Legal Bilingualism[†]

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Legal bilingualism is an ideal to which the Canadian legal order aspires. In practice this aspiration has led to the production of legislation and federal judicial decisions in both English and French. This essay considers the semantic and epistemological foundations of legal bilingualism. It argues that postmodern critiques of legal indeterminacy rest on the same impoverished view of human communicative symbolisms that sustains the claim that legal bilingualism can be realized by simply translating legal texts. Once the deferential and presentational capacities of human symbolisms are recognized alongside their rational and discursive properties, the relationship between language and legal knowledge reveals its complexity. This essay explores the theory and practices of legal bilingualism and reviews the institutional requirements of a bilingual legal order. Legal bilingualism is contrasted with legal dualism in the conclusion to the essay, where the semantic and epistemological lessons of legal bilingualism are then read back into the interpretation of unilingual legal orders.

Le bilinguisme juridique est un idéal auquel aspire l'ordre juridique canadien. En pratique, cette aspiration a mené à la production de textes législatifs et de décisions judiciaires et en français et en anglais. Le présent article examine les fondations sémantiques et épistémologiques du bilinguisme juridique. L'auteur soutient que les critiques post-modernes de l'indéterminisme juridique reposent sur la vision appauvrie des symbolismes communicatifs humains qui sert de base aux revendications de ceux qui croient qu'il est possible de traduire un pur métalangage légal en un langage naturel. Une fois les capacités déférentielles et présentationnelles des symbolismes humains reconnues parallèlement à leurs propriétés rationnelles et discursives, le lien entre la langue et le savoir juridique révèle sa complexité. Cet article explore la théorie et les pratiques du bilinguisme juridique et passe en revue les impératifs institutionnels indispensables à un ordre juridique bilingue. L'auteur met en évidence la distinction entre le bilinguisme juridique et le dualisme juridique. La conclusion intègre les leçons sémantiques et épistémologiques du bilinguisme juridique pour ensuite les appliquer à des ordres juridiques unilingues.

[†]This essay originated in a project entitled "Canada's Bilingual and Bicultural Legal System", prepared while I held a Canadian Law Information Council Summer Research Fellowship in 1981. At that time I benefitted from the research assistance of Mindy Paskell-Mede. A revision of the C.L.I.C. study, prepared by Stephen Toope, was delivered to the Canadian Section of the International Association for Legal and Social Philosophy at Vancouver in May 1983. In 1988, Richard Janda reshaped the essay for delivery to legal-theory workshops at McGill and the University of Toronto. In 1990, the text was edited once more by David Lametti and was presented at faculty seminars at the Australian National University and Murdoch University. Desmond Manderson helped me rework the essay in a French-language version for presentation to a workshop at the University of Montreal in 1994. The essay was again substantially revised for presentation at a faculty seminar at U.B.C. in January 1996 and at "The Blasted Pine" conference. To my various research assistants, to those participants in the seminars at which earlier versions of this text were presented, to the designated commentator at "The Blasted Pine" conference, Mary Ellen Turpel, and to my colleagues and former colleagues G. Blaine Baker, Michael Bridge, Daniel Jutras, Nicholas Kasirer, Dennis Klinck, Shauna Van Praagh and Jeremy Webber — each of whom read and commented upon the essay (some in several of its forms) — I am most grateful. None, however, should be held responsible for defects in the present essay.

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Prologue

11.1 Now the whole earth had one language and few words ... 4. Then they said, "Come, let us build ourselves a city, and a tower with its top in the heavens, and let us make a name for ourselves, lest we be scattered abroad upon the face of the whole earth." 5. And the LORD came down to see the city and the tower, which the sons of men had built. 6. And the LORD said, "Behold, they are one people, and they have all one language; and this is only the beginning of what they will do; and nothing that they propose to do will now be impossible for them. 7. Come, let us go down, and there confuse their language, that they may not understand one another's speech." 8. So the LORD scattered them abroad from there over the face of all the earth, and they left off building the city. 9. Therefore its name was called Babel, because there the LORD confused the language of all the earth; and from there the LORD scattered them abroad over the face of all the earth.

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4. Chap. XI, 1-9: Causes de la Dispersion des Peuples et de la Confusion des Langues; La Tour de Babel.

Toute la terre avait une seule langue et les mêmes mots ... Ils dirent encore: "Allons, bâtissons-nous une ville et une tour dont le sommet soit dans le ciel, et faisons-nous un monument, de peur que nous ne soyons dispersés sur la face de toute la terre." Mais Yahweh descendit pour voir la ville et la tour que bâtissaient les fils des hommes. Et Yahweh dit: "Voici, ils sont un seul peuple et ils ont pour eux tous une même langue; et cet ouvrage est le commencement de leurs entreprises; maintenant rien ne les empêchera d'accomplir leurs projets. Allons, descendons, et là **même** confondons leur langage, de sorte qu'ils n'entendent plus le langage les uns des autres." **C'est ainsi que** Yahweh les dispersa de là sur la face de toute la terre, et ils cessèrent de bâtir la ville. C'est pourquoi on lui donna le nom de Babel, car c'est là que Yahweh confondit le langage de toute la terre, et c'est de là que Yahweh les a dispersés sur la face de toute la terre.[1]

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[1] The two quotations are from: (i) *The Holy Bible* (Revised Standard Version, 1952) Genesis 11:1, 4-9; and (ii) *La Sainte Bible* (La Société de Saint-Jean l'évangeliste, 1968) la Genèse; 1ère partie; Vième section, sous-section 4; 11ième chapitre: 1, 4-9. Apart from linguistic differences relating to vocabulary and syntax — the traditional referents for the derivation of meaning — other semiotic divergences between these texts are immediately apparent: the use of numbered verses in English; the use of capitals in English and bold text in French; the use of an introductory title in French. Each of these is a significant element through which the reader apprehends the text and ascribes meaning to it. But we should not conclude that any of these devices are specific to either English or French.

All communication is translation, even where the "same" language is being deployed. In order to give a preliminary indication of this subthesis of the present essay it is helpful to compare the rendering of the story of the Tower of Babel given in the King James Version of the Bible, which reads as follows:

> **11.1** And the whole earth was of one language, and of one speech ... 4. And they said, Go to, let us build us a city and a tower, whose top *may reach* unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth. 5. And

Introduction

1. On its traditional theological reading, the story of the Tower of Babel teaches that the multiplicity of human languages is evidence of our fall from grace. If only we had not been punished by God, we could have built to the heavens. One language would give us all a shared knowledge and knowledge, after all, is power.[2]

But the story leaves us uncertain as to whether the multiplicity of languages after Babel is a genuine barrier to shared knowledge or whether it, in fact, best reflects the nature of the knowledge that is accessible to us through language. Is the story of Babel about limits on the capacity of human beings to communicate with each other, or is it also about limits on the capacity of human beings to deploy language in expressing what they know?

> the LORD came down to see the city and the tower, which the children of men builded. 6. And the LORD said, Behold, the people *is* one, and they have all one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do. 7. Go to, let us go down, and there confound their language, that they may not understand one another's speech. 8. So the LORD scattered them abroad from thence upon the face of all the earth: and they left off to build the city. 9. Therefore is the name of it called Babel; because the LORD did there confound the language of all the earth: and from thence did the LORD scatter them abroad upon the face of all the earth.

It is to be noted that, while both are in English, the Revised Standard Version differs from the King James Version not only in its grammar, syntax and vocabulary, but also in its translation and interpretation of Hebrew, Greek and Latin texts. These discrepancies are especially evident in verse 1, where the Revised Standard Version suggests, in using the expression "few words" rather than the expression "one speech" (found in the King James Version), an interpretation of the story that raises not only questions of translation (semantics), but more fundamental questions of interpretation (epistemology). Moreover, the French-language version presents itself as a combination of the two English-language translations: between "few words" and "one speech" lies "les mêmes mots". Here a distinction is being drawn between grammar and syntax on the one hand, and vocabulary on the other.

[2] The classical reading of the Tower of Babel is presented in N. Frye, *The Great Code: The Bible and Literature*, 1st ed. (New York: Harcourt Brace Jovanovich, 1982) at 158, 230. See also G. Steiner, *After Babel: Aspects of Language and Translation*, 2d ed. (Oxford: Oxford University Press, 1992) *passim*, on the theology of Babel.

Socio-linguists have another reading of the story of Babel, formulated as the "Law of Babel". See J.A. Laponee, "The Language System and the Language Policies of Canada, Functionalities and Dysfunctionalities" in K. Kulcsar & D. Szabo, eds., *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada and Hungarian Academy of Sciences, 1996) 98 at 98-99:

> [T]he number of distinct languages used for communication in a closed system is related to the density of communication within that system. Concentrate all the individuals ... in a single and dense communication network, such as a single big city, and they will, over time, develop a common language ... On the contrary, if you scatter people all over the map, if you separate them by seas, jungles, rivers and mountains (and, for good measure you may also wish to separate them by hatred and fear), then, says the Law of Babel, men will develop a multiplicty of languages and will cease to understand one another.

2. Differences between languages seem to make it more difficult to converse with someone who does not speak one's own tongue than with someone who does. Yet, these differences do not render us mute when faced with people who speak a language foreign to us. The fact that we can communicate despite differences in language points to the possibility of a shared human knowledge beyond language.[3] Indeed, the history of intercultural contact, whether in colonial settings or otherwise, confirms the capacity of human beings to communicate and to symbolize prior to learning a "natural" language.[4]

Conversely, the existence of mutually incomprehensible tongues suggests a fundamental individuating impulse of language itself.[5] For example, some thirty different varieties of English are now spoken around the world.[6] Each human language, and each dialect within each human language, is a distinctive symbol system — as divergent and as productive of insight as music and painting. Each human language and each dialect within each human language permits each speaker or listener, writer or reader, to fashion a different communicative *timbre*. Grammatical differences between active and passive voices or among indicative, subjunctive and imperative moods within a language, permit us, and at the same time oblige us, to fashion what we wish to say in particular ways. This is even more so the case with grammatical and syntactical differences as among human languages.

But the lesson is deeper. Ultimately, all communication is translation; ultimately, all listeners and readers are imperfectly recoding speech or text into their own personal language. Learned conventions and generalized, recurrent contexts for the deployment of natural languages desensitize us to the complexity of communication through language, especially among those who "share" the same natural language.[7] But confronted with Babel — with the confusion of tongues — we cannot escape this

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[3] On various understandings of the human capacity to acquire language, and to acquire a second or third language, see S. Pinker, *The Language Instinct: How the Mind Creates Language* (New York: William Morrow, 1994).

[4] In this essay, unless the context clearly indicates otherwise, I use the word "language" to refer to what linguists call "natural languages". Conventionally, natural languages are said to be human languages like English or Japanese, as opposed to a computer language, musical notation, formulas in logic, and so on. See generally H. van Riemsdijk & E. Williams, *Introduction to the Theory of Grammar* (Cambridge: M.I.T. Press, 1986).

[5] This assertion is not, however, uncontroversial. Traditional linguistic analysis had it, to paraphrase the formula popularized by Cailleux, that "for every language that dies, two are born" (see A. Cailleux, "L'evolution quantitative du langage" (1953) Bulletin société préhistorique française 505). Yet, today, the trend seems to be reversing itself. Given increasingly globalized communications structures — the global village — linguists predict that some 90 percent of the world's 7000 languages are likely to disappear in the not too distant future (see S. Moisan, "La disparition menace 90% des langues de la planète" *Le Devoir [Montréal]* (10 September 1992) 11, cited in Laponce, *supra* note 2, 98 at 99).

[6] See D. Crystal, *The Cambridge Encyclopaedia of the English Language* (Cambridge: Cambridge University Press, 1994).

[7] See, however, J.-C. Gémar, "La traduction juridique: art ou technique d'interprétation?" (1987) 18 R.G.D. 495, for a sensitive presentation by a linguist of the point that there is little legal activity that does not involve the same intellectual operations that a "legal translator" routinely deploys.

engagement with the capacities and limitations of human language. More than this, were it not for Babel we might miss the richness of our expressive resources beyond language. Hence, the paradox of Babel: we might actually be richer rather than poorer for having many languages.[8]

3. Neither mainstream nor critical legal scholarship today seems especially sensitive to this paradox. Mainstream jurists who ascribe to legal texts the capacity for the exact reflection of human normative intention presume also the possibility of exact translation of legal texts. At its limits, this presumption reflects a longing for one shared legal discourse, a longing that finds its way into many considerations of legal translation. Some time ago, R. Michael Beaupré wrote approvingly of efforts to identify a "legal metalanguage":

> It would not be one artificially concocted and imposed, but one that is, in a sense, waiting to be discovered through joint research by linguists, translators, comparativists (in addition, presumably, to philosophers and psychologists) who would seek to unlock a legal prototype which, it may be argued, is already part of our "collective unconscious".[9]

These contemporary legal Kabbalists, who hold fast to theories of linguistic monogenesis and universal grammar, and for whom redemption lies in the rediscovery of the "translucent immediacy of that primal lost speech shared by God and Adam",[10] assume that law would be perfected by being reduced to one language form.[11] A "positive" legal metalanguage — "esperanto juridiko" — will, it is thought, save legal discourse from anarchy.[12] The re-establishment of a transnational *ius commune*, to be expressed in a scientifically constructed language that is rationally com-

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[8] Put differently, it appears that bi- or multi-lingual persons have insights about the connections between knowledge and language and between a symbol and the symbolized that escape unilinguals. See K. Hakuta, *Mirror of Language* (New York: Basic Books, 1986), especially c. 9, "Reflections on Bilingualism".

[9] R.M. Beaupré, "La traduction juridique: Introduction" (1987) 28 C. de D. 735 at 745. Beaupré cites the "tentative progress toward standardizing 'common law French' as well as efforts towards the discovery of 'neutral' common law — civil law terminology" as evidence that a legal metalanguage might be possible. For the suggestion that computerization may assist in generating a neutral, positive legal language that lends itself to direct translation, see D. Bourcier & E. Andreewsky, "Traduction et polysémie: un exemple de traitement automatique en informatique juridique" in J.-C. Gémar, ed., *Langage du droit et traduction* (Quebec: Éditeur officiel du Québec, 1982) 233. See also R.M. Beaupré, *Interpreting Bilingual Legislation*, 2d ed. (Toronto: Carswell, 1986); R.M. Beaupré, "Litigating the Meaning of Bilingual Legislation" (1988) 9 Advocates' Q. 327 [hereinafter "Litigating the Meaning"].

[10] Steiner, *supra* note 2 at 474.

[11] As an antidote to uncritical assent to this proposition, one might reflect upon the apocalyptic prophesy of "pure speech" in Zephaniah 3:9, or the "gift of tongues" in Acts 2:4-12, as Biblical allegory for the preconditions for, and consequences of, universal discourse.

