top of being the kind of argumentation that is generally triumphant in the legal institutional context. The rule-oriented approach sees language as a means to organize, express and pronounce social norms that in some sense are conceived as nonlinguistic or extralinguistic entities, although lawyers will generally agree that even if that were the case, legal and other social norms are accessible only through linguistic formulations that express them. The linguistic approach might use something of an Occam’s razor: if norms are only accessible, pronounceable and manipulatable in their linguistic aspect, why insist on their “nonlinguistic reality”? Is there a sense in which a norm is different from its linguistic formulation? At the conclusion of this essay, I attempt to show how these two “approaches” to legal argument are institutionally superimposed on each other in a way that is essential to law’s requirement for social rationalization. This ideology of superimposition - rhetoric through representation - in turn drives the most prevalent modes of legal instruction and pedagogy.

However, before attempting to draw pedagogical insights, the bulk of this essay studies how notions of language use apply to legal performance. There are various ways to attempt such a study; the one employed here works through a nontechnical survey of some major approaches in the philosophy of language. Language springs from culture, practice and their historical dimensions, while law and legal instruction, ever since Hellenic times, were seen as paradigmatic contexts for the application and study of social language. Thus, the present inquiry addresses the relations between language and action as a history of ideas centered on the following questions: 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)? How do we train and initiate prospective lawyers into a linguistic culture and ideology that underlie these questions? With no claim to exhaustiveness, this essay proposes to delineate, trace and reconstruct the main features of three interacting language functions 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 even theological puzzles.

II. 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.

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.³ According to this paradigm, the language most common and most effective in social interactions - notably in politics and in litigation - is persuasive language. Language is not and cannot be representational, as Socrates (and much later, Aquinas, Leibnitz and the early Wittgenstein) thought, and what is more important, representation of nonlinguistic 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 this general principle. Gorgias himself, a skeptic in matters epistemic, claimed that even if we do - by accident - stumble across some referential "truth", we could not convey it to others, not as a matter of competence but because of language's inherent shortcomings in representing anything extralinguistic.⁴ 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. The only valid sense of "truth" is not that which language represents but that which language creates in social mediums. 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. Such a view is not cynical because it does not follow that language masquerades as civic virtue since 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 antisophist 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 nonlinguistic metaphysics, and its use is therefore independent from any concept of knowledge, except for that of rhetoric itself.

In the middle-middle ages,⁵ 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. Medieval philosophy considered such matters as not 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. Legal rules are to be discovered rather than created, inferred from the eternal law of divine origin rather than constructed.⁶ Law is not about power but about justice and the common good, and language - as

used by correct political institutions - is for effectively applying and translating these metaphysical abstractions into civic and political practice.

Human Law is to be shaped primary through inference from "Natural Law," by which Aquinas denoted the subset "Eternal Law" that is accessible to rational inquiry. Inference, let us recall, was - and in many circles still is - perceived not as a narrative mode but as an iron-clad logical form that pertains to guarantee that an argument's conclusion - in this case, propositions of Human Law - follows from the premises, namely propositions of Natural Law. Nevertheless, it is a mistake to interpret Aquinas' jurisprudence in excessively rigid terms. Aquinas does leave 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 premise 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.⁷ While justice, perhaps, requires that litigants be granted rights of appeal, it has little to say 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? During the Renaissance, Francis Bacon grieved that to a large extent language does not fulfill this function and that it would require a radical purification in order to succeed. More than a means of understanding, language was deemed an impediment: it imposed its own cultural biases, vocabulary and equivocal systems of meaning on our worldview in a manner that veils the world and obscures our perception.⁸ Kant would later speak of epistemological "categories" that are necessary, constitutive postulates of reason,⁹ but Bacon sought to rid science from "the idols of the market," as he termed prepurified representational language in his search for perfect systems of representation and communication.

Leaping a good historical distance and unpardonably overlooking much of what we pass by (such as Spinoza's use of multilayered rhetoric, simultaneously conveying meanings on different levels to savants and to the multitudes, and Leibnitz's *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.¹⁰ Even when representational, Nietzsche saw language as culturally

constructed and subject to pragmatic needs, stemming from two interconnected concerns: a survival-and-attainment interest that depends on classifications¹¹ and communication.¹²

Classifications and categorizations, 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 and cognition are not about correctly representing the world but about laying the foundations for action.¹³ 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.

It is intriguing to observe in Nietzsche's discussion of communication a precursory affinity to the later Wittgenstein.¹⁴ Language, Nietzsche claims, is to be seen first and foremost as a social, public phenomenon that develops and lives in the social sphere (as opposed to the private). Surely, language 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 PRECRITICAL 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*¹⁵

In the nineteenth and twentieth centuries, the positivist and the Marxist movements 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 an artificial, constructed reality. As for the so-called "logical positivists" in the twentieth century, 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 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.”¹⁶ 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).¹⁷ Likewise, sentences or propositions cannot be explained because every explanation merely puts forth another sentence, or proposition; they can only be “shown.”

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* in a collective plural tense rather than the monologic singular (in contrast to Descartes). We have not dealt with epistemology directly here, 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,” i.e., to the impenetrable ontological something that Kant called “the thing in itself.”¹⁸ 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,¹⁹ which helped them form the positivist postulate of representation, grounded in a 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 “verifiability principle” that claims 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”).²⁰ Using verifiability as a meta-semantic criterion for 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.²¹

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.²² This extreme formulation received as much critique from within the school as from without.²³ This position excludes every universal statement, statements about experiences of 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.²⁴ 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.²⁵

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.²⁶ Nevertheless, logical positivism 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 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 is important not to confuse 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, that privileged the representational function of language (a bias that J.L. Austin dubbed “the descriptive fallacy”²⁷) but in approaching language strictly as a medium of *meaning*. For Austin, language consisted not merely in a system of meaning but in a framework and agent of social action: in *doing* things other than representing “facts” or “states-of-affairs.” Moreover, Austin attacked logical positivism both by systematically developing the notion of “doing” things with nonrepresentational language, 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.”²⁸ Latter-day critics frequently remark that “many writers . . . in linguistics and the social sciences . . . have assumed that referential communication [a kind of representational talk] is the only function of language.”²⁹

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.”³⁰ The legal relevance is that, accordingly, as long 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 in terms of “legal ontology”:³¹ whether law is all just a matter of social facts, or can it not be properly conceptualized without recourse to normative categories that are *not* social facts (such as first-order ethical theory, a correct theory, whether socially pervasive or not.)³² However, the relationship of linguistic theory to this jurisprudential inquiry must be treated elsewhere.

IV. THE LINGUISTIC TURN

He gave man speech, and speech created thought,
Which is the measure of the Universe.

