Peirce, Paradox, Praxis

Approaches to Semiotics
94

Mouton de Gruyter
Berlin · New York

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The Image, the Conflict, and the Law

by
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Mouton de Gruyter
Berlin · New York 1990

Mouton de Gruyter (formerly Mouton, The Hague)
is a Division of Walter de Gruyter & Co., Berlin.

Library of Congress Cataloging in Publication Data

Kevelson, Roberta.
Peirce, paradox, praxis : the image, the conflict, and the law / by Roberta Kevelson.
p. cm. – (Approaches to semiotics ; 94)
Includes bibliographical references and index.
ISBN 0-89925-641-4 (acid-free paper)
1. Semantics (Law) 2. Law – Methodology. 3. Semiotics. 4. Peirce, Charles S. (Charles Sanders), 1839–1914. I. Title. II. Series.
K213.K5 1990
340'.1–dc20 90-13472
CIP

Deutsche Bibliothek Cataloging in Publication Data

Kevelson, Roberta:
Peirce, paradox, praxis : the image, the conflict, and the law / by Roberta Kevelson. – Berlin ; New York : Mouton de Gruyter, 1990
(Approaches to semiotics ; 94)
ISBN 3-11-012313-4
NE: GT

Typesetter: Arthur Collingnon GmbH, Berlin. – Printing: Ratzlow Druck, Berlin. – Binding: Dieter Mikolai, Berlin. – Printed in Germany.

Acknowledgements

Research for this study and assistance in manuscript preparation was made possible by several grants from The Pennsylvania State University. I particularly wish to thank the Commonwealth Educational System, Liberal Arts Research and Graduate Studies, the Institute for the Arts and Humanistic Studies, the Berks Campus, and especially the Berks Campus Library and University Libraries. Appreciation is also extended to Cambridge University's Squire Law Library and its other special collections; to Princeton University's Firestone Library for use of the Law Collections and Marquand papers, and to the Law Library of the Library of Congress.

I also thank those of my colleagues who reviewed early drafts of chapters and offered suggestions and who shared their personal libraries with me.

Some few chapters are revisions of papers published as earlier versions elsewhere; I thank the publishers of *Law and Semiotics, Synthese, ARSP, RS/SI*, and proceedings of conferences where early drafts appeared.

The final manuscript was prepared by Cindy Palecek, to whom I also express my appreciation.

With special thanks, I want to acknowledge the thoughtful criticisms of my colleagues in this "community of inquirers," which has grown and flourished in recent years in the emerging field of Legal Semiotics; it is such international communities that Peirce envisioned not as utopic, but as infinitely existent.

Preface

The epithet "the legal garden" was aptly applied by Walter Wheeler Cook early in this century to the Realists' turning over and over the encrusted bed of the law in order to begin to cultivate a new, creative legal theory that would view law as mediator between a public community and its institutions of government.

Cook was severely criticized by David Cavers, among others, for endlessly weeding but never actually planting this legal garden. Cavers held that the time must come when criticism stops and action begins. But Cavers was not a Peircean, and modern semiotics' time had not yet come. Cavers, unlike the Realists, missed the point: criticism *is* action, interpretive action that results in consequences which increase the meaning of ideas-as-signs and thereby brings about a measurable increase of the real world.

In this book I try to show a continuity of thought, centering on the indeterminacy of law: on conflicts, contradiction, and paradox represented in and by law. I assume that this continuous growth of modern semiotics originates with Peirce, branches into Legal Realism, and branches further into Legal Semiotics on the one hand and Critical Legal Theory on the other. The Real world is distinctly different from the True world as may be represented by True propositions. The distinctions between Reality and Truth, Peirce holds, apply not only to positive scientific truth, but also to the normative sciences, to mathematics, and to commonsense practical life (CP 5.565–568, 1901).

My purpose in writing this book is four-fold: 1) to advance Peirce Studies; 2) to develop ideas introduced in my previous studies on Peirce and on Legal Semiotics; 3) to show where and how a Peircean semiotics may illuminate and thus open points of resolution in current problems in law, especially in Conflict of Laws; and 4) to perform the function of excorticator of this continuum of thought just as the more one strips away the outer layers of a birch tree the more the quality and character of the tree becomes apparent.

There is yet one more motive that impels this study: – the intention to indicate and clarify relationships between the three divisions of Peirce's Normative Sciences (Logic, Ethics and Esthetics).

I take Esthetics to be pivotal in Peirce's entire theory of signs. It both accounts for and maps the development of values in thought. Esthetics provides a cross-referential point between the Peircean protosemiotic, phenomenological process and the consequent first principles of his metaphysics.

The connection between law and logic should be clear, since it centers on legal discourse. The connection between law and ethics should be no less clear, since *it* centers on the correspondence between abstract norms for "right conduct" and actual practice of establishing and enforcing "right conduct" in everyday life. But the connection between law and esthetics is less clear, and may only become more apparent, more transparent, when we regard law as a representation of value, as a blueprint or plan of action for realizing human values in public life. As such a plan, law as sign appears predominantly iconic. As icon or image, it thus assumes a function not unlike that of artworks.

I hope that the book as a whole will be used as a kind of instrument – a *Kaleidoscope*, as David Brewster regarded his invention. The key term in kaleidoscopic viewing is *focus*. Focus, in Brewster's sense, is the creative discovery of new relations, new compositions, and new forms by turning the instrument and one's self in all possible ways until something occurs which holds one's attention. This occurrence, together with interest and attention, is focus.

This book presents, then, an introduction to a legal aesthetics – a Peircean "Esthetics" – to be developed more comprehensively in my forthcoming book (1990).

To say that law as a sign is predominantly a plan of action (i. e., an iconic function) does not reduce its function of representing the conflicting structure of experience as index. Further, an esthetics of law will hopefully disclose the value, or symbolic function, of law as an idea of human *praxis*.

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Part One

Presuppositions: The Map and the Legend

> ... a mapping theory can do more than merely provide a coherent framework for charting relations between traditional questions and established lines of enquiry; it may also identify new or neglected questions or suggest that old ones were misposed. And this may lead both to different lines of enquiry and to new perceptions of connections with established enclaves of knowledge that had not previously been seen to be relevant... A mapping theory charts relations between lines of enquiry and raises questions....
>
> William Twining
> "Evidence and Legal Theory" *Legal Theory and Common Law* (1986:77)

Chapter I

Introduction: Grants and Assumptions

I.

When Peirce writes (as he frequently does throughout his voluminous works) on the idea as a continuum, he does not mean that an idea is a continuous fiber drawn from a single source and pulled thinner and tauter until it can be drawn no further. What he does mean is that the idea as continuum is, like the spinning of a yarn, a process by which loose threads become integrated with that idea-strand which one holds at any given time as a fusion or con-fusion of fibers of thought. This reference to a continuous thought as a spinning of a yarn alludes also to the improvisational telling of a story.

Both references are implied in Peirce's notion of the continuum. First, the spinning of material is like the refinement of the raw stuff of thought into a form which may be interplied with other similar forms – as parts of language related with other parts of language become discourse – to become a fabric, a "whole cloth" or general idea. Second, my comparison between thinking and telling of tales suggests that the tale, beginning with a common theme or topic shared by audience and storyteller, is invented and evolved as the raconteur, sensitive to his listeners, responds, weaves, embroiders, embellishes, and designs the story as an interpretive and dialogic reply. Like a question, such receptivity is an implicit (though sometimes explicit) prodding for more. Peirce himself refers to this process of picking up loose threads of thoughts left hanging, as it were, in one's mind; when the moment presents itself in the actual practice of perceiving a new fact and tying it to a known fact, the dropped ends of old beginnings of ideas are picked up and fused or spun together with the new into a single strand.[1]

An idea, in Peirce's theory of signs or semiotics, is a continuous invention and interpretation and representation. In actuality there is no sharp division between old and new; rather, there is a continuous transformation of both, in each new stage of their relationship, into a

bonding. An idea is in this sense more than a *sequence* of knots; but each invisible interval, each hypothetical juncture, becomes the "place" of emergence of a new stage of an ongoing process which may no more resemble its preceding stage than a butterfly resembles a grub. Yet the butterfly interprets its predecessor and represents it as a *verisimilitude* (see Kevelson 1987b).

