

LAW AND SEMIOTICS

VOLUME 1



EDITED BY
ROBERTA KEVELSON

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PLENUM PRESS • NEW YORK AND LONDON

Library of Congress Cataloging in Publication Data

Round Table on Law and Semiotics (1987: Pennsylvania State University)

Law and semiotics / edited by Roberta Kevelson.

p. cm.

"Proceedings of a Round Table on Law and Semiotics, held April 11-13, 1987, at the Center for Semiotic Research in Law, Government, and Economics, Pennsylvania State University, University Park, Pennsylvania"—T.p. verso.

Includes bibliographies.

ISBN 0-306-42803-2 (v. 1)

1. Semantics (Law)—Congresses. 2. Law—Philosophy—Congresses. 3. Semiotics—Congresses. I. Kevelson, Roberta. II. Title.

K213.R68 1987

340'.11—dc19

87-32715

CIP

Proceedings of a Round Table on Law and Semiotics, held April 11-13, 1987,
at the Center for Semiotic Research in Law, Government, and Economics,
Pennsylvania State University, University Park, Pennsylvania

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A Division of Plenum Publishing Corporation
233 Spring Street, New York, N.Y. 10013

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ACKNOWLEDGMENTS

Grateful acknowledgment is made for the support of The Pennsylvania State University for this First Round Table in Law and Semiotics. We thank the following: The Berks Campus; Commonwealth Educational System; College of the Liberal Arts; Philosophy Department, and Keller Conference Center. We thank, also, Svoboda's Book Store for the book exhibit. Special thanks to Cindy Palecek for her preparation of the manuscripts in readiness for publication. Harold Brogan assisted in the coordination of the Conference, and we are grateful for his help.

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INTRODUCTION TO THE FIRST ROUND TABLE ON LAW AND SEMIOTICS

Roberta Kevelson

I. MOTIVE FOR ROUND TABLES

The first Round Table on Law and Semiotics was convened April 11-13, 1987 at The Pennsylvania State University under the auspices of The Center for Semiotic Research in Law, Government and Economics. Its primary purpose was to bring together in open forum scholars who at present represent several young, intellectually exciting approaches to the study of The Law but have had to date little or no opportunity to examine where or why these new approaches significantly overlap at critical junctures. These various approaches also seem to diverge at points where one might be led to expect an overlapping, a superimposition, a dovetailing, or at the least, a complementarity of views as a prelude to a much needed comprehensive and even holistic picture of a theory of law.

It would be a simple matter to merely say that the several approaches could be categorized under the following heads, e.g.: traditional jurisprudence; philosophy of law; social science perspective on law; law as rhetoric in legal practice, proceedings and discourse; Continental hermeneutics as integral aspect of Structuralism including its pre- and post-stages; positivistic law; natural law; and what is

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here presumed to be an overarching view: the 'method of methods' which may unify these various approaches, namely a Semiotics of Law. Semiotics of Law is itself far from a single theory. It is at this time a generic term which subsumes at least two fundamentally differing approaches: the one is a continuing development of the Greimasian school and the other is derived from the theory of signs of Charles S. Peirce.

With respect to the general category, Semiotics of Law, it is not yet possible to venture a prediction as to which if either of these two principal methods of legal semiotics will come to be regarded as equivalent with a *generic* Legal Semiotics, as vaseline, frigidaire and xeroxing have come to be, as tradenames, equivalent in meaning with their respectively referent generic terms.

The Center for Semiotic Research in Law, Government and Economics was established in 1984 with the intention of supplementing Peirce studies by providing a locus for colloquia, publications and all related activities of special research in the area of Peirce's contributions to and unpublished thought on the practical sciences -- on the organizations, or sign-systems of social value which epitomize, as institutions, manifest systems of Peirce's pragmatism. It was believed that a semiotics of law, *based on Peirce's views* would accomplish a two-fold purpose: 1) a research center, as initially conceived, would function as an interpretive instrument or filter for large portions of Peirce's thought still largely unexplored; and 2) a mediative function for practical law. By analyzing special problems in law and related practical sciences, from a Peircean semiotic point of view, studies in the field of Semiotics and law would be capable of *becoming utilized* in the actual practice of these professional fields by indicating how persistent problem areas might be looked at from another light, and from this light be more readily resolved. Semiotics of law was assumed to have practical consequences, as Peirce maintained.