[12] Here the hope is to discover the legal equivalent of pure mathematical symbols: a vocabulary (1, 2, 3, *pi*, *etc.*); a grammar (+, -, x, =, *etc.*); and a syntax (rules for reading and prioritizing mathematical operations). On the emergence of mathematical symbolisms, see G. Ifrah, *L'Histoire universelle des chiffres: L'intelligence des hommes racontée par les nombres et le calcul*, vol. 1 (Paris: Robert Laffont, 1994) *passim*, but especially at 1-20.

plete and that exhausts the imaginable legal universe, motivates legal Kabbalists. Both nostalgic Kabbalists who seek to reinvent the hegemony of Roman law and revolutionary Kabbalists who promote expert-systems as the universalizing legal discourse share the ambition.[13] Like jurimetricians, empiricists and social scientists before them, today's revolutionary legal Kabbalists believe that the project of law may be saved if recentred on the description of things, not norms.[14]

4. Contrast this belief with that of contemporary critical legal scholars. Latter-day American Legal Realists, who claim that the inherent "arbitrariness, incoherence and indeterminacy" of language fatally infects legal discourse,[15] at first seem far removed in their diagnosis from the Kabbalists. Yet their preoccupations are not so different. While they see that formal statements of law posing as objective norms are readily dissolved, they too assume that langnage and meaning are one, and therefore deny that law can have meaning apart from its use by the powerful to coerce:

> Knowledge and social power are inseparable ... [T]here is no way to achieve *closure* with respect to the meaning of expressions or events. The distribution of meaning depends on socially *created* and *contingent* representational conventions. Eacli attempt to fix meaning is belied by the dependence of meaning on language. Meaning is dependent on artificial and differential signification practices.
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[13] For a detailed critique of nostalgic Kabbalism, especially in its neo-Romanist versions (*e.g.*, H. Berman & C. Reid, "Roman Law in Europe and the *ius commune*" in *Scintillae Juris: Studi in Memoria di Gino Gorla, II* (Milan: Guiffre, 1994) 989), see P. Legrand Jr., "*Antiqui Juris Civilis Fabulas*" (1995) 45 U.T.L.J. 311. A similar critique of revolutionary Kabbalism — that promoted by devotees of "expert systems" (*e.g.*, J. Goulet, *La machine à faire le droit* (Sillery: Presses de l'Université du Québec, 1987) — is developed by R.N. Moles in "Logic Programming — an Assessment of its Potential for Artificial Intelligence Applications in Law" (1991) 2 J.L. & Info. Sci. 137, and in "The Open Texture of Language: Handling Semantic Analysis in Decision Support Systems" (1993) 4 J.L. & Info. Sci. 330. See also A. Wolfe, "Algorithmic Justice" (1990) Cardozo L. Rev. 1409; S. Utz, "Rules, Principles, Algorithms and the Description of Legal Systems" (1992) 5 *Ratio Juris* 23.

[14] See P.H. Shuck, "Why Don't Law Professors Do More Empirical Research?" (1989) 39 J. Legal Educ. 323, who believes that empirical research can give rise to "positive knowledge" and thus a firm foundation to replace the indeterminacy of its existing "language-bound rules". Richard Posner makes a similar plea in *Overcoming Law* (Cambridge: Harvard University Press, 1995). Compare, however, D.M. Trubek & J. Esser, "'Critical Empiricism' in American Legal Studies: Paradox, Program or Pandora's Box?" (1989) 14 L. & Soc. Inquiry 3; R.J. Coombe, "Room for Manoeuver: Toward a Theory of Practiee in Critical Legal Studies" (1989) 14 L. & Soc. Inquiry 69; R.J. Coombe, "'Same As it Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 McGill L.J. 603; see also C. Gecrtz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167.

[15] The periodical and monographic literature on these so-called "indeterminacy truths" is overwhelming. For a recent and representative Canadian expression, see A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

> [L]egal thought is a representational discourse which purports to re-present social relations in a neutral manner. But like language generally, legal discourse can never escape its own textuality.[16]

Here one confronts the obverse to Kabbalism. Adherents to the "contingency thesis" — the conception of the legal enterprise as a mask for oppression — also ask of law what Ayer and other logical positivists earlier asked of language. But far from lamenting the law's failure to live up to its promise to be a universal discourse — as if it made sense in the first place to assume that law should ever have been a linguistic edifice logically erected upon protocol sentences[17] — scholars affiliated with the Critical Legal Studies movement, and their fellow travellers among less sophisticated legal postmodernists,[18] seize on the failure of the Kabbalists' claim about language as proof that legal normativity itself is impossible.[19] Knowledge and social power being inseparable in their view, law and presumably every other human symbolism derive from and reinforce existing distributions of power; none has any critical purchase on power itself.[20]

5. Between the illusion of homogeneous, neutral, determinate legal language and the illusion of contingent, arbitrary, indeterminate legal language lies the insight of legal bilingualism. Legal bilingualism (or more radically, legal multilingualism) takes as given that the complete normative content of law cannot be expressed by a particular set of words in one or any number of languages; but it also takes as given that language is a privileged communicative symbolism for apprehending law's normativity. All law, given this insight, is multilingual.

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[16] G. Peller, "The Metaphysics of American Law" (1985) 73 Calif. L. Rev. 1152 at 1170, 1182 [footnote omitted].

[17] Like much modern legal scholarship, the Critical Legal Studies project has learned only half the lesson of Kelsen's and Carnap's failed program. That Carnap did not succeed does not mean that all language is metaphysical nonsense, only that a universal grammar which exhausts human knowledge is impossible. See R. Carnap, "The Elimination of Metaphysics Through Logical Analysis of Language" in A.J. Ayer, ed., *Logical Positivism* (Glencoe, Ill.: Free Press, 1959) 60.

[18] A helpful introduction to legal postmodernism, which argues the contingency thesis through a critique of traditional legal theory, is presented in C. Douzinas & R. Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (New York: Routledge, 1991). See also C.J.G. Sampford, *The Disorder of Law: A Critique of Legal Theory* (Oxford: Blackwell, 1989).

[19] For an alternative conception of the claims of legal discourse, see O. Barfield, "Poetic Diction and Legal Fiction" in C.S. Lewis *et al.*, eds., *Essays Presented to Charles Williams* (Oxford: Oxford University Press, 1947) 106; C.D. Stone, "From a Language Perspective" (1981) 90 Yale L.J. 1149.

[20] A powerful statement of this perspective may be found in A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993). The fundamental incoherence of an argument that social power shapes human symbolizing but is itself not a form of human symbolizing subject to its own critique is carefully demonstrated in H. Putnam, *Pragmatism: An Open Question* (Cambridge: Blackwell, 1995). See further A. Honneth, *The Critique of Power: Reflective Stages in a Critical Social Theory*, trans. K. Baynes (Cambridge: M.I.T. Press, 1991) who argues that postmodernism, properly understood, provides a vantage point of resistance to power, because it denies "authorial authority" and thus democratizes interpretation.

Especially during the past three decades, the idea of legal bilingualism has received much attention in Canada.[21] Federal-government policy promoting bilingualism in general, including minority-language educational rights, is a central component of the contemporary Canadian legal order.[22] Statutes, regulations, judicial decisions and government documents are now being translated from English to French and to a lesser degree from French to English. Today, most new federal legislation is actually being drafted in two original language versions. Bilingual courts and administrative agencies have been established. Defendants in criminal cases may insist on being tried in the language of their choice. A comprehensive body of published legal doctrine in French and English is emerging. French-language common law legal education is a reality, and English-language civil law education has a distinguished history. Finally, the constitutional guarantees of legal bilingualism set out in section 133 of the *Constitution Act, 1867*[23] have been elaborated and extended by the *Official Languages Act*[24] and by the *Canadian Charter of Rights and Freedoms*.[25] Many now apply to certain provinces as well as to the federal government.[26]

6. Together, these features of Canadian law have contributed to the generation of an official legal symbol system that, at least in its theory and in its formal trappings, op-

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[21] Of course, the possibility and problems of legal bilingualism have an impeccable pedigree in Canada dating back to the late eighteenth century. For a review of the context of the codification of the private law of Lower Canada, see J.E.C. Brierley, "Quebec's Civil Law Codification" (1968) 14 McGill L.J. 521. See also Royal Commission on Bilingualism and Biculturalism, *Final Report*, vol. 1 (Ottawa: Queen's Printer, 1967) at 52-55, and Royal Commission on Bilingualism and Biculturalism, *The Law of Languages in Canada* (Study No. 10) by C.-A. Sheppard (Ottawa: Information Canada, 1971). These problems are not, however, to be confounded with problems of legal bijuralism — the need for federal statutes to speak equally to both civil-law and common-law systems. On this collateral issue, see J.E.C. Brierley, "Legal Bijuralism in Canada" in H.P. Glenn, ed., *Contemporary Law: Droit contemporain* (Montreal: Yvon Blais, 1991) 22 at 41 [hereinafter "Legal Bijuralism"].

[22] The literature on these themes over the past quarter-century is vast. See generally, and for a representative sampling, M. Bastarache, ed., *Les droits linguistiques au Canada* (Montreal: Yvon Blais, 1986); M. Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987); A. Martel, *Les droits scolaires des minorites de langue officielle au Canada: de l'instruction a la gestion/Official Language Minority Education Rights in Canada: From Instruction to Management* (Ottawa: Office of the Commissioner of Official Languages, 1991); D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Que.: Yvon Blais, 1991).

[23] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[24] *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

[25] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[26] On minority-language guarantees under the Canadian constitution, see generally P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1197-226 and A. Tremblay, "Les droits linguistiques" in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) 15-1. On the constitution itself as a bilingual document, see R.M. Beaupré, "Vers l'interprétation d'une constitution bilingue" (1984) 25 C. de D. 939; J.P. McEvoy, "The Charter as a Bilingual Instrument" (1986) 64 Can. Bar Rev. 155. For a more general discussion of the theory of minority-language guarantees and their application in various countries, see further P. Pupier & J. Woehrling, eds., *Langue et droit/Language and Law* (Montreal: International Institute of Comparative Linguistic Law, 1989).

erates in "two official languages". Substantively, however, there may be a different story. Constitutionalized bilingualism seems to be leading scholars and commentators to adopt an inapt and inept view of what legal bilingualism actually requires. Briefly, the way official legal bilingualism has been understood and practiced to date in Canada implies that language precedes law and that language fully captures law.[27] On such a conception of the enterprise, a bilingual legal order is composed simply of two separate and equally authoritative collections of literary sources, each of which can be generated and deployed in isolation from the other.[28]

To understand legal bilingualism as nothing more than textual duality is to ignore the paradox of Babel. If one is to have a truly bilingual legal culture, one cannot be content merely with producing legal artifacts in two languages. To presume that language is merely a cipher of experience, and to act as if English and French stand more or less in the same relation as semaphore and Morse code, or as Roman numerals and Arabic numbers,[29] is to retreat to the questionable assumptions that law can be fully rendered by language and that language can be a universal discourse.[30]

7. Legal bilingualism presupposes finding a method for reading and interpreting these legal materials that recognizes their equal authority (to the extent any text may

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[27] It is not difficult, however, to prove these implications to be counterfactual. To take one example, if the federal legal order is bilingual (extrapolating from section 133 of the *Constitution Act, 1867*, *supra* note 23), and if the federal legal order carries forth pre-confederation law in both statutory and common-law form (extrapolating from section 129 of the *Constitution Act, 1867*, *ibid.*), then a French-language legal norm applicable in Ontario must exist prior to the translation of the pre-confederation statute by which it found initial textual expression, and prior to the development of a French-language common-law rule that gives it linguistic form. On these features of section 129 for the character of Canadian constitutionalism, see R.A. Maedonald, "The Constitutional Position of the Civil Code of Lower Canada and the Civil Code of Quebec as an Expression of Federal Suppletive Law" (Study prepared for the Department of Justice, March 1996) [unpublished]. See also R.A. Macdonald, "Encoding *Canadian* Civil Law" in J.E.C. Brierley *et al.*, eds., *Mélanges Paul-André Crépeau* (Cowansville, Que.: Yvon Blais, 1997) [forthcoming].

[28] This theme is carefully developed in N. Kasirer, "The Annotated Criminal Code *en version québécoise*: Signs of Territoriality in Canadian Criminal Law" (1990) 13 Dalhousie L.J. 520, where the inadequacy of such a view is exposed.

[29] Of course, despite their greater propensity to be so treated, even Morse code and semaphore are not neutral ciphers; nor indeed are Roman numerals and Arabic characters. In the hands of skilled operators, the subtext of what can be conveyed by each of the first pair differs in the way the letters are paced and spaced; similarly, the computations that can be undertaken using Arabic characters are infinitely more complex than those manageable in Roman numeric characters, with the consequence that even though both are ostensibly ciphers, one permits (encourages) intellectual operations that the other does not — with significant practical consequences not only for mathematics, but for architecture, engineering and science generally (see Ifrah, *supra* note 12, c. 24-27).

[30] The debate between those who believe the deaf should be taught a sign-language system derivative from lip reading (the "oralist" tradition) and those who favour indigenous sign systems that exploit the cultural and gesticulatory media of communities of the deaf, is a debate between "universalists" and those who see language as communicative symbolisms grounded in more local practice. For discussion, see P. Siple, ed., *Understanding Language Through Sign Language Research* (New York: Academic Press, 1978); O.W. Sacks, *Seeing Voices: A Journey Into the World of the Deaf* (Berkeley: University of California Press, 1989).

be an authoritative expression of normativity) and that, in Canada, necessarily draws on both English- and French-language versions. Without such a methodology, the promise of legal bilingualism risks being transformed into a practice of *de facto* legal dualism, that is, the pretence that Canadian law can be completely understood by referring to only one of the two official texts.[31]

This distinction between legal bilingualism and legal dualism suggests the need for further inquiry into the theoretical foundations of legal bilingualism. It requires asking what legal bilingualism implies about the relation between law and its various forms of expression in language — here called the "semantic question" — and what it tells us about the nature of legal knowledge accessible through language — here called the "epistemological question".

8. The burden of this essay is both practical and theoretical. In the realm of practice, the essay illustrates why certain officially accepted contours and institutions of what is deemed to be legal bilingualism in Canada are inadequate to satisfy the ambitions of a bilingual legal order. Theoretically, the essay claims that the answers it offers to the semantic and epistemological questions posed above are applicable to all text-reliant legal orders — bilingual or not. More than this, the essay suggests that these questions inhere in any attempt to express legal normativity — whatever the chosen vehicle of communication.[32] That is, while many problems of law in modern society are intimately connected with the capacities of language as a mode of communication, from a broader perspective they are at the same time connected to the intellectual and moral capacities of human beings to symbolize.[33]

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[31] The temptations of dualism are everywhere. See R.A. Macdonald, "Bilingualism or Dualism?" (1988) 25 Lang. & Soc'y 40, and "Bilinguisme ou Dualisme?" (1988) 25 *Langue et Société* 40. These two short texts are the English-language original and an "official" French-language translation of a speech pointing to the perils of dualism and arguing that bilingual legal texts must necessarily be created in two languages given their symbolic functions. How deep the irony that a speech making such an argument should have been simply "literally" translated (without the author's knowledge or approval) in a publication reflecting the then present practice of legal bilingualism in Canada.

[32] See N. Kasirer, "Larger than Life" (1995) 10 Can. J. L. & Soc'y 185, for an evocation of the capacity of representational art to give access to legal normativity. This suggests an important caveat. While I agree with Kasirer about the normativity of, among other symbols, art, I do not argue explicitly in this essay that the analysis of legal normativity being advanced applies to legal orders that have no language component (*e.g.*, a hypothetical legal order that is both practice-based and that records and passes on its normative content by means of non-language symbolisms). Nor do I claim that the analysis necessarily applies to legal orders that, while language-symbolized, have no textuality (*e.g.*, a hypothetical legal order that is practice-based but that records and passes on its normative content entirely by oral rather than written means). The analytical claim is meant to extend only to text-based legal orders — whether unilingual, bilingual or multilingual. On the importance of these distinctions, see W.J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Methuen, 1982).