Shelley, *Prometheus Unbound*³³

Perhaps more than any other line 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.³⁴ 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 or 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 signifiers and presupposed signified, extra-linguistic entities, and talk “about” must be reinterpreted as *formative* rather than representational in the positivistic sense.³⁵

From this perspective 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. As Ferdinand de Saussure, the founder of modern linguistics, 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 signifies).³⁶

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.³⁷ 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 are talking differently about the world - and we are - then we must be constructing different world-views as we go. These world-views become ideological (a notion further discussed below) once they underline normal talk: for instance, in the quotation from Shelly above, the reference to the masculine case “man” is given as the standard or general case of “human”, other forms of denotation being derivatives.³⁸

Through communication we may “inhabit each other’s world” to formidable effects of sharing, but the prospect of a perfect, universal system of representation and communication is not attainable.

Linguistic pluralism is 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 language³⁹ Some linguistic variances may indeed seem minor, but language is saturated with content, an ideological content at that. Every descriptive utterance makes a claim, a response to the questions “what counts?” and “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.⁴⁰ Power and politics were sidelined, but in a pluralistic world of interests, passions and power, discourse is shaped by contingent, not universal, factors that are inherently political.

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?⁴¹ Language has become, instantly, political. Using language is no more merely a matter of signification, a relation between a system of signs and signified “things.” While language may function partly in this representational capacity, it has come to be seen primarily as a matter of communication and also of power. Of communication because, as Jürgen Habermas put it in his dialogical notion of “discourse ethics,” an initial level of consensus and cooperation - “inhabiting the other’s world” and addressing her *qua* human - is not merely required in any linguistic exchange but is universally implied by the very act of communicating with the other.⁴² Meaning and performance are not analytical definitions of clear-cut “sense and reference”⁴³ or performances of preordained “procedures,”⁴⁴ respectively, but ongoing, dynamic *intersubjective* practices: they are determined through-and-by practice and linguistic exchange, not presupposed by them.

Michel Foucault implicitly rejected Habermas’ notion and worked to examine the modes by which language-as-power is both free of any “discursive-ethical” presuppositions and yet does not merely respond to the social sphere but shapes it.⁴⁵ Francis Bacon’s famous dictum, “knowledge is power,” is put on its head: it is not presupposed, representational and referential knowledge that empowers social agents but power relations that frame what counts and validates knowledge in different historical settings. 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? Whose voice counts, and how did it get that way? How do such classifications as

between normality and perversion, health and sickness, sanity and lunacy, lawfulness and criminality, emerge in history, not as a matter of language “capturing” by reference any “natural” distinctions but as a matter of shaping and determining discourse in an eternal play of multiple power-centers?⁴⁶

An ideology of representation frequently obscures language’s manipulative functions and the ways in which it constructs itself: language users appear to refer to, and thus represent, some “transcendent facts” about the world while actually manipulating concrete contexts through the manifest (and often innocent, if not entirely benevolent) representational claims (“manipulations” here should be read in its technical sense, one not necessarily subject to intentionality).⁴⁷ 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 a history of use. Performativity - doing things with words - thus refers not merely to acts or “moves” within a presupposed language-game (e.g., naming or marrying), but also to linguistic acts that construct the language-games as well as the consciousness that follows from them.

Representationalism becomes an agent of obscuring rather than informing: social agents perform through manipulations of language that purports to represent extra-linguistic “facts” - i.e., outside the scope of choice or action of the speaker - while actually constructing speech on its grammatical, ideological, and denotational levels. Yet, such non-linguistic realities, if we take the linguistic turn seriously, cannot be talked about: reality is only accessible through language, and what we call “the world” is not the “totality of facts” as depicted in Wittgenstein’s *Tractatus Logico-Philosophicus* but the totality of talk.⁴⁸ The age-old distinction at the foundation of representationalism between word and object (to play on the title of a seminal work by Quine⁴⁹) or *mots* and *choses* (to play on Foucault⁵⁰) should be reinterpreted in performative terms: the way we talk about things constructs the things.

To an extent building on the Sapir-Whorf hypothesis,⁵¹ knowledge is no longer a mental representation but a social, intersubjective, mostly institutional construct. Epistemological idealism, revitalized 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 lacks the power to represent things, but that its power is almost too strong: it constructs its object(s) and is arguably an out-of-control cultural and political play of masks. Indeed, some of the most significant work done by feminist, race and critical legal scholars aims at exposing domination whereby ideological biases and political bents are codified by ostensibly neutral, procedural, liberal, or formal language (while not mutually-exclusive, these are different categories).⁵²

What, in turn, of legal language? For legal realists such as Oliver Wendell Holmes language is what manipulates a legal agent - notably a court - to act in a certain way. Whether language pretends to represent something (such as legal doctrine) may be useful, but that is not its

specifically *legal* usage: in court, claims of representation are one more mechanism of rhetorical manipulation. This observation 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

Throughout the years, like a clandestine society guarding a secret heritage, lawyers have preserved the rhetorical paradigm while not fully professing it. For in the histories of legal process, even when the judges of old were the decision-makers who counted, language belonged to the lawyers. Everything lawyers 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.⁵³ In the modern era, the relationships between players and language in the legal game has shifted. To a growing degree and in several key areas of practice, judges seized language through a process of textualization, as this class intensified its institutional production of canonical texts.⁵⁴ 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.⁵⁵ Lawyers are social agents with limited power to use performative language in the sense in which a judgment rendered by a court is performative (a performance that in modernity has taken on a textual form, namely an "opinion").

In order to seize that language, lawyers must pass through the courts and the judges and must infiltrate textuality. The principle itself is not entirely 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 siblinehood 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 cannot be understood by means of either representationalism or rhetoric alone, for 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 *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 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 to 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.⁵⁶ 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.⁵⁷ 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 linger over the endangered Giv'on.⁵⁸ 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. Norms are special in that there is an important sense in which they are available to us only through language, but that does not mean that they are "merely" linguistic entities. The descriptive "rules" that report natural phenomena (e.g., "law of gravity") are also accessible only through formulations, 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 social, normative fact - even if its effects and implications depend upon the language that describes it and the ways it is interpreted by a community of interlocutors. I will not renounce the debt if, in the historical ways in which semantics changes, the phrase "X owes Y five dollars" no longer refers to an obligation of payment.

The Oxford philosopher J.L. Austin was the first to provide a comprehensive discussion of the performative paradigm. According to Austin's colorful tongue, "when I say 'I do' . . . I am not reporting on a marriage, I am indulging in it."⁵⁹ 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 therefore arguably needs no interpretation. Everything done with language consists of manipulation of signs - phonetic, textual, body gestures etc. - so the constitution of speech acts, unlike some other acts, is dependent upon interpretation.⁶⁰ This, then, is perhaps a good place to examine, in the context of this study, the reception and interpretation of communicative acts and how their meaning depends on their understanding as being representational, performative or rhetorical.

