Historical Aspects of Legal Interpretation

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> A body of doctrine is an organized set of "truths" that are accepted as authoritative. Their authority is incorporated in the *transmission* of the doctrine. To be more accurate, it is inherent in the relationship linking (*religare*) a plurality of receivers with a single sender who stands above them. . . . Both materially and etymologically, the authority of the word is an effect of teaching.[1]

INTRODUCTION

One of the most interesting developments within contemporary legal theory has been the increasing importance accorded to the concept of interpretation. It is fortunately no longer possible to speak uncritically of, or simply to assume, the communicational and linguistic dimensions of legal regulation or of legal institutional discourse. While the concepts of communication—of discourse, language, text and sign—have long been key terms of debate within philosophy, literary theory and cultural studies, it is really only very recently that lawyers and particularly the legal academy have begun to take a serious if somewhat defensive interest in these disputes. The issues raised and the interests threatened are ponderous and vast; many of the dogmatic articles of legal faith are at stake and it should not be viewed as surprising if the debates as to the substantive implications of different forms of interpretation appear at times extreme and the positions adopted seem labored or untenable. The issues raised are intrinsically political: a direct challenge is presented to the traditionally established motive and characteristics of legal method, the humanistic tenets of legal philology are denied, and the liberal ideology of the rule of law itself is again placed in question. In such a context the current jurisprudential debates have an uncharacteristic urgency, for it is not simply the legal educational apparatus that is asked to change its course but, more dramatically, it is substantive legal practice and the corresponding professional status or standing of the law that are placed in balance.

Clearly the issues adverted to are too broad to form anything more than a general though dynamic context to the present inquiry into the historical status of the legal text as object of interpretation. As a further complication,

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1. R. DEBRAY, CRITIQUE OF POLITICAL REASON 246-47 (1983) (emphasis added).

it should be added that the issues to be sketched out cross not only the traditional disciplinary boundaries of philosophy, linguistics, criticism and law, but also transgress the geographical boundaries of theoretical traditions. On one side, French structuralism and its inheritors within an increasingly important *Critique du Droit* movement[2] is thrown together with German hermeneutics[3] and with Anglo-American traditions of critical linguistics[4] to develop an as yet somewhat incoherent or superficial critical legal studies. On the other side of the debate, institutional jurisprudence has responded with an amalgam of European positivist philosophy of science, Anglo-American speech-act theory, analytical theories of *verstehen* or purposiveness in rule following, and on occasion more weighty theories of an essentially Germanic deontic logic or semiotics.[5] While there is no common element running through the debate, and even where key concepts or terms are used across the divide, as is the case with the term "hermeneutics," which is used both in positivist philosophy of law and in certain versions of deconstruction,[6]

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2. The principal theme within the French *Critique du Droit* school has been the epistemological claim that law is to be understood as a construct. For the structuralists, the construction of law has to be understood in terms of the opposition of binary categories—the opposition, for example, of the commodity form to the legal form which in turn opposes the category of exchange to that of legal subjectivity, and that of expropriation to that of legal right. The more recent work of the school has endeavored to develop a broader, nonessentialist Marxian conception of critique and to analyze its applicability to law in terms of the discourse of the legal institution and the reappropriation of legal ideology. *See* B. EDELMAN, OWNERSHIP OF THE IMAGE (1979); M. MIALLE, UNE INTRODUCTION CRITIQUE AU DROIT (1976); Journès, *The Crisis of Marxism and Critical Legal Studies: A View from France,* 10 INT'L J. SOC. LAW 2 (1982); Stewart, *Pour une Science Critique du Droit,* 25 ANNALES DE VAUCRESSON 201 (1985). For an account of the more general epistemological debate, see E. LACLAU & C. MOUFFE, HEGEMONY AND SOCIALIST STRATEGY (1985).

3. Particularly the philosophy of language and of interpretation which develops from German phenomenology combined with neo-Marxist social theory, and which finds its most sophisticated representation in the work of Jurgen Habermas. *See, e.g.,* J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979); J. HABERMAS, THEORY AND PRACTICE (1974). For a useful introduction, see Sumner, *Law, Legitimation and The Advanced Capitalist State: The Jurisprudence and Social Theory of Jurgen Habermas,* in LEGALITY, IDEOLOGY AND THE STATE 119 (D. Sugarman ed. 1983).

4. Reference here is specifically to the development of sociolinguistics as a methodology for the analysis of the pragmatic and political contexts of language use. The best introductions to the discipline can be found in B. BERNSTEIN, CLASS, CODES AND CONTROL (1977); LANGUAGE AND SOCIAL CONTEXT (P. Gigliopoli ed. 1972). More recent work includes R. FOWLER, B. HODGE, G. KRESS & T. TREW, LANGUAGE AND CONTROL (1979); W. O'BARR, LINGUISTIC EVIDENCE (1982).

5. *See* A. GREIMAS, SÉMIOTIQUE ET SCIENCES SOCIALES (1976); G. KALINOWSKI, INTRODUCTION À LA LOGIQUE JURIDIQUE (1965); Oppenheim, *Outline of a Logical Analysis of Law,* 11 PHIL. SCI. 142 (1944).

6. Deconstruction refers to the method of textual analysis and interpretation developed by J. Derrida and subsequently adopted as one of the defining terms of the post-structuralist school of literary and social theory. *See* J. DERRIDA, POSITIONS (1981) [hereinafter cited as J. DERRIDA, POSITIONS]; J. DERRIDA, WRITING AND DIFFERENCE (1978). In its broadest signification, deconstruction may be defined as a method of reading texts in terms of their metaphysical structuration. The text is analyzed in terms of its contradictions and lacunae so as to reveal an open-ended plurality of meanings, none of which meanings is accounted more basic or more "original" than any other.

or with the even more frequently abused concept of nihilism,[7] the definition and heuristic function of the terms is precisely the object of conflict. There is, however, a discernible convergence around issues of language and interpretation, text and signification, and even though the meaning given to these terms varies according to their context and, more crucially, according to the political and discursive commitments of their users, they do at least form an object of dialogue and dispute.

It is the purpose of the present paper to engage somewhat elliptically with the disputes and disputed terms that the critical legal studies movement, both in Europe and in America, currently aims to appropriate.[8] It will do so by presenting two crucially related arguments, the one historical and the other somewhat more polemical. The historical argument draws upon the concept of discourse[9] to suggest that the legal concept of interpretation is theological in its derivation and that it is unjustifiably authoritarian in its practice. The exegetical and hermeneutic traditions of religious and legal interpretation, it is argued, survive in and crucially continue to support the persistent contemporary privileging of the law as definite *written* text, as code (*caudex*) or unitary and univocal inscription of a sovereign will.

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7. The term nihilism derives from the work of the German philosopher F. Nietzsche and refers to a historically specific rejection of the dominant nineteenth-century Christian doctrines of "unity," "purpose" and "being." Nihilism was not the rejection of all purposes and meanings but simply an attack upon the values of a specific tradition and its concept of truth. *See* F. NIETZSCHE, THE WILL TO POWER (1909).