[33] I acknowledge that I am only scratching the surface of an enormously difficult problem that has preoccupied the world's greatest philosophers. For present purposes, I need only acknowledge that although I came to most of my conclusions independently, I have since discovered a close commonality between the views I present here and those of Donald Davidson. See, in particular, D. Davidson, *Essays on Actions and Events* (Oxford: Clarendon Press, 1980); D. Davidson, *Inquiries into Truth and Interpretation* (Oxford: Clarendon Press, 1984).

Briefly, and with a particular reference to Canadian experience, the question discussed in this essay is this: Given legal bilingualism, how is it possible?[34]

I. The Semantics of Legal Bilingualism

9. What might the possibility of legal bilingualism tell us about the relationship between language and law? A first step in answering this question is, obviously, to identify different ways in which language is routinely deployed to express legal normativity. In the mid-1990s it is no longer necessary to argue at length for several basic semantic propositions.[35] I take for granted the appropriation of Wittgenstein and Merleau-Ponty by progressive legal scholars: who can fail to acknowledge the indeterminacy and contingency of vocabulary, grammar and syntax?[36] Despite the assertions by critical scholars of the novelty of their insight, the point is practically trivial. Few dis-

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[34] Of course, even to pose this question in a law-review article raises a paradox. Like any legal essay, this one attempts to reduce to more or less discursive writing its answers to the problem posed. It is not, that is, either a poem or a short story. This attempt should not be understood as a concession to the view that law is or ought to be a neutral linguistic discourse. We are always seeking to capture in discursive language that which is, fundamentally, metaphorical. Though a poem, play or novel might better serve my purposes, even these language forms carry their own conventions of discursiveness.

The fact of this being an essay raises a further paradox. Language, however deployed, is only one communicative resource open to human beings. In any essay, we are driven to capture in words that which is not merely linguistic: would my painting, concerto, or dance (rather than my speech) impoverish or enrich my meaning? Ineluctably, the answer would depend on my own ability to deploy these symbolisms powerfully, and on the capacity of my audience to engage with them. The conventions of legal academia being typically limited to the apprehension and analysis of text, a law-review article in the form of a multimedia compact disc risks confounding rather than illuminating its audience.

Finally I had considered producing the text of this essay in French or in alternating paragraphs of English and French so as to reinforce this point about discursivity, but were I to have done so, I would have run up against the paradox of Babel. A text in a foreign language will initially counter the shackles that discursiveness places on readers. But absent a bilingual audience it risks being understood simply as "pidgin" and not as the intended metaphor. See the Eighth Study in P. Ricoeur, *The Rule of Metaphor: Multi-disciplinary Studies of the Creation of Meaning in Language*, trans. R. Czerny (Toronto: University of Toronto Press, 1977) 257.

[35] It bears notiee, however, that when a first version of this essay was presented in 1981, practically every semantic point was rejected by the legal audience to which it was addressed. Despite its fundamentally orthodox philosophical premises, the text was dismissed as yet another "Fish-story" (*sic*), the reference being to S. Fish, *Is There A Text in this Class: The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980), which had just been published. It is a measure of how much more sophisticated legal scholarship has become that in the short spaee of 15 years, the semiotic assumptions of a "radical text" are now taken as relatively mainstream, even by those who tend toward postmodern and critical legal studies positions. Compare D. Klinck, *The Word of the Law: Approaches to Legal Discourse* (Ottawa: Carleton University Press, 1992) c. I-4, 10, 11; P. Goodrich, *Languages of Law* (London: Weidenfeld & Nicholson, 1990).

[36] The central issue is to understand how contingency arises and what resources we have, both within and outside language, for dealing with it. For an exchange on this point, see B. Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill L.J. 451; A. Hutchinson, "That's Just The Way It Is: Langille on Law" (1989) 34 McGill L.J. 145. See also B. Langille, "The Jurisprudence of Despair, Again" (1989) 23 U.B.C. L. Rev. 549.

pute that language is the translation of ideas and representations into a particular symbolic form, and few dispute that this particular symbolic form only gives the appearance of presenting precise meanings that are broadly shared within a particular community.

Yet we ought not to be transfixed by language or even by examples drawn from the deployment of language. However special language may be as a mode of human communication, its indeterminate and contingent elements are little different than those inherent in all communicative symbolisms.[37] The problem of human communication — of translating one's thoughts into a communicative symbol, of then deploying that symbol, and of attempting to respond to another's translation and reexpression within that symbolism — is universal. It follows that the so-called indeterminate and contingent properties of language can be identified, highlighted and analyzed by means of semiotic procedures common to human symbolisms generally.[38]

10. Law, as a species of human endeavour, necessarily engages its practitioners in a complex exercise of formulating and deploying symbols.[39] These symbols operate at an instrumental level where they may be used as vehicles for expressing and communicating the meaning of everyday experience. But they are more than this. Symbols exert a control over how ideas are expressed and, more fundamentally, over what ideas can be expressed. They mould attitudes, structure thought and contribute to the reconstruction of culture and community.[40] Symbols and symbol systems, being as varied as human experience, may relate to every kind of human communication and to every kind of human capacity to interpret the messages of others. They may be visual (painting, text), aural (music, speech), olfactory (cooking, insence), physical (dance, ritual) or multiple combinations of these (opera, theatre). The means for human symbolizing are limited only by the imagination of humans themselves.

In law and contemporary "modernist" legal theory, nonetheless, a *summa divisio* of communicative symbols reigns: symbols are characterized as either linguistic or nonlinguistic.[41] What is more, within the privileged category of linguistic symbols it is

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[37] See S.K. Langer, *Philosophy in a New Key*, 3d ed. (Cambridge, Mass.: Harvard University Press, 1957) c. 1, 2.

[38] For examples of how this might be done, see D. Howes, "In the Balance: The Art of Norman Rockwell and Alex Colville as Discourses on the Constitutions of the United States and Canada" (1991) 29 Alta. L. Rev. 475; D. Howes, "'We Are the World' and its Counterparts: Popular Song As Constitutional Discourse" (1990) 3 Int. J. Pol. Cult. & Soc'y 315; D. Howes, "La constitution de Glenn Gould: le contrepoint et l'État canadien" in J.-G. Belley, ed., *Le droit soluble: Contributions québécoises à l'étude de l'internormativité* (Paris: L.G.D.J., 1996) 95.

[39] See N. Elias, *The Symbol Theory* (London: Sage, 1991). I have tried to illustrate an understanding of legal doctrine as symbol rather than as norm in R.A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994) 39 McGill L.J. 761. Compare R. Kevelson, *The Law as a System of Signs* (New York: Plenum, 1988).

[40] See P.L. Berger & T. Luckmann, *The Social Construction of Reality* (New York: Doubleday, 1966).

[41] As others have noted, this bifurcation roughly tracks the distinction between made law and implicit law — between the law emerging from specialized social institutions such as legislatures, courts and law faculties, and the law emerging from human interaction. See *e.g.* L.L. Fuller, "Human Inter-

text (the written) that reigns over speech (the oral). While much of the law immediately known to the ordinary citizen — crimes, property, torts — concerns the interpretation and understanding not of what was said or written, but of what was done or not done, jurists are typically preoccupied by the language of the law. Cases, statutes, jury instructions, pleadings, negotiations, contracts, wills and marriage vows presuppose language. As a result, even though the normativity of official law is, in no small measure, rendered by nonlinguistic symbols,[42] much professional legal activity describes itself as little more than the generation and interpretation of complexes of linguistic symbols.[43] Law is, on this construction, held to be something close to secular scripture.[44]

11. Language apparently exhibits two communicative properties better than other symbolisms. First, its *nominative* capacity — the fact that language permits explicit denotations — seems to give us mastery over objects and concepts. Like a totem, a voodoo doll or a monarch's crown, a name stands as surrogate for that which is named, and functions as an instrument of subjugation.[45] Unlike a photograph, language enfranchises whoever bestows the name. In prompting those who name to explore, organize and take responsibility for this subjugation, the act of naming normally requires the differentiation of self and other to a greater degree than, for example, the invocation of a totem. The act of naming thus reveals one of the communica-

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action and the Law" (1969) 14 Am. J. Juris. 1, and more recently, B. de Sousa Santos, "Law: A Map of Misreading. Toward a Post-Modern Conception of Law" (1987) 14 J.L. & Soc'y 279.

[42] More generally, one might say that much legal normativity is in fact comprised of non-linguistic symbols. See R. A. Maedonald, "Pour la reconaissance d'une normativité juridique implicite et 'inférentielle'" (1986) 18 Sociologie et Sociétés 47, for an exploration of the idea from a perspective internal to law, and W.R. Janikowski, ed., *Legality and Illegality: Semiotics, Postmodernism and Law* (New York: P. Lang, 1995), for the same idea from an external perspective. See, finally, P. Goodrich, "Modalities of Annunciation: An Introduction to Courtroom Speech" in R. Kevelson, ed., *Law as Semiotics*, vol. 2 (New York: Plenum, 1988) 143; P. Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995).

[43] See J.-G. Turi, "Norme linguistique et norme juridique" (parts 1-3) (1984) 53 *Québec français* 78, (1984) 54 *Québec français* 86, (1984) 55 *Québec français* 74. Compare P. Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992). For a rich historical perspective, see D. Manderson, "*Statuta* v. Acts: Interpretation, Music, and Early English Legislation" (1995) 7 Yale J.L. & Human. 317.

[44] See J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1986), especially c. 1, 4. As for constitutions, see M. Golding, "Sacred Texts and Authority in Constitutional Interpretation" in R. Penode & J. Chapman, eds., *Authority Revisited* (New York: New York University Press, 1987) (NOMOS 29) 267; T.C. Grey, "The Constitution As Scripture" (1984) 37 Stan. L. Rev. 1. As for civil codes, see J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Civil Law* (Toronto: Emond Montgomery, 1993) at 84ff; P. Legrand Jr., "Strange Power of Words: Codification Situated" (1994) 9 Tul. Eur. & Civ. L.F. 1.

[45] Of course, this surrogate function of nouns and representational objects may also be seen in other symbolisms: the ringing of a bell, the firing of a cannon, the smell of incense and the tasting of wine perform a like function in various contexts. They can all be both signs and denotators (see Langer, *supra* note 37 at 53-78).

tive advantages of language: nouns appear to be more mobile than totemic objects both in their denotations and in their metaphoric deployment.[46]

A second communicative property of language is its capacity, through conventions of syntax and grammar, to facilitate the successive articulation of presumably limited units of thought and experience. This *iterative* capability allows speakers and writers to control chronology, suggest causal relationships and generate what appear as logical arguments moving from premise to conclusion. English — perhaps less so than languages that decline nouns and their modifiers, but more so than languages that do not recognize grammatical distinctions between verbs and nouns — permits its speakers to differentiate "The practice was perfect" from "Practice makes perfect", "Practice to perfect" and "Perfect the practice". Each of these phrases can reasonably be understood by speakers of English in at least two different senses, depending only on the grammatical function of the words in question: is "perfect" a verb or a noun? and is "practice" a noun or a verb?[47]

12. These two features — vocabulary and grammar — distinguish language from other communicative symbolisms, at least as a matter of degree. But they do not make language entirely subservient to human intention. Nouns, especially, have the power to confound as well as to enfranchise. A vocabulary often limits what one wishes to say and, at times, may even induce one to say what one does not wish to say. Words contain unsuspected valuations, often by incorporating an unstated context, or even by encapsulating an entire theory.[48] For this reason, employing a particular word in a novel context can lead to confusion. And yet, using a term of art to challenge the accepted theory it encapsulates can provoke revelation, as did Darwin's use of the word "species".[49] Words limit; words liberate; words confound; and words enfranchise.[50]

It is not just vocabulary that has the capacity to imprison; so too do grammar and syntax. The structure of everyday language typically is linear and episodic, channelling our apprehension of the world and our expression of ideas. For this reason, language frequently seems incapable of reflecting the complexities of spatial and temporal relations. Linguistic presuppositions and stereotypes become so ingrained that they create habits of thought — intellectual "boilerplate" — which are almost impossible to

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[46] For a development of this point, see F. de Saussure, *Course in General Linguistics*, trans. W. Baskin (New York: McGraw-Hill, 1966) at 68ff.

[47] These grammatical senses often can be signalled by means of emphasis in pronunciation; they are much more difficult to convey in a written text without the use of conventions such as quotation marks, italics, capitals and like devices. On these conventions, and analogous conventions in music, see C.D. Stone, "Introduction: Interpreting the Symposium" (1985) 58 S. Calif. L. Rev. 1.

[48] This point is explored in the introduction of M.-C. Prémont, *Le langage du droit* (Ph.D. Thesis, Faculty of Law, Université Laval, 1995) [unpublished]; G. Lakoff & M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) c. 1.

[49] For a thoughtful elaboration of the theme, see J. Beatty, "What's in a Word: The Problem of Coming to Terms in the Darwinian Revolution" (Paper delivered at Concordia University, June 1980) [unpublished].

[50] On these points generally, see J. Goody, *The Domestication of the Savage Mind* (Cambridge: Cambridge University Press, 1977); Goodrich, *supra* note 35; Ong, *supra* note 32.

penetrate without a conscious departure from conventional syntax and grammar.[51] More significantly, syntactical structures carry with them assumptions about individuation, causation and human agency. The power of poetry and other forms of literature derives largely from a self-conscious "abandonment to metaphor" — that is, using the conventions of grammar against its logic.[52]

13. Jurists have long recognized that language does not arise in syntactical and contextual isolation.[53] They have, however, tended not to acknowledge in practice the central role that symbolic analysis plays in apprehending the meaning of legal language.[54] Following Ernst Cassirer and Suzanne Langer, I distinguish two modes for deploying and interpreting communicative symbolisms: the discursive and the presentational.[55] Symbolisms in a discursive mode seem to isolate small units of understanding and arrange thought as chronology; the meaning we ascribe to them seems to confront us serially. For example, oral directions given on the street corner to a tourist seeking to find a particular attraction are most likely to be given and interpreted, at least initially, discursively. Symbolisms in a presentational mode do not lend themselves as easily to fractionation, either temporally or spatially; they confront us, and we understand them, as an undifferentiated whole. For example, a sculpted piece of art is initially most likely to be revealed to, and interpreted by, the viewer presentationally.

Of course, no human communicative symbolism — language, art, music, dance, ritual — is inherently and exclusively discursive or presentational. These two are modes of symbol structure internal to symbols and modes of apprehension of symbols particular to the roles of any symbolism in a given culture. Choices about style (including rhetorical choices) made by the initiator of the communication, and choices and interpretive strategies made by the target of the communication will, along with cultural context, shape the communicative frame.[56]

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[51] This idea is explored using the conventions of classical-music forms in D. Manderson, *The Aesthetics of Law* (D.C.L. Dissertation, McGill University, 1997).

[52] P. Ricoeur explores this "abandonment to metaphor" at length in *Temps et récit*, 3 vols. (Paris: Édition du Seuil, 1984).

[53] See *e.g.* the famous exchange between H.L.A. Hart ("Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593) and L.L. Fuller ("Positivism and Fidelity to Law — A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630). A whole textbook industry, devoted to constitutional and statutory interpretation, and a whole subset of legal theory, devoted to deriving the *ratio decidendi* of cases, depends on the syntactical and contextual features of legal interpretation. See *e.g.* the symposia published in "Symposium: Law and Literature" (1982) 60:3 Texas L. Rev.; "Interpretation Symposium" (1985) 58:1-2 S. Calif. L. Rev.; "Symposium *Patterson* v. *McLean*" (1989) 87 Mich. L. Rev. 1-137. See also M.S. Moore, "The Semantics of Judging" (1981) 54 S. Calif. L. Rev. 151.