However, it became apparent shortly after the establishing of the Center that not only were all methods of legal semiotics *not* Peircean in origin, but were in their respective foundational assumptions not likely to be compatible with Peirce's semiotics without some radical, transforming development of the idea, 'legal semiotics'. It was clear that if one would intend to be faithful to Peircean semiotics then holding a fixed notion of what an idea of Peircean semiotics of law means would be a violation of the spirit of Peirce's thought; this above all emphasizes the growth and development of initiative ideas and also the stricture that *all leading principles must be subject to revision*.

Even the *idea* of Peircean semiotics, as leading principle, must itself be an open idea, the meaning of which must be transformable through the process of defining it. A *metasemiotics* view of a semiotics of law must leave open the possibility for revision of the leading principle of the term, "legal semiotics."

Therefore, if legal semiotics is an idea which accumulates and evolves its meaning in the very process of self-examination, then a process of investigating law investigates itself as well in any semiotic process of inquiry. It became apparent that the most appropriate contribution the Center could make to the area of a Peircean semiotics would be to act as a sponsor, an inclusive rather than exclusive agent for inquiry of all kinds into the general topic of law and semiotics. If the Center was to be in a genuine sense a forum for free inquiry it must, like any pluralistic and democratic organization, provide opportunities for conflict. It must not only recognize conflicting views, but must actively seek out and entertain them. The Center is one of five international centers for law and semiotics which sponsored and helped to establish the new International Association for Law and Semiotics.

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There is an analogy here between the changing interpretation of the idea of free expression in the First Amendment of the United States Constitution, and the changing interpretation of the primary goal of a Center for Semiotic Research in Law based on Peirce's theory of signs understood as a process of the transformation of meaning through the continuous interpretation of meaning-as-sign:

Just as the original notion of free expression in the First Amendment of the Bill of Rights presupposed that there existed a consensual agreement on shared and basic social values which were inviolable and above attack, later interpretations of the First Amendment, after 1798, came to *justify* the apparent absoluteness against governmental abridgement of the right of free expression by arguing that a free society not only tolerated conflicting and opposing views, criticism of government of the most severe and most fundamental kind, but, moreover, *required* such conflict in order to exist and grow as a free society. Freedom was said to *depend* upon criticism of authority. In an analogous sense, it is assumed here, Peircean semiotics as a method of free inquiry requires that no leading principle including one's own be sacrosanct and exempt from criticism, but rather, be part of the process of the growth of all ideas in concert with and in the course of meeting with other ideas.

It is Peirce's main contribution to philosophical thought, he says in his final years, that a Method of Methods as he conceives it should be the method of semiotic inquiry, the aim of which is to be able to 1) account for various discipline-specific methods of investigation and 2) evolve from these diverse threads of discourse general principles of a unifying nature.

It is this aim which characterizes the First Round Table on Law and Semiotics, and which will continue to characterize subsequent Round Tables in the next several years.

Two kinds of introduction will be made in this prefatory chapter of the First Round Table Proceedings. The first will introduce the participating *schools of thought* represented around the Table. The introductions are necessarily limited to overviews and short profiles and will unavoidably pass over most if not all of the urgent and contemporary issues which are topical in each respective frame of reference. The second kind of introduction will be of the persons who took part in this significant meeting and their views as presented. Again, only sketches are offered here of participating scholars, and only abstracts of a line or two will be offered as caption descriptions. The papers are presented in this volume with little major revision from the oral presentations, although constraints on length have, in a few cases, required deletion of much interesting and important information. Not every paper presented at the conference is included in this volume. A few presented, which are not part of this collection, will be commented on in this introductory chapter to provide the reader with as complete a picture of this major conference as is here possible.

We regret that the general discussion, which was exemplary in its openness and intensity, and which characterized the heuristic probing of the participants, was not recorded for editing into this volume. It should be stressed that this meeting was not a symposium which centered on one or two selected topics of a controversial and moot nature, but was a hub of many thoroughfares of inquiry into the basic notion of the law as a system of signs, from many sources, for the purposes of "transacting ideas" on this subject. Thus, it was not a problem-solving seminar so much as it was a marketplace, a locus of transaction and exchange, of establishing equivalences, when possible, between differing concepts of the term, Semiotics of Law.