8. I do not intend to contribute to the growing number of bibliographies of critical legal studies and related contributions. Of the available French literature, M. FOUCAULT, DISCIPLINE AND PUNISH (1979); P. LEGENDRE, JOUIR DE POUVOIR (1976); J. LENOBLE & F. OST, DROIT, MYTHE ET RAISON (1981) are particularly recommended. A partial translation of a synoptic article in this field is le Roy, *Legal Paradigm and Legal Discourse,* 12 INT'L J. SOC. L. 1 (1984). G. ROSE, THE DIALECTIC OF NIHILISM (1984) provides a stringent criticism of the claims and epistemological foundations of the post-structuralist movement and method, although I have argued elsewhere that her critique is mistaken. *See* Goodrich, Book Review, 12 J. L. & SOC'Y 241 (1985). For further bibliographical details, see Goodrich, *Language, Text and Sign in the History of Legal Doctrine,* in SEMIOTICS, LAW AND SOCIAL SCIENCE 95 (D. Carzo & B. Jackson eds. 1985); Goodrich, *Law and Language: An Historical and Critical Introduction,* 11 J. L. & SOC'Y 173 (1984). Some of the issues dealt with here are touched upon in Hutchinson, *From Cultural Construction to Historical Deconstruction,* 94 YALE L.J. 209 (1984); Singer, *The Player and the Cards, Nihilism and Legal Theory,* 94 YALE L.J. 1 (1984); *see also* Goodrich, *Law and Modernity* (to be published in MOD. L. REV. vol. 48); Grey, *The Constitution as Scripture,* 37 STAN. L. REV. 1 (1984).

9. I refer specifically to the contemporary sociolinguistic definition of discourse as a set of specifiable semantic regularities or as a "paraphrastic unity" associated with institutional linguistic usages. Specific disciplines, genres and paradigms of knowledge develop and institutionalize specific "meaning effects" or accents according to the social and political position and purposes of the administrative or institutional practices within which the discourse is to be inscribed. *See* M. PECHEUX, LANGUAGE, SEMANTICS AND IDEOLOGY pt. III (1982); *see also* M. FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (ed. 1972); V. VOLOSINOV, MARXISM AND THE PHILOSOPHY OF LANGUAGE (1973); Goodrich, *The Role of Linguistics in Legal Analysis,* 47 MOD. L. REV. 523 (1984).

The second argument or theme asserts that the essentially biblical attitude towards the interpretation of legal texts has long outlived its linguistic and political justifications. A close historical examination of the linguistic traditions and techniques invoked by critical legal studies suggests the possibility of a theoretical foundation to legal interpretation in a rhetorical tradition of linguistic and legal criticism. The rhetorical analysis of legal texts attempts to break down the closure of legal knowledge and to open the monologue of legal textual practice to the material economy of discourse and what might be termed the politics of legal signification. Only when it is seen explicitly as the symbolic signification of political authority or sovereign power—as the rhetorically organized expression of authority—does it become possible to treat legal regulation *rationally* as a form of collective existence, as a series of motivated and structured choices as to the terms and content of social life. Only as a historical and social knowledge—as opposed to a strictly normative legal technique—can law interpretation and the legal text come to be contested within the legal institution, and the ritual text and ceremonial meaning be confronted by its substantive practices and called to account for what it has done, for its practice.

I. TEXT AS SYSTEM; FROM EXEGESIS TO HERMENEUTICS

A useful if simple starting point is the premise that the object of interpretation, be it word, sentence, text or discourse, is never something given of itself, but always a construction, something posited or produced. Without entering any of the disputes as to the units and levels of language, it can be briefly observed that the word combines or unifies phonemes (the basic units of sound), that the sentence unifies words (syntagms), that the text orders and systematizes lower level groups of sentences, statements or utterances, and that the discourse (as discursive order) coheres texts. In none of these instances is the act of cohering or unifying entirely innocent; it involves choices and the adoption of positions at the levels of lexicon (vocabulary), syntax (sentence structure) and semantics (meaning). Particularly in the case of the text and the discourse, though equally if less obviously so at the level of lexicon and syntax, the object and outcome of interpretation is the result of carefully regulated techniques and strategies of construction. The object of interpretation is most commonly circumscribed, unified and then given a meaning by means of one of several possible interpretative methodologies which will not only define what it is that has to be interpreted but will generally also legitimate or "authorize" the meaning produced. In terms of legal interpretation, the historically dominant strategies are those of exegesis and hermeneutics, and it would seem helpful to look at these two methodologies in a certain amount of historical detail. From what institutions do they derive, what is the motive underlying their use, and what are their typical effects or functions?

The earliest, most rigorous and also most persistent form of textual technique is that of exegesis, a strategy and technique of interpretation which has frequently encompassed the entirety of practical legal method. In terms of contemporary legal method, the exegetical technique is still the strongest argument legitimizing (or authorizing) both text and interpretation, and for that reason alone its details deserve careful examination and *evaluation.* However, those details will be dealt with here not in the contemporary terms of formalism, literalism and logical subsumption, but rather in the traditional scholastic terms of "similitude," "concordance" and "gloss." The second portion of this article will indicate the relation of the exegetical strategies as outlined to contemporary techniques and their accompanying theoretical justifications within the discourse of the philosophy of law.

A. Scripture

In its broadest meaning, exegesis is definable as a particular system of authorizing, unifying, and interpreting or applying religious texts. In this sense it operates a very specific system of privileges which function to produce an authorized or "true," ritually validated, meaning and discourse. Because religious (patristic) exegesis is not here the specific object of study, its principal techniques of valorization can be dealt with relatively swiftly without in any sense claiming to have provided anything more than an outline and exemplification of theological, textual casuistry. First, religious meaning is textually located. From the earliest rabbinical writings on biblical law to the patristic exegesis of the first century A.D., religious meaning was conceived as being written and as awaiting discovery through the technique of authoritative commentary—commentary bound by and tied to the language of the written text. The meaning discovered and settled by commentary was the "true" meaning, the meaning accepted by the entirety of the church; in one contemporary formulation, "this is an exegesis, which listens, through the prohibitions, the symbols, the concrete images, through the whole apparatus of Revelation to the word of God."[10]

The privileging of the written—the hermeneutic autonomy of the text—carries with it certain interesting supplementary devices. To privilege the written text was only a part of the patristic strategy; it also entailed attributing authority to the text and unifying its content. Although the religious text, within the western tradition at least, is a specific graphic and physical entity—it is epitomized by the ten commandments brought down from Mount Sinai in the form of inscriptions upon stone tablets—the written text connotes

10. M. FOUCAULT, THE BIRTH OF THE CLINIC xvii (1976). On religious exegesis more generally, see ST. AUGUSTINE, ON CHRISTIAN DOCTRINE (ed. 1958); R. GRANT, A SHORT HISTORY OF THE INTERPRETATION OF THE BIBLE (1963); G. ROSE, *supra* note 8; T. TODOROV, SYMBOLISM AND INTERPRETATION (1983).

more of an ideational or theoretic coherence than a purely physical one. The unity of the code, of the written biblical law, is a function of power and discipline, of the hierophantic (priestly) or oracular quality of the law rather than simply being an internal quality of the text. Initially there is the postulation that the text is significant, that for institutional and interpretative purposes the text or series of texts are to form a single "Text," a system of *primary* meanings which are, through authoritative commentary, to be repeated and obeyed.[11]

Second, following from the interpretative stature of the primary text, it may be observed that the religious code is not simply the authoritative creation of a textual system but it is also and perhaps more importantly the creation of a discursive space. The religious hierarchy or the powers of the established church seek, through the primary text, to map and control, to organize and restrain, an analytical space, a discipline in the sense of doctrine or teaching. The analytical space created by the code is that of repetition and respect, of identity and reception produced through the social administration of the discourse, through the hierarchically organized relation of priest or "knower" to hearer, rather than through any necessary internal criteria within the text or discourse itself. The "religious" is located in the material conditions of its enunciation, in the forms in which it is communicated, and in its transmission rather than its content:

> [T]he dual figure of the priest and the hieroglyph occupies an exemplary position . . . bringing together the essence of social power qua power of writing, or at least an essential moment of these powers and of what is represented in them. And these two figures are inseparable; they belong to one and the same system and are mutually constitutive. No priests without a hieroglyphic writing, no hieroglyphics without a working priesthood. Occupying the *center* within the succession of writing . . . the hieroglyph is the elementary milieu, the medium and general form of all writing.[12]

The creation of an analytic space by essentially external constraints upon the enunciation and reception of religious dogma—the creation of a specific and restricted auditory space—should not, however, detract from the internal features of the religious code. Although there are clearly dangers in attempting to generalize the different techniques and schools of patristic ex-

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11. Foucault has written:

> In short, I suspect one could find a sort of gradation between different kinds of discourse within most societies: discourse "uttered" in the course of the day in casual meetings, and which disappears with the very act which gave rise to it; and those forms of discourse that lie at the origins of a certain number of new verbal acts, which are reiterated, transformed and discussed; in short, discourse which is spoken and remains spoken . . . and remains to be spoken.