[54] Two notable exeeptions are J.B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (Chicago: University of Chicago Press, 1984); and Klinck, *supra* note 35.

[55] See Langer, *supra* note 37, c. 4.

[56] The thought is from D.C. Freeman, ed., *Linguistics and Literary Style* (New York: Holt, Rinehart & Winston, 1970). See also S. Chatman, ed., *Literary Style: A Symposium* (London: Oxford University Press, 1971).

14. "Natural languages" are most often deployed in everyday life for instrumental purposes (*e.g.*, oral statements of future conduct, or written assembly instructions for household objects). In such usages their discursive properties are brought to the foreground. One presumed advantage of grammar-based language over pictographs and hieroglyphs is precisely that the rules of grammar and syntax permit writers and speakers to exploit discursive communication. Conventions about sentence parsing, about the relationship of subject, verb, direct object and indirect object, and about the referent of phrases and clauses, in addition to a limited number of conjunctions and prepositions, permit the juxtaposition of words and define the range of possible relationships that ordinary usage can accommodate.[57]

Yet this property of discursivity is not always capable of management in simple sentences. For example: it is relatively easy to say that a book is "on" a table, or "under" a table; more difficult to say simply that a book is being taken from a position on the table and placed in a position under the table; and very difficult to say simply that a book is being taken from a position on top of another book on top of a table, and placed in a position under another book under the table. These situations that seem to require subordinate clauses and complex grammatical constructions are presumably the referents of the expression "a picture is worth a thousand words". Conversely, depending on the potential range of the intended audience, a series of nonlinguistic pictoral instructions may even display greater discursive capacity than language itself.[58]

15. Discursivity is more than a consequence of grammar and syntax; it flows also from limitations on the aural and visual capacities of human beings. Orality in the speech of one speaker is itself linear. The same is true in dialogue if cacophony is to be avoided. Unlike musical notes that may be played simultaneously to produce a harmonic even as they progress in temporal fashion as themes and subthemes, different words are only with great difficulty made capable of such harmony when spoken together; their logic is to follow each other in temporal sequences.[59] So too with texts, although their linear properties tend to be spatial rather than temporal. Conventions for reading texts (*e.g.*, in English but not Chinese, commence at the top left and proceed in a horizontal line to the right) permit authors to control, in large measure, the order in which ideas are initially engaged. These same temporal and spatial conventions work together to condition communication in other symbolisms such as film,

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[57] This is not to say that there do not exist equally elaborate conventions for reading hieroglyphics. The point is only that the spoken rendition of most hieroglyphs proceeds discursively and not as one sound.

[58] Two relatively recent phenomena of the globalized economy evidence the point. Assembly instructions for knock-up furniture of the type sold by IKEA and emergency-procedures cards found in airline-seat pockets both rely on sequentially numbered pictograms as discursive symbolisms.

[59] I acknowledge the phenomenon of singing in harmony; but here there is no conflict in the words being sung. More difficult is the case of singing in harmonic rounds. Nonetheless, the temporal displacement of the words of a round between groups of singers is designed for harmonic effect, even when, in rare cases, entirely different texts are being sung by different groups of singers. We are trained simultaneously to follow two or more musical themes, but we are not trained to follow two conversations simultaneously.

theatre, mime, or dance. By contrast, most purely spatial visual symbolisms — painting, for example — and most olfactory symbolisms,[60] are not as susceptible of similarly authoritative antecedent discursive control. They are, therefore, symbolisms that tend initially to be apprehended primarily in a presentational mode.[61]

Just as conventions of space and time enhance the properties of some symbolisms such as language that conduce to discursivity, it is also possible to reduce the reflex to discursivity by explicitly transgressing these conventions. Poetic forms, flashbacks and multiple images in film and theatre, subthemes and counterpoint in music, foreshadowing in dance and ritual, or combinations of these techniques can serve to disrupt the linear logic of discursivity — be it spatial or temporal. It is also possible to enhance discursivity in symbolisms that are, in most cases, apprehended primarily in a presentational mode. The use of colour and perspective, series paintings such as Vassarelli's *C.T.A. 102*, comic strips, the mounting and display of sculpture to reveal the work part by part, and the adherence to conventions for the interpretation of certain nonlinguistic symbols such as a tapestry, can offer clues for a discursive "reading" of symbolisms that might initially be thought dominated by presentational forms.

16. Jurists in Western legal traditions have chosen, or at least believe that they have chosen, language as their primary symbolism of normative communication.[62] Because technical legal language is deployed and apprehended predominantly in a discursive mode, not surprisingly, many jurists believe that law itself can be fully understood discursively. One kind of discursivity, formal rationality, was identified by Max Weber as the authoritative standard to which Western law should aspire.[63] Weber attempted to distance the ideal of Western law from the deferential language forms associated with "hallowed traditions" and "oracular revelations", which he characterized as "irrational". Nevertheless, even formally rational language requires deference to authoritative texts, and this deference ultimately emerges from tradition and reve-

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[60] See D. Howes, ed., *The Varieties of Sensory Experience: A Sourcebook in the Anthropology of the Senses* (Toronto: University of Toronto Press, 1991); but contrast the complex rendering of the relatively formalized rituals of eating in M. Visser, *Much Depends on Dinner: The Extraordinary History and Mythology, Allure and Obsessions, Perils and Taboos of an Ordinary Meal* (Toronto: McClelland & Stewart, 1987); M. Visser, *The Rituals of Dinner: The Origins, Evolution, Eccentricities and Meaning of Table Manners* (Toronto: Harper Collins, 1991).

[61] To say that these symbolisms are initially apprehended in a presentational mode raises complex questions of how it is that we learn a language. Is there a difference between acquiring the ability to comprehend and speak a language and the ability to read and write a language? Similarly, is there a difference between acquiring the ability to comprehend and make music, and the ability to read and write music? Is the difference between presentational and discursive apprehension merely a matter of education? Is learning discursivity a more complex, hence later, intellectual achievement? If so, why is it that we also have to learn how to read a poem, listen to music and look at a painting? On these issues, see generally Pinker, *supra* note 3.

[62] Yet this, it should be recognized, is a choice. For a fascinating exploration of one alternative, see A. Lowenhaupt Tsing, *In the Realm of the Diamond Queen* (Prineeton: Princeton University Press, 1993).

[63] Sce M. Rheinstein & E. Shils, trans., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1954).

lation. The language of deference and authority occupies a significant place in law beside the language of rational deduction. Both are necessarily commingled, much as discursive and presentational forms are commingled.[64]

These two sets of distinctions between forms of legal normativity can be placed on intersecting axes so as to construct a four-square typology. If one asks what are the expressive types of legal language created by conventions of grammar, syntax, space and time, one can distinguish between the discursive and the presentational. If one asks what are the cognitive forms of legal language, one can distinguish between the rational and the deferential. The following table plots these possibilities.[65]

Presumptive Formal Typology of Linguistic Legal Symbols

	Rational	Deferential
Discursive	Legislation	Judicial reasons for decision
Presentational	Contractual boilerplate	General principles of law

Positing a bilingual legal order clarifies the interrelation between these kinds of legal normativity. It helps to reveal both why rationalistic and discursive language has tended to dominate most approaches to legal normativity and why deferential and presentational normativity are, nonetheless, always in play.

17. Take, first of all, the archetypal discursive-rational language symbol in official law — legislation. It is often said that a statute simply means what its words literally say. But as soon as an apparently rational and discursive language symbol like a statute is made in two languages, its deferential and presentational aspects become more apparent. The enactment of bilingual statutes in Manitoba, New Brunswick and Ontario has created a presentational symbol far more significant than the discursive content of any of the legislative texts so presented.[66] While bilingualism heightens our sense of the presentational element of statutes, this element persists even where texts do not exist in two or more language versions. In the first half of the twentieth century, for example, the *Civil Code of Lower Canada* attained scriptural status among French-speaking jurists in Quebec.[67] Perhaps the most striking contemporary example

[64] This commingling is examined in J. Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986).

[65] The irony of deploying a table — a visual symbolism that *prima facie* suggests presentationalism — to explicate the seemingly discursive text of a legal essay surely bears notice.

[66] See A. Braën, "Le bilinguisme dans le domaine législatif" in *Les droits linguistiques au Canada*, *supra* note 22, 72.

[67] See the story as presented in Brierley & Macdonald, *supra* note 44 at 67-73. See further J.-L. Baudouin, "Conférence de clôture" in *Enjeux et valeurs d'un Code civil moderne* (Montréal: Thémis, 1991) (Journées Maximilien-Caron 1990) 219; a series of critiques of this reverential fallacy are developed in P. Legrand Jr., "Civil Law Codification in Quebec: A Case of Decivilianization" (1993) 1 Z. Eu. P. 574; P. Legrand Jr., "Bureaucrats at Play: The New Quebec Civil Code" (1995) 10 Brit. J. Can. Stud. 52; Legrand Jr., *supra* note 13; and P. Legrand Jr., "Civil Codes and the Case of Quebec:

is the Constitution of the United States, which has become an icon for the American citizen.[68]

Once a legislative text is understood as having a presentational meaning, its authority is enhanced and its capacity to function as a deferential symbol enlarged. Such a text can become, for true believers, a pure object of deference. This is especially true where, as in the cases of the Torah, the Bible and the Koran, belief is itself grounded in a deferential context such as religious tradition.[69] Correlatively, once a discursive legislative text is seen overtly as an object of deference, its normative weight increases and its presentational symbolism comes to predominate. The notion of "fundamental rights" is among those legal concepts most tributary to presentational interpretation by most Canadians. Hence, for many, the *Canadian Charter of Rights and Freedoms* is emerging as a reverential "sacred text".[70]

18. Modern official law also relies heavily on discursive-deferential texts: archetypally, the written judgments of adjudicative bodies. Where "reasons for decision" are given in more than one language, however, the presentational function of language is often engaged. Those who have struggled to ensure that courts entertain arguments and render judgments in both English and French are not simply concerned with expanding the range of legally cognizable justificatory material available for deployment by adjudicators. They are concerned as well with ensuring that the courts and their decisions in some sense belong to minority language communities. This effort would hardly have been necessary were the business of adjudication merely discursive and rational. For example, a *bricoleur* really does not care to retrace the mathematical operations by which the members of a truss-roof are located. Clearly, some goal besides the correct deduction of the legal outcome sustains the bilingualizing endeavour.[71]

Semiotic Musings around an *accent aigu*" in R. Kevelson, ed., *Conscience, Consensus, and Crossroads in Law: Eighth Round Table on Law and Semiotics* (New York: P. Lang, 1995) c. 13 [hereinafter "Semiotic Musings"].

[68] See *e.g.* M. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1986).

[69] This theme is developed in B. Polka, *The Dialectic of Biblical Critique: Interpretation and Existence* (New York: St. Martin's Press, 1986).

[70] Pejoratively, such zealots may be characterized as *Charter*-patriots. On *Charter*-patriotism, compare M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994) with A.C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queens University Press, 1992) and with D.M. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995). Reverential interpretation of the *Charter* is examined in B. Polka, "The Supremacy of God and the Rule of Law in the *Canadian Charter of Rights and Freedoms*: A Theologico-Political Analysis" (1987) 32 McGill L.J. 854.

[71] See M. Bastarache, "Le bilinguisme dans le domaine judiciaire" in *Les droits linguistiques au Canada*, *supra* note 22, 129. Of course, there is a different argument to be made for enacting legal rules in both the French and English language, namely, that citizens have a legitimate expectation of being able to understand the law that is applicable to them. But this argument simply exhausts itself in multilingual societies such as Canada. Instrumental effectiveness and moral legitimacy apply just as

The reason why it is important to be able to argue before a court in one's own language owes much to the rhetorical power of language. If the norm itself is available in one's language and if judicial judgment is simply the deductive application of the norm, pleading in one's language and receiving judgment in one's language is a superfluous luxury. But if a judgment is the rhetorical act of convincing, its presentational elements are equally important. The process of argumentation in law is more than a process of rational justification; it is also a process of presentational dialogue.[72]

19. Symbolisms in an apparently presentational mode, such as a stop sign or contractual boilerplate, can evoke deference but they can also provoke other responses from the agent who acknowledges the norm. To respond, "stop signs should be obeyed because they help to coordinate the behaviour of all motorists," is to recall how legal normativity can be revealed in a presentational-deferential text. Rendering a presentational symbol in two languages highlights the connection between its discursive element and its normative meaning. Those who have gone to the trouble of erasing the word "stop" on signs in Quebec do so because they are not convinced that "stop" and "*arrêt*" are simply equivalent. To them, the sign reads very differently if the word "stop" is blocked out. Indeed, Quebec's language legislation would be incomprehensible were there not also a presentational meaning to apparently discursive words.[73]

Most of Canada's official law seems far removed from the presentational-deferential mode typically found in literature or religious canon. Nonetheless, its general principles, which remain largely unarticulated and undetermined, inform legal normativity. Unexplored assumptions, the generative ideas of a legal order, permit legal normativity to appear discursive by dispensing with inquiry about certainty. Law itself symbolizes a rationality that can never be fully achieved. We defer to the law as sound and principled, but we are not able to express in a definitive way the grounds for our deference. The presence of a second language at least serves to reassure us that this deference is not linguistically arbitrary. To claim that norms must be expressed and that their interpretation and application must be justified in more than one language is also to claim that whatever the semiotic importance of discursive, rationalistic modes for their apprehension, they must also be apprehended in presentational, deferential modes.

20. The object of posing the semantic question has been to show that the mere possibility of legal bilingualism can reveal something of the interrelationship between legal normativity and the manner of its expression in language. The discursive and ra-

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much to aboriginal peoples and to immigrants who speak neither French nor English, yet apart from aboriginal peoples, few have claimed the need for multilingual legislation. The argument, that is, rests primarily on symbolic and not on instrumental grounds.

[72] The *locus classicus* is, obviously, Ch. Perelman, *Traité de l'argumentation: la nouvelle rhétorique*, 5th ed. (Bruxelles: Université de Bruxelles, 1988). See also Ch. Perelman, *Logique Juridique: nouvelle rhétorique*, 2d ed. (Paris: Dalloz, 1979).

[73] For a further elaboration of this idea, developed in respect of the use of the French word *Québec* in the title of the English language version of the *Civil Code of Québec* (*sic*), see P. Legrand Jr., "Civil Codes" in Kevelson, ed., *supra* note 67; J.E.C. Brierley, "Les langues du Code civil du Québec" in P.-A. Côté, ed., *Le nouveau Code civil: interprétation et application* (Montreal: Thémis, 1993) 129.

tional is intertwined with the presentational and deferential even in language-dependent legal symbolisms. Legal knowledge does not exhaust itself in the discursive and rational apprehension of texts, as the contemporary Kabbalists would have it. Nor does it exclusively depend upon the meaning of those texts being reduced to discursive rationality, as latter-day realists would have it. Legal knowledge transcends language, and this invites consideration of law's epistemologies.

II. The Epistemology of Legal Bilingualism

21. Discursive rationality is not only a mode of symbol structure internal to symbols; it is also a mode for interpreting communicative symbolisms. Nowhere is its power more evident than in that symbolism we characterize as language. After all, language is the symbolism of choice precisely in those situations in which we want to express a train of limited ideas in a definite order, the instruction manual being the archetypal use of language in which both structure and meaning seem only discursive.[74] Discursivity facilitates an economy of expression which, in combination with rules of grammar and the reification of concepts, seems to make language "logical".