This book attempts to continue the main topics developed in my recent studies, *The Law as a System of Signs* (1988b) and *Charles S. Peirce's Method of Methods (1987b)*. It may be recalled that the former attempts to show that Peirce's thought provides a theoretical foundation for investigations of legal semiotics; the latter argues that the law is a prototypical sign system for Peirce's theory of signs. The former concludes by drawing attention to the problems of conflict of laws and conflicts *in* law, and also to the underlying paradoxical structure one must assume in analyses of the law regarded as a quintessential model of social praxis. The latter concludes by establishing correspondences between evidential procedure in law and the function of facts in general inquiry.[2]

This volume attempts an even closer examination of the interpenetration of Peirce's semiotic philosophy with the problems of conflicts in the practice and theory of law. Yet many of Peirce's major concepts still need to be identified and clarified if they are to become useful to the growing community of inquirers in legal semiotics. At the same time, Peirce scholars as a group may find the connections established between Peirce's thought and problems peculiar to law especially helpful in providing new access to old territory.

This book is not organized along the lines of an Aristotelian tale, with beginning, middle, and end; it is more akin to the modern short story, which plunges one into the middle of things and moves in all directions and dimensions to some moment of insight and realization. With respect for Aristotelian diehards, I introduce this volume with a brief and provisional definition of semiotics; but any definition of semiotics should first be qualified. One is reminded, for example, of Thomas A. Sebeok's remark in his draft of "Semiotics in the United States: The View from the Center" (8.29.88:211), which he was kind enough to send me in prepublication form: "There is as yet ... a very far from universal consensus among us," in this *bricolage* process of the coding and recoding of signs, "as to what mosaic fragments will be pertinent to such an envisaged synthesis, or precisely how the parts, once identified, ought to be combined". While Sebeok is here expressly referring to our present lack of a complete history of semiotics, I suggest that such a history is

not too different from a definition, since a history relates the activities of the topic in question, both past and predictable. This description of acts or *praxis* is what Peirce calls the proper definition of any term.[3] A definition is a kind of property of sign-like labelled ingredients, active and inert, of products of all kinds.

In his famous definition of the symbol lithium Peirce gives us his "pragmatic maxim": "Consider what effects, which might conceivably have practical bearing, we conceive the object of our conception to have. Then, our conception of these effects is the whole of the conception of the object" (CP 5.402). Our definition of semiotics, and of legal semiotics in particular, is the story of what it can be expected to do; its history includes this element of predictability. Yet any definition remains indeterminate in part, since we have not exhausted all possibilities of what it might do if we experimented with it in ways yet unforeseen, or if we had done so in the past.

This comingling of the definite with the vague in every history and definition is the implicit assertion that freedom is always the farthest reach of the possible, and that the infinite is that fact which one can always increase from any farthest reach of a finite conceivable place by saying "this and yet *one more*". Legal Semiotics as an "intellectual sign" is self-reflexive not only as abstract interpretant signs are cross-referential, but also as each meaningful sign makes its mark or expression on actual experience and becomes consequential as an action in the common world of common people – in their wills, their trusts, their reciprocities and rights, their personhoods as recognized and as represented by law as paradox, as praxis, as conflicts of power.

For convenience in handling, modern semiotics may be defined as the theory and method of inquiry which seeks to account for the process whereby representations of value (such as ideas) or equivalent signs and representations of value-judgments (such as standard currency or conventionalized gesture) develop, increase and cumulate meaning. Sign-functions are counters in transactions of values.[4] They have "cash-value", in James' sense.

In a most general sense, semiotics regards all the various modes of expressing and evolving value judgments as the exchange of messages. The particular modes of expression are governed by the codes of the sign-system in question. For example, verbal messages are governed by the code or rules for the use of any given natural language, with respect to the purpose at hand and with reference to a specific context. Nonverbal messages which include appropriate social behavior or the price-system

of any given economic sign-system are governed by legal codes and codes of customary and legitimated behavior – e. g., rules governing the exchange of commodities and goods of all kinds.

Semiotics assumes that the dialogic structure of the Legal Contract, for example, corresponds isomorphically with the dialogic exchange of verbal meaning. Just as the Legal Contract commences with a show and acceptance of "consideration," the semiotic verbal process commences with agreement between both parties regarding the "motive" or reason for the semiotic action, which is mutually wanted. The terms "motive" and "consideration" refer to the commitment or bond put up as evidence of agreement and of good faith in entering into a semiotic exchange of values. These terms are as indigenous to economics as they are now to be assumed to be basic concepts in modern psychology. Thus Semiotics further assumes that the structure of economic-legal activity is prototypical of verbal and other nonverbal transactions of signs, including emotional trade-offs.

Modern semiotics has evolved from a long tradition of regarding signs and sign-systems as equivalents of thought processes and of social institutions which have infraverbal substructures – e. g., political and educational institutions. This tradition, originating with the Stoics, was reinterpreted by the Schoolmen, revived by John Locke, and transformed in the nineteenth century by the American pragmatist Charles Sanders Peirce. According to Peirce, it is Semiotics which is best capable of establishing bridges to link the most abstract of the sciences (e. g., mathematics) with the most practical of the sciences (e. g., law and economics). The purpose of Semiotics is to show, in general, how two distinct systems of inquiry become interrelated, and how each may act indexically and experientially as a check and a balance on the other. The method of Semiotics, which presumes that all systems of inquiry and exchange are open-ended, seeks to create new value in junctures established by bringing together two or more previously unrelated sign-systems into more comprehensive and more unified value-gestalts or complex sign systems.

Semiotics expects that by showing interaction between two elemental sign-systems, such as the legal system and the economic system, one may better understand not only the patterns by which new values are brought into play, but also how flaws and disturbances in a creative process result in constraints of new value – i. e., restrictions on freedom of inquiry and other related value-seeking activity. The resolution by reduction of the paradoxical structure is such a constraint; this will be discussed further below.[5]

A definition also has a kind of supporting function, not unlike the distaff used in spinning. But this instrument, as we recall, has a pejorative and even a sexist connotation as well as an instrumental function, since it refers at one and the same time to the vertical rod women traditionally use in converting raw material into cloth and to the subordinate role of those who spin. There is, at the least, an incongruity in this term which presents the supporting staff as representing the dominant male role and also as the means whereby the maker of yarn achieves her purpose. This incongruity recalls Kenneth Burke's classic example of the "incongruity by perspective": the lion is regarded as king of the beasts, but also as a feline, and felines are commonly regarded as females or "shes". Most people, Burke remarked, have little or no problem in simultaneously accepting the two conflicting meanings (Burke 1966: 199, 234). Our problem here is to explain how this apparent contradiction, and even paradoxical situation, is reconciled logically, or deliberately and intentionally *not* reconciled semiotically. For now, let us regard definitions as props in the drama of reality becoming, and thus as sign-functions in this act of a play – well-made or otherwise.

II.

The law abounds with paradoxes similar to the Burkean example above. I will be concerned in this book with some major and selected areas of legal problematic where a new approach to the paradoxical is long overdue. The most significant areas involve contradictions both within single legal systems and between two separate systems of law. Since the former is anathema to the legal positivists, I will focus especially on Bentham and Austin in several chapters which deal with legal fallacy. Elsewhere I will discuss the idea of paradox and proof in law.

The theme of the paradox runs through all the chapters in this book – in some cases as a major motif, and in others as a secondary theme. In those chapters which attempt to provide a general background of Peirce's thought for non-Peirceans, I discuss Peirce's view that logics are inventions for realizing particular purposes.[6] The idea that the end of philosophy is the ascertaining of truth, and that in law this goal is extended to public affairs, is appropriate to traditional logic and its purposes. But if the aim of law and/or philosophy is not the ideal of truth, but is rather the establishing of bonds of trust and community, then a different kind

of logic is more appropriate. This different kind of logic describes a different way of knowing (or "trowing," to use Peirce's term). I explore here two kinds of knowing which distinguish the later Peirce from the earlier, still tied to Kant.

The idea of trust in law is exemplified by the practice of transferring goods and properties. The problem of trusts and successions is examined in the context of changing concepts of property, trusts, and contractual relations in laws, especially as it concerns the international community and points up sticky issues in the general area of Conflict of Laws, otherwise known as Private International Law. This approach to succession in relation to Conflicts of Laws takes up where the problem of Conflicts and Indeterminacy in legal semiotics left off in *The Law as a System of Signs* (Kevelson *1988b*).

III.