M. FOUCAULT, *supra* note 9, at 220.

12. Derrida, *Scribble,* 58 YALE FRENCH STUD. 116, 125 (1979); *see also* J. DERRIDA, OF GRAMMATOLOGY pt.1 (1976) [hereinafter cited as J. DERRIDA, OF GRAMMATOLOGY].

egesis between the first and thirteenth centuries, there would appear to be at least a superficial coherence to the strategy and method uniting the exegetical text. Initially it should be noted that the text is a unity by virtue of its *source,* the sovereign or divine intention which lies behind the biblical text and awaits discovery by means of careful exegetical construction or literary technique. The written word is, in Derrida's terms, the "logocentric" representation of a prior presence, a prior speech.[13] The authorship of the text is its unifying feature; it is also the guarantee of its validity and its meaning. That its meaning is *unitary* and univocal as the Church requires it to be is a product of the fact that the religious text is always to be approached as a didactic and sacred document, as the source of both knowledge and potential salvation, as the sole mode of study and aspiration. The unitary source and unitary meaning as the doctrinally agreed "correct" or "valid" meaning resulted in a number of elaborate and highly sophisticated means of controlling polysemy within the religious text. The code is the complete and consistent source of knowledge; it is, for political reasons within the Church of Rome, a total or universal set of meanings applicable throughout Christendom, and for such to be the case requires a highly defined set of reductive textual methodologies. Textual meanings are to be systematized throughout the entire code, and for this effect to be achieved a very clear hierarchy of meanings must be established. For St. Augustine and St. Thomas Aquinas the solution was in principle relatively simple. They both, though in somewhat different ways, introduced a conception of biblical language as a primarily denotative or referential language: the sign is in principle a name for a thing, and where it fails to name some entity directly, according to St. Augustine, it must be corrected "partly with reference to a knowledge of languages, and partly with reference to a knowledge of things."[14]

For Aquinas as well, signs had a fundamental or literal meaning which took precedence over other levels of allegorical, moral and anagogical meaning. The plurality of meanings was thus to be drastically restricted; there was ultimately, in principle or doctrine, only one meaning. At the level of the lexicon this meant a nominalized approach to metaphor and a strictly reductive approach to other forms of variation, figuration or ambiguity of meaning: "nothing necessary for faith is contained under the spiritual sense that is not openly conveyed through the literal meaning elsewhere."[15] At the semantic level the techniques are more complex; the universality of the

13. The term "logocentric" derives from J. DERRIDA, OF GRAMMATOLOGY, *supra* note 12, and refers to the embeddedness of western philosophy in a metaphysics of presence—in theories of meaning which depend upon some concept of a central, fixed "originary" meaning or truth.

14. ST. AUGUSTINE, *supra* note 10, at 50.

15. 1 T. AQUINAS, SUMMA THEOLOGIAE 18 (ed. 1920); *see also* Jackson, *The Ceremonial and the Judicial: Biblical Law as Sign and Symbol,* 30 J. STUDY OLD TESTAMENT 25 (1984).

biblical meaning has to be replicated intertextually through the rigorous search for *concordances* or equivalences between different elements of the text. Not only, in other words, is the plurality of lexical meanings to be drastically reduced or controlled by reference to a doctrinally imposed, literal/denotative meaning, but the larger units of language or discourse—sentences, discrete utterances and isolable propositions—are to be made semantically *consistent* throughout the text. In the last analysis, the signified is to be privileged over the signifier; the doctrinal or "spiritual" is to be preferred to or is to redefine the literal meaning where the literal meaning appears to conflict either with other sections of the text or with a doctrinal truth such as, for instance, St. Augustine's privileging of charity as the prime virtue of the Christian faith. The semantic strategy is one of closure or reduction: it seeks to impose restrictions, to valorize, certain semantic associations while excluding others. Meanings should be clear, the faith should be available or at least decided by the authorities (*auctoritates*) of the Church or of the greatest number of churches, if truth and error, faith and heresy, were to be distinguished and their consequences made plain.[16]

B. Gloss

The relation between the religious and the legal text or code is one of close if not exact equivalence. In terms of external, institutional support or traditional *auctoritates,* the links between law and religion were, from the earliest days of the western legal tradition, of extreme proximity if not identity. Not only were the early jurists, with the sole exception of the forensic rhetoricians of classical Greece and of the Roman Republic, a priesthood, but jurisprudence or the study of law was itself classically defined as a "knowledge of things divine and human."[17] The correlation between religious and legal power can be traced in external terms through to the contemporary professions via a continuous process of secularization which has merely replaced an explicit priesthood of *pontifices* (pontiffs), or *sacerdotes legum* (priests of the law) with other forms of legal privilege (*honestiores*) and with professional "knowers," and has correspondingly replaced the natural law justifications of legal sovereignty (as God's law or as "divine right") with an ideology that naturalizes the new law tables, the hierarchy of sources, the statute book and judgments.[18]

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16. ST. AUGUSTINE, *supra* note 10, at 12; *see also* U. ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE 147-63 (1984).

17. DIGEST, pt. 1, bk. 1, tit. 1 (*see infra* note 22).

18. For initial analyses of the contemporary profession, see F. BURTON & P. CARLEN, OFFICIAL DISCOURSE ch.4 (1979); P. CARLEN, MAGISTRATES' JUSTICE (1976); R. DINGWALL & P. LEWIS, THE SOCIOLOGY OF THE PROFESSIONS ch.5 (1983); THE POLITICS OF LAW ch.3 (D. Kairys ed. 1982); Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561, 660-70 (1983). For historical arguments as to secularization, see J. DAWSON, THE ORACLES OF THE LAW (1968); P. LEGENDRE, L'AMOUR DU CENSEUR (1974); W. ULLMANN, LAW AND POLITICS (1975).

Granted the contextual character of all communication, it is of utmost importance not to lose sight of the hierarchically organized "subject positionings" between which communication occurs. The point is not simply that society organizes and authorizes discourses, that speakers are qualified and topics of speech restricted according to predetermined institutional spaces. The socially designated status and propriety of the speech is frequently a matter of its place and appropriateness to that place, be it bar, bench, pulpit, podium or political rostrum.[19] At the same time, however, the external constraints upon speaker and speech are also frequently reflected in the manner in which the text is constructed, both in its intratextual ordering and in the interpretative techniques used to reconstruct the speaker's meaning in or behind the text.[20] Legal exegesis provides, if anything, an even clearer, more concise and more functional example of the relation between "hieroglyph" and power, between writing and authority, between institutional goals and discourse, than even the religious code can claim.

In the face of problems of periodization and of conflict between different schools of classical exegesis—those of the glossators, commentators, humanistic legal philologists and later the exegetes of the nineteenth-century codes—it is necessary to make certain drastic excisions.[21] Rather than discuss issues of method raised by earlier traditions of *interpretatio* and earlier codes, this article shall concentrate instead on the more politically crucial period of the reception of the *Corpus Iuris Civilis*[22] in medieval Europe, and particularly the Italian and French glossatorial schools of the twelfth and thirteenth centuries. The reason for this choice is both pragmatic and strategic. The period in question is in many ways exemplary of legal method and legal communication as such: in an albeit extreme form, the glossators devised and consolidated the specificity of law as a discourse in a manner that is still of the utmost contemporary relevance.