But the ascription of meaning cannot be equated with the act of naming. Meaning implies, at the very least, a congeries of relationships, and not simply a denotational inventory of objects to which a word is appropriately applied. It follows that, while conventional explicit denotations may be catalogued, together they do not comprise literal meaning. A literal meaning is no more than a stylized teleological argument in which the range of factors thought relevant to the discovery of context is conventionally and artificially constrained.[75] A speaker or writer expresses thought through speech or text, and a listener will ascribe a meaning to the sound or printed mark. The quality of communication between them will depend on their ability to engage in a shared and interactive process of ascribing meaning.[76]

22. Each legal act or judgment involves a complex endeavour of characterization and nominative ascription. Take the case of a female store clerk, picketing in a lawful labour dispute, who is then charged with trespassing by the manager of a shopping centre.[77] Whether this dispute is argued and decided as a crime, tort or labour-relations issue, or as an issue of private property, freedom of speech or women's rights is never decided solely by the explicit denotations of the legal terminology invoked. Quite

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[74] Of course, in moments of anguish, reflection, sorrow and joy particularly, we directly confront the impoverishment of discursive rationality. Here our points of reference tend to the presentational and deference; here we know precisely why "words fail us"; and here we know that formula and ritual are meaningful precisely because they are not being deployed and apprehended in a mode of discursive rationality. Once again, see Langer, *supra* note 37 at 83-88.

[75] See Klinck, *supra* note 35 at 91-102. But compare L. Raucent, "Droit et linguistique — une approche du formalisme juridique" (1978) 19 C. de D. 575.

[76] From the voluminous literature, one might profitably consult B.S. Jackson, *Law, Fact and Narrative Coherence* (Merseyside: Deborah Charles, 1988); D.R. Klinck, Book Review of *Law, Fact and Narrative Coherence* by B.S. Jackson (1992) 7:1 Can. J.L. & Soc'y 224.

[77] The reference is, of course, to *Harrison* v. *Carswell*, [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68, [1975] 6 W.W.R. 673.

apart from characterizations of such events resulting from the application of analytic tools in disciplines that do not depend on law's conceptual apparatus (such as economics, sociology, political theory or whatever), the categories of legal self-ascription themselves are multiple. The framing of an issue, the interpretation of a case, and the analysis of legislative instruments all reveal the importance of implicit connotation arising within the legal order. Yet, legal language also reflects popular language and is constantly coloured by non-legal denotations and connotations. Because implicit connotations cannot be controlled, explicit denotations will ultimately change; changing explicit denotations will in turn change implicit connotations.[78]

To recognize that discursive modes necessarily carry meaning associated with presentational modes is to acknowledge that writer and reader (speaker and listener, artist and viewer, composer and listener) engage in making explicit the possibilities of knowledge that were implicit in the symbolism being apprehended. At the same time, the evolving catalogue of discursive statements replenishes a meaning that can only be described as inchoate: that which is known, but which the knower does not yet know is known. Inchoate meaning is partly shared and partly personal: shared, because the attainment of meaning in any text or symbol draws one beyond oneself; and personal, because to symbolize is to engage in self-revelation. Meaning does not totally inhere in a text; nor is it definitively given to a text by an author; nor is it uniquely ascribed to a text by a reader. To read a text is to undertake a "tri-lectic" with the text as text, with its author and with oneself, in which a constellation of experiences, values, fears and aspirations — many of which are only dimly perceived — are brought to bear on the processes of naming, sorting, recognizing and ignoring the larger part of the world about oneself.[79]

23. Each act of interpretation is an act of will by which interpreters impose themselves upon their world; but each judgment is also an act of submission, for each interpretative act commits interpreters to a future judgment shaped by past understanding. Seeing the ascription of meaning to communicative symbolisms as active interpretation has two major implications in a legal context. First, the conception of normativity in legal texts as exclusively *a priori* cannot be sustained. Neither statutes nor judicial decisions have one correct meaning. The canonical language of statutes and the mythology of legislative intention suggest the possibility, but the actual practice of

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[78] Except in very highly technical fields — biology and physics come to mind — scientific words are either derived from non-scientific usage, or quickly pass into everyday use. Today, this is manifestly the case with "computer-speak": hardware, software, abort, interface, download, network and so on. A brilliant historical demonstration is provided in J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), which traces how legal language, popular language and philosophical language interpenetrate, and how, once the philosophical context of legal doctrine is lost, the continued coherent deployment of the concepts central to such legal doctrine is impossible.

[79] I know no better attempt to explore this idea than M. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (New York: Harper & Row, 1964).

interpretation is to the contrary.[80] Moreover, since the holding of a case exists only in relation to other decisions in a related field, and since that field is constantly changing, it is virtually impossible for someone to pick one case and, having read it, appreciate much of its potential legal meaning.[81] Absent this larger context, a reader would have no standpoint from which to discern whether what is said in a statute or case is different or important.

Second, the addressee of a legal text assumes a critical role in discerning its potential meaning. To claim that interpretation engenders a "tri-lectic" among reader, writer and text means that a conception of the community of possible readers is essential for any author. In law, unfortunately, the relevant community has rarely been thought to be universal. While statutes and judicial decisions are widely available, their usual audience is a restricted group — lawyers and judges. Again, the transformation of unwritten presentational symbolisms (ritual, tradition, custom) into written discursive language often abets the contraction of community.[82] The tragedy of much modern official legal writing — and even unofficial legal writing such as the present essay — is its renunciation of any attempt to expand the community of readers.[83] The tragedy is particularly evident in statutes such as the *Income Tax Act*.[84]

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[80] See generally P.-A. Côté, *Interprétation des lois*, 2d ed. (Cowansville, Que.: Yvon Blais, 1990) at 3-6, 235-37 and sources cited. See also R.A. Macdonald, "On the Administration of Statutes" (1987) 12 Queen's L.J. 488.

[81] The literature on the derivation of the *ratio decidendi* is both rich and enormous. The best elaboration of the preset point may be found in the introduction to A. Harari, *The Place of Negligence in the Law of Torts* (Sydney: Law Book, 1962) at 5-11. See also G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

[82] See Goody, *supra* note 44, c. 4.

[83] The point, of course, is not that every possible reader will read. Rather, where the moral ambition is to write so that all might read, the character of writing, the character of what is written and the character of membership in a community will be changed. For speculations on this theme, see L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969) c. 2, 5. Implicitly, the purpose of "plain language" movements is not just to make law accessible; it is to enfranchise a greater proportion of citizens by implicating them in the process of legal elaboration. On the relationship between literacy and enfranchisement, compare R.A. Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor Y.B. of Access Just. 287 with E. Ryerson, *Report on a System of Public Elementary Instruction for Upper Canada* (Montreal: Lovell & Gibson, 1846) and N. Macdonald *et al.*, *Egerton Ryerson and His Times: Essays on the History of Education* (Toronto: Macmillan, 1978).

[84] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. Philip Vineberg put it this way:

> At first reading, the new tax law defies understanding. The opening words of the Bible in Hebrew are: *Brayshis boroh elohim ess hashomayim vhoretz.* These six words are extended in the King James' version to nine: "In the beginning God created the heaven and the earth". In the style and phraseology of the tax draftsmen, it would read somewhat as follows:
>
> > At a time prior to the first taxation year of the taxpayer, and next immediately preceding the commencement of the first taxation year of the world's first taxpayer, the Supreme Authority, as defined in section 248(c), and hereinafter referred to as the 'S.A.' (whose decision is final and binding and free from any review, whether by judicial determination or otherwise, except only for right of cross-appeal by the Minister of

24. Analytically, in Western legal traditions legal norms may be distinguished along two formal axes. If one seeks to highlight the way in which their meaning is expressed in language — in a particular text, for example — a distinction can be drawn between formulaic (or canonical) norms and inferential (or metaphorical) norms. If their mode of elaboration is highlighted, a distinction can be drawn between explicit (institutionally stated) and implicit (interactional) norms.[85] The resulting typology, which parallels the typology of language forms discussed previously, is also illuminated when plotted against the requirements of legal bilingualism. It reveals that the model of law as purely explicit and formulaic is implausible, and therefore that independent, isolated, parallel language texts cannot really exist in a bilingual or multilingual legal order. Interpretation presupposes that, whatever the presumptive form of a legal norm, retrieving its substantive meaning is an exercise that depends on working through each of these forms as applied to that norm.

Presumptive Formal Typology of Legal Norms

	Formulaic	Inferential
Explicit	Legislation	Judicial reasons for decision
Implicit	Custom, tradition	General principles of law

25. Explicit formulaic norms, such as those thought to be found in statutes, are meant to express discrete, authoritative propositions. Such norms lack narrative structure and assert propositions without supplying an argument. This was not always true of statutes. One striking example, of continuing importance in Canada, is the Royal Proclamation of 1763, which reads, in part:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require,

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> National Revenue), produced, grew, mined, created, manufactured, fabricated, improved, packaged, preserved, and constructed, in whole or in part, not more than the greatest and not less than the least of the aggregate of:
>
> i) the maximum upper extension of the minimum areas above the universe, as defined in section 251;
>
> ii) the minimum lower extension of the maximum areas below the universe; and
>
> iii) the area in between.

Not many readers would have waited until the exciting part where Adam and Eve are expelled from the world's first tax heaven. The Bible wouldn't have become a best-seller ("Understanding the New Tax Law" [1972] Meredith Mem. Lect. (*Twelve Lectures on Income Tax Laws* (Montreal: Wilson & Lafleur)) 7 at 7).

[85] This typology is derived from Macdonald, *supra* note 42.

> that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement ...

[The French version reads:]

> Attendu qu'il s'est commis des fraudes et des abus dans les achats de terres des sauvages au préjudice de Nos intérêts et au grand mécontentement de ces derniers, et afin d'empêcher qu'il ne se commette de telles irrégularités à l'avenir et de convaincre les sauvages de Notre esprit de justice et de Notre résolution bien arrêtée de faire disparaître tout sujet de mécontentement, Nous déclarons de l'avis de Notre Conseil privé, qu'il est strictement défendu à qui que ce soit d'acheter aux sauvages des terres qui leur sont réservées dans les parties de Nos colonies, où Nous avons cru à propos de permettre des établissements ...[86]

The French version contains two interesting differences from the English version: (1) the word "Indian" is translated as "*sauvage*", and (2) the term "all reasonable Cause of Discontent" is translated as "*tout sujet de mécontentement*". Neither of these differences concerns the explicit formulaic norm announced at the end of the clause, but each significantly colours the rhetorical effect of the provision. If one reads both versions on the assumptions that the French version is not a translation of the English version (admittedly false in fact), and that both do have equal normative weight (admittedly false in practice), one has a subtler sense of the narrative contained in the Proclamation. The terms "*sauvage*" and "all reasonable Cause of Discontent" insert elements of paternalism not fully present in the other version. The reader need not ask which version is more authentic (indeed, here the paternalism alternates). Nor is it possible to find a common meaning for each pair of terms. One must supplement one version with the other and recognize that the text is incomplete without both. The presence of an equally authoritative set of propositions in two languages that must be reconciled can force an analysis of the spirit, intent and objects of an enactment — precisely those elements that are not explicit or formulaic.

26. Explicit inferential norms, such as those expressed in court decisions, are meant to state premises, develop an argument and reach conclusions. Insofar as judges are writing "opinions", they are attempting to persuade, and persuasion is intimately linked to stylistic choice.[87] Style largely depends upon the language in which it is expressed: its grammar, idiom, vocabulary and literary tradition. While good, even excellent, translations are possible, they can never identically capture the persuasive

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[86] *Royal Proclamation, 1763* (U.K.), 3 Geo. 3, reprinted in R.S.C. 1985, App. II (Constitutional Acts and Documents).

[87] See D.R. Klinck, "Style, Meaning and Knowing: Megarry J. and Denning M.R. in *In re Vandervell's Trusts (No. 2)*" (1987) 37 U.T.L.J. 358 [hereinafter "Style, Meaning and Knowing"]; D.R. Klinck, "'Criticizing the Judges': Some Preliminary Reflections on Style" (1986) 31 McGill L.J. 655.

authority of the original judgment. One sacrifices either normative precision or rhetorical impact.[88]

To the extent that judgments are understood to culminate in a *ratio decidendi*, they are assimilated into the model of explicit formulaic norms. If there are such things as *rationes decidendi*, one might believe that at least they can be exactly duplicated into another language. A sophisticated understanding of legal normativity, however, once again serves to challenge this approach by highlighting that one loses part of the judgment in not knowing the entire original decision. Whatever else it may be, a case headnote is not an adequate *précis* of a judgment's normativity.[89] The lesson is that one must simply be able to act through "committed practices" in both languages if one wants fully to understand legal normativity in a bilingual legal order. Ultimately, this means not only the ability to speak, read and write in both languages, but also the ability to plead, draft and judge in both languages.

27. Implicit formulaic norms, such as those constituted in and acted upon through custom or trade usage, are meant to describe a practice so as to make it possible to engage in that practice. Here, language is not used to construct an authoritative text. The only "text" is the practice itself. Of course, the practice may become sufficiently canonical that it is ritualized, as in the formalities for nominate contracts such as *emptio-venditio* in Roman law, or that it even becomes expressible in a formula. If that formulaic description of the practice should then become authoritative, as when a custom is referentially incorporated into a statute or when it is explained in a judicial decision, the norm is transformed from implicit to explicit. But should the customary canon remain unauthoritative, the canonical text by which it is expressed also remains a reflection of an implicit, formulaic norm.[90]

Where a practice is shared by speakers of different languages, the textual differences that might emerge through attempts to state the practice canonically are only latent in the norm. The possibility of shared practices despite differences in the language of practitioners holds out the promise of explicit norms that are not arbitrary. A bilingual legal order brings to consciousness how any given language translates normativity. Its practice also serves to identify the movement from implicit to explicit norms, much as it serves to identify the counter-movement from explicit to implicit norms.

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[88] On this point, see the sensitive unpacking of the work of Lord Denning in D.R. Klinck, "'This Other Eden': Lord Denning's Pastoral Vision" (1994) 14 Oxford J. Legal Stud. 25.

[89] The idea that rules themselves are complex narratives is not new to legal theory. See *e.g.* R.M. Cover, "The Supreme Court, 1982 Term — Foreword: *NOMOS* and Narrative" (1983) 97 Harv. L. Rev. 4; R. West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory" (1985) 60 N.Y.U. L. Rev. 145. See especially Jackson, *supra* note 76 at 97ff.; its implications for the normative impossibility of headnotes are obvious.

[90] This point is developed in R.A. Macdonald, "Custom Made" (Research paper prepared for the Law and Society Programme of the Canadian Institute for Advanced Research, initially presented as the Lansdowne Lecture at the Faculty of Law, University of Victoria, 18 January 1990) [unpublished].

28. Implicit inferential norms, such as those which constitute the general principles underlying a particular legal order (*i.e.*, public-policy norms, political and economic ideologies, tacit principles of justice and conceptions of the possibility of human agency) are typically made patent in dialogue and debate centring on what these principles are. One might go so far as to say that the substance of the principles is inseparable from the question as to what they actually might be in a given case.[91] It is worth stating the obvious: jurisprudential arguments about the foundations of law are also of this character.[92]

While the problems of jurisprudence have stimulated various programmes for their solution in different places at different times, debate and dialogue have not been precluded by a difference in language between various intervenants in these debates. Ideas of law and legal theory typically cut across linguistic boundaries.[93] This suggests that the "arbitrariness" of any single or even all natural languages, in and of themselves, is not the source of theoretical debate. The coexistence of multiple languages in debates about law's finalities and about general legal principles points away from radical scepticism about the possibility of normative meaning opened by reference to language.[94] A bilingual legal order reinforces this insight: the multiple languages exist not across legal orders, but within a single legal order.