In the Jamesian sense of ideas having meaning insofar as they have "cash-value" participants convened not with fixed and firm values assigned to their

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respective views, but with the intention to trade and to buy, and to change in the process their initial ideas on a semiotics of law into a kind of market equivalent. Therefore, since no absolute and generally accepted definition of a legal semiotics existed prior to this meeting, everything which interpreted the idea of legal semiotics adds to and transforms this base idea. The best definition, as was understood, was that which would continue to evolve so long as inquiry remained vital, forward moving, and therefore of an open, unstable, even nonparadigmatic nature.

It is fair to say that a working paradigm for continuing investigation of law and semiotics was the *prime motive* for convening. It is equally fair to say that a paradigm, prematurely arrived at, would abort the eventual and hoped-for comprehensiveness of a *stable* definition of legal semiotics. A working hypothesis has yet to be forthcoming. This initial discovery stage, or 'abductive' stage in Peirce's terms, will continue in the next and subsequent Round Tables. The Round Tables on Law and Semiotics should rightly eventually conclude with agreed-upon paradigms for future stages of semiotic investigation of law.

II. A PLURALISM BY METHOD

Although from a global view of semiotics and law activity, of its range across the several categories mentioned above, not all the possible approaches to law and semiotics were represented at this Round Table. It should be held in mind that the range is far wider than appears here. For example, one would expect little activity from a positivistic point of view, mainly because the basic tenets of positivism in any area are antithetical to methods of inquiry which assume that infinite interpretation of infinite sign functions requires that the system in question be open, and not closed as positivism requires; yet there is much activity by legal

positivists which is claimed to fall under the rubric of legal semiotics. The recent proceedings of colloquia on Law and Semiotics of the International Association report such diverse approaches.

Similarly, while one would not expect that proponents of one of the many definitions of natural law, which generally presumes an *a priori* or innate ability to distinguish between right and wrong which, links legality with legitimacy and legal regulations with moral structures, would find interest in a semiotic approach to law since a sign function is a product of human invention and not a manifestation of divine will as carried forward in the natural order; but there *is* significant research conducted on law and semiotics from the point of view of natural law theory. In this volume are papers which deal with semiotics and law from this perspective.

There is no paper in this collection which represents the concerns of legal drafting and semiotics, nor of jurimetrics, nor of computer science, artificial intelligence and legal semiotics. Yet these *are* areas of the general topic of law and semiotics in which there is much current and important work of this kind taking place. Also, while the concerns of modern linguistics are frequently referred to in a number of the papers included here, there is no single paper which is explicitly from the frame of reference of linguistics. The same can be said of social anthropology, of which law and semiotics are important areas of research today. There is some mention of the interdependence of law, politics and economics, but no single study discusses particular problems in the economic basis of law, nor, on the other hand, does any single study investigate the much discussed topic of an economic basis for constitutional law.

It cannot be stressed too often: any traditional discipline concerned with a set of problems and questions with regard to the substantive material it investigates may, with a shift of perspective, provide a point of departure for investigation from

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the semiotics viewpoint. The broad content of law is no exception. Approaches to law from the usual and traditional viewpoints of philosophy and of jurisprudence become now joined to this third predominant mode of examining law: semiotics.

Semiotics, it is often claimed, is a branch of philosophy. Others claim that semiotics is a branch of rhetoric. Still others claim that it is a branch of linguistics. What is claimed *here* is that semiotics is not a branch of any other discipline-specific mode of inquiry. It is a distinctive method of investigation in and of itself. Peirce's view was that all of what he regarded as his expanded logic may be seen as synonymous with what he meant by the term semiotics. Yet, as noted in several passages above, not all current roads to law and semiotics are via Peirce. Few indeed are.

At this First Round Table one could identify at least four almost distinct methods: 1) Critical Legal Theory, which one would tentatively group under the general head of jurisprudence since most people working in this area are practitioners and/or professors of law; 2) Continental Structuralism and Hermeneutics, as distinct from but dovetailing with traditional concepts of legal interpretation; 3) deterministic theories of law, e.g., Natural Law and Positivism; 4) Philosophical Ethics in its broadest embrace. A fifth category should also be listed, which falls under Legal Rhetoric and includes notions of Speech Acts. Not least as a strong sixth is Peircean Semiotics which may eventually be seen to support or perhaps shade all the above as a penumbra.

In the following few pages selected key features of two of the main methods represented at the First Round Table will be broadly defined: Critical Legal Theory, and to a lesser extent, Peircean Semiotics.