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19. *See* M. FOUCAULT, POWER/KNOWLEDGE (1980); G. THERBORN, THE POWER OF IDEOLOGY AND THE IDEOLOGY OF POWER 77-89 (1980).

20. On the question of the inside and outside of discourse more generally, see J. DERRIDA, OF GRAMMATOLOGY, *supra* note 12, at 27, 44; J. DERRIDA, POSITIONS, *supra* note 6, at 37; Brown & Cousins, *The Linguistic Fault,* 9 ECON. & SOC'Y 251 (1980).

21. On historical issues, see P. STEIN, REGULAE IURIS (1966); W. ULLMANN, *supra* note 18; A. WATSON, THE CIVIL LAW TRADITION (1981); Legendre, *Recherches sur les Commentaires Pre-Accursiens,* 33 REVUE D'HISTOIRE DE DROIT 353 (1965); *see also* J. FRANKLIN, JEAN BODIN AND THE SIXTEENTH-CENTURY REVOLUTION IN THE METHODOLOGY OF LAW AND HISTORY (1966); M. VAN DE KERCHOVE, L'INTERPRETATION EN DROIT (1978). On the more general political history of the glossators and the university law curriculum, see D. KELLEY, THE BEGINNING OF IDEOLOGY (1981); W. ONG, RAMUS: METHOD, AND THE DECAY OF DIALOGUE (1958); 1 Q. SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978). For later exegetical schools, see P. GOODRICH, READING THE LAW ch.5 (1986); C. PERELMAN, LOGIQUE JURIDIQUE (1976).

22. The *Corpus Iuris Civilis* is the vast compilation of Roman law ordered by the Eastern Roman emperor Justinian in 527 A.D. and published in 532-535 A.D. Compiled by a specially established commission headed by Tribonian, the *Corpus Iuris* is divided into four parts, the *Code,* the *Digest,* the *Institutes* and the *Novels.*

The compilation of the *Corpus Iuris* at the command of the Emperor Justinian during the third decade of the sixth century is an event of such historical and political significance that it is hard to circumscribe.[23] As an exercise in the codification of substantive law or of an extant and enforceable body of rules, the *Corpus Iuris* was anomalous even at the time of its original compilation. While the compilers were explicitly directed to avoid contradictions, repetitions and archaisms, the very nature of this vast project was, in terms of available materials and knowledge, never likely to produce a coherent or consistent body of contemporary rules from the scattered and fragmented literary remains of a western Roman Empire that Constantine had abandoned over a century earlier. The paradox instituted by the publication of the *Corpus Iuris* is in many respects the same as that which accompanies its reception in medieval Europe. The paradox is that of how and why the very basis of the western legal tradition and method should take the form of a vast compilation of foreign legal scripts written in an alien language and directly applicable only to a past culture. The question to be posed is: what lies behind a singularly remarkable philological and legal event—the rediscovery of a set of initially incomplete manuscripts, five centuries after their original publication, in a library in Pisa? As one recent commentator has stated:

> To say that law was taught and studied in the West as a distinct science at a time when the prevailing legal orders were only beginning to be clearly differentiated from politics and religion, raises a number of questions. What did the first law teachers teach? . . .
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> The answer surely sounds curious to modern ears. The law first taught and studied systematically in the West was not the prevailing law; it was the law contained in an ancient manuscript which had come to light in an Italian library towards the end of the 11th century. The manuscript reproduced the enormous collection of legal materials which had been compiled under the Roman Emperor Justinian in about 534 AD—over five centuries earlier.[24]

Assuming that the general features of the reception of the *Corpus Iuris* are by now established,[25] it is possible to concentrate in greater detail upon the methodological and linguistic peculiarities that the reception produced, a task which is best approached through the analysis of the exegetical concept of the source of law. If the source of law is defined initially in broad terms

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23. *See* A. WATSON, *supra* note 21; *see also* H. BERMAN, LAW AND REVOLUTION (1983); W. ULLMANN, THE MEDIEVAL IDEA OF LAW (1946); A. WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY (1984). For a more detailed study and references, see T. HONORE, TRIBONIAN (1978).

24. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 898 (1977).

25. *See, e.g., id.; see also* P. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE (1929); A. WATSON, *supra* note 21.

as that which gives validity and legitimacy to a particular form of regulation or discipline, then, in the case of the method of exegesis, it is easy enough to extrapolate from arguments as to sources to the related issues of the linguistic and communicational character of the established sources of law, the specific textual and doctrinal qualities of the compilation in question.

Perhaps the most striking feature of the reception of the *Corpus* is not so much the religious fervor with which a series of archaic and arcane texts were seized upon by the first school of glossators, but rather the even more striking longevity of the techniques which these early glossators developed for explaining, systematizing and teaching the text. In many ways those methods are still the principal tenets of legal interpretation, and the linguistics that such techniques imply are still to be found implicit within much contemporary philosophy of law. It would seem indisputable in such circumstances that the techniques satisfied a social need or performed a material function, that they captured an essential element of what is in hermeneutics termed the "spirit" or "idea" of law.[26] That function, as expressed earlier in relation to the religious code, is that of creating an analytical space for legal discipline or order, of setting in motion the conditions for a specifically legal discourse; it is "a monumental design for a whole society"[27] based upon *legality* rather than upon any more explicit justificatory argument, upon form and not upon any particular quality of content.

The first move in an exegetical strategy may be characterized, both historically and analytically, as that of postulating a sovereign source of law. Just as it is the hidden presence of God's word that makes the numerous books of the Bible a single text and a single doctrine, so also the disparate segments of the *Corpus Iuris* become a single text or textual system by virtue of their direct relation to the Emperor Justinian. The analogy can usefully be developed further. Certainly Justinian was not the direct author of the codification, but the codification was compiled and the law was rationalized at his explicit command. It was for essentially political reasons, however, that the glossators sought to emphasize rather than to question the *Corpus Iuris* as the expression of a single sovereign will. In the emerging Italian city states of the twelfth century and in France, it was not simply the Roman law that the glossators resurrected, but it was also, and perhaps more significantly, the idea of empire and of *imperium*[28] that was recovered as well and traditionally expressed in the maxim *"unum esse jus, cum unum sit imperium."*[29] The *Corpus Iuris* represented a particular kind of political

26. *See* Betti, *Hermeneutics as the General Methodology of the* Geisteswissenschaften, in J. BLEICHER, CONTEMPORARY HERMENEUTICS 51 (1980).

27. J. DAWSON, *supra* note 18, at 124; *see also* Thomas, *Le Langue du Droit Romain,* ARCHIVES DE PHILOSOPHIE DU DROIT 103 (1974).

28. Imperial, governmental or legal (magisterial) power.

29. "The unity of the law is founded upon the unity of the empire."

order or sovereignty and would, with little adaptation, equally well serve the propagation of an imperial or politically unifying theme in the fragmented west of the twelfth and thirteenth centuries as it had satisfied the ideological needs of Justinian as universal lord of the earlier eastern Roman Empire.[30] The *Corpus Iuris* had the status of *lex sacra* (sacred law) for ideological and political reasons; its universality was directly related to the concept and extension of empire based upon the model of imperial Rome or *sacrum Romanum imperium* (holy Roman Empire).