29. The object of posing the epistemological question has been to suggest that the possibility of legal bilingualism can reveal something of the way legal knowledge is apprehended, rendered and transmitted through different forms of language symbolism. To acknowledge legal bilingualism is to reveal why norms expressed in texts issued by authoritative institutions are inseparable from norms having neither authoritative nor textual expression. To work through how these norms can be understood bilingually is to describe legal bilingualism itself.

III. Theorizing about Legal Bilingualism in Canada

30. The general considerations of the previous two sections now permit some answers to be given to the question raised in the Introduction to this essay: Given legal

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[91] See "Cinquièmes Journées juridiques franco-hongroises" (Symposium: les Principes généraux du droit, Budapest, 13-17 October 1980) [1981] R.I.D.C. 180-91.

[92] R. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Butterworths, 1989) nicely explores why these so-called "academic" debates matter to the politics of legal practice. See also L.L. Fuller, *The Problems of Jurisprudence*, temp. ed. (Brooklyn: Foundation Press, 1949).

[93] This is not, of course, to claim that language is irrelevant to the relative weight of different approaches and that these approaches are identical regardless of the language in which they are adumbrated. Compare D. Davidson, "Reply to Foster" in G. Evans & J. McDowell, eds., *Truth and Meaning: Essays in Semantics* (Oxford: Clarendon, 1976) 33.

[94] There is, of course, the response that even the deconstructive writing is itself contingent and makes no claims to intersubjectivity. See L. Hutcheon, *A Poetics of Postmodernism: History, Theory, Fiction* (New York: Routledge, 1988). But the point being made in the text is not that one can ascribe non-contingent rationality to language. It is only to note that communicative symbolisms are not lifeless — they are communicative.

bilingualism, how is it possible? Bilingual legal texts will normally be created either as two originals which are then reconciled as against a more general expression of ministerial intention formulated (orally or in writing) in one language, or, as more often has been the case historically, as one original which is then translated.[95] Hence, it is tempting to begin with a brief excursus on the theory of translation. There are, of course, many "theories" of legal translation as literary (and legal) practice.[96] Regardless of the actual mechanics of translation in any given context, inevitably Steiner's Law applies: all interpretation is an act of translation, and all translation is an act of interpretation.[97] This is why theorizing about legal bilingualism in a particular legal order is helpful in rendering patent the epistemological and semantic foundations of deploying language to apprehend legal normativity.

31. Recall the two paradigmatic types of discursive legal norm: legislation and reasons for judgment given by an adjudicative body. Despite their differing authoritative status and textual mode of expression, as texts, both rest on identical epistemic and semantic grounds. Legislative drafting involves the same kind of interpretive exercise as decisional writing by courts and other officials. Both require the translation of a legal idea, into language or into a new language. Sometimes this exercise of translation implies the initial drafting of a piece of legislation or the discovery and application of legal norms that previously had no canonical expression in language (customary and common-law rules). In these cases, the point of entry for the constitutive or reconstitutive effort is practice, not text. Action, relationships and even entire lives have to be apprehended as normative artifacts that contain both explicit and implicit meanings.

Conversely, sometimes this normative exercise implies the amendment of an existing text in one or more natural languages (or even the translation of a legislative text from one natural language into another); likewise, sometimes it implies the discovery and application of legal texts already expressed in canonical form in one or more natural languages (or even the translation of reasons for judgment from one natural language into another). In these cases the reconstitutive process is a search for

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[95] Until recently, the practice of legislative drafting at the federal level was of the latter type (see L.-P. Pigeon, "La rédaction bilingue des lois fédérales" (1982) 13 R.G.D. 177), whereas, since the mid-1980s, it has been one of co-drafting. See P. Johnson, "Bilingual Drafting: The Government of Canada System — Part I" (Paper presented to the National Seminar on Legislative Drafting and Interpretation, Ottawa, 19-21 August 1987) [unpublished]; L. Levert, "Le bijuridisme législatif" (Manuscript, 25 March 1996) [unpublished]. See also A. Morel, "La rédaction de lois bilingues harmonisées avec le droit civil" (Manuscript prepared for the Federal Department of Justice, September 1996) [unpublished].

[96] For a sampling, see J. Kerby, "Problèmes particuliers à la traduction juridique au Canada" (1979) 12:2, 3 R. de l'Université de Moncton 13; "La traduction juridique" (Symposium, Australia, August 1986) (1987) 28 C. de D. 735-859; Gémar, *supra* note 7; P.W. Schroth, "Legal Translation" (1986) 34 Am. J. Comp. L. 47 (supp.); A. Covacs, "Bilinguisme officiel et double version des lois" (1979) 24 META 103; J.-C. Gémar, "La longueur des textes en traduction juridique — domaines anglais et français" in P. Pupier & J. Woehrling, eds., *Language and Law* (Montreal: Wilson & Lafleur, 1989) 599. See also Gémar, ed., *supra* note 9.

[97] See Steiner, *supra* note 2, preface and *passim*.

the meaning of a legal norm whose apprehension is already partially controlled by a text (be it an enactment or a judgment).

32. A legal norm comprises more than just the words that serve to give an explicit point of reference for its apprehension. Words, phrases, and even entire statutes, codes and judicial decisions are normative symbols that contain both explicit and implicit meanings.[98] The problem of legal bilingualism is one of legal interpretation/translation conceived in this more embracive sense. This problem is at once lesser and greater when an authoritative text rather than an action is the symbolic referent — lesser because of discursive conventions of language already noted, and greater because these conventions truncate the search for meaning. Authoritative texts in two or more languages raise three discrete interpretive challenges. These flow from: uncertainty about the relative authority of the two versions; doubts about the degree to which either reflects the norm; and the embedded character of language.

33. Take first those challenges relating to the manner in which texts are created. Here the focus is on legislation. If legal bilingualism presupposes equal authority of both versions of a text, how ought the interpreter to react when one such version is patently a derivative translation of the other?[99] Given the draftsperson's necessary fidelity to textual symmetry, the implicit and symbolic meanings of the primary version will inevitably be lost, ignored or compromised for pragmatic reasons in any translation.[100] For this reason, it is doubtful that legally significant one-to-one translations are even possible, even where the principal nouns in the norm are transliterated terms of art: contract, offer, acceptance, capacity, cause. Such an exercise is predicated upon the dubious proposition that words (and especially legal terms of art) carry with them detachable, fixed meanings that can be derived from a bilingual dictionary.[101]

34. As to the second challenge, even where both language versions have been drafted as originals, the ministerial directive giving rise to the drafting exercise inevitably will be expressed in one or the other language. Consequently, the implicit problem being addressed, and the implicit solution being sought, will be shaped by the perspective of the person requesting the legislative text.[102] Again, regardless of the language of the

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[98] The point is nicely developed in the special case of legal fictions by R.A. Samek, "Fictions and the Law" (1981) 31 U.T.L.J. 290.

[99] This, for example, is the case of the *Civil Code of Québec* (see Brierley, *supra* note 73, especially at 144-45).

[100] The point is developed in L.-P. Pigeon, "La traduction juridique — L'équivalence fonctionnelle" in Gémar, ed., *supra* note 9, 271; see also P. Newmark, "The Translation of Authoritative Statements: A Discussion" in Gémar, ed., *ibid.*, 283. See below, text accompanying notes 146-62, for examples of changes to the manner of drafting the form, style and presentation of federal legislation that would be required to make a text semiotically "language-neutral".

[101] For a subtle rendering of these problems, see N. Kasirer, "Dire ou définir le droit?" (1994) 28 R.J.T. 141; N. Kasirer, "What is vie commune? Qu'est-ce que living together?" in Brierley *et al.*, eds., *supra* note 27 [forthcoming]. See also S. Sarcevic, "Bilingual and Multilingual Legal Dictionaries: New Standards for the Future" (1988) 19 R.G.D. 961.

[102] The counsel of the so-called mischief rule of *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637 (K.B.), thus speaks not only to the task of the judge-interpreter, but also to the task of the drafter-

ministerial request, the resulting text may constitute a better reflection of normative intention and extrapolation in one version rather than the other.[103] More to the point, clarity is not fundamentally the criterion of fidelity to intention. A legal rule that seems clear in its expression in one language and not so straightforward in its expression in the other may actually be a more faithful rendering of ministerial purpose in its less clear version. Still again, the meaning of a rule cannot be reduced to its lowest common denominator of overlapping meaning.[104] Finally, when a bilingual text is not created in two original versions, definition, grammar and syntax in both languages will still exercise significant influence over its import. A close reading of two texts may point to a norm only imperfectly rendered in each and which, like the elephant touched by several blindfolded persons, is much greater than the immediate extension of any of their reports.[105]

35. This suggests a third challenge that inheres in all legislative drafting and interpretation: the language of law is embedded. As noted above, it is embedded first in everyday usage: no matter how autonomous certain technical legal concepts are from everyday usage, they cannot be disjoined from it.[106] More than this, the language of law is also embedded in legal tradition: in Canada, there are not only two official languages, but also at least two official legal cultures — the common law and the civil law.[107] A statute that translates "mortgage" as "*hypothèque*" fails to acknowledge how much legal language presumes legal culture.[108] Similarly, a statute entitled the *Federal Real Property Act/Loi sur les immeubles fédéraux*[109] presumes that an "*immeuble*" in common-law legal French is equivalent to "real property", and that "real property" in civil-law legal English is equivalent to "*immeuble*". Both are, obviously, inexact pre-

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interpreter. And this is true whether the text is to be produced in several linguistic versions or in only one. All drafting, like all interpretation, is translation.

[103] Art. 2674, para. 3 C.C.Q. is an example where the translated English text ("proceeds" for "*sommes d'argent*"), though inexact, offers a more coherent normative statement than the original French text.

[104] Compare "Litigating the Meaning", *supra* note 9 at 329, where Beaupré calls this method the search for the "highest common meaning", and advocates its adoption.

[105] Compare the essays from the symposium "L'interprétation des lois et des conventions plurilingues" ((1984) 25:4 C. de D.) with C.B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts Versus the Presumption of Similar Meaning" (1991) 40 I.C.L.Q. 953.

[106] See J. Darbelnet, "Niveaux et réalisations du discours juridique" in Gémar, ed., *supra* note 9, 51.

[107] In addition to the common-law and civil-law traditions, there are also numerous aboriginal legal traditions that are part of "official" Canadian law (see *e.g.* J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629); and there is also a federal legal tradition that by its very nature is neither "common law" nor "civil law" (see J.E.C. Brierley, "Quebec's 'Common Laws' (droits communs): How Many Are There?" in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 109; see also Macdonald, "Encoding *Canadian* Civil Law", *supra* note 27).

[108] Ministère de la justice, Section du Code civil, *Le traitement des créanciers dans la loi sur la faillite et l'insolvabilité et les mécanismes de garantie dans le droit civil du Québec: rapport, problèmes et solutions possibles* (December 1996) [unpublished].

[109] S.C. 1991, c. 50.

sumptions."[110] Here, the aspiration to legal bilingualism highlights the different dimensions of the embedded character of all legal language."[111]

36. Over the past few decades, various tentative responses to the challenges of legal bilingualism have emerged from official circles in Canada. Some years ago, the Law Reform Commission of Canada issued a study paper entitled *Drafting Laws in French*."[112] Its authors drew inspiration from French theorists who had argued that "[t]he expression of the law, to be well understood, ought to be written in a language directly accessible to the mind."[113] If one pardons the overstatement about how the mind apprehends language, one can nonetheless discern much wisdom in the affirmation. The vocabulary, grammar and syntax of the law ought to respect, at any given time and in any given place, the conventions and usages of the natural language in which the legal norm is being expressed. But the Law Reform Commission appears to have accepted a further, unstated, assumption that is less defensible.

This assumption is that language and culture are so integrally connected that to communicate law adequately, only the "indigenous" language of a given legal system is appropriate. For the Law Reform Commission, "[i]n order for [a] rule to be accepted, it must be, above all, in keeping with the customs and cultural reflexes of those persons to whom it is addressed."[114] Translations are inadequate because the "sound-associations" within a language cannot usually be translated, though they are of immense importance in building up interpretive responses. This view of legal translation presumes that one is creating a second legal order, as much as possible the mirror of the other, but necessarily separate from it.

The late Jean Kerby, a linguist formerly with the Federal Department of Justice, held that "la traduction comporte non seulement le passage d'une langue à une autre, mais encore la transposition du message d'un système de droit à un autre."[115] In this

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[110] See J.E.C. Brierley & N. Kasirer, "Review of *Federal Real Property Act/Loi sur les immeubles fédéraux* in light of the bijural and bilingual character of federal statutory instruments" (Manuscript prepared for the Federal Department of Justice, 31 March 1996) [unpublished].

[111] The point is explored in E. Smith, "Peut-on faire de la *common law* en français?" (1979) 12:2, 3 R. de l'Université de Moncton 39. For an affirmative answer to this question, see P. Legrand Jr., ed., *Common Law: d'un siècle l'autre* (Cowansville, Que.: Yvon Blais, 1992); M. Bastarache & D.G. Reed, "La nécessité d'un vocabulaire français pour la *Common law*" in Gémar, ed., *supra* note 9, 207. See also "Legal Bijuralism", *supra* note 21. Other aspects of the theme are elaborated in J.-M. Brisson, "L'impact du Code civil du Québec sur le droit fédéral: une problématique" (1992) 52 R. du B. 345; J.-M. Brisson & A. Morel, "Droit fédéral et droit civil: complémentarité, dissociation" (1996) 75 Can. Bar Rev. 297.

[112] Law Reform Commission of Canada, *Drafting Laws in French (Study Paper)* (Ottawa: Minister of Supply and Services Canada, 1981).

[113] *Ibid.*, epigraph (trans. quote from Report preceding Decree No. 71-740 of 9 September 1971 instituting new rules of procedure intended to constitute part of a new Code of Civil Procedure (France), cited in J.-L. Sourioux & P. Lerat, *Le langage du droit* (Paris: Presses Universitaires de France, 1975) at 64).

[114] *Ibid.* at 279.

[115] Kerby, *supra* note 96 at 13. See also J. Kerby, "La traduction juridique, un cas d'espèce" in Gémar, ed., *supra* note 9, 3.

conception of the enterprise, a direct connection between a language and a legal tradition is implied: the common law and the English language are inexorably connected such that the possibility of "common law in French" is fatally compromised; and the civil law and the French language are intimately connected, such that the possibility of "civil law in English" is also fatally compromised.

37. These observations are deeply troubling. While they apparently rest on a sophisticated view of the relation of language to meaning, they "essentialize" both language and legal culture.[116] In so doing, they ignore several instances of the successful practice of legal bilingualism. Nonetheless, this approach is not surprising, given three key theoretical tenets that have accompanied the movement to official legal bilingualism at the federal level in Canada over the past few decades: positivism, statism and monism.