III. CRITICAL LEGAL THEORY

This short subsection on Critical Legal Theory should be prefaced by noting that all of the above methods mentioned, as well as those not represented at the Round Table, are not discrete categories of methodology but are linked with one another. These links are sometimes acknowledged. But more often they are overlooked or are not yet generally known. The assumption held here is that these interconnections will, when they become apparent, reveal an approach to Law and Semiotics which is of a complex, diversified, but *unified* nature.

For example, the key term in a Peircean process of semiotics is interpretation. Signs are Interpretants, or interpretive stages of entire processes of semiotics. People are interpreters *of* Interpretants, or signs. In a Peircean process of semiotics the emphasis is on the consequences of sign interpretation, i.e., on the result of rhetorical force which signs exert on both their ideational environments and on their contexts in the practical and phenomenal world. It is thus far little known and rarely expressed in relatively few writings on Law and Semiotics that it is a Peircean pragmatics --a semiotics -- which provides theoretical foundations for the movement in American law known generally as Legal Realism, as developed through Justice Oliver Wendell Holmes, through Jerome Frank, through Karl Llewellyn and others. This new approach to jurisprudential theory which emerged is well recognized by the term, or title, Legal Realism. Critical Legal Theory is a direct descendent of Legal Realism and therefore of Peirce. Critical Legal Theory is the 'new' Realism.

However, the Critical Legal Theorists have not as a group recognized this affiliation.

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On the contrary, Peirce's name is conspicuous by its absence from studies in Critical Legal Theory. It is just beginning to be visible in some current work by Critical Legal Theorists.

One of the most important collections of papers in Critical Legal Theory is the Proceedings of the Interpretation Symposium in the SOUTHERN CALIFORNIA LAW REVIEW, 58 1/2 1985. This major symposium was concerned with the following topics: "Interpretation Methodologies from other Disciplines"; "Hermeneutics and Legal Interpretation"; "Philosophy of Language and Legal Interpretation"; "Constitutional Interpretation". The contributors to this symposium opened up a new channel for inquiry among legal professionals and professors of law, although also included in this meeting were distinguished philosophers, sociologists, and representatives in general from both the professional and academic communities.

This symposium followed by almost a decade the great debate on law between Dworkin and Hart, i.e., between proponents of, respectively, moral and positive approaches to the function, meaning and use of the law. This debate is still ongoing among scholars of law and semiotics. It provided a wedge with which to open inquiry on the dearth of theory in law as it is presently taught in the law schools, particularly the law schools in the United States. Critical Legal Theory is speculative in degree and manner which does not characterize the Hart-Dworkin contrasts.

The common thread binding together *all* the various approaches to legal interpretation is that the process of interpreting is an integral part of the product or results of interpretation. Means *becomes* end.

There is no opportunity here to review some of the papers on interpretation in this symposium of 1985 on aspects of Critical Legal Theory. But it must be pointed out that the quest for models of interpretive processes was eclectic then and is still eclectic. The models most readily at hand were, not surprisingly, those most current in the writings of the Continental hermeneuts, e.g., Gadamer, Habermas, Betti, Foucault, and to some extent Apel and Derrida. Within this universe of discourse emphasis has also been on interpretation as a psychological aspect of human activity. Thus psychoanalytic models in the Freudian and Lacanian traditions became part of this Continental discourse from which Critical Legal Theory has taken its early and present cues and views.

Several of the Round Table papers are both centrally and peripherally concerned with these models. Indeed, some of the participants of that Interpretation Symposium participated in this First Round Table, thus sharing that earlier dialogue with this one and enriching discussion not predominantly in the area of Critical Legal Theory here with insights which developed directly out of that 1985 meeting.

It should be noted here that in 1983, prior to the Symposium on Interpretation, the First Symposium on Law and Semiotics was held at the annual meeting of the Semiotic Society of America. Here the emphasis was in no way dependent upon Continental heremeneutics, but rather drew from 1) the Hart-Dworkin debate, 2) the notion of legal procedure as rhetoric, 3) a semiotic approach to legal history, 4) legal anthropology, 5) Peirce and 6) other concurrent theoretical frameworks for modern semiotics, e.g., Saussure, Eco, Hjelmslev, Barthes, Charles Morris, as well as from gleanings from the various Semiotics journals published throughout the semiotic-speaking world.