More important, however, than the postulation of an explanation for the status of the *Corpus Iuris* is an analysis of the exegetical techniques that constituted the text as a system and as statutory law in the original sense of *statutum*—that which is set up or authoritatively laid down. Just as the Church had attributed to the Bible the status of truth as being the inherent property of the word of God, so the glossators based the entire apparatus or technique of exegesis upon the truth or reason of the code. The code as written law was to be treated in its entirety as *ratio scripta* (written reason), as the expression of a divine and universal reason imbued with the status of sacred law (*lex sacra*). Not only did the code contain the *complete* law, not only was it exhaustive, but it was also perceived to be a rational unity, a logically coherent whole which, by virtue of the eminent qualities of its author and the uniquely logical character of his historic will, was perceived to require faultless obedience and application.[31] The text became a primal discourse which, for reasons of its source, was to be treated as, or better, made to appear to be faultlessly authoritative.

The specific techniques of exegesis build upon the ideological requirements of universality and reason.[32] Just as the ideology of the source of law

> has the effect of transforming successive historical legislators into one "pontifical" legislator, so also it transforms scattered texts into a single Text. This Text is implemented by a rigorous method and its presuppositions are developed virtually indefinitely by reference to its own internal logic; it thus extends itself stage by stage and can claim finally to have regulated everything under its unified categories.[33]

A science of the text, a science of the order and logic of the written law, is developed in the diverse forms of the method of the gloss: "the work of applying grammatical, etymological and logical techniques to standardize and adapt the ancient texts. Grammar, lexicology and logic are all required

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30. *See* Q. SKINNER, *supra* note 21; W. ULLMANN, *supra* note 18, at 83.

31. *See, e.g.*, P. LEGENDRE, JOUIR DE POUVOIR (1976); J. LENOBLE & F. OST, *supra* note 8, at 219.

32. H. KANTOROWICZ, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW (1969) provides the best introduction to the methods and texts of the glossators. For further references to sources, see Q. SKINNER, *supra* note 21; W. ULLMANN, *supra* note 18.

33. J. LENOBLE & F. OST, *supra* note 8, at 227.

to function in a unitary fashion so as to control the movement towards the sense (the *ratio*) of which the Text is the bearer."[34] The key to the glossatorial method, however, is not so much its analytic character per se—its rigorous pursuit of "grammatical" meanings—as its use of varying forms of that method to create and maintain an orthodoxy based upon the integrity of the text and fidelity to the general method of exegetical restrictions upon interpretation and justification. In many senses the function of transmission outweighs any particular form of exegetical method, and where major doctrinal debates have emerged they have used arguments as to method precisely to reinstate the "original" or "true" text. Luther, and the Reformation in general,[35] sought a return to the unadorned biblical text, free from the commentaries and dogma of the Roman Church. Similarly, the commentators or post-glossators, in challenging the earlier glossatorial school, argued that the growing apparatus of glosses—of *notabilia* (summaries), *distinctiones* (classifications), *brocardica* (maxims), *quaestiones* (problems of law), and later *regulae* (principles), *materiae* (introductions) and *summae titulorum* (synopses of titles)[36]—were threatening to obscure the original Text and the original meaning or will which underlay it. The commentators sought to recover the true Text, to restore the integrity of the sovereign word, and the later humanist challenge to both the early schools of exegesis took a very similar form. For the legal humanists, however, the Text itself, the *Corpus Iuris,* was to be questioned philologically and was to be replaced by a prior, stronger Text, the surviving documents of Roman law (*ius commune*) itself. The humanists were concerned to recover and to transmit the original text or sources of the *ius commune* (civil law) rather than to rely upon their secondary representation in Justinian's compilation. Crucially, however, the change in the object of interpretation was not to be matched by any corresponding revision of the primary status of the texts interpreted nor in the function of the interpretative method, that of restoring the legal orthodoxy and reinstating the genuine classical "idea" or "spirit" of the law,[37] of returning to an authentic or "true Latinity" (Budé) by means of a philological restoration of the real textual monuments of Roman law.

While there are obvious dangers and clearly much scope for error as to historical detail, it might nevertheless be useful to sketch the general form of the gloss as intratextual technique before moving on to summarize the later hermeneutic inheritance of, and dependence upon, this early exegesis.

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34. P. LEGENDRE, *supra* note 18, at 94.

35. For an account of the principle of *sola scriptura,* see D. KELLEY, *supra* note 21; 2 Q. SKINNER, *supra* note 21.

36. For useful discussions and references, see J. FRANKLIN, *supra* note 21; H. KANTOROWICZ, *supra* note 32; P. STEIN, *supra* note 21. The object of the attack was the monumental *Glossa Ordinaria* of Accursius, written and circulated around 1250.

37. *See* D. KELLEY, THE FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP (1970); *see also* sources cited *supra* note 36.

Roughly in the order of their textual importance they may be listed as follows.

(1) The tenet of *doctrine.* Reference here is to the manner in which the characteristic form, and to some extent even content, of the primary Text is mapped in advance or is already known to the priesthood of its interpreters. Theological and legal dogmatics predetermine the source, the authorship and authority of the unified Text as system and establish in advance the detailed "rules of recognition" for the validated discourse: "questions of heresy and unorthodoxy in no way arise out of fanatical exaggeration of doctrinal mechanisms; they are a fundamental part of them."[38] St. Augustine, for example, remarked on several occasions that our path through the gospels is marked not by visibility or sight but by faith;[39] the literal sign is distinguished from the figurative by reference to the creed of charity or, more generally, by reference to the established authority of the church. Legally comparable textual mechanisms are found in the introduction to the *Corpus Iuris* but, more importantly, are essential facets of the glossatorial technique. The form of the text is that of the complete law—it is exhaustive of all the legal possibilities—and in terms of its content, it is free of contradiction and repetition. No two statements, claimed Accursius, are *"contraria"* (opposed) or *"similia"* (the same). In short, the text is unified in advance; it represents a very peculiar and very special object of knowledge, and it is constituted as sacred writ (something written and something sent) to be handed on under very carefully controlled circumstances.

(2) The tenet of *legality* or principle of restrictive interpretation and commentary. Particularly in the case of legal interpretation the stress upon the written source of any rule application or judgment is doctrinally extremely strong. Citation and quotation are the standard material of legal study and legal judgment alike, and even within the common law tradition the most usual form of justificatory argument is reference to "old law" and to its scriptural forms in the plea roll (established pleadings) writs and later in precedent or statute.[40] The more general purpose of the concept of legality, however, is definitional. The written law defines all social relations and resolves all social conflicts by reference to the legal Text. The validity of the judgment is also its justification, its proximity to the literal meaning of the rule. A brief reference can then be made to the general form of legality as a textual methodology, referred to in the *Corpus Iuris* and adopted by

38. M. FOUCAULT, *supra* note 9, at 226; *see also* R. DEBRAY, *supra* note 1. For contemporary debates as to "recognition," see B. JACKSON, SEMIOTICS AND LEGAL THEORY (1985). For an interesting account of linguistics, which deals with this specific issue in terms of the "preconstructed" in discourse, see M. PECHEUX, *supra* note 9.

39. ST. AUGUSTINE, *supra* note 10.

40. *See* P. STEIN, *supra* note 21; Kantorowicz, *The Quaestiones Disputatae of the Glossators,* 16 REVUE D'HISTOIRE DU DROIT 1 (1939). The issue of the partial distinctiveness of the common law is beyond the scope of this article.

the glossators, and indeed by Bracton and the early literary exponents of the common law, as that of "procedere ad similia" (proceeding by analogy, or from like to like). Where St. Augustine refers to "similitude" as a principal feature of the gospels, and St. Thomas to the textual production of "concordances," the authoritative commentary takes a legal form in the glossatorial use of restricted analogies. Interpretation begins with *interpretatio declaritiva* (*significatio*, or lexical gloss) and moves with great caution towards *comprehensio legis*, the ascertainment of the intention and consequent scope of the norm (*mens legis*).