VI. INTERPRETING COMMUNICATIVE ACTS: PROMISES AND CONTRACTS

Let us take this inquiry of the interpretation of performative acts - in this case, promises - to a faraway, Norwegian wood, where Peer Gynt and Solveig enjoy the kind of domestic bliss they

were denied in Ibsen's existential drama.⁶¹ Peer 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 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 you did promise, and consequently I spent the day building a hearth for it, which is now useless" "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 Peer has performed the act of delivering a *tree* (a representational question). The second is, whether he committed himself to do so by performing the speech-act of promising (a performative question). Additionally, Solveig, relying on Peer's utterance, treated it rhetorically – as a reason for action, something that persuades her, in reliance, to take on a complementary task. They both agree that some distinct words were uttered (a "rhetic" act, as it were), but for some reason that does not 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 representational meaning. 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*). In that context a tree must be something that burns lengthily, and anything else is not a tree, botanical classifications 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 that the forest holds in abundance. They are very pretty, Peer thinks, and so he chops one down for embellishing their home. 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 because the interpretation is a separate performance that does not depend on her anymore. The outcome might be that, unwillingly, Peer has indeed performed a different physical act than he promised. That act is real and valid as any he may have intended. It seems that interpreting is a performance 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.⁶² 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 contempt for the law, quite accurately captured his times’ revolution in the law of contracts, from a subjective “meeting of the minds” rationalistic doctrine to an interpretative, intersubjective one that looks less to the intentions of an utterer in performing a speech act and more to an interlocutor’s right to rely on a “reasonable” interpretation of it.⁶³ The formation of a contract was no longer subject to an inquiry of mental states - “I did not intend to promise,” as Peer says - but to the conventional interpretation of the communicative *acts* of the parties, whether characterized as “conduct” or “language” ones. In so-called “private” law, especially - where parties’ liability on their antagonists’ detrimental reliance on communicative acts is sometimes seen as the normal if not the underlying structure of all claims⁶⁴ - courts increasingly shift from factual questions of the mold “what has occurred?” to the normative one, “how is a party entitled to rely on any given communicative act?” The representational and reconstructive approach to facticity becomes instrumental in a tacit translation to a language of claims.

We may observe how this analysis of law as discourse and as practice finds expression in legal pedagogy and initiation. Law professors and other agents of legal instruction, direct and indirect ones - professionals, peers, colleagues, antagonists - surf the translation from a language of facticity to that of normativity, from cases to doctrine to policy, a nonlinear movement of abstraction and subsequent “applications.” First-year law-school classes tacitly follow this mold. Professors initiate students into the facticity/normativity shift rather than explicate it, train and lead discussions through it rather than make it explicit. The pattern of discourse is played out rather than becoming an object of discourse. The metadiscursive elements - e.g., the question how the language through which law is conceptualized shifts between facticity and normativity - remain, by and large, in the background. More advanced classes or advanced stages of first-year classes may approach the metadiscursive framework of facticity-to-normativity more directly, not merely working through the discursive structure but making it the

object of discussion, as well. For instance, an instructor teaching a basic contracts or torts class may still pose to her students such facticity-reconstructing questions as “what was a party’s intention? What did they do?” only to shift to ones regarding the normative effects of the reconstructed facticity: “What claim may emerge from this narrative reconstruction?” The open question, “How is the move from particular facticity to general normativity performed?” is, to a large extent, the beginning of what “learning to think like a lawyer” means, even before engaging students in more advanced performances such as “application” of norms to factual states-of-affairs or the challenges of policy arguments (the priority is ideological - pedagogical and discursive - but not rigidly sequential or temporal).⁶⁵

In common law systems in particular - and where the Socratic method is intensively employed all the more - instructors typically begin a course of study with particular cases, emphasizing an ideology of facticity; but as classes advance discussions tend to abstract from cases, as various policy arguments, theoretical frameworks, and textual interments of doctrine and codification are gradually introduced.⁶⁶ Arbitrarily-chosen cases are then transformed from narrative and facticity to archetypes, while some are reduced to mnemonic devices for memorizing and invoking portions of doctrine, or a theoretical ambiguity, rather than textual portions of reconstructed facticity given to normative “application.”⁶⁷ Interpretation is no longer merely factual but normative, and any claimed difference between interpretation and application is gradually revealed as a mirage.⁶⁸

Let us now return from legal pedagogy to the role of performative language in both carrying out legally-significant acts and their conceptualization. In the normative universe persons 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 Suzanne with a gift, a 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 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 Suzanne 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.⁶⁹

However, there is potential trouble: Suzanne 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.⁷⁰ 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. Language does not represent action, it thus *performs* it. Nor does it serve merely as a rhetorical device to drive or motivate players to designated action. Language does not (or not merely) report or describe reality (cf. the representational paradigm) - nor is it 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.

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 performative 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 depiction is far from complete because, in addition to their rhetorical roles, trial lawyers do possess some performative powers, while judges and even juries, on top of their performative roles, use language to both represent and persuade the multiple audiences they confront. 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).⁷¹

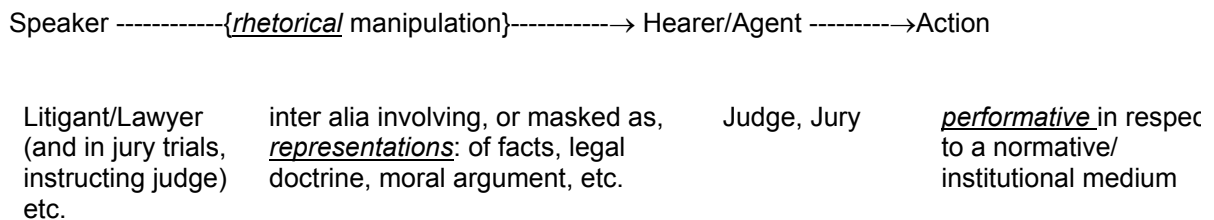
Juries may even produce texts, such as when they are asked to render a Special Verdict or a General Verdict Accompanied by Answers to Interrogatories. In the former case, juries are required to "return only a special verdict in the form of a special written finding upon each issue of fact."⁷² In the latter case, 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."⁷³ However, it is erroneous to consider the verdict as strictly performative and the answer as wholly representational and rhetorical because in cases where 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, contemporary legal theory focuses less on the somewhat abstract concept of "Law" as it does upon the practices of courts and other legal institutions. This empirically-inclined approach, which 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.⁷⁴ The lawyers, who always suspected if not fully believed this position, see it as their business to maneuver the courts - *rhetorically* - to act - *performatively* - in ways 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. It is not what you say that matters, but what you achieve by saying it. The lawyers’ influence on the normative universe *qua* lawyers is typically indirect; they manipulate the holders of the institutional, performative power, who are the courts. In the rhetorical function of their performance, trial lawyers echo the ancient Sophists’ challenge, to which representational knowledge of doctrine, rules, precedents and most everything else that is so exactly taught in law schools is subject: “What is there greater than the word which persuades the judges in the courts, or the senators in the council or the citizens in the assembly, or at any other political meeting?”⁷⁵