It should be mentioned in this introductory chapter that when the distinguished philosopher of law, Norberto Bobbio, recently drew careful distinctions between the "law of reason" and the "reason of law " (Bobbio 1988: 97 – 108), he emphasized a major distinction between two kinds of logics. The one is a development of traditional Aristotelian formal logic, while the other is close to what Peirce has described as his Expanded Logic. This expanded logic is tripartite, consisting of Speculative Grammar, Critic, and Methodeutic or Speculative Rhetoric. Speculative Rhetoric is the highest and overruling division; Critic or Formal logic is governed by it.

Bobbio, in different purpose and manner from Peirce, accords with Peirce nevertheless in some respects. Bobbio points out that the classic laws of thought in formal logic are no less binding today in our evaluation of valid arguments than they were ages ago; but that the use of reason in law brings about an adaptation of these traditional laws of reason that is not only a compromise of strict logic, but an interpretation from strict logic. Further, Bobbio points out that there are two distinctly different purposes here and that law, not being an exact science, must utilize as its proper mode of reasoning a logic which is not strict or exact.

The distinction between formal and informal logic in Bobbio's paper is not identical with the distinction made by Peirce; Peirce sees nonformal logic as the more comprehensive of the two, while Bobbio suggests that

it is but a special case. This distinction between two kinds of logic antedates Peirce, and continues to succeed him. It has often been suggested that the compromise of strict logic for the purposes of law is analogous to the substitution of cheaper for better building materials, to cutting corners in building construction in the interests of costs, or to the modification of blueprints in deference to the peculiarities of the terrain on which a particular structure is to be located. All of these analogies suggest that there is an ideal or best type, and that any adaptation of this best type is in the interests of practicality as a token of that type. By this mode of inference, reason in law (as contrasted with the law of reason) is a kind of ideal reason which upholds the proverbial laws of thought. Reason in law, as Bobbio describes, may be seen as a member, however deviate and even anomalous, of the ideal form. Understood in this way, reason is a member of the abstract and ideal vision in general. It is utopic.

The Aristotlean principle in logic, the *nota natae* or the mark ('Peirce', in Baldwin 1902: 2. 183), is the underlying principle which is referred to with respect to reason in law. The assumption of universal predication itself rests upon an assumption which is antithetical to the main premises of Peirce's theory of signs – his pragmatic method as a whole. Establishing and sustaining the notion of an ideal reason as an absolute authority precludes investigation of other modes of reasoning which are not merely extensions of the ideal, but are sufficiently distinct to be regarded as types of logical reasoning in their own right. This point is discussed further below. Simply, and for the purposes of general introduction, that which is in some context a token of a type may become in other contexts a type in itself. There is a historical continuity one may trace which reconstructively discloses kinship between types or systems of thought that have since evolved into distinctly different systems. For example, consider the division of a cell into two new cells which can no longer be regarded as merely the splitting-off of a master cell, but the actual creation of something genuinely new and different, a subject. As a new subject it is no longer a predicate, to use the models of grammar and of logic. Here we are touching upon a major problem in current literature, particularly in areas within philosophy of science, since this problem centers on the controversial issue of continuity vs. discontinuity.[7] For our purposes here, it must suffice to say that the problem may not yet have been accurately stated. The relation between a token and its type may, from one perspective, represent a continuum; but from a different perspective the conse-

quence of the token's becoming itself a virtual type is representative of discontinuity. This point requires further qualification.

If we are examining the process by which reason in law is related to the Laws of Reason, then this relationship *as* process – where a process is regarded no less as a phenomenon than is a tangible "thing" – presents us with a violation of the "law of identity"; indeed this may be the basic paradox we need to examine.

The controversy raised among logicians by the late Baron Chaim Perelman's "Les Paradoxes de la Logique", (Perelman, 1936: 204–208) is rarely if ever discussed today, especially since Perelman's later writings on *The New Rhetoric* and his now classic studies of argumentation and law do not attempt to revive the old issue. We recall, however, that in this early paper Perelman attempted to demonstrate that paradoxes were compatible with classical logic. He examined the famous Paradox of the Liar, the Paradox of the Barber, and others to show that these "antinomies" derived from hypotheses which were not inconsistent with hypotheses that are valid in strict logic. He claimed that such paradoxes are legitimate, and that the fundamental logical laws of traditional Critic require alteration. His opponents jumped on his argument and rejected it, largely on the grounds that paradoxes or antinomies which follow from hypotheses are not valid in classical logic. It is not possible to review here the extremely interesting discourse which evolved around Perelman's paper, but one may refer to this event in the recent history of modern thought – which, unfortunately, neither then nor now has had significant contact with Peirce and *his* views on paradox.

Still without direct reference to Peirce, Perelman in *The New Rhetoric* comes very close to Peirce when he points out that it is especially in law that we see paradox as a kind of rhetorical use or interpretation of strict logical form. In any choice or law, Perelman explains, the deciding judge must resolve the "juridical antinomy in the case he is hearing" by choosing one of two possible laws which will justify his decision; further, he has to justify his own choice in order to maintain the appearance of the law as a stable system (Perelman and Olbrechts-Tyteca (1958) 1969:414). Note that the problem of choice of law in Conflict of Laws is taken up throughout this volume. Elsewhere Perelman has shown how the model of classic tautological statements is used (i. e., interpreted rhetorically) in order to present in such nonformal arguments, as in legal arguments, the *appearance* of truth (Perelman and Olbrechts-Tyteca 1958:217; 443, 444). This notion of appearance and its correspondence with reality are the

two "Prototypical Terms," according to Perelman, and will be discussed in passing in several chapters of this volume.

The point to be stressed here is that ideas are evolved and developed through strategies of rhetoric – through dissociation, equivalence, and other rhetorical tactics. These tactics in rhetorical method permit the increase of a message, but at the same time they also increase the likelihood of the occurrence of genuine paradox.

The paradoxical structure, to be discussed especially in the chapter on Dewey's "deflection" from Peirce on the topic of inquiry, includes the problem of the indeterminate – i. e., that sign of the relationship of vague with definite which indicates the process of permutation or transformation of ideas. At the point where two or more frames of reference come together, at that invisible boundary which brings one universe of discourse into a relation of superimposition upon another, the traditional laws of identity and contradiction become irrelevant. They are inadequate to account for the actual process of confusion which takes place at this pushing of two borders, two grounds of reference, into a common field (Kevelson 1987b). The paradox thus signifies a creative merger: It is a structure which appears on the brink of merger, or "arbitrage" (a finance term that plays a major role in Conflict of Laws studies today). The paradox, or the indeterminate situation which it signifies, is the occasion for a mutual transformation of both elements of the paradoxical relationship. This indeterminate situation is that which is in *praxis*, in that experiential ground which provides data for a theory of actual practice, characterized by a logic of questions or by what Dewey calls a logic of inquiry. Chapter Five of this book will discuss some of the hallmarks of inquiry and interrogativity as it pertains to representation and discovery in a general sense, and also to discovery as a part of evidential procedure in law.

To summarize thus far, the argument of this book is that paradox is not an aberration of ideal reason; rather, it is the basic structure of relationship of the minimal unit of meaning in a system of reason which *reason in law represents in paradigmatic fashion.* The logic of paradox is from this point of view not a problem to be resolved such that the paradoxical character is eliminated – although this happens if and only if the paradoxical meaning or situation at hand is "translated" reductively into a more traditional, authoritative logic.

Peirce, in his "semeiotic" or expanded logic, which he held to be synonymous with semiotics, subordinates traditional logic or Critic to this new logic. Although the entire distinguished community of Peirce

scholars have to date written admirable exegeses on Peirce's logic of relatives and on aspects of his pragmatic logic, they have failed to investigate seriously the role of paradox in the expanded logic. In *Charles S. Peirce's Method of Methods* (Kevelson 1987b) and in The *Law as a System of Signs* (Kevelson 1988b), the centrality of paradox in Peirce's entire architectonic philosophy was introduced and opened for discussion. In this volume, the problem of paradox is explored further, especially in relation to the characteristic logic of reason in law, from the point of view of legal semiotics.

IV.