(3) *Unity* of meaning and *univocality* of language form a further tenet of the glossatorial technique. It is essential to dogma or doctrine that the rule—the normative resolution to a dispute—is received not as the invention of the glossator but rather as the restoration of the text by means of strictly logical techniques: "in the epiphany of the law the jurist counts for nothing."[41] The text has only one meaning, and the specific rule is univocal: the signifier is the neutral medium of the prior signified, the written representation of a prior speech. At the level of glossatorial technique the unity of meaning and univocality of language were the principal object of a diversity of procedures. Without entering into details, it can be noted that the operation of the marginal gloss was in fact highly sophisticated. The reading (*legere*) of the text would take the form of a very specific order of procedures leading from an introductory contextualization (*notabilia/materia*) to a reading of the text itself which would examine both the terms of the rule in question and the rule itself in the light of their coherence with other instances or usages elsewhere in the text (*connotare*) and also, as time passed, their consonnance with other glosses. Throughout the endlessly complicated array of textual mechanisms of explanation, the impetus was always the same mixture of reductionism and of order being placed upon the chaos of social relations.

(4) Finally, the tenet of *resolution*. Whatever the difficulties of procedure and of reading, the text must be made to speak to, and further to resolve, the issue (either *quaestio* or *causa*) before the student or judge. The exegesis of the glossators and of the Renaissance made considerable academic play upon the fact that legal problems were resoluble problems, and the method of *disputatio* (scholarly debate on moot points of law) in particular represents an early version of the "problem of law" as a discrete and resolvable legal issue. Law indeed is differentiated from other discourses precisely by the strictly normative character of its texts and the consequently exhaustive pre-

41. P. LEGENDRE, *supra* note 18, at 96. For an earlier statement of a similar principle, the Dean of the Faculty of Law at Paris, wrote in 1857, "the whole body of statute law, the spirit as well as the letter of the law, with a broad account of its principles and the most complete treatment of the consequences which flow from it, *but nothing but statute law:* such has been the motto of the teachers of the Code Napoleon." C. PERELMAN, *supra* note 21, at 23.

cognition or foreknowledge that the jurist has of legal answers to legal questions. The text provides for everything in advance; the text needs merely to be repeated and applied, comprehended and taught. For the glossators it was never necessary to leave the boundaries of the text. Law was tradition and monument, authority and meaning; it was to be *preserved* and transcribed, invoked and handed down; it came from above and was applied below.

C. *Tradition*

The importance of treating the law as something to be preserved and taught—the medieval dialectic of *doctrina* (teaching) and *disciplina* (learning)—meant that an important aspect of the post-glossator's role was that of the custodianship of tradition. Where tradition was threatened either by inaccuracy, failure of memory or loss of relevance, the tools or techniques of recollection become important objects of study in their own right. Legal humanism in particular was meticulous in its attention to philological detail. The work of the philologists indeed has an immense significance in its own right and, via the work of the Grammarians and of de Saussure,[42] can claim a relatively direct relation to contemporary linguistics and certain versions of semiotics. In the present context, however, the significance of tradition and of the textual bearers of tradition have a more direct relevance in terms of the much more contemporary justification provided for exegetical strategies of religious and legal interpretation in terms of *hermeneutics.*[43] Although it is not here possible to deal with hermeneutics in any detail, a brief analysis of the fundamentally exegetical character of hermeneutics can bring to light certain further features of the conception of law as a textual system.

In its contemporary Germanic derivation in the nineteenth-century work of Schleiermacher and Dilthey,[44] hermeneutics provides exegesis with a seemingly modern philosophical justification in the philosophy of understanding. More important, however, than the claims made by the theologian Schleier-

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42. With regard to the Grammarians, see the classic text of C. LANCELOT & A. ARNAULD, A GENERAL AND RATIONAL GRAMMAR (ed. 1968); *see also* F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (ed. 1966).

43. The classic modern text on hermeneutics is H. GADAMER, TRUTH AND METHOD (1979); within the Anglo-American tradition of jurisprudence the term "hermeneutic" has been used infrequently and inconsistently up until the past decade. Concern with law and language is still somewhat of a peripheral interest though we now find the term "hermeneutic" occasionally debated. *See, e.g.,* R. DWORKIN, POLITICAL JUDGES AND THE RULE OF LAW (1977); LAW, MORALITY AND SOCIETY ch. 1 (P. Hacker & J. Raz eds. 1977); N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY app. (1978); THE POLITICS OF INTERPRETATION (W. Mitchell ed. 1983).

44. F. SCHLEIERMACHER, HERMENEUTIK (ed. 1959). *See generally* R. PALMER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER AND GADAMER (1969); H. RICKMAN, MEANING IN HISTORY (1961).

macher as to the scope and theoretical character of a general hermeneutics,[45] is the historical context and the textual practice that developed within religious, and especially legal, hermeneutics. Far from being in any open or dialogic sense a philosophy of understanding, hermeneutics was a discipline of strictly textual interpretation which reinvoked the traditional exegetical concepts of source, intentionality and unity of meaning to propose historically validated or correct interpretations. Hermeneutics, which Schleiermacher defined as the "art of avoiding misunderstandings," and Dilthey as an attempt to "understand the author better than he understands himself,"[46] was itself a reaction to the breakdown of the classical tradition—the late eighteenth-century and early nineteenth-century loss of faith in unitary meanings and the apparent decline in relevance of the humanist values. Dilthey is quite explicit that the hermeneutic method is doctrinal and political: "it is the strange fate of hermeneutics . . . [that] it only gains recognition when there is a movement among historians which considers understanding individual historical manifestations an urgent matter for scholarship,"[47] that is, for theological or jurisprudential study.

The first moment of hermeneutic interpretation can be termed that of historical recovery or the preservation of a threatened tradition, a tenet which gains a very precise and illuminating definition in the work of Gadamer; hermeneutics is the doctrine of *translation.*[48] Etymologically, of course, the word hermeneutics derives from the Greek myth of Hermes, the herald of the gods. Hermes was the messenger of the gods who would translate and communicate an original and divine speech to its human audience. The foreign and strange signs and symbols of the gods had to be translated into familiar, recognizable and intelligible human speech. Gadamer, however, develops this process of transmission into a principle of interpretation as translation in which essential oppositions are constituted between the divine and the human, the foreign and the familiar, the written and the spoken, and lastly and most broadly, the past and the present. The notion of translation is pivotal and has a peculiar relevance to legal hermeneutics.

A primary though little studied feature of the law is its language.[49] Both in the civil and the common law traditions, the language of the law has been a foreign or alien one. In the case of civil law the language was that of classical Latin until the mid-seventeenth century. From the first vernacular

45. A useful guide to the original texts is to be found in H. SCHNADELBACH, PHILOSOPHY IN GERMANY, 1831-1937 (1984); *see also* T. TODOROV, *supra* note 10.

46. W. DILTHEY, SELECTED WRITINGS 258-60 (1976).

47. *Id.* at 261.