A schematic rendition of the lawyer’s view of these linguistic interactions is presented in the following figure.⁷⁶ It is paramount to emphasize that even a non-critical, “professional” lawyerly approach to language will not take the following distinctions as linguistic *categories*, which - as functional designations - they indeed are not. These distinctions are offered as the *salient linguistic aspects* of language-use in typical legal interactions. The multifunctionality of all these interactions and the senses in which all speech acts are performative are explored below, where I examine how law’s drive to rationalization requires obscuring even these functional delineations.

Figure 1: A classification of linguistic function in litigation



VII. 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 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*?⁷⁷ How was it possible for him 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? Why not just *will* it? And what can be the relevance of this radical narrative to conceptions of 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 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 did he have 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.”⁷⁸ There was existence - God existed - but as what a 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 an act of will for creation.

Yet, puzzles concerning the role of language 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 narrative⁷⁹ - was not the only thing that existed “in the beginning,” as the word or concept “light” preceded the phenomenon (however, did not 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. Should not 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.⁸⁰ Thus, interpreting the Biblical narrative on its own terms requires the hermeneutics of the performative paradigm of language, albeit applied here to different realms than the social-normative one usually associated with it.

When did God lose the monopoly over blurring the distinction between the Natural and the Social is probably impossible to determine. Humans practiced magic from times immemorial (and still do); and that is what magic is precisely about: linguistic manipulations that effect realms other than the social-normative. 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 supernatural 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 pre-interpreted by the practitioners themselves. This observation does not 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.⁸¹ 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 considers herself subject to the malediction, she will most probably 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 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, does not need to persuade anyone of the merits of her case. Her antagonist, it is assumed, knows of her own 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 fades into the background, as producing evidence while addressing the spirits is unnecessary because unlike judges they are omniscient and will not adhere to an unfounded claim.

VIII. LAW AND LANGUAGE

How do lawyers use language, and what happens to them in law school, in terms of initiation into a discourse and a practice? Whatever the precise answers to these questions are, they cannot be confined to either of two prevalent lay conceptions: first, it is not the case that legal language is predominantly representational in that it signifies rules and other normative or legal entities; and second, it is not the case that it is predominantly rhetorical in the narrow sense of partisan persuasion. In both functions, whether a lawyer attempts to make an argument that the law “is” such-and-such or that an authorized agent should act in a given manner, performative functions of language are applied. This application is the case even when the speaker, whether novice or veteran, is unaware or vaguely aware of the various performative aspects and effects of her performance. Those, I think, are best described in terms of linguistic ideology and the ways in which it shapes legal discourse and responds to law’s typical modes of justification and rationalization.⁸²

As an example, consider the so-called “Socratic method,” so prevalent in law school instruction. Under this technique students are examined - “grilled” is a term often used - on both matters of facts and doctrine relating to case assignments.⁸³ The instructor’s relentless questioning pilots the student towards a single acceptable answer, formed in a single acceptable terminology.⁸⁴ While the instructor performs speech-acts that on a surface-level are questions, she frames the surface-dialogue in a monological sense, discarding contributions that do not fit neatly into the pigeon-holes of the discourse into which legal inductees are expected to be initiated. This kind of instruction is rarely about pluralism or creativity: it is about the ability to give a pre-conceived account of an interaction (e.g., a case) in a pre-conceived language. The emphasis is on representation, almost to the exclusion of other language functions but not necessarily because law professors consider representationalism more salient in legal argumentation than rhetoric or performativity.

The Socratic method is used mostly in first-year classes: it is supposed to induct students into a representational approach to rhetoric. In other words, the ideology here is that a good - i.e.,

acceptable or rhetorically effective - legal argument is, 1) representational (“the law/fact *is* such and such,”) and 2) fulfills the felicity conditions of talk that is rhetoric-as-representation, namely, *true* in the sense that it is acceptable to the court as a description of a state-of-affairs, whether legal or otherwise. “True” here must be conceived in a generally non-referential manner, one that would be acceptable to Gorgias or Protagoras: it is a criterion for acceptability within the legal practice, not an assertion about states-of-affairs outside it.

The standard of representational acceptability does not relate a-priori to matters outside the courtroom, although claiming such a relation may prove a potent rhetorical strategy. Courtroom language is fascinating in that it is both highly positivistic - arguments about what the law “is” may seem preferable to those framed in terms of what the law ought to be - yet referential only in the limited sense of what it attempts and manages to do in court. This complexity is at the root of many misunderstandings about the ideology of legal argument. On the one hand lawyers are blamed as opportunistic rhetoricians concerned only with “winning” a case, on the other as naive positivists who talk about law and factual reconstruction in rigidly positivistic language. The fracture between the two linguistic ideologies contributes to their image as mercenary speakers with little if no integrity or discursive consistency. Whether integrity is to be found in any other sense in legal discourse, this image is unfounded. Lawyers care about effective rhetoric, but legal institutions force them to make representational assertions, governed by constraints of relevance, coherence and narrative conventions, for the former to count as rhetorically effective. Basing rhetoric on facticity - either by lawyers or judges - is a primary constituent of law’s mode of justification and hence of rationalization.⁸⁵ It is the skilled rhetorician whose claim is accepted on factual grounds - that the case or the law *is* such-and-such. Litigators may care for representationalism only as far as it propels their argument, yet they are constrained by the institutional norms of the legal discourse in framing their arguments – mostly although not exclusively, in representational language. Even Daniel Webster, faced with an impossible case “on the facts” relating to his miserable client, reverts to factual argument concerning human nature.⁸⁶ Merely telling the court that it *should* perform in such-and-such a manner may ring well outside legal practice-as-discourse, yet within it, a certain form of positivism reigns. The basis for action is framed in factual language, even when the object of facticity is a norm.

The Socratic method does not merely tell or preach this brand of positivism: it recreates a context for students to perform the ideology, take part in it and assume it. Later during the students’ training, this approach will be further developed through workshops, moot court competitions and the like, alongside doctrinal classes. Whereas advanced students may encounter instruction contexts that encourage and require more advanced rhetorical skills, the ideology of facticity-as-rhetoric remains the most salient aspect of legal-linguistic performance.