38. In the present context, legal positivism is not meant to signal a particular jurisprudential theory about the pedigree of legal norms.[117] Rather, it points to the widespread belief that it is desirable to reduce all law to written enactments. Many of those who preach legal bilingualism today are naively continuing the Napoleonic and Benthamite codification projects in their unvarnished form.[118] Of course, most contemporary proponents of codification (whether of the private law in a civil code, or of civil-liberties guaranties in a charter of rights and freedoms) do not pretend for a moment that legislation either precedes or exhausts legal normativity.[119] They do, nonetheless, assume that "made law" overtakes the legal norm that it purports to express. When custom is thus made, a form of legal transubstantiation occurs; thereafter, law is text. Because constitutionalized legal bilingualism requires legislative instruments

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[116] The literature on such themes tends to emanate from writers who perceive a legal tradition under threat, such as civilians in Scotland, Louisiana or Quebec, although it is also present in dominant cultures. See *e.g.* C.R. McDiarmid, *Scots Law: How Can and Why Should It Survive?* (LL.M. Thesis, Faculty of Law, McGill University, 1995) [unpublished]; A.N. Yiannopoulos, "Louisiana Civil Law: A Lost Cause?" (1980) 54 Tul. L. Rev. 830; D. Lemieux, "The Quebec Civil Law System in a Common Law World: The Seven Crises" [1989] Juridical Rev. 16. For a general discussion, see Brierley & Macdonald, eds., *supra* note 44 at 67-73 and sources cited. But it also has a long pedigree in cases of "threatened" legal languages. See *e.g.* M. Sparer & W. Schwab, *Rédaction des lois: rendez-vous du droit et de la culture* (Quebec: Éditeur officiel du Québec, 1980); P. Issalys, *Langage et système des lois* (Quebec: Éditeur officiel du Québec, 1980).

[117] For a contemporary account of the necessary elements of such a theory, see J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

[118] Compare J.B. Proudhon, *Traité des droits d'usufruit, d'usage personnel, et d'habitation*, 2d ed. (Dijon: V. Lagier, 1836) and J. Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Athlone, 1970).

[119] See P.-A. Crépeau *et al.*, eds., *Codification: Valeurs et langage* (Quebec: Service des communications du Conseil de la langue française, 1985); on charters of rights, see R.A. Macdonald, "The New Zealand Bill of Rights Act: How Far Does it or Should it Stretch?" in *The Law and Politics: 1993 New Zealand Law Conference — Conference Papers*, vol. 1 (Wellington: N.Z. Law Society, 1993) 94 at 113-41.

to be enacted in both French and English, the legal order itself will be more bilingual the more it is written.[120]

No doubt, the theory of legal bilingualism requires that all legislative texts be rendered and that verbal communication in law flourish in two languages: that is, in Canada, in both French and English.[121] But what of non-literary and non-verbal normative symbolisms — customs and those practices, understandings and symbolic constructions that do not depend on preexisting legal language? Since they are, in the crudest sense, not directly translatable, proponents of legal bilingualism feel impelled to discount or minimize them as legal artifacts. Demonstrating a commitment to legal bilingualism and to promoting its official practice therefore tends to privilege a theory of law that equates legal normativity with its expression in language.

39. A second assumption shared by many proselytizers for legal bilingualism is that legal normativity can be equated with the activity of the state. On this view, all law is either made, or referentially incorporated, by the political state. The rationale for conflating law and state is that if the enacted product of official legislatures — the federal Parliament or provincial Legislatures — can be rendered in both languages, then one of the basic requirements of legal bilingualism has been achieved. Ensuring that other state institutions — courts, administrative tribunals, the public service — operate bilingually completes the project.[122] This dominant conception of law is increasingly being contested. Legal normativity may be understood as grounded in several sites besides the political state.[123] Within the geography of a single state, many unofficial legal orders compete for the fidelity and attention of citizens. Each of these — corporations, unions, universities, clubs, and so on — produces its own legislative and judicial texts.[124]

If legal bilingualism is about textuality, adopting a non-statist view of law might seem to require that each of these so-called peripheral legal orders also operate bilin-

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[120] For a critique, see R.A. Macdonald, "Understanding Regulation by Regulations" in I. Bernier & A. Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81.

[121] See *Constitution Act, 1867*, *supra* note 23, s. 133; *Charter*, *supra* note 25, ss. 16, 20; *Official Languages Act*, R.S.C. 1985, c. O-2, s. 1. See generally the two volumes edited by Bastarache, *supra* note 22.

[122] For an inventory of the obligations of various governments in Canada, see Hogg, *supra* note 26 at 1197-1226; Tremblay, *supra* note 26.

[123] See generally J. Griffiths, "What is Legal Pluralism?" (1986) 24 J. of Legal Pluralism 1; B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995).

[124] For a lengthy excursus in the Canadian context, see R.A. Macdonald, "Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in Royal Commission on Aboriginal Peoples, *Aborigiual Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993) 232.

gually.[125] For this reason, the claim that law arises only in state institutions permits proponents of legal bilingualism to circumscribe the scope of necessary translation. Dispute resolution institutions other than courts — not being official institutions of the state — need not operate in both English and French.[126] More than this, these proponents seek to draw the sources of law narrowly. Textbooks, treatises, monographs and other commentary — not being official products of the state legal order — need not be produced in two languages. Adopting a statist view of law permits those who are committed to legal bilingualism to claim success as soon as the artifacts of state institutions are rendered bilingually.

40. Those who promote legal bilingualism typically also assume that there is within the state legal order only one normative system. They cleave to a monistic view of law. The official legal order comprises a single system of norms that can be arranged in hierarchical fashion such that conflicts between them are capable of a "correct" resolution. On such a view, legal bilingualism is simply the double representation of a single legal reality: whether apprehended in English or in French, there is only one legal norm — a legal norm that is totally confounded with either of the texts of its expression.[127] This formal conception of law focuses on the identification of the legal norm.

The possibility that interpretation is an act of constructing meaning puts assumptions about the transparency of words into question. The goal of preventing the two language versions of a norm from being ranked lexically — of asserting the equality of the two texts — leads proponents of legal bilingualism to claim the discreteness of each version. To recognize that the law does not operate as a single normative system and that any particular legal rule may have a different outcome in different situations seems to undermine the project of legal bilingualism; it suggests that what really matters is individuality and not language affiliation.[128] In this sense, the challenge of legal pluralism is that it seems to dismiss the mediating role of English and French as official modes of apprehending law in Canada. Whatever the language of a text, a person may translate it into a personal language which may or may not be one of the official natural languages of the legal bilingualism project.

41. These three assumptions and commitments induce those who argue for legal bilingualism to advance a formal conception of law: law is reduced to its discursive ex-

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[125] For an explanation of alternate strategies to avoid this result, see R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in A. Lajoie, ed., *Théories et émergence du droit* (Montréal: Thémis, 1997) [forthcoming].

[126] On the implications of deregulation, privatization and alternative dispute resolution for the reconfiguration of state normativity under a non-pluralist regime, see R.A. Macdonald, "Prospects for Civil Justice" in Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) (Chair: J.D. McCamus).

[127] The impossibility of conflating text and norm is often claimed by postmodernists to be their key insight: see Douzinas & Warrington, *supra* note 18. Compare Fuller, *supra* note 53 for a similar affirmation a generation earlier.

[128] See J. Boyle, "Is Subjectivity Possible? The Post Modern Subject in Legal Theory" (1991) 62 U. Colo. L. Rev. 489.

pression in language. The thirty-year official-languages saga in Quebec — Bill 63, Bill 22, Bill 101, Bill 178, and Bill 86[129] — and its obverse, the tribulations in the prairie provinces over the language of education,[130] are classic manifestations of the misdirection of energy by many supporters of legal bilingualism. Their case for legal bilingualism is grounded in the principle that the law should be made manifest in the language of the citizen to whom it is addressed.

But what difference does it make to the average citizen that official legal rules are available in two languages? Few citizens ever read legislative instruments. Fewer still pore over reports of judicial decisions or doctrinal writings. One suspects that institutional bilingualism is conceived and understood as a professional exercise: it requires the creation of more official written law for the benefit of practitioners of official written law. Far from producing proof of how law transcends language, the development of legal bilingualism in Canada has contributed to a renaissance of legal formalism. In other words, the theory of legal bilingualism one adopts directly influences what one is prepared to consider as law.[131] Not surprisingly, the mantra of official legal bilingualism in Canada is now: if it cannot be made bilingual, it cannot be law.

42. This renewed formalism consequent upon the attempt to achieve a bilingual legal order has the potential to exacerbate two other pathologies of modern law. There is a strong possibility, first, that current understandings of legal bilingualism will produce *de facto* legal dualism (the practice of two legal unilingualisms), and second, that legal texts will become even more bureaucratic than they have been previously. Evidence in support of the former proposition can be found in the history of orthodox civil-law practice in Quebec. Legal practice in post-confederation Quebec has always been carried on in English and French and has always been centred upon at least two sets of written materials. Except at the highest levels of legal endeavour, until recently these practices remained largely insulated from each other.[132] The English-speaking bar has developed specific case-law *dossiers* quite distinct from the francophone bar.

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[129] Bill 63, *An Act to Promote the French Language in Quebec*, 4th Sess., 28th Leg., Quebec, 1969 (assented to 28 November 1969, S.Q. 1969, c. 9); Bill 22, *Official Language Act*, 2d Sess., 30th Leg., Quebec, 1974 (assented to 31 July 1974, S.Q. 1974, c. 6); Bill 101, *Charter of the French Language*, 2d Sess., 31st Leg., Quebec, 1977 (assented to 26 August 1977, S.Q. 1977, c. 5); Bill 178, *An Act to amend the Charter of the French Language*, 2d Sess., 33d Leg., Quebec, 1988 (assented to 22 December 1988, S.Q. 1988, c. 54); and Bill 86, *An Act to Amend the Charter of the French Language*, 2d Sess., 34th Leg., Quebec, 1993 (assented to 18 June 1993, S.Q. 1993, c. 40). See generally J.E. Magnet, *Official Languages of Canada* (Cowansville, Que.: Yvon Blais, 1995), especially at 35-65.

[130] For the relevant decisions of the Supreme Court on language-of-education questions, see Hogg, *supra* note 26 at 1219-38; see also P. Foucher, "Les droits scolaires des minorités linguistiques" in Beaudoin & Mendes, eds., *supra* note 26, 16-1.

[131] The causal connection is, obviously, not unidirectional. Commitments about what counts as law derive from many sources, and not just a concern about bilingualism. Nonetheless, within a broadly statist and instrumentalist conception of law, a concern for bilingualism reinforces the tendencies noted.

[132] For a discussion of this point, albeit mainly about the ignorance of English-speaking *common* lawyers, but by implication also English-speaking *civil* lawyers, see J. Deschênes, *The Sword and the Scales* (Toronto: Butterworths, 1979) c. 3 ("On Legal Separatism in Canada").

Even the accepted interpretations of statutes, codal articles and cases have frequently been dual.[133] Secondary-source materials (texts, law-review articles, standard-form contracts, precedents) have tended to be deployed by those who practice law primarily in the language in which these doctrinal sources were composed.[134]

Under the *Civil Code of Lower Canada*, the relative frequency of deployment of particular legal institutions, such as the fiduciary substitution by contrast with the trust, showed a divergence grounded in linguistic and cultural dualism.[135] Similarly, recourse to, and acceptance of, different legal institutions — community of property with a contractual appointment of an heir by contrast with separation of property with *inter vivos* matrimonial gift — reflected differing perceptions of the role of courts or public officials such as notaries.[136] Judges themselves revealed methodological divergences that can be traced, at least in part, to questions of language and culture.[137]

43. These are only examples of the scope and character of legal dualism. The larger questions are: What is the basis for claiming that legal bilingualism has the potential to produce *de facto* legal dualism? And what is wrong with legal dualism? The latter

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[133] See *e.g.* the differing interpretations given to *Matamajaw Salmon Club* v. *Duchaine*, [1921] 2 A.C. 426 (P.C.) (contractual dismemberment of ownership/theory of estates) and *Banque canadienne nationale* v. *Lefaivre* (1950), [1951] Que. K.B. 83, 32 C.B.R. 1 (ownership *sui generis*/mortgage-type transaction) and to art. 127 C.C.L.C. (obligatory impediment to marriage/impediment only binding on the duty of the official solemnizing the marriage) and art. 2022 C.C.L.C. (absolute prohibition of disguised non-possessory security over moveables/prohibition not reaching double-sale transactions).

[134] An unscientific sampling in 1981 of memos and briefs prepared on three sets of topics — wills, contract remedies and latent defects — by two Montreal law firms (one largely English-speaking, one largely francophone) revealed that less than 50 percent of the authorities referred to (cases, doctrine) were common and that each tended to cite material in the predominant language of the firm in a ratio of 3:1.

[135] Much of this is a direct result of how law is taught, and with the relative ease with which the institution finds a reflection in the non-legal literature, in cultural mythology and in religious dogma. Compare, on this point, different treatments of family-property arrangements in Ringuet, *Trente arpents* (Paris: Flammarion, 1938), H. MacLennan, *Two Solitudes* (Toronto: Collins, 1945) and M. Richler, *St. Urbain's Horseman* (New York: Knopf, 1971).

[136] Compare M. Ferron & R. Cliche, *Quand le peuple fait la loi: la loi populaire à Saint-Joseph de Beauce* (Montreal: Hurtubise, 1972); C.-E. Gagnon, *Mémoires d'un notaire de campagne* (Quebec: Septentrion, 1990); and E. Kimmel, "The Notarial System and its Impact in Canadian Law" in R. Landry & E. Caparros, eds., *Essays on the Civil Codes of Québec and St. Lucia* (Ottawa: University of Ottawa Press, 1984) 109, for different perspectives on the notarial profession reflecting cultural-linguistic dichotomies.

[137] These divergences frequently manifest themselves in debates about preserving the "purity" of civil-law institutions from the corrupting influence of the common law, although it has never been the case that such a polemic was produced by an English-speaking judge. For comparative interpretive perspectives, see S. Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil" (1987) 32 McGill L.J. 559; J.-G. Castel, "Le juge Mignault défenseur de l'intégrité du droit civil Québécois" (1975) 53 Can. Bar Rev. 544; D. Howes, "Nomadic Jurisprudence: Changing Conceptions of the 'Sources of Law' in Quebec from Codification to the Present" in Glenn, ed., *supra* note 21, 1. See, on the linguistic point, J. Deschênes, *supra* note 130 and the comments of A. Monet J.A. in *Central Factors* v. *Imasa Ltd.* (12 March 1979), Montreal, 09-000-245-779, J.E. 79-318 (C.A.).

is more easily answered. From a practical point of view, the problem of legal dualism is that it enhances justificatory confusion by a continual process of self-referential citation. This self-reference necessarily truncates the search for meaning. Many of the possible interpretations of legal rules are lost, or at least are not consciously present, in the mind of the interpreter who looks to the rules in only one language. Rather than seizing upon a second language in order to enrich legal understanding and to gain more sophistication in legal interpretation, the jurist who looks to only one text accepts incomplete normative descriptions and relies on jejune interpretive methods.[138]

Numerous factors contribute to the apparently inexorable decay of legal bilingualism into legal dualism: intellectual laziness among legal professionals; rampant unilingualism among legal elites; a proliferation of mediocre translations of texts; an educational system that privileges information over understanding; and, not least, a plethora of secondary sources and computerized finding tools.[139] Given this, and accepting the ambition of legal bilingualism as a primary goal, one might well conclude that comprehensive translation of legal materials is counterproductive. Legal resources in two-language versions have the perverse consequence of limiting the catholicity of a lawyer's search for meaning. The more materials are available in one's own language, the less one tends to look outside that language for ideas and inspiration, and the less one tends to look outside the language for criticism and interpretation of legal rules.[140] The more legal materials are available in both languages, the less interpreters will have to confront the assumptions, nuances and metaphors of their own language.[141]

44. This last observation points to the second concern, noted earlier, about the new formalism consequent upon the quest for legal bilingualism. The conception and drafting of bilingual texts risk becoming even more bureaucratic. Bureaucratic texts are those that are not necessarily the work of one person and that are highly formu-

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[138] This theme is elegantly explored in N. Kasirer, "Dire ou définir le droit", *supra* note 101.