Peirce's followers (i. e., followers who assimilated Peirce's leading principles into Law, – Holmes and the Legal Realists engendered by Holmes, for example) repeatedly emphasize the paradoxical nature of law. For example, Pound circles about the problem in *The Paradoxes of Legal Science* (1928/1970). Pound, however, in his discussion of paradoxical processes, alludes not to Peirce but to Whitehead (1928/1970: 3,7,9). The majority of the Realists, including Holmes, also fail to credit Peirce, but they do regard Dewey as having originated this new direction in analyzing legal theory, discourse, and practice. All these terms may be regarded as subheadings of the covering term, Praxis, defined here as the speculative doctrine of practical processes. This study, as stated, investigates the paradoxical structure of law from the point of view of legal semiotics. But there is not a single thesis which is pursued to a single conclusion. Rather, each of the chapters here focuses on a different aspect of paradox and praxis. The semiotic theories assumed here derive from Peirce. Therefore, this book may be read 1) as a major contribution to the growing body of literature on law and semiotics, 2) as a contribution to Peirce scholarship, and 3) as both of the above together, since my assumption here is that Peirce provides the most thorough and systematic approach to semiotic analysis of law we have available. It is true that Peirce himself only rarely addressed the direct application of general semiotics theory and method to problems in law. Yet, as I have argued elsewhere (Kevelson 1987b, 1988b), his own special concerns with the theory of signs were profoundly influenced by various theories of jurisprudence throughout his enormously productive lifetime. One may regard the law as a vector, a channel, and a force for transforming the activities of the law into those

elements of his theory which he painstakingly examined and reexamined and which become distinct subtopics of his pragmatic method and his theory of signs.

Thus it can be said that the idea of Ideal Reason in law was for Peirce the Type, and the exemplifications of reason in law became the various Tokens of that Type; conversely, a Token in its turn may become a general Type.

V.

Recent political history is still sufficiently fresh for us to recall the "sleaze" issue of former U.S. Attorney General Meese's tenure, which was described by Arnold Burns, former Deputy Attorney under Meese, as "something out of Alice-in-Wonderland" where "right is wrong, and wrong is right," where "down is up, in is out," happy is sad, black is white, etc. (network media interview, July 26, 1988). Burns' contention or accusation was that working for the Justice Department under Meese was a "wonderland".

Clearly, Burns was not talking about a creatively paradoxical situation. He was talking about simple confusion and inversion of what he believed to be customarily held values and procedures. Yet, Burns' indictment – the only informal indictment served against Meese, since he was not legally indictable – points up the presuppositions regarding law in reason which were presumed, by Burns and many others, to be operative in "reason in law". Burns' attitude serves as an illustration of a widespread assumption that even though the law was susceptible to human error – a euphemism which stands more for sloppiness than for Bentham's sinister intent (to be discussed below) – it must keep its ideals of logic and other values in full view, so that when it errs it does so in frailty and from the human need to compromise. It was never suggested by Burns that an Alice-in-Wonderland approach to the office of the Attorney General could have been deliberately chosen. I am not going to suggest that Meese was indeed guided by a logic of paradox which he might have regarded as more appropriate to the business at hand, and therefore more ethical or more correct given the situations he dealt with; I will, however, suggest that if Meese had been better acquainted with Peirce or with the legal semiotics which derive from Peirce, he could have presented an

original and creative self-vindication. He could have justified his actions not only on ethical grounds, but also, by extension, on legitimate and fully legal grounds. He chose only the legal grounds, unfortunately for Legal Semiotics. We will not, however, attempt to investigate here how Legal Semiotics as a viable power structure – a structure of knowledge – can become effectual on the stage of actual practice.

The afterword of this volume, "The Grin of the Cheshire Cat and the Triumph of Utterable Chaos," takes its cue from Ilya Prigogine and opens new questions of power and potentia. The theme of the Nobel Laureate Prigogine's work is *From Order to Chaos*. It is a premise and leading assumption shared by David Bohm, Karl Pribram, and other leaders in their various fields of science. B. J. Hiley and F. David Peat have recently completed the editing of a new collection of papers which carries this order-to-chaos concept still further. At this writing I have just had the opportunity to see John Briggs' contribution to this collection, "Reflectaphors: the (implicate) universe as a work of art," (1987:414–435), in which he applies Bohm's notions of the continuously evolving "underlying construction of matter" to the interpretation of metaphor, or what he calls "reflectaphor" in poetry. Briggs says it is not surprising that "the interpreted meanings of metaphors often turn out to be paradoxical or self-contradictory. The movement which produces this effect bears connection to Bohm's implicate order."[8]

My own acquaintance with Bohm's work began several years ago when I was attempting to understand what Peirce meant when he described the cumulative process of creating meaning through the continuous interpretation of an interpretant sign. At that time, during the writing of *Charles Peirce's Method of Methods*, I did not include explicit discussion of Bohm's work. Nor do I here, but it becomes an important reference in the "Kaleidoscopic" changes of value, which I examine in the ninth chapter of this book, and which is a focal point for my book in progress on Peirce's Esthetics.

Also, in Chapter Nine, I discuss David Brewster's reason for inventing the kaleidoscope as an instrument for creating new ways of focusing and therefore of creating new forms of value. I examine as well some further consequences of juxtaposing the paradoxical "order-to-chaos" idea with Peirce's paradoxical semiotics. In both notions there is the use of lawlessness (i. e., a deliberate violation of traditional laws of nature and thought) for the purpose of creating new disorder, new opportunity and occasion for doubt, for inquiry, and for the growth of discourse and knowledge.

Let us recall that Semiotics is first of all, as Sebeok (1988) notes in his recent study, "Semiotics in the United States," a quest for greater cognition. In similar fashion, the project of philosophical aesthetics and its critical appraisal of the work of art has primarily been for the purpose of understanding how new knowledge is created through artsigns or artworks. A parallel approach to a legal aesthetics from the perspective of general semiotics would view law as a work of human invention and creativity which may, like the artwork, be investigated for new knowledge – e. g., for understanding the practice of *Praxis.*

Thus, to assume a paradoxical structure for reason in law is merely to assume, with Bohm, a kind of "holomovement" in which *possibles* emerge, act, and disappear *but leave a trace, an effect, and a consequence upon the work so that implicate possibles may be understood as creating and transforming agents or signs representing agentive force which, as knowledge, contributes to our creation of a greater and freer world.* This paradoxical function, this possibility which can never be reconstructed except through hypothetical reasoning, is nevertheless a real possibility and a real function. It is consequential. It produces meaning. And such are the criteria for any sign, any idea or thought or system of thoughts, in a pragmatic *praxis:* 1) it must generate, out of itself, in situation, its significance; and 2) it must leave its mark.

Briggs, cited above, refers to the "paradoxical movement of meaning through metaphor," which corresponds in significant ways to the vestiges of cultural values and beliefs that cling to codified law and which cannot readily be expunged despite the most ardent Benthamite efforts to clean up the law. The paradox permits significant relates of any initially indeterminate situation to be sustained, to metamorphose, to grow underground even as the "science of signs" itself emerges at intervals in the development of Western thought in conflictual relation with Aristotelian thought, but periodically subsides after such intervals into a kind of subterranean dormancy; it surfaces again with the Schoolmen, sinks back into the lower strata of law and legal praxis, and again emerges with Locke, and again with Peirce. The paradox must always appear grotesque, as the bearer of strange and novel value in this undulating continuum of idea where each emergent fragment seems a distortion of the known, the familiar, the safe habits of thought. Paracelsus, a neglected semiotician, claimed that the Grotesque was one of the Elements residing in the interstices of the earth. Paracelsus, noted by Peirce as one of the greats of history, will be looked at closely, with Peirce and the "Occult", in Kevelson (1990) on esthetics and value.

VI.

There is a parallel between Peirce's Normative Sciences of Logic, Ethics, and Esthetics and the actual *phenomenal* relationship between the organization of communication systems, both verbal and nonverbal. A legal system such as ours represents pluralistic creeds of interpersonal and communal behavior as realizations in public life of nonformalized social values. The law traditionally has attempted to logically derive the informal from the formal, whereas a Peircean approach would say that the inference is correctly from nonformal to ideal to formal – i. e., from experience to esthetics to critic. The triadic relationship between 1) modes of communication, 2) guidelines for mutually satisfactory interpersonal relations, and 3) wellsprings of shared common origins and goals is the experiential relationship of matter-of-factness, which can never be grasped in its entirety since the very notion of entirety presupposes a finite universe. The idea of a finite universe is an ideal proposition *only*. This tripartite level of actual life among fellow humans in any given society includes all that is within the law and all that is outside the law, such as one's private feelings, personal relationships, and physioneurological connections with emotional responses such as rage, love, hatred, fear, etc. All of the artworld is implied in this triad, as is all that is coming into existence, as thought or as material object – as nature lifeless and nature alive, in Whitehead's sense. That which falls in the cracks of the divisions between logic, ethics, and esthetics in Peirce's schema does not fall to nowhere, but is comingled in those intervals or interludes which link, in non-normative ways, the distinct categories of the normative sciences. In actual life these interludes or spaces, or places of "Musement" and Pure Play, constitute a cohesive binding and transforming force of experience. In all semiotic analyses these forces and interplays need to be accounted for. The interpretation together with the indefinite objects are The Real which communities shape and become, as signs themselves.