The linguist Michael Silverstein analyses linguistic performatives in what we may term “surface” or “interactional” and “deep structure” or “constitutive” functions.⁸⁷ Surface

performatives are largely akin to Austin's illocutionary acts, the strict social-action sense of "doing by speaking" in such acts as promising, ordering, naming, etc. Some surface performatives are less obvious than others and more dependent on context: recall that Peer Gynt, in the above example, denied performing a promise, instead claiming to have made a descriptive assertion of his inclination - an ostensibly non-obligatory speech-act, unfortunately upon which Solveig relied. Other performances are even less transparent and are sometimes analyzed as "indirect speech acts,"⁸⁸ where the semantic content of an utterance is pragmatically (i.e., contextually) transformed into a different performative act. For example, the utterance "can you pass the salt?" in the context of a dinner is more likely a request and not a question, and repetitive requests for strong condiments at the dinner-table may amount to an expression of discontent with the quality of the food. "Interactional" performatives, according to Austin, are purely conventional and presuppose what he termed "procedures" - the recognized social conditions for performing them (e.g., the correct manner of marrying according to the Church of England doctrine and the necessary and sufficient conditions that marrying presuppose).⁸⁹

As non-obvious as the communicative function of some performative utterances is, deep-structure or "constitutive" performatives tend to be even less transparent to both casual and discursive speakers. Through the linguistic interaction, speakers frame what Bakhtin called the "general language" of the interaction: the correct verbal approach to talk of the matter at hand.⁹⁰ "Constitutive" performatives - more precisely, the constitutive-performative function of certain portions of speech is quite correctly characterized as metalinguistic, because their particular function is to constitute the first-order language of the linguistic interaction. What is the phraseology, imagery, vocabulary and grammar that are appropriate for the given linguistic exchange? As any such choice tacitly responds to the question surrounding what matters and what aspects of social reality are the salient ones for this interaction, this talk. Clearly then "constitutive" functions of performatives are at the core of the metalinguistic notion of linguistic ideology.⁹¹ All discourses are presupposed by linguistic ideologies, including legal talk and legal pedagogy. At time the ideology surfaces as when "constitutive" performative functions become the object of talk, as in "politically correct" language or shifts in social relationships. Consider, e.g., the awkwardness that seems to perpetually underscore shifts from equivalents of "thou" to equivalents of "thee" in languages that maintain the distinction, as documented, ridiculed, and admired as a vehicle for rich interpersonal expression by Thomas Mann in *The Magic Mountain*.⁹²

Linguistic ideologies frame the Socratic method's approach to facticity and to the relationship between representationalism and rhetoric. By pressing a certain ideology of legitimate talk, the Socratic method is performative in Silverstein's second, "deep structure" sense, which does not merely serve utterers in performing speech acts but constitutes the language and discourse in which such performances may be undertaken. Thus all institutional, and probably all discursive

talk, is performative in its meta-claim that such-and-such is the acceptable language in which to perform in the “surface” sense, where the distinctions between rhetorical, representational and performative speech may be functionally (but not morphologically!) observed.

* * *

The focus of this discussion is the normative universe (of which law and legal discourse are subsets), which means that 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 extent of the right she holds, etc. Rights are intersubjective facts - they depend on discourse and emerge from it - but that is their nature *qua* normative facts, not a reductive critique of their phenomenological status. Nevertheless, I fully accept that communicative apparatus 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? Only a complete, intersubjective theory of performative language, freed from the confines of standard speech act theory and its confinement to intentionality, may address that concern - a project yet to be undertaken.

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 dependent upon the social context of their inception, which in turn are constitutive of their *normativity*. Although several studies of legal language refer to this claim, they largely fail to analyze what linguistic *performance* exactly does in those contexts, instead concentrating almost exclusively on different approaches to linguistic *meaning*.⁹³ 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 largely 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 allows for these functional paradigms to work?”⁹⁴ 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.⁹⁵ By “performativity” I meant 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 versus its content). Not less significant, language is performative, but intentions or designs 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.

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¹ SEAMUS HEANEY, *Lightenings*, in SEEING THINGS 56 (1991).

² PLATO, PHAEDRUS, ION, GORGIAS AND SYMPOSIUM WITH PASSAGES FROM THE REPUBLIC AND LAWS 62 (Lane Cooper trans., Oxford University Press, 1938).

³ At the outset the narrow sense of “rhetorical paradigm” employed here must be delineated because “rhetoric” has come to mean different things to different people. In the narrowest sense, it means an array of techniques for effectively mastering social language, primarily through persuasion. In a broader sense, it means discourse: the social, intersubjective or cross-cultural 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, *infra*, clarifies the relations between rhetoric, representation and performativity as understood here.

⁴ See PLATO, GORGIAS (Donald J. Zeyl trans., Hackett Publishing Co. 1987).

⁵ Historians and scholars of scholastic thought divide the middle-ages into imprecise sub-divisions. The middle-middle ages (ca. 1000-1300 CE) are commonly considered a highpoint of scholastic learning and institutionalization.

⁶ See THOMAS AQUINAS, SUMMA THEOLOGICA, SP QQ 90-95.

⁷ 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 bases for justifying the particular mode of agency that is recourse to authority. See Joseph Raz, *Authority, Law and Morality*, 68 MONIST 295 (1985).

⁸ “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.” FRANCIS BACON, NOVUM ORGANON 31 (Joseph Devey ed., P.F. Collier & Son 1902) (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 use of the term). On the history on the quest for the perfect representational language, see UMBERTO ECO, THE SEARCH FOR THE PERFECT LANGUAGE (1995).

⁹ See generally IMMANUEL KANT, *Transcendental Logic, Chapter II: On the Deduction of the Categories*, in THE CRITIQUE OF PURE REASON 77 (J.M.D. Meiklejohn trans., George Bell & Sons 1901).

¹⁰ 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 did not seem to think that his expressible theses were valueless. Coming to terms with contradictory claims is a hermeneutic necessity, and a very rewarding one at that, when reading Nietzsche.

¹¹ FRIEDRICH NIETZSCHE, THE GAY SCIENCE §355 (Water Kaufmann trans., Random House 1974) (1887).

¹² *Id.* at §354.

¹³ For a recent contribution and re-evaluation of several cognitive models and their critical application to legal practice and legal theory, see STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

¹⁴ I refer mainly to Wittgenstein's theory of "meaning as use" and his arguments against the possibility of a "private language." See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Abscombe trans., 1958) See also P.M.S. HACKER, *Wittgenstein's Later Conception of Philosophy*, in INSIGHT AND ILLUSION: THEMES IN THE PHILOSOPHY OF WITTGENSTEIN 146 (1986).