[139] I have attempted to illustrate how similar factors have begun to transform legal practice in R.A. Maedonald, "Images du notariat et imagination du notaire" [1994] Cours du Perfectionnement du Notariat 1.

[140] Here one returns to the theory of bilingual education. See K. Hakuta, *Mirror of Language* (New York: Basic Books, 1986) c. 9. In law, some of the best theoretical writing on this point is by David Howes (see D. Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill L.J. 523; D. Howes, "La domestication de la pensée juridique québécoise" (1989) 13:1 Anthropologie et Sociétés 103; D. Howes, "Dialogical Jurisprudence" in W.W. Pue & B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 71; Howes, *supra* note 135; and D. Howes, "Faultless Reasoning: Reconstructing the Foundations of Civil Responsibility in Quebec Since Codification" (1991) 14 Dalhousie L.J. 90.

[141] See Brierley & Maedonald, eds., *supra* note 44 at 147-49 for discussion in the context of a civil code. Compare Beaupré, *Interpreting Bilingual Legislation*, *supra* note 9. Of course, the whole exercise of comparative law is predicated on the assumption that "exteriority" enriches understanding. See *e.g.* P. Legrand Jr., "Comparative Legal Studies and Commitment to Theory" (Book Review of *A Modern Approach to Comparative Law* by P. de Cruz) (1995) 58 Moderu L. Rev. 262.

laic.[142] One already sees, in cases where enactments or judgments are not initially conceived in two originals, legislative drafters or judges writing for a translator. In the latter situation, sometimes the author does not even verify the translated version of his or her judgment.[143] The more a text aspires to formulaic rationality for ease of translation, the more difficult becomes the task of ascribing meaning. In systems that privilege such forms of communication, an interpreter is less concerned with the meaning of a text than with its practical application. It follows that in a jurisdiction with two unilingual sectors of the bar, the pressure will increase to produce materials whose meaning is intended to be self-evident.

The devaluation of legal meaning reflected by a devaluation of legal symbolism parallels a similar reconfiguration of society's most pervasive communicative symbols. Harlequin romances, verse masquerading as poetry in greeting cards, Muzak, "art" sold in shopping-centre parking lots, plastic renditions of *David*, television soap operas, sports-stadium rituals and *Reader's Digest* are only some examples of the commodification of form. Ultimately each of these derivatives takes on an iconic and original life of its own — becomes its own original. This is the character of popular culture, a culture that feeds into the very communicative symbolisms against which it is constructed.[144] While "low culture" beneficially calls "high culture" to account, in law, the syntactical form of "popular culture" is usually misappropriated into a context where professional practice purges it of its substance. This misappropriation grounds the contemporary crises of law: the curse of masses of indecipherable legislation, volumes of detailed statutory instruments, bureaucratic judgments, and headnotes routinely cited as expositions of the law, even by judges themselves.

IV. Practicing Legal Bilingualism in Canada

45. The two foregoing consequences of the official theory of legal bilingualism in Canada today — dualism and bureaucratic writing — might lead one to conclude that the project is inherently flawed. Yet neither is a necessary concomitant of the endeavour. Each is only a consequence of particular semantic and epistemological presuppositions bound up in the official theory. It is possible to conceive of a legal theory and a legal practice that accommodate and welcome the possibility of a bilingual legal order rather than dual unilingual legal orders, and that contest and resist the contemporary drift towards bureaucratic discursivity in legal texts. In short, if the objective is

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[142] See Vining, *supra* note 64, part I; and J. Vining, "Justice and the Bureaucratization of Appellate Courts" (1982) 2 Windsor Y.B. Access Just. 3.

[143] The point is obvious in cases where judges are unilingual. Of course, much effort now goes into ensuring high-quality translation of Federal Court and Supreme Court judgments in Canada. For a striking example of the pitfalls of not attending to translation, see *Tamarak Construction Inc.* v. *United Services Club Ltd.*, [1971] C.A. 334, where "change of heart" in a judgment was translated in a headnote as "transplantation de cœur" (*ibid.* at 334).

[144] See *Law and Popular Culture* (special issue) (1995) 10 Can. J. L. & Soc'y. See especially A. Hunt, "The Role of Law in the Civilizing Process and the Reform of Popular Culture", *ibid.*, 5.

to generate the preconditions for and the practices necessary to sustain legal bilingualism, the primary task lies in translating theory into action.

The antidote to legal dualism cannot lie in endless exercises of bureaucratic normalization of legal terminology (at its most asinine, ought one to render "the common law" by "*le droit commun*", "*le* common law" or "*la* common law"?).[145] Terminological normalization may well facilitate the production of texts in both French and English,[146] but it is no guarantee that the equivalent expressions will necessarily compel engagement with each other. An increased recourse to legislated legal norms is also no assurance that law will be read bilingually. Finally, the practice of translating all forms of legal texts from French into English and from English into French offers no certainty that both will actually nourisb interpretation. All the above, paradoxically, facilitate and encourage legal dualism.

The antidote to legal dualism does, however, lie in the promotion of legal bilingualism, where language serves as a point of access for legal knowledge rather than as an exhaustive expression of that knowledge. In a bilingual legal order there will be little place for "official" translation understood as the discursive rendering of legal texts generated in one natural language into legal texts expressed in another.[147] In such a legal order the specific practices of legal bilingualism will vary according to the different modes of expression — as enactment, as *ratio decidendi*, as custom — through which the legal norm in issue may be apprehended.

46. In imagining the practices required by legal bilingualism, one may begin by considering the legislative text. Most twentieth-century enactments are attempts to render inferential legal norms into explicit language or to induce new inferential legal norms by providing them with a canonical textual referent.[148] These explicit norms can never be dissociated from their implicit context, and their formulaic (instrumental) meaning will always be nourished by inferential (symbolic) understanding.[149] Nevertheless, the creation of a textual deposit of law is a central feature of the legal enterprise, especially in contemporary, democratic, pluralistic societies.[150]

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[145] On this parenthetical point see P. Legrand Jr., "Le droit de Blackstone et la langue de Molière: une valse à mille temps" in P. Legrand Jr., ed., *supra* note 111, vii (Preface).

[146] See Ministry of the Attorney General for Ontario, *Petit guide de terminologie juridique / Handbook of Legal Terminology* (Toronto: Ministry of the Attorney General, 1981), and sources cited for examples of the exercise.

[147] This is not to say that "official" translations will not be necessary. Not all legal material will be created simultaneously in both English and French; not all interpreters will interpret legal material simultaneously in both English and French. The point, to be explored below, is that these "official" translations must be understood as "translations". See Covacs, *supra* note 96.

[148] It was not always so. See Manderson, *supra* note 43. On the contemporary theory of legislation, see C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Oxford University Press, 1964) at 426-69; J. Ghestin & G. Goubeaux, *Traité de droit civil: introduction générale*, 3d ed. (Paris: L.G.D.J., 1990) at 225-302.

[149] See Macdonald, *supra* note 42.

[150] See L.L. Fuller, *Anatomy of the Law* (Westport, Conn.: Greenwood Press, 1968) at 57-69, on "implicit elements in made law".

There are, of course, many forms of enactment. Legislation is at its most discursive in statutes, regulations, orders-in-council and bylaws. It is less so in most constitutions, codes, policy directives and like instruments.[151] Even in its most discursive expressions, however, the aspiration to achieve a one-to-one correspondence between texts in two natural languages is a false hope. In both the internal logic of legislative language and its external presentation on a page or computer screen, normative divergence is betrayed.[152] The occasions for this divergence and the accommodations that the structural properties of language impose upon those who would seek legal bilingualism through legislation bear notice.

47. Any attempt to achieve a bilingual statute-book through the translation of legislation initially drafted in one language into another cannot fully succeed. The inevitable limits of discursivity are such that translators will be compelled to sacrifice meaning for textual exactitude, and this sometimes even at the expense of clarity.[153] These same limits also compromise the quest for a strict, discrete dualism in texts, even where two originals are initially produced. Distinct originals are, in other words, the precondition for legal bilingualism. Bilingual statutes will then be the result of integrating two separate texts initially crafted and drafted in a manner sensitive to the contexts and subtleties particular to each language.[154] This dual craftsmanship would inspire not only the vocabulary but also the syntax and grammar of legislation. It would also shape the formal structure and organization of the legislative text. Neither version would emerge as a "translation" or "rendition" of the other.

The formal as well as substantive consequences of dual drafting and of a commitment to the equality of texts are profound. Some can be immediately perceived. It could well be that in one language version what is stated as an exception to a principle

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[151] See on these points Macdonald, *supra* note 120 at 121-25.

[152] For example: texts take up more space in one language than another; subjects in one text become objects in the other; contingent clauses may precede the noun in one language, and may follow it in the other. See generally M. Sparer, "Rédaction des lois, langage et valeurs: les enjeux" in Gémar, ed., *supra* note 9, 111.

[153] One of the most striking illustrations comes with the Supreme Court's initial interpretation of s. 28 of the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c. 10, where "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" is translated by: "autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire." The French version implicitly excludes a common-law requirement to act judicially of the type found in *Ridge* v. *Baldwin* (1962), [1963] 1 Q.B. 539, [1962] 1 All E.R. 834. For a consequence of this difference, see the judgments of Pigeon and Dickson J.J. in *Howarth* v. *National Parole Board*, [1976] 1 S.C.R. 453, 50 D.L.R. (2d) 349 [hereinafter cited to S.C.R.]. Dickson J., presumably working from the English version of the legislation, found the administrative body in question to be subject to a requirement to act on a judicial basis and therefore subject to the review of the Federal Court of Appeal under s . 28 (*ibid.* at 459-62). Pigeon J., presumably working from the French version, read s. 28 more narrowly, so as to exclude administrative decisions which are "aucunement [des] décision[s] judiciaires" because no legislative text imposed a duty to act judicially from the review of the Court of Appeal (*ibid.* at 472).

[154] See Levert, *supra* note 95; Morel, *supra* note 95; Canada, Ministry of Justice, *Report of the Legislative Bijuralism Committee / Rapport du Comité sur le Bijuridisme Législatif* (Study prepared by the Legislative Services Branch, 4 April 1996) [unpublished].

might, in the other, be stated as the principle itself. Since the legal norm is not the text, there would be no necessary reason for statutes to have the same number of sections, sub-sections, or paragraphs in both language versions.[155] There would be no reason why the typical English-language definitional enumeration of legal concepts (real property, personal property, incorporeal hereditaments, chattels real, rights of reversion) could not be rendered in the French-language version by a simple general expression (*tous les biens*).[156]

Bilingualism ought also to be reflected in the material presentation of legislation. One might ask why the alpha-numerical presentation of, say, the *Revised Statutes of Canada*, should not be different as between English and French versions: for example, if the *Bankruptcy and Insolvency Act* is listed as chapter B-3, why should the *Loi sur la faillite et insolvabilité* not be listed as F-something?[157] Again, one might ask why one version should always be on the right-hand (or left-hand) side of the page. Could not two volumes be produced so that in the French volume the French text would be in the right-hand column and follow the French alpha-numeric order, and in the English volume the English text would be in the right-hand column and follow the English alpha-numeric order? In other words, an acknowledgment of the semiotic importance of all elements of substantive and material presentation[158] requires a rethinking of more than the language of legislation.[159]

48. Of course, legal texts have an instrumental purpose: they are meant to be applied. Application presupposes interpretation and interpretation presupposes translation. Hence, a rethinking of the manner of drafting and presenting legislation presumes that the underlying theory of interpretation of bilingual texts would also be recast.[160] Authoritative interpretation of legislative texts would reconstruct the expansive process of their drafting. Just as the drafters of bilingual legislation are engaged in the

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[155] One already sees evidence of this in the non-parallel enumeration of definitions in federal statutes and in the non-parallel expression of paragraphs and sub-paragraphs (see *e.g. Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 2, as am. by S.C. 1990, c. 8, s. 22; S.C. 1993, c. 28, s. 78 (Sch. III, item 38)).

[156] Compare the two versions of s. 4 of the *Federal Real Property Act*, S.C. 1991, c. 50, both of which adopt a generic mode of expression.

[157] One might overcome objections related to citation confusion by listing English versions in Roman characters and the French-language version in Arabic numbers. Thus, *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-III; *Loi sur la faillite et insolvabilité* S.R.C. 1985, c. F-6 (hypothetically).

[158] The semiotics of the statute book have achieved a signal place in Quebec. In one popular edition of the *Civil Code of Lower Canada* (J.-L. Baudouin & Y. Renaud, eds., *Codes civils (Bas Canada et Québec) — Civil Codes (Lower Canada and Quebec)* (Montreal: Wilson & Lafleur, 1991)), the English text of the Code is printed in a typeface demonstrably smaller than the French text. See A. Duval, "Bilingue à 25%" (Book Review of Baudouin & Renaud, eds., *ibid.*) (1991) 94 R. du N. 260. See also "Semiotic Musings", *supra* note 67.

[159] There is a further complication at the federal level in Canada, given that federal legislation must speak also to two legal traditions: civil law and common law. On these questions, see sources cited *supra* note 154.

[160] This does not imply that prudential rules of interpretation for dealing with bilingual texts should be completely abandoned. See generally Beaupré, *Interpreting Bilingual Legislation*, *supra* note 9, for a listing of analogues, in bilingual context, to ordinary canons of statutory interpretation.

translation of a single juridical idea into two natural languages, interpreters would come to accept that knowledge of one version alone is an insufficient point of reference for understanding the juridical idea in question. They would understand legislative texts as fully embracing both English and French connotations and contexts, and as necessarily meaning what both versions say. No longer would it be possible to speak of two texts being equally authoritative.[161] To the extent that any formulation of a legal rule can be authoritative, it will be necessary to speak of one authoritative bilingual text in French and English.

For this reason, formal incommensurability,[162] or even substantive inconsistency,[163] of legislative texts would pose no special interpretive problems. Interpreters would treat any apparent incommensurability of material presentation and substantive inconsistency between English and French versions of a statute no differently than they would treat any apparent commensurabilities and consistencies between them. In both situations, interpreters would construct, to the best of their ability, the legal norm immanent in the language of the two texts. The act of interpretation will always be an attempt to apprehend the legal norm of which the text is a contingent formulation. This point might be misunderstood as a claim that meaning is radically constructed and that the indeterminacy of language fatally compromises the very project of law.[164] It means no such thing. Once the requirements of legal bilingualism are understood, the determinacy or indeterminacy of language becomes an irrelevant distraction. The language of legislation is a point of access for apprehending, constructing and translating a legal norm; it is never the norm itself.

49. Legal texts that are explicit but more presentational, such as judicial decisions and other written justifications for official action, raise different problems. For here, it is generally acknowledged by all manner of legal theorists that a written opinion expressing a legal norm is not the norm itself.[165] Even where the judgment purports to justify a particular interpretation of a norm, the apprehension of which a legislature has taken the trouble to direct through the language of an enactment, it is still less susceptible than the statute or regulation to statement in a discursive, canonical

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[161] Compare the present formulation of s. 18(1) of the *Charter*, *supra* note 25.

[162] By "formal incommensurability" is meant: section numbers need not be the same; the total number of sections might differ; a rule may be cast as a principle in one version and as an exception in the other; and so on.

[163] By "substantive inconsistency" is meant: words and phrases that have the same normative function in a