48. H. GADAMER, *supra* note 43, at 147.

49. For useful works on the common law dimension of this problem, see Cairns, *Blackstone, An English Institutist,* 4 OXFORD J. LEGAL STUD. 318 (1984); Shoeck, *Rhetoric and Law in Sixteenth-Century England,* 50 STUD. PHILOLOGY 110 (1953); Woodbine, *The Language of English Law,* 18 SPECULUM 395 (1943).

institutional works of the seventeenth century to the present day, the conceptual structure, key terms and above all the *method and style* of the legal discourse remain both latinized and, in sociolinguistic terms, alien. In the common law tradition Latin was only very briefly the principal legal language, and it was largely displaced in the thirteenth century by law French which, together with certain Latin relics, remains an important constituent of legal language. Hermeneutics, for Gadamer, recollects and interprets the documentary expressions of religious and legal culture. It has the power to assign historical significance and to restore original meanings:

> [A]ll that no longer expresses itself in and through its own world—that is, everything that is handed-down, whether art or other spiritual creations of the past, law, religion, philosophy and so forth—is estranged from its original meaning and depends for its unlocking and communication [upon hermeneutics].[50]

Hermeneutics translates and reinstates meanings that are unavailable to common knowledge or to ordinary language, that were spoken in the past but remain to control the present, that were *written* and require contemporary interpretation. For Dilthey, history is itself a great dark book—"the collected work of the human spirit, written in the languages of the past"[51]—and Gadamer too proposes the exemplary foreign character of writing: "the full hermeneutical significance of the fact that tradition is linguistic in nature is clearly revealed when the tradition is a written one. . . . [The] written texts present the real hermeneutical task."[52] The reasoning behind this emphasis upon the written sign and upon meaning as paradigmatically a textual phenomenon is the equation of the written with the foreign or strange—if not always with the divine then at least with the powerful. The written text, for hermeneutics just as much as for the earlier exegesis, is simply the representation of a prior speech; it is the sign of the authorial intention: "[t]he sign language of writing refers back to the actual language of speech. . . . All writing is . . . a kind of alienated speech, and its signs need to be transformed back into speech and meaning."[53] Hermeneutics, in other words, will provide the rules for rediscovering the "full speech" or self-presence of the rational author or valid source of the text.

The notion of interpreting the written by reference to its concealed source—a prior unity or speech—effectively reinstates the humanist claim that there is always a unitary meaning to the text, by virtue, if by nothing else, simply of its being treated as text in the strongest sense of the term. The text is here again a system; it is gospel or law which will provide the basis of

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50. H. GADAMER, *supra* note 43, at 147.
51. W. DILTHEY, *supra* note 46.
52. H. GADAMER, *supra* note 43, at 351-52.
53. *Id.* at 354. On the linguistic aspects to this position, see J. DERRIDA, OF GRAMMATOLOGY, *supra* note 12; *see also* J. DERRIDA, MARGINS OF PHILOSOPHY 307 (1982).

commentary either as preaching or judgment. Certainly there are numerous refinements and subtleties occasioned by the renewed theoretical tradition of exegesis as hermeneutics: a greater attention to historical semantics, to grammatical detail and indeed to problems of interpretation *as* application or judgment (*subtilitas applicandi*), but the goals of valid interpretation and of objective textual meaning remain constant. The text must be made to speak to the present, and while hermeneutic interpretation actively transmits the historical meaning to its contemporary significance, hermeneutics itself is simply a normative discipline erecting the contours and concepts by which we come to know the objectivity of meaning and the rational value of tradition.[54] In the terminology of Emilio Betti, a leading contemporary scholar of legal hermeneutics, hermeneutics establishes the canons of interpretation; it provides normative techniques which will successfully restrict interpretation to the text and will eventually provide an institutionally satisfactory meaning for the text. By the essentially traditional means of reconstruction and integration, the text as system is reestablished or, in Betti's terms, the canon of the "coherence of meaning, the principle of totality" is vindicated: "the meaning of the whole has to be derived from its individual elements, and an individual element has to be understood by reference to the comprehensive, penetrating whole of which it is a part."[55]

II. TEXT AS SOCIAL FUNCTION: FROM RHETORIC TO DISCOURSE

The two major traditions of hermeneutics—those of theological and jurisprudential interpretation—were products of an analogous impetus or ideological motive. What united them was the attempt to revive textual traditions which, while still comparatively well known, had lost or obscured their original meanings. Their meanings had become alien or unavailable, as, for instance, was the case with the understanding of the Bible and Luther's determination to reassert principles of *sola scriptura* (the text alone) and *sensus literalis* (literal meaning) against the dogma of the Roman tradition. It has been the implicit argument of the preceding survey of traditions of interpretation that a similar sense of threat to dogma and doctrine lies behind the more contemporary reawakening of jurisprudential concern with hermeneutics. Where critical legal studies is genuinely and substantively critical, it forces the legal institution to reopen the methodological baggage of exegesis, philology and hermeneutics as the justificatory techniques for judgment according to the "rule of law." The epithets and labels of dispute—those,

54. Contemporary philosophy of law certainly treats legal hermeneutics in this sense. According to N. MacCormick, the hermeneutic viewpoint (or internal aspect of legal rules) entails both a cognitive and a volitional element: the end state produced by the rule is viewed as desirable by the rule user. N. MACCORMICK, H.L.A. HART (1981).

55. Betti, *supra* note 26, at 59.

for example, of objectivism and subjectivism, positivism and nihilism, semiotics and psychoanalysis—have a certain polemical novelty in the legal sphere. This debate, however, is in itself frequently in danger of wearily repeating the arguments and assumptions—political and linguistic—of numerous earlier controversies where the most noticeable result of the challenge to the legal institution and its textual system had merely been that it served to reinstate fidelity to the text and the accompanying procedures and principles of scriptural repetition. Rather than enter those debates here or endeavor to provide a more detailed critique of the persistence of exegesis, this article shall instead refer briefly to alternative issues and to a relatively obscure tradition of intepretation, rhetoric. The motive underlying such a reference is not that of invoking a further esoteric body of knowledge and technique but rather that of raising the possibility of a different terrain of debate in which the epistemological antinomies of reason and nihilism, sociality and solipsism, discipline and discretion are no longer the sole guiding choices for the interpretation of legal text and legal power.

The interpretative tradition which comes closest to the aims and aspirations of critical legal studies is neither humanist nor dialectic, neither structuralist nor semiotic, but rhetorical. The tradition in question is to some extent the excluded figure in the post-medieval academic curriculum and a few comments upon its history as a discipline are necessary.[56] The earliest explicit study of legal argument and legal judgment was linguistic; it dates back to the fifth century B.C. and takes the form of technical or forensic manuals associated initially with the work of Corax and Tisias of Syracuse.[57] The manuals classified and illustrated the principal categories and techniques of "effective argument" or "persuasive speech" before the newly constituted democratic juries of Sicily and Greece. The conceptualization of the discipline is best represented in the work of Aristotle, and it was to a large extent an Aristotelian conception of rhetorical study and criticism which was developed by the Roman forensic orators Cicero and Quintilian. It is the conception of language, text and technique in the synthetic works of Aristotle and Cicero that will be analyzed here and distinguished, where necessary, from the later and much weaker traditions of rhetorical study associated particularly with the Renaissance and, as the other of logic or the "science" of reason, with the rationalism of the eighteenth century.

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56. Among the more interesting discussions are J. DERRIDA, *supra* note 53, at 207; T. EAGLETON, WALTER BENJAMIN (1981); G. KENNEDY, CLASSICAL RHETORIC (1980); M. PECHEUX, *supra* note 38; T. TODOROV, THEORIES OF THE SYMBOL (1982). For a historical account of the jurisprudential relevance of rhetoric, see Goodrich, *Rhetoric as Jurisprudence*, 4 OXFORD J. LEGAL STUD. 88 (1984).

57. In the traditional accounts reported by Plato and Aristotle, rhetoric was the invention of a teacher, Corax of Syracuse, and found its original use in arguments as to property rights before the legal assemblies of the newly established democracies in Sicily and Greece. ARISTOTLE, RHETORIC bk.1; PLATO, GORGIAS.

Long before the emergence of any class or profession of lawyers, rhetoricians studied the workings and practices of the legal assemblies (*agora*) as part of a general study of the politics and power of public speech. Rhetoric was secular in its origins and popular, rather than hieratic, in its practice. It was concerned not with prior truth or revelation but rather with practical criticism and the relationship of arguments used and actions proposed to the needs of the immediate historical community. The first tenet of rhetorical interpretation can thus be broadly phrased as follows. In definitional terms it can be observed that rhetoric is defined as an explicitly political form of study. For Aristotle, rhetoric studies contingent (historical) human behavior and is consequently "a branch of the science dealing with behavior, which it is right to call political."[58] For Cicero, similarly, rhetoric is defined as *civilis ratio,* (political reason), and for both Cicero and Quintilian, rhetoric deals with "speaking well in civil matters."[59] More profoundly, the rhetorical *method* of study itself ensures a historical and political character to interpretation and argument. For Aristotle, the political character of speech is contained in the very notion of genres of rhetoric, genres which are defined by reference to institutional factors relating to the speaker and the place of speech. In essence, there are for Aristotle three spheres of public speech, each directly related to the function of the assembly being addressed and the institutionally determined goal of the speaker: policy, justice and honor being the respective aims of the deliberative, forensic and the epideictic assemblies. That speech orientates the public sphere is even clearer with Cicero who devotes considerable attention to the related conceptions of *inventio*—the "discovery" of arguments or starting points for argument—and *loci communes*—the subjects of argument or topics, arguments traditionally associated with specific objects of speech.[60]

Invention is the first stage of the classical rhetorical process. The rhetorical discovery of arguments is social, according to Cicero, not simply because the topics of argument were drawn from the realms of public discourse—each genre or institution has its specific topics—but more precisely because rhetoric was the study of appropriate (ethical) or useful (political) speech. Very briefly, there was a conceptual or occasionally philosophical dimension to rhetoric which located arguments in relation to the past purposes and future needs of the community. It was not simply that the speech was viewed as functional—that it accompanied and guided institutional practices—but also that it was by its very nature tied to the community, that thought was

58. ARISTOTLE, *supra* note 57, at 1356a.

59. For discussions of the definition and scope of rhetoric, see CICERO, DE INVENTIONE bk.1.1-5 (*eloquentiae studium*); QUINTILIAN, INSTITUTIO ORATORIA bk.3.6 (*bene dicendi scientia*).

60. CICERO, TOPICS 2.2, 2.7; *see also* E. GRASSI, RHETORIC AS PHILOSOPHY (1980); TACITUS, A DIALOGUE OF ORATORS 95-103 (ed. 1911).

intrinsically a social activity and should be studied as such, in terms both of its topics and its topicality.

The second tenet of the rhetorical interpretation follows from the first. Language was, for the rhetoricians, inherently social; it was not to be studied as grammar or the ideality of *langue* but rather as a complex and stratified usage, as *parole* or performance. The correlate to this discursive approach to language was a view of the text not as a system but as a series of functions. It is the rhetorical and social organization of speech—the relationship of text to institution and institutional functions—that is studied by the classical rhetoricians. In such a conceptual framework neither text nor institution can claim to be privileged or to belong to a realm of scientific necessity. The text is instead a series of rhetorically engaged *probabilities* drawn from and applicable to a specific audience. The concept of audience[61] raises a third feature of the rhetorical interpretation and a second aspect of the text as function, namely, that in its refusal to privilege any specific genre or audience the rhetorical analysis implicitly deconstructs the exegetical conception of the unity and univocality of the written source. The exegetical tradition consistently presented the discourse of the law as an inexorably rational transmission of written meanings. The legal text was a series of monologic normative formulations, an object of "scientific" analysis, and required simple application and obedience. The law could not be questioned; it was given in advance and merely needed careful professional restoration. For the rhetorical tradition, however, all speech is dialogic: it is the product of a process of communication entailing a context, a speech situation, and varying factors of expectation and adaptation to audiences and their probable responses. "[A]ny concrete discourse (utterance) finds the object at which it was directed already as it were overlain with qualifications, open to dispute, charged with value."[62] In classical terms the dialogic character of legal speech was expressed in terms of the power of eloquence. Speech was a part of the public sphere of discourse, and for those with access to the public sphere eloquence was power, or at least it was the possibility of participation in the political, legal or ideological process of the city state. The Roman historian Tacitus specifies the condition of the great oratory of the past in the following terms:

> [T]here was the high rank of the defendants and the importance of the issues, which of themselves were in the highest degree conducive to eloquence . . . . For the power of genius grows with the importance of affairs, nor can anyone produce a speech that is brilliant and renowned unless he has found a case worthy of it.[63]

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61. A category particularly stressed by C. PERELMAN & L. TYTECA, THE NEW RHETORIC (1969). For a critical analysis, see F. MORETTI, SIGNS TAKEN FOR WONDERS ch.1 (1983).

62. M. BAKHTIN, *Discourse in the Novel,* in THE DIALOGIC IMAGINATION 276 (1981).

63. TACITUS, *supra* note 60, at 115-16.

Alternatively, Tacitus questions the utility of dialogue or eloquence where the public sphere has radically contracted and survives only, at least in theory, in the languages of the academy and opposition.[64] Where exegesis replaces dialogue, where authoritative commentary displaces dialectic, then recovery of the rhetorical facets of all language use itself becomes an object of directly political struggle.

CONCLUSION

Just as the exegetical tradition of text and interpretation has its modern equivalents or counterparts both in explicit conccptions of legal hermeneutics and in various substantive positivistic textual strategies, so too the rhetorical tradition of interpretation, to some extent, now travels under new signs or carries different names. Certainly, aspects of the sociology of language, critical stylistics and various applications of discourse analysis all come close to renewing a genuinely rhetorical tradition of text and interpretation.[65] While it is not possible here to summarize the details of contemporary developments in disciplines as diverse as media studies and text stylistics, it is perhaps possible briefly to advert to the common edge that the rhetorical enterprise lends to any discipline that examines the symbolic and political dimensions of its communicative practices.

The rhetorical analysis has its basis in forms of political criticism which endeavored to evaluate the relation and appropriateness of language use to its specific context as well as to evaluate the content of the speech in terms of its value for the immediate historical community. These two criteria of analysis combine in the simple claim that all speech is dialogic in character and consequently is best understood not solely in the normative linguistic terms of the various forms of exegesis but rather in the material terms of its specific context and uses. The issucs raised are those of text and institution, discourse and power, and they are to be posed—whether within critical semiotics, sociolinguistics, discourse analysis or text stylistics—as forms of uncovering the polysemy—the inherently tropological character—of all language use. Such a task is of an especially radical character in relation to the legal institution and its texts, precisely because legal method and legal interpretation postulate the unitary nature of legal language and the mon-

64. The Roman historian Tacitus composed the *Dialogue of Orators* around 100 A.D., and his account of the decline of rhetoric is both amusing and persuasive. Useful discussions of the themes there raised can be found in T. EAGLETON, *supra* note 56; T. TODOROV, *supra* note 56.

65. This line of argument can be followed most clearly in relation to media studies. *See, e.g.*, H. DAVIS & P. WALTON, LANGUAGE, IMAGE, MEDIA (1983); CULTURE, SOCIETY AND THE MEDIA (M. Gurevitch, T. Bennett, J. Curran & J. Woollacott eds. 1982). Various arguments taken from literary criticism can be found in P. DE MAN, ALLEGORIES OF READING (1979); T. EAGLETON, LITERARY THEORY 194 (1983).

ologic character of legal judgment as essential legitimating features of legal discourse. The analysis of law as rhetoric has to challenge those claims as to the privileged status of legal speech at every level and in each of the guises that they assume: philosophy of law, substantive jurisprudence and legal practice. In a recent analysis of philosophical semiotics, Umberto Eco suggests that "behind every strategy of the symbolic mode, be it religious or aesthetic, there is a legitimating theology . . . a positive way to approach every instance of the symbolic mode would (therefore) be to ask: which theology legitimates it."[66] The rhetorical tradition poses a further and more concrete question; in addition to the abstract designation of the form of mystification or ideology, it also develops a more stringent line of questioning: what politics does this discourse enshrine and what are the political effects of this text—not simply what does it say, but what does it do, by what means and to whom?

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66. U. Eco, *supra* note 16, at 163.