¹⁵ LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 70 (Philomel 1989) (1866).

¹⁶ LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS §4.031 (1922) (Henceforth TLP); 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, later came 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 step became a crucial one in developing the performative paradigm. For Wittgenstein's own rejection of the representationalism of the "picture theory" (in favor of a theory of use), see WITTGENSTEIN, *supra* note 14, at §§ 6, 37, 59, 115, 191, 251, 295, 352, 374, 402, 422-7, 490, 519-20, & 573.

¹⁷ See NOAM CHOMSKY, SYNTACTIC STRUCTURES (1957).

¹⁸ See Immanuel Kant, *Transcendental Analytic, Chapter III: Of The Ground of the Division of all Objects into Phenomena and Noumena*, *supra* note 9, at 257.

¹⁹ See A. J. Ayer *Introduction*, in LOGICAL POSITIVISM 5, 11 (A.J. Ayer ed., 1959). See also Moritz Schlick, *The Turning Point in Philosophy*, *id.* at 54; *Meaning and Verification*, 45 PHILOSOPHICAL REVIEW 339, 355 & 361 (1936).

²⁰ 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. Nonanalytic, or *synthetic* statements, are informative and generally - again with the exception of mathematics - aposteriori: "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 WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (2d ed., rev. 1961). "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 empirically verifiable because it makes a claim about all balloons, including those that are inaccessible, such as balloons that do not yet exist.

²¹ It is relevant to the discussion of rhetoric to note the 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 (1946).

²² See Friedrich Waismann, *Verifiability*, in ESSAYS ON LOGIC AND LANGUAGE 117 (A. Flew ed., 1951) (1945). It is interesting to compare Waismann's approach to philosophy to Wittgenstein's. According to the latter, philosophy does not generate knowledge (or "propositions") about the world: it only clarifies the grammar of talk of knowledge. In contrast, Waismann relied 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." Friedrich Waismann, *How I see Philosophy*, in LOGICAL POSITIVISM 354, 380 (A.J. Ayer ed., 1959).

²³ See Moritz Schlick, *The Foundation of Knowledge*, in A.J. Ayer (ed.), *supra* note 19, at 209, 225 (evaluating the verifiability principle from the premises of logical positivism); KARL POPPER, *Two Kinds of Definitions*, in POPPER SELECTIONS 87, 95 (1985) (critiquing both the inherent logic and the usefulness of the principle). See also POPPER, *The Empirical Basis*, *id.* at 152; QUINE, *supra* note 20.

²⁴ 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 *infra* note 25.

²⁵ Different treatments from within the school were offered to remedy this problem. 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 *generally* KARL POPPER, CONJECTURES AND REFUTATIONS (Harper Torchbooks 1968) (1962); THE LOGIC OF SCIENTIFIC DISCOVERY (Harper Torchbooks, 2d ed. 1968) (1959). 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, LANGUAGE, TRUTH AND LOGIC (Introduction to the 2nd ed. rev., 1946). For a collection of works by logical positivists and thinkers who influenced them, see A.J. AYER ED., NOTEREFMERGEFORMAT LOGICAL POSITIVISM (1959).

²⁶ This movement generates much of its thrust from THOMAS S. KHUN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

²⁷ NOTEREFMERGEFORMAT J.L. AUSTIN, *Performative Utterances*, in PHILOSOPHICAL PAPERS 234 and *passim* (1961) (1956). By this time Wittgenstein's posthumous *Philosophical Investigations* was already published, in which the "picture theory" is replaced by the multifunctional "meaning as use" theory (that Austin criticized for other reasons).

²⁸ AUSTIN, *supra* note 27.

²⁹ Judith Irvine, *When Talk isn't Cheap: Language and Political Economy*, 16 AM. ETHNOLOGIST 248, 250 (1989).

³⁰ 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. Also, contra the positivists' project, the TLPH should not be regarded as 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, *supra* note 16, at §6.522) - rather than giving them up. The TLPH concludes with this famous proposition: "About what we cannot speak, we must be silent." *Id.* at §7. (This translation is preferable, for obvious reasons I think, to Pears and McGuinness'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.

Currently, few 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." JOHN SEARLE, EXPRESSION AND MEANING 134 (1979), reiterating SEARLE, *infra* note 57. 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 116, 116-7 (1978). On this question, personal introspection may inform us differently.

³¹ See RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

³² For an early treatment of the related question of "inclusive legal positivism" - that which recognizes that law consists of kinds of social norms that, while not emerging from such "pure" frameworks as Kelsen's so-called "pyramid of norms," and whose institutional origin is murky are nevertheless *social* norms, as opposed to transcendental or metaphysical - see Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

³³ Percy Bysshe Shelley, *Prometheus Unbound*, II, iv, 72-3 (1820). "He" in the quoted passage is Prometheus, humanity's benefactor, and the reference to "man" as the general case of "human" is a case for a linguistic-determination analysis as explained below: the dependence of cognition and knowledge on language, which in turn internalizes ideology. See *infra* text accompanying note 39.

³⁴ See RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1980). See also RICHARD RORTY ED., THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (1967). For a powerful, non-relativistic construction that develops a "communicative turn" as a synthesis of the linguistic turn and a universalist approach to communication and ethics, see JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984). For a discussion of a "cognitive turn" and its application to legal theory, see Winter, *supra* note 13. For several related discussions of the linguistic turn and applications to legal theory, see JAMES BOYD WHITE, *Justice as Translation*, in JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 257 (1990).

³⁵ See Jonathan Yovel, *What is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises,"* 94 NW. U. L. REV. 937 (2000). See also WHITE, *supra* note 34, at 229.

³⁶ See FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 120-22 (Charles Bally & Albert Reidlinger eds., Wade Baskin trans., 1959). See also Elizabeth Mertz & Jonathan Yovel, *Metalinguistic Awareness*, in THE HANDBOOK OF PRAGMATICS (Verschueren et al. eds., forthcoming 2002).

³⁷ See WHITE, *supra* note 34.

³⁸ The canonical works that launched “epistemic relativism,” “linguistic relativity” and “linguistic determinism,” as well as similar claims in linguistics and anthropology, are EDWARD SAPIR, *LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH* (1921) and BENJAMIN LEE WHORF, *LANGUAGE, THOUGHT AND REALITY: SELECTED WORKS* (J. B. Carroll ed., 1956). The so-called “Sapir-Whorf” hypothesis established the dependence of cognition and of the interpretation of experience, including knowledge of the world, on the language and other “cultural horizons” by which persons are bound (in a way quite different from Prometheus’ “external” bondage, *supra* note 33). See also JOHN A. LUCY, *DIVERSITY AND THOUGHT: A REFORMULATION OF THE LINGUISTIC RELATIVITY HYPOTHESIS* (1992).