In this sense one wants to understand Peirce's theory of signs as a descriptive method, ever more open to novelty. An opposing point of view to the one I hold is that semiotics in general and legal semiotics in particular must be prescriptive, since those who know best can say most and thus direct the public for its own good. The arrogance of a self-elected priesthood needs no further comment. What can never be stressed too often, however, is that it is not the few who provide the landscape, but the whole community with its context of earth as the landscape. The semiotician, as Peirce well knew, is sometimes an architect, sometimes an

engineer, sometimes a speculator, sometimes even the Great White Wig and Highest Legal Actor; but in all these roles he is foremost an artist and co-participant with that material he describes and thus molds and re-presents. To describe rather than prescribe, a semiotician must consider what it means to observe.

In Peirce's thought, observation is not the empirical transfer of a fact perceived in the phenomenal world to an impress of that fact as idea in the mind.[9] Neither is observation directed by one's aprioristic, preconceived knowledge of the world. Surely, as Whitehead insisted, everything important is a fusion of the matter of fact in question with those presuppositions the inquirer brings to the "given" fact. But semiotics assumes further that presuppositions are themselves malleable, creatable, inventable and *ad hoc*.

Just as our understanding of what *is* changes in the very idea of the act of observation, we also find that a corresponding idea of the evidentiary procedure in law is also in continuous transition. We find, for example, that protean value enters into the process of fact-finding in an increasingly overt manner in law, and that therefore there is an element of the aesthetic in discovery in law as well as in observation in general. I hope to lay some cornerstones in place for a forthcoming inquiry into Peircean aesthetics, in law and elsewhere. With this in mind, this volume provides some footing for that future project. But for now I want to focus on the linkages between the main topics of this volume only.

This volume lays out my basic assumptions. In Part One I attempt to place the Peircean notions of Property, Praxis, Paradox, and Presupposition in high relief. Later I look closely at the deceptively simple legal concept of Place, and attempt to show how an interpretation of Place from a Peircean perspective may result in changing the angle from which the law at present tends to view the concept of territory or Real Estate. A further chapter takes up this notion of territoriality and examines it from the controversial context of the Restatement of the Conflict of Laws and the Realists' position in the early part of this century.

Chapter Three challenges the concept of proof in legal argument, and shows that the basic structure of the legal argument is a relationship of the indeterminate and the vague.

The fourth chapter examines important differences between Peirce's and Dewey's understanding of the indeterminate situation. Peirce's contention, unlike Dewey's, is not only that paradox is a creative opportunity, but also that this opportunity should be and may be sustained throughout the continuum of any idea, toward any goal, since it is the indeterminate which assures the continuance of freedom.

Chapter Five deals explicitly with the structure of inquiry. Chapter Six deals with main differences between Peirce's and Kant's understanding of understanding: Peirce's praxis is based on trust, whereas Kant's is rooted in the conviction that truth remains the touchstone both for inquiry and for a prescriptive law.

Chapter Seven presents a phenomenological view of fact-finding in nonlegal procedure. This chapter concentrates on how a fact is prepared for its function *as* fact (see Kevelson 1987b). This chapter further discusses the relationship between the vague and the definite.

Part Two looks at law and semiotics from a vantage point outside the law – that is, from the topic of lawlessness. The problem of derelicts and delapidations in law is taken up in Chapter Ten, which discusses the foundation of reciprocity in the idea of civil rights. The emergence and development of the Legal Realists since the Restatement of Conflict of Laws is taken up in Part Three. This section concludes with an appraisal of the present movement in law and semiotics, which includes the Critical Legal Theorists, or the "Newest Realists", as I refer to them.

The Fourth Part of this volume relates specific problems of rights in law to the global arena and to issues in Conflict of Laws which touch upon the rights of individuals. The perceived crisis in international law is discussed here. Chapter Eighteen of this section looks at the First Amendment as a source of conflict *in* law. This chapter recalls the origin of semiotics since the Stoics and their *summum bonum,* Freedom. It links Part Four with Part Five, which contains a major chapter on Peirce and Epicurus and their respective ideas of observation.

Part Five also explores analogies between space-relations, configurations, and iconic representations of place as property and ground or territory in law. The final chapter attempts to bring together representation in law with representation as a major Peircean concept.

This concluding section is intended to point up the interplay between Ethics and Value, or that which Peirce sees as the responsibility of a normative Esthetics. This section introduces some leading ideas for a legal aesthetics yet to be articulated as an outgrowth of this inquiry into the Peirce, Praxis, Paradox trident developed here.

In a short afterword, law as an aesthetic work – a value-bearer – is discussed. The Peircean assumption that disorder or chaos is natural, and that order is the result of human invention and intervention and is therefore a "surprising fact" – places the marked event against its vague, unmarked, and presumably natural ground.

Chapter II

The Lay of the Land

I.

Peirce was well acquainted with Bolzano's work on paradoxes; he especially acknowledges his indebtedness to Bolzano's important insights on time and space in *The Theory of Science* ((1837) 1972). Peirce refers to Bolzano in manuscript 622 (1909), in which he discusses aspects of his pragmaticism. Peirce also explicitly refers to Bolzano's *Paradoxes of the Infinite* (1851) in his redefinition of the idea of continuity in "The Bedrock beneath Pragmaticism" of 1906.[1]

Peirce's idea that whatever is continuous consists of separate parts is itself a paradox. The relationship between such parts consists of the fact that each part shares with every other part some commonality of an "internal nature", as participants of a place, a time, a space. These "things," which are partially represented in all the members of the thing as a continuity, are "spiritual realities ... are all ideas ... are all characters ... are all relations ... are all external representation ..." (CP 6.174). The relationship between all the several parts comprises such connections as to constitute the existence of the thing in which they all participate.

Everything which can be said to consist of material parts has "different sets of such parts," as will be further discussed in Chapter Ten of this volume, with respect to the continuity of the legal concept of Land. To foreshadow: land in law consists of the ideas of countless material parts of Land as a general idea, such as seas and oceans, soil, buildings, fields, trees, animals, minerals, etc., and in brief, of everything above and everything below any defined space on the surface of the earth. *Land, then, is such a continuity in law as Space is in metaphysics.*

Further, Peirce stresses, there is nothing which is said to have an "Essence" such as an intrinsic aim or purpose or person or instrument which actually has such material parts in this strict sense of materiality. But in a somewhat looser sense of materiality, Peirce says, that which is included in our understanding of what is generally meant by the *idea* of

Material Part is the *connection itself* which links constituents of a continuity into a collection or into a network of relationships – i. e., a system of signs (CP 6.174).

To briefly anticipate, this discussion on continuity and the legal concept of land will take us eventually into legal aesthetics and Peirce's notion of Esthetics. It should be remarked here that Peirce's phenomenology, profoundly influenced by Bolzano, dispenses with analysis of the aesthetic *objects* regarded as indivisible and atomistic wholes. Peirce concentrates instead on the *linking processes,* which unlike atomistic whole 'objects', he says are subject to analysis and to a subdivision into parts and functions (Kevelson 1987; see Chapter Twenty of this volume). Peirce's categories refer to processes, not to things. *Processes are phenomenal.*

For present purposes, however, it is important to note briefly that the unification of parts of a continuity is brought about through the interval or the presumed connecting process, which is also understood as a material part, as "parts of some *state* of it, and very likely of an instantaneous state that is an *ens rationis* closely approximating to the nature of a fiction" (CP 6.174). Implied in this constructed fiction is the important idea that these intervals are infinite constructions and that we know of their existence not because we can sensibly perceive and observe them, but because of their consequences, which are "traces" of their existence. We can and do observe such traces. This idea of "trace" is controversial, as we know from present-day linguistic theory; it is also a significant explanatory hypothesis in the work of experimental biologists such as Max Hamburgh, where the effects of a substance come into existence and pass out of existence after the completion of its function. Traces are left as consequences which *are* observable in a succeeding stage or part of the continuous process in which they participate (Hamburgh 1971). This same notion of trace is prominent in the physicists' approach to the analysis of subatomic particles; though this topic requires separate discussion, it is worth mentioning at this point since it brings up the paradoxical notion of place or, in a legal sense, of Land and its continuous metamorphoses in both legal theory and actuality. Land in law is another term for the Heraclitan River, i. e., for the phenomenality of permanence and change.

It is notable that Bolzano's rejection of the Kantian understanding of time and space hinges on his own reinterpretation of the notion of trace. Bolzano asserts that whatever we mean by infinite time and space is the result not of intuition, but of a concept, an idea of continua, such that by space "we mean nothing but the class of all possible locations," where

the idea of a location is a material determination or a particular property of the "actual *concept of* space" (Lindahl 1977: 27–29).

Further, Bolzano pointedly argues in opposition to then widely held assumptions that the infinite is such that it cannot be increased. Bolzano says that "it is clear that an object which has changed through a given period of time has passed through an infinite number of different states, one after the other, since there is an infinity of moments in that duration that followed each other" (Bolzano 1837: 414–418, 134).

A close discussion of Bolzano's ideas as they compare with Peirce's – especially on the topic of continuity and by extension on the legal concept of land – must be deferred to a later time. But in passing it is important to call attention to the fact that Bolzano was deeply influenced by Bentham's theory of Utility. He was in agreement with Bentham on most if not all of the major principles of a Benthamite utilitarianism. But this affiliation is sometimes suggested as being based more on Bolzano's religious beliefs than on his careful scrutiny of Bentham's logic (Bolzano (1837) 1972: xxiv). There is a serious inconsistency here, since Bentham's logic and Peirce's are fundamentally opposed on the crucial point of indeterminacy. It should also be recalled that Husserl also claims Bolzano as his mentor, and understands his own monumental approach to phenomenological analysis as having derived from the foundation of Bolzano's logic. It can only be mentioned in passing at this time that Husserl, through misunderstanding, misapplied Bolzano's logic to his own project. Peirce, on the other hand, was undoubtedly distracted by the fact that Bolzano expressed such open admiration for Bentham's Utility. At the same time, although Bolzano's *Paradoxes* were not widely known at the time of Peirce's own writings, Peirce was aware of Cantor's exceptionally high regard for Bolzano's work, and especially for his contribution to mathematics on the topic of continuous functions – e. g., "any infinite set contains a subset that stands in universal correspondence to it ... (and) that this is not a contradiction" (Bolzano (1837) 1972: xxvii). Bolzano's contemporary critics pointed to his violation of the law of identity and thus regarded Bolzano's contribution as contradictory or fallacious. What was not then widely appreciated was the fact that Bolzano had indeed laid the ground for a logic of paradox, and thus called forward a new logic.

But Bentham rejected such a paradoxical logic, as is well evidenced in his rejection of the idea that a person may have an obligation under law to behave in a particular way in a given situation to a particular person, but according to the law this same person may also have a different

obligation or duty *not* to behave in that particular way, in a given situation to a particular person. Bentham did not accept the premise that the law can be internally contradictory; he insisted that a reciprocity between parties in contractual relations, such as between tenant and landlord, must be clear and nonparadoxical or noncontradictory in the law. (See the subsequent chapter in this volume on "Paradox in Law.") A position basically antithetical to Bentham's has also been taken up in recent times by G.L.S. Shackel in the context of discussion about distinctions between entrepreneurial activity and imaginative activity in law and economics (Shackel 1979: 19–63). Shackel's thesis will be returned to in this volume; briefly, his main assumption is that choices are not between given alternatives, but are constructed within the chooser's place of operations, his field, so that what appears as a random possibility is random only with reference to an existing situation or system. This is Peirce's position with respect to randomness, and it is also an integral part of the framework of Hayek's economic philosophy (Kevelson 1988b).

As for Bolzano and the problem of paradox in pragmatic praxis, and especially in relation to law and semiotics, it must be pointed out as a reminder that De Morgan's famous *Budget of Paradoxes*, with which Peirce was well acquainted and which he respected with serious qualification, was written before Bolzano's work on the *Paradoxes* appeared (De Morgan (1915) 1954). De Morgan's great contribution was to delineate and evaluate the various kinds of reasoning which had been filed loosely under the superheading of paradox, and to distinguish between genuine and false paradoxes. De Morgan's famous "Budget" will be returned to in the following chapter. For now, we recall that De Morgan's account of the famous law trials of William Hone in 1817 show the extent to which the law may be seen as contributing to the notion of legal paradox. In De Morgan's example the defendant is not on trial for a crime he *did* commit, since it was believed unlikely that a verdict of guilty would have been found (owing either to technicalities in the law or to public sentiment, which favored the accused); instead, the law, as De Morgan explains, tried and convicted the accused on the *pretense* of considering a totally different crime than was at issue in the court.

In other words, the legal prosecution may direct its energies and actions at a series of *alleged* crimes of such a nature as sedition or false pretense and thereby "cause" the jury's sympathies to become alienated from the defendant. The defendant then stands to be judged not for the actual crime of which he is innocent and which innocence is presumed through the bias of the jury, rather, he is tried by his peers on other

trumped-up or insinuated charges, such as may predictably outrage the jury and thereby may predictably result in a judgment of "guilty".

This is a fallacy and not a true paradox, according to De Morgan, except that the method of the law could substitute one crime, as alleged, for another crime, also as alleged, on the assumption that the Common Grounds of the public – the verdict of the defendant's peers – would condone one kind of act and condemn another kind. The law deliberately referred to its knowledge of practical public sentiment and value, which was held up as the single or continuous concept of ideal Public Value. But actually, the parts of this Value are not consistent with one another, such that one offense is easily tolerated by a public while another offense, equally illegal, is not. It is not the case that the Public Value represents both a verdict against and a verdict for. The argument is *not* paradoxical, since what is referred to as a continuous term, Public Value, is not synonymous with the value judgments of jury members, as individual people, who collectively represent the idea of Public Value. This notion of paradox and representation is further discussed in the concluding chapter of this volume, on Representation in Law.

The main point here in introducing the De Morgan example of the so-called paradox of the law in the Hone Trials is to distinguish between a shift from the identity of a part or token of a continuum to that part as a new whole or general and a "typical" continuum. Just as a token of a type in the logical sense may function as a type itself in a different context, the paradox is created whenever there is an attempt to regard a token as *always* a part of a type or as a Universal, Ideal and indivisible Quality of fixed magnitude with finite definition.

On this token/type shifting relationship, Bolzano correctly criticizes Locke's assumption that in every analytic judgment "the species is the subject and the genus the predicate". Bolzano points out, "Not every concept of species is compounded from the concept of the genus," (Bolzano 1972 [1837]: 200). This is what he calls Locke's "far-reaching error." Two propositions expressing different meanings or ideas are not identical or even equivalent "even if they are about the same object," Bolzano says, and thereby challenges the traditional notion that a proposition must be either analytic or synthetic. Bolzano says the *shape* of the proposition (i. e., its *verbal appearance* as phrase or statement or utterance) is not sufficient to indicate whether a proposition is to be understood as analytic or synthetic (Bolzano 1972 [1837]: 198 – 199). On the contrary, proverbs or truisms as representations of public knowledge and gnomic

wisdom may sound and/or appear as analytic propositions, yet they are not. They are "empty tautologies."

As pointed out by Perelman above, this "appearance" is a rhetorical strategy. To Peirce, such strategy is a higher or governing use of logical form to produce pragmatic consequence. *It is the function of Pure Rhetoric, otherwise known as Semiotic Methodology.*

According to Bolzano, the main distinction between analytic and synthetic propositions is that the synthetic propositions do not comprise any idea which can be altered or substituted by another idea or term without also altering the truth or falseness of the proposition. By contrast, the parts of an analytic proposition may conceivably all be substituted by other parts without altering the truth or falseness of the original proposition. Further, however one chooses to define and differentiate between analytic and synthetic judgments, we come to the conclusion "that the difference between analytic and synthetic judgments is merely *subjective, and* that the same judgment is sometimes analytic and sometimes synthetic, depending on what concept we have of the object to which the subject idea refers" (Bolzano, ibidem).

II.

Peirce speaks on the topic of the subjective in Ms 1116. Peirce would say that one's purpose informs one's choice. He says it is subjectivity which constitutes the origin of inquiry at the phenomonological stage of investigation, where the focus is upon the object *carved out* or *prescinded* from its ground.

Richard Bernstein aims for a reinterpretation of subjectivity, for an elimination of the distinction between the subject and the object which characterizes Cartesian thought. He places Peirce in the same camp, in this respect, with Heidegger and Gadamer, who also oppose Cartesian subjectivity (Bernstein 1983).

The "private subjective judgment" according to Bernstein, with particular reference here to Hannah Arendt's work, must evolve to a dialogic notion of subjectivity where the subject is not the private person, *but a relationship between persons in society.* This evolved sense of subjectivity is necessary to bring about an acceptance of the idea that the force of judgment in public life is the expression of actual and even possible agreements with others. This agreement is seen as subjective. This subjec-

tivity makes possible a living force of reciprocity in contractual relations, since the subject is not identical with the Ego but rather is part of a consensus among like-thinking and like-valuing people (Bernstein 1983:218).

Bernstein reminds us that Kant's radical subjectivism opens a new perspective upon value judgments in association with the idea of "free play." This "play" leads to an interrelation between the forming of value judgments and the process of interpretation through which they evolve (Bernstein 1983:119).

A judgment, an aesthetic or value judgment, may be likened here to a continuum. But the connections which are the parts of this judgment are the infinitudes of sign interpretation, and it is *this* process which is analyzable in the semiotics of Peirce – especially in his phenomenological preparation for semiotic analysis. But aesthetic judgments, unlike analytic or synthetic judgments, are not propositions of truth or falseness, Bernstein points out. Unlike Kant's approach to aesthetic judgment as the establishing of true and therefore prescriptive or deontic statements, the aesthetic judgment is – in Gadamer's sense, for example – an intersubjective agreement of persons interacting in free play. The aesthetic judgment is suppositional only. It is malleable, reformable, improvisable. Thus far, Gadamer's play is akin to Peirce's. (For differences of a crucial sort, see Kevelson 1987b.)

This intersubjectivity, I have argued, is none other than the praxis of pragmatism and the dialogic structure underlying all semiosis. The intersubjectivity in the process of forming new value judgments is Pure Play or Pure Musement in Peirce, and represents an interlude or interval of infinite possibility. As Play it includes the relationship between the vague and the definite. It is a process which gives free play to the paradoxical, since such judgments are placed on the edge of particularities and their limitations as thus far defined boundaries (Kevelson 1987b). This edge, this invisible link between states of existents, is the all-in-nothing point of transition, the Sign Zero.

By a shift of perspective, we recall Bolzano's recognition that a proposition may be either analytic or synthetic; and depending on the subjective view, a new focus may be created. A creation of value through focusing is discussed further in Chapter Nine.

But Bernstein has raised a question which concerns us deeply in this study: namely, what is to be done in our world, where so much of the community's shared and reciprocal relations have broken down and where intersubjectivity seems so elusive? The solution suggested here is

problematical, since to make or bring about through various kinds of social engineering, through coercion or deception of any kind, any deliberate restructuring of the parts of intersubjectivity really defeats the whole purpose of intersubjectivity, since intersubjectivity or community must spring from choice, spontaneity, and freedom to contract (Bernstein 1983: 226). This is precisely Hayek's point in *Law, Legislation and Liberty.*

The law cannot impose freedom. Its mandate is not to *interfere* with freedom of intersubjectivity. To parody the old saw, judgment (i. e., intersubjective judgment) cannot be legislated. This may indeed be a "higher morality" than the so-called morality too often cited as higher than law and thus constituting a problem for law. Let us recall Bolzano's investigation of the origins of judgment, which concludes that we cannot accept either empirical "truth" or aprioristic assumptions of "truth" as starting places for our judgments. Rather, we take our views *as if* they were true, shared and confirmed by others, from which affirmation we draw our common experience (Bolzano 1972 [1837]: 349).

III.

Yet the testimony of our senses, of our eyes in particular, is not enough. We need a kind of geometry. In other words, we need a theory and a praxis of space and of place, Bolzano suggests. This idea of place requires a method of inquiry which seeks explanation from the effect, the phenomenon upon which we are focusing our attention. This method is what Peirce has identified as the method of abduction, the method of discovery.

In the law, discovery procedures are part of the whole of evidential procedure. Discovery will be discussed further in a later chapter.

Briefly here, in the Law of Property evidences usually consist of those documents which attest to events that mark significant transactions in public life: e. g., a deed, a license, a contract, a promissory note, a death certificate, an agreement to buy and sell, a lease.[2] Unlike the proposition, which points to or indicates a universe of which it is "an image with a label or pointer attached to it," an assertion involves an action with and to someone else, other than oneself, Peirce says. The former may be true or false; the latter is a sign of the Real.

The assertion of something (i. e., the assertion of a proposition) is, according to Peirce, the presentation of evidence that one assumes responsibility for that which one asserts. One cannot assert *ex post facto*

either in logic or in law, since one cannot promise to do what should have or could have been done in the past. An assertion is evidence that one intends to do something. A contract is such an assertion, Peirce reminds us. If asserting a proposition is making oneself responsible for the truth of that proposition, then one cannot assert something over which one has no control. An assertion of a proposition says only that if such a hypothetical situation shall arise in the future, then and only then will one assume responsibility. But the most important aspect of assertion is that it is evidence of a law, and "A law ... which never will operate has no positive existence," Peirce says. The assertion of a law is the assertion or warrant that the law will be operative. The law may be of physics or of human affairs in social interaction, Peirce suggests. Any law which is not expected to operate in the future is not evidence of a functioning law, *but is a definition only*. To say that an object is hard or red, or to say that the laws governing tenancy are reciprocal, is to say of these attributes or "properties" that the object referred to is subject under law, and "therefore is a statement referring to the future" (CP 5.545, written in 1902 on the topic of beliefs and judgments).

To refer to one's belief, Peirce says, is to refer to something of which an assertion is, in part, a process – to that continuity of belief (CP 5.546, c1909). A shared belief or a community value – an intersubjective judgment – is also in part an assertion, according to my interpretation of Peirce, and is thus a community commitment to a common future. This shared belief is evidence of the promise or trust the value asserts.

Further, Peirce says, to take an oath in a court of law is not only a presentation of an intention, but a representation; "It is not mere saying, but is *doing*." Peirce reminds us that when the law requires us to take such an oath it refers to such saying as an "act," or "speech act." All judgments involve such acts, Peirce says. They require that we produce sufficient energy to realize our intentions. The failure to bring about what we assert we will do leaves us "liable to real consequences, or effects" (CP 5.547). A judgment or belief in the sense that it consists in part of assertion is an ethical act, Peirce says. The reference for such action, we may infer, is to our values. In this regard, Peirce's Esthetics is the referent for Ethics in the Normative Sciences of his semiotic theory. The problem remains: how are values to be discovered – i. e., created and justified?

We recall that a law which cannot be realized is not a law but an empty definition. The assertion which assures that the law will be enforced is a promise that a propositional truth will be brought about not in imagination or wishful thinking or intellectual playing, but in the existent

world, *since the asserted proposition points to the existent world.* But the assertion must then leave room open for possibilities which may on several levels *become* existent.

IV.

Peirce was especially concerned with Hamilton's mathematical idea of the "imaginary"; he developed this idea through the mathematical work of his father, Benjamin Peirce, to suggest that new information not implicit in the main subject of a discourse may be anticipated although not yet known. An "imaginary" may be a possible comment to a topic. In diagramming the relationship between old and new information, between topic and comment – or Theme and Rheme – the "imaginary" of mathematical discourse becomes analogous with an imaginary but conceivable Rhema in dialogic exchanges of messages. (This notion of the imaginary is discussed in the chapter "Time as Method" in Kevelson 1987b).

In a very short and undated manuscript, presumed to have been written around the middle of the 1870s, Peirce connects the notion of the imaginary with non-Euclidean, synthetic geometry and links it to his concept of the continuum (see Ms 101). It is around this period that Peirce undertakes the monumental task of describing the evolution of geometry. In Ms 118 he regards imaginaries as part of algebra, but integrated into geometry since they serve some special purposes.

From a nonmathematical viewpoint, and risking gross oversimplification, I understand Peirce to suggest a relationship between the two kinds of geometrical systems which explore systems of points in space: one a system of imaginative quantity and the other a system of "the real plane of projective geometry." This may be understood as one representing the other such that a surface is produced. A reciprocity between the two geometrical systems makes possible an exterior *face* of the figure described. This surface may then be regarded as a site or a ground – i. e., a definite place (Peirce Ms 14, reprinted in Eisele 1976: 3.1.4)

To go back in history as Peirce did to locate the roots for his idea of Speculative Rhetoric, Pure Rhetoric or Methodology, we might look briefly at the medieval cosmological notions of place, infinity, and paradox in order to attempt to understand how the legal notion of Land, originally a token of the medieval and metaphysical logical Place, was

evolved: in law Land is no longer a token, but a type or classification not connected with the idea of Place in its original sense. A brief look at the Land/Place evolution may be useful here:

Pierre Duhem opens his *Medieval Cosmology* with an inquiry into the development of the ideas of infinitely large and infinitely small, beginning with Aristotle and concluding with a review of 15th-century cosmology. He follows this first stage of inquiry with a detailed and close examination of the changing concept of place from Aristotle, with important incursions into the Arabic notions of place, and into the 15th century (Duhem 1985 [1909/1916]: 139–143).

In presenting some of the ideas which seem to me especially important to the understanding of the doctrine of territoriality as it was regarded by the contributors to the Restatement of the Conflict of Laws, I attempt here only to focus on those aspects of the idea of Place which form a continuity, a line of thought or sign system, which becomes expressed in politics and law as territory and as sovereign lands or nations.

First of all, we want to grasp the static framework of Aristotelian concepts of place: 1) the place of a body must contain the body, and 2) the place of a body is fixed and constant; it is the referent of the body, and it is motionless.

The paradox here is that the "ultimate celestial sphere" is incorporate and immaterial, since it has no place which contains it, and it is motionless. But Aristotle's ultimate place not only has the potential to move but moves between day and night, hence between positive and negative. Later Arabic thought, especially the work of Avicenna, refined Aristotle's apparent contradiction: it becomes such that what is meant by the body is the *surface of the body's surroundings in its place*. The idea of Place is the defined limits of the container of the body which contacts the contained body. Place is the boundary or wall or demarcation of where the body ends and the ground of its locus begins. Averroes also stressed the Aristotelian notion of the immobility of place; he speaks of place as that object toward which a thing is inclined or upon which it rests. In order for a body or thing to move of its own volition, the place upon which it rests must be capable of movement, for then the body could not be said to move of its own "intention," or in a much later sense of the idea, of its own "free will" (Duhem 1985 [1909/1916] ibidem).

The immobility of place becomes interpreted as a constant, and eventually as a permanence or a stability which permits the agentive and volitional body to move about, as it were, by its own force and power. By the time of Roger Bacon, which corresponds roughly to the elimination

of the ergative function in many Indo-Eurpean languages (e. g. in English) the then prevailing notion, regarded as an interpretation of Aristotle, was that celestial orbs have no need of place. Only the lower natural creatures require a place, since they, as contrasted with the heavenly bodies, are imperfect and thus have needs. By the time of Duns Scotus, whose thought had so great an influence upon Peirce, the immobility of the celestial spheres was challenged: a thesis was advanced which proposed levels of place, where each part of the continuum of place became capable of degrees of movement since each part depended upon that which was higher in the order of the spatial continuum than itself. Whence came the first movement? In this hierarchical structure of thought, first movement came from the Prime Mover, from God. Thus Place is, as Locke is to say of Real Property much later, a gift from God. I extrapolate the following, which is significant:

The notion of place became, through Duns Scotus, inextricably tied to the power of mobility. One may then infer that to the extent that a body has the power of agency to move freely, i. e., at will, the place occupied by that body has a corresponding power of motion. The place closest to the Divine permitted those bodies which occupied it a maximum mobility. The place farthest from the divine seat was occupied by bodies with proportionately less power of agency to move about at will. Further, those bodies with no proper place – that is to say, with no place which they had by evidence of deed, bequest, or token of divine will – were the least powerful of all bodies, since they were the least capable of moving volitionally. *A place, then, becomes the testimony of one's power of motion, i. e., one's power to act. This ideal place, I suggest, is carried forward as sovereign territory and private property, into law and legal concepts.*

It is Duns Scotus who revolutionized the earlier ideas of Place, according to Duhem, for it is Scotus who establishes the relationship between a "contained body and the containing body," or place (Duhem 1985 [1909/1916]: 183). Place, after Scotus, then becomes a covering term for this relationship. Scotus maintains that every place must have a surface since every place has its "counterpart," which is "the action of lodging," or location. The action of lodging, *locare*, has its counterpart in the passion of being lodged, *locari*. The term Scotus gives for the counterpart of place is the word *ubi*, the "whereness." Scotus introduces terminology from classical rhetoric to express his idea, so that in addition to the place and the where, the disposition or *positio* should also be identified; this disposition indicates the order or organization of the body in relation to

the place. The disposition becomes a set of geometric postulates which "specify" the "where" of the body in place. *It is a kind of syntax or grammar of the body-place relationship*, I might add.

Scotus further takes up the problem of how a body is in one place at one instant but in another place at the next "instant," so that to observation, the body over the duration of a moment is in two places, i. e., *is both here and not here.* If the place is constantly in motion, than it is a different place in every moment of time, according to the Aristotelian viewpoint that time is change with respect to a before and an after.

Scotus does not attempt to resolve this paradox and its radical contradictions of all notions of Aristotelian thought. It contradicts, as well, all of the Scholastic thought that went before it, since it sees motion as a continuum, independent of either body or place. The movement of rotation is seen by Scotus as endless, independent from other bodies, containers or forces. It is what we would idiomatically call "perpetual motion." Scotus' concept of the endless contiguity of motion suggests the idea of a self-generating force, a self-energizing force, a force which behaves in opposition to positive entropy, and which changes and accelerates and continues without requiring any influx of external energy or motivation. This idea is examined by Peirce, and will be looked at closely in another study, since further inquiry into perpetual motion will take us far from the ground of our inquiry and into the stratosphere of cybernetics.

Following Scotus, the idea of place underwent several significant transformations for law, for by the time of Scotus the organization of the idea of nation states had already become a viable and dynamic concept of the way the sovereign states behave and develop agentive power to act by expanding territorially, by stretching and acquiring additional space and place. Thus the power of the will became firmly interrelated with the ownership of land as the surface of place. Real Property, or the Where, became the counterpart for free action in the world, and a sign of freedom of the will.

Admittedly, I have taken great liberties with the ideas suggested by Duhem's overview of the development of the idea of place. Nevertheless, the correspondence between cosmological place and the place of secular territories or lands appears to have emerged as representations, one of the other. The Peircean proposal that topical geometry is actually the first of the geometries to treat of space proper suggests that a revolutionary concept in mathematics is not only a revolutionary turning point for the relationship between a body of literature, for example, and its context or place, but also provides a major and radical reinterpretation in law

with respect to land, to presumed and traditional relationships between tenant and landowner as representation of the land which led eventually but directly to revision of the notions of territoriality in Conflict of Laws via the Restatements of the Legal Realists in the first third of this century.

It must be mentioned that all of the ancient theories on place presumed a center of the universe. This presumed center of the universe no longer holds. Thus the laws of property, of contract, of community and of intersubjective relationships which were presumed to have derived from a common ground are now perceived to be falling apart. Yeats knew this. So did Peirce in his famous "Guess at the Riddle," and so did his mentor, Schiller, who taught the aesthetics of the phantasms of possiblity, of freedom, of the grotesque.

V.

The following chapter will briefly consider some of the alternatives to traditional jurisprudence raised by both the radical left and the radical right in response to the perception of the notion of the "end of law," interpreted not as Pound intended, as goal or aim or ideal purpose of the law, but rather as the finish, the demise, the death, and/or the *End of Law*? as Timothy O'Hagan suggests (1984).

In concluding this chapter I want to direct attention once more to the idea of free play mentioned above and to the idea of Musement and interlude in Peirce's thought, which is here understood as an infinite connection or link between sign systems, between bodies in motion but self-contained and defined by their surfaces, as play is defined by the rules of the game, and the limits of the game by its board, its court, its field. Above I also referred to the idea of the imaginary as a complement to the actual plane of projective geometry, since through this relationship surfaces are created upon which one designs or maps activities and movements toward goals.

The idea of utopics as imaginary constructions or even real constructions with ellipses, or nothings with nothings or missing places, suggests a parallel to that existent world to which the law refers and to which it points. A utopic place is not an idealized noplace. It is a possible and hypothetical construction for experimentation of and by the law.

Utopics might provide a parallel rather than an alternate approach to the erosion of reciprocity which formerly acted as a cohesive and binding