³⁹ See Michael Silverstein, *Language Structure and Linguistic Ideology*, in *THE ELEMENTS: A PARASESSION ON LINGUISTIC UNITS AND LEVELS* 193 (Paul R. Clyne et al. eds., 1979). See also BAMBI B. SCHIEFFELIN, ET. AL. EDS., *LANGUAGE IDEOLOGIES* (1998).

⁴⁰ For Kant’s principle of the necessity - and hence universality - of these and other postulates of cognition and perception, see *supra* note 9.

⁴¹ I use “normal language” as an ideologization, quite close to what Bakhtin termed “general language.” See MIKHAIL BAKHTIN, *THE DIALOGIC IMAGINATION* (Michael Holquist ed., 1981); PAVEL N. MEDVEDEV, *THE FORMAL METHOD IN LITERARY SCHOLARSHIP: A CRITICAL INTRODUCTION TO SOCIOLOGICAL POETICS* (Albert J. Wehrle trans., 1978).

⁴² See JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (Christian Lenhardt & Shiery Nicholens trans., 1995). See also JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (Jeremy Shapiro trans., 1971).

⁴³ According to Frege, these are the two components of meaning. See WOLFGANG CARL, *FREGE’S THEORY OF SENSE AND REFERENCE: ITS ORIGINS AND SCOPE* (1994).

⁴⁴ This is how Austin thought of language’s “felicity conditions” of successful speech acts. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) and the discussion of performative language *infra*.

⁴⁵ See MICHAEL KELLEY ED., *CRITIQUE AND POWER: RECASTING THE FOUCAULT/HABERMAS DEBATE* (1994).

⁴⁶ See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* (1981); *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (1988).

⁴⁷ According to Bourdieu, some institutions *must* obscure their true function in order to operate (e.g., giving of gifts in certain societies actually serves as what an observer may interpret - functionally, but not symbolically - as an economic exchange). See PIERRE BOURDIEU, *AN OUTLINE OF A THEORY OF PRACTICE* (1977). Effective language-functions - such as certain types of performativity in their relation to reference - may require similar guises to operate.

⁴⁸ See WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS*, *supra* note 16, at §1.1.

⁴⁹ WILLARD V. QUINE, *WORD AND OBJECT* (1960).

⁵⁰ MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF HUMAN SCIENCES*, (R.D. Laing ed., 1973).

⁵¹ See *supra* note 39.

⁵² See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HAR L REV 1685 (1985); *Distributive and Paternalist Motives in Contract and Tort Law*, 41 MARYLAND L REV 563, (1982); Donald Jones, *No Time for Trumpets: Title VII Equality, and the Fin-de-Siecle*, 92 MICH. L. REV. 2311 (1994); Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL LEGAL STUDIES*, 120 (Allan C. Hutchinson ed., 1989); Catherine A. McKinnon, *The Roar on the Other Side of Silence*, in *HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 3-24* (Catherine A. McKinnon & Andrea Dworkin eds., 1997).

⁵³ 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.

⁵⁴ 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.

⁵⁵ 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* (1882); W.T.S. DANIEL, *THE HISTORY AND ORIGIN OF THE LAW REPORTS* (1884).

⁵⁶ According to Raz’s theory of practical reason, first-order reasons are simply facts that govern action in that persons take them into consideration (e.g., the fact that book A is more interesting to me than both books B and C is a reason to purchase A rather than B or C). The fact that a ship was named *Julia* in an event that is socially recognized as the correct one for naming ships is a reason to refer to the ship by that name. Second-order reasons dictate what first-order reasons may or may not be taken into consideration (e.g., the fact that I can’t afford to purchase book A excludes it from consideration, its other merits notwithstanding). Rules, according to Raz, are paradigmatic cases of secondary reasons: the social rule that empowers certain social agents to name ships is a reason not to call her by a name of one’s preference, and an imposed budget is a reason to exclude some preferences, namely those that transgress the

exclusionary rule. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975). For a critical examination of Raz's and other models of rules-as-reasons (mainly Fredric Shauer's), see Jonathan Yovel, *Overruling Rules?*, 4 *PRAGMATICS & COGNITION* 347 (1996).

⁵⁷ Thus, Searle distinguished utterances' "propositional content" from their performative force: "Is the meeting adjourned?" "the meeting is adjourned." "meeting adjourned!" "I promise 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* (1969).

⁵⁸ *Joshua* 10:12-13.

⁵⁹ J.L. AUSTIN, *Performative Utterances*, in *PHILOSOPHICAL PAPERS* 235 (1961) (1956).

⁶⁰ This is true with respect to 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.

⁶¹ HENRIK IBSEN, *PEER GYNT* (Michael Meyer trans., Doubleday 1963) (1875) .

⁶² See *infra* note 70 and accompanying text.

⁶³ See CHARLES DICKENS, *THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB* (Malcolm Andrews ed., 1998) (1837).

⁶⁴ In essence, such approaches either translate or reduce traditional notions of contractual, tortious, and restitutional ("unjust enrichment") claims to a general structure of reliance, which traditionally has been associated with torts only. See PATRICK S. ATIYAH, *THE RISE AND FALL OF THE FREEDOM OF CONTRACT* (1979); GRANT GILMORE, *THE DEATH OF CONTRACT* (1972). A canonical and perhaps the most influential work in American jurisprudence is Lon Fuller & William Perdue, *On the Reliance Interest in Contract Law*, 46 *YALE L. J.* 52 (1936). Several contemporary commentators argue back and forth for the adequacy of Fuller and Perdue's categorization of private law remedies (and therefore of claims). See 1 *ISSUES IN LEGAL SCHOLARSHIP, SYMPOSIUM: FULLER AND PERDUE* (2001) <<http://www.bepress.com/ils/iss1/>>.

⁶⁵ For a much richer analysis see Elizabeth Mertz, *Linguistic Ideology and Praxis in U.S. Law School Classrooms*, in *LINGUISTIC IDEOLOGIES*, 149 (Bambi Schieffelin et al. eds., 1998).

⁶⁶ Like other instructors mixing first-year classes with advanced ones (in this case, classes in contracts and in domestic and international commercial law) I encounter the temptation of novice students to rely on such instruments as Restatements and the Uniform Commercial Code to arrange doctrine and overcome factual, interpretative, policy-related and other ambiguities, and then that of advanced students to rely on the familiar structure of cases when dealing with abstract and fairly complex statutory materials and accompanying interpretative texts, even when these are presented from a fairly legal-realist rather than strictly doctrinal perspective.

⁶⁷ Such is not the case with code-based classes or other courses heavily based on legislation or other non-case textual instruments (which tend to be advanced or elective classes). Different casebooks manifest different pedagogical approaches, ranging from case-laden ones that simulate the first-year, common-law approach to textbooks with relatively scant case offerings and heavy reliance on case-abstract close-reading and policy analysis as main interpretative approaches to doctrine. In some areas, where legislation may be new or newly revised (I have in mind classes in commercial law centering on Uniform Commercial Code articles 3, 4, 5, or 9) the temptation to use cases solely as examples for rule-application - rather than a conglomerate of action and facticity that doctrine and policy face - is manifest in newer books. *E.g.*, RONALD MANN, *PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS* (1999).

⁶⁸ For a thorough philosophical analysis of this claim, see HANS GEORG GADAMER, *TRUTH AND METHOD* (2nd rev. ed. 1993). A thorough examination of teleological models of legal interpretation along Gadamerian lines is offered in AHARON BARAK, *PARSHANUT BAMISHPAT [INTERPRETATION IN LAW]* VOL. 1 (1992).

⁶⁹ Note how little the tenability of this last phrase is changed in linguistic-turn terms. Under an essentialist-representational paradigm, "right" is an entity as firm and stable as any social relation, an entitlement that a person may "have." Under a linguistic-turn understanding to say that Suzanne "has" a right to X means to partake in a language game where other players - property registrars, courts, trespassers, thieves - talk and act in certain ways that respond to the saying "S has a right over X" without being bothered by the metaphysical or even phenomenological meaning of "having a right over X." The language-game becomes wholly social, and as a matter of practice needs not assume anything besides communication.

⁷⁰ See WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JURIDICAL REASONING* (1964) (1919).

⁷¹ See Michael Silverstein, *Metapragmatic Discourse and Metapragmatic Function*, in *REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS* 33 (John A. Lucy ed., 1993).

⁷² *FED.R.CIV.P.* 49(a).

⁷³ FED.R.CIV.P. 49(b).

⁷⁴ See OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881).

⁷⁵ PLATO, GORGIAS, *supra* note 4, at 452.

⁷⁶ 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 Karl Olivecrona, *Legal Language and Reality*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 151 (Ralph A. Newman ed., 1962). Nevertheless there remains a fundamental riddle: what convinces people? For a powerful narrative approach to the question of persuasion, see BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* (1988). See also CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF PERSUASION* (1994).

⁷⁷ 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 through a speech act. *Genesis* 1:6, 7. But the earth and the water were, after a fashion, already there. See discussion below.

⁷⁸ *John* 1:2.

⁷⁹ See *John* 1:1, 1:14.

⁸⁰ 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 MICHAEL DUMMETT, *Frege’s Distinction between Sense and Reference*, in *TRUTH AND OTHER ENIGMAS* 116 (1978). Interestingly, the performative paradigm proved fruitful in understanding reference as well. The philosopher Saul Kripke offered to shift the emphasis from the relation between a “type”-word and a class of referents to the question of how the connection between them has been established, to the act that constituted it - a performance that underlines representation, instead of the opposite. See SAUL KRIPKE, *NAMING AND NECESSITY* (1972). See also Peter F. Strawson, *On Referring*, 59 *MIND* 320 (1980); Hilary Putnam, *Meaning and Reference*, 70 *THE J. OF PHILOSOPHY* 699 (1973); *Reference and Understanding*, in *MEANING AND THE MORAL SCIENCES*, 97 (1978).

⁸¹ SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: “CUSTOMARY” LAW ON KILIMINJARO, 1880-1980* (1986).

⁸² See *supra* text accompanying note 39.

⁸³ A thorough empirical study of language and socialization in first-year law school instruction is offered in ELIZABETH MERTZ, *LAW SCHOOL LANGUAGE: LEARNING TO “THINK” LIKE A LAWYER* (forthcoming). I am indebted to Professor Mertz for allowing me to consult her forthcoming book in manuscript.

⁸⁴ See MERTZ, *supra* note 83, chapter 4 part II.

⁸⁵ See Jonathan Yovel, *Invisible Precedents: On the Many Lives of Legal Stories Through Law and Popular Culture*, 50 *EMORY L.J.* 1265 (2001) (discussing the role of narrative and manipulations of institutional context in law’s attempts at rationalization).

⁸⁶ BENÉT, *THE DEVIL AND DANIEL WEBSTER* (1965).

⁸⁷ The following builds on some of Silverstein’s work with conscious neglect of important nuances. See Silverstein, *supra* notes 39 & 71. The spatial metaphors are used here for convenience only; at times they may be misleading, and Silverstein uses simple numerical indices (such as “function 1” and “function 2”). For a critique of the use of spatial metaphors in functional analysis, see Jonathan Yovel, *Analogical Reasoning as Translation: The Pragmatics of Transitivity*, 13 *INT’L J. FOR THE SEMIOTICS OF LAW* 1 (2000)

⁸⁸ See François Récanati, *Some Remarks on Explicit Performatives, Indirect Speech Acts, Locutionary Meaning and Truth-Value*, in *SPEECH ACT THEORY AND PRAGMATICS* 205 (John Searle, et. al. eds., 1980).

⁸⁹ See Austin, *supra* note 44.

⁹⁰ See MIKHAIL BAKHTIN, *Discourse in the Novel*, in *THE DIALOGIC IMAGINATION* 258 (Micheal Holquist, ed., 1981).

⁹¹ For elaboration see Mertz & Yovel, *supra* note 36.

⁹² See THOMAS MANN, *THE MAGIC MOUNTAIN* (John E. Woods, trans., Knopf 1995) (1924). Emotional, romantic, familial, adversarial and other social relations between such prominent characters as Hans Castorp, Madame Chauchat, Joachim, and Maynheer Pepperkorn, are typified through these grammatical forms and their ambiguities and equivocations.

⁹³ A similar critique is voiced by Peter Brooks, *Storytelling Without Fear? Confessions in Law & Literature*, 8 *YALE J. OF LAW & THE HUMANITIES* 1 (1996). Agreeing with Brooks's sentiments, I find this neglect to characterize some of the mainstream of the law-and-literature work. More specifically, the critique is that inquiries into legal textuality should offer analyses of texts' institutional and extra-institutional performances, as a matter of social and cultural effect, rather than merely as expressions of meaning. I attempt such an inquiry in Yovel, *supra* note 87.

⁹⁴ I address that question summarily in Yovel, *supra* note 35.

⁹⁵ Quite obviously, the aspects of legal language and its instruction dealt with in this study are not exclusive. For one, this study does not deal with legal language's expressive and emotive aspects. This neglect to deal with poetics should not reflect a hierarchy of the salience of the various aspects of language's multifunctionality, only the limitations of an article-length account of language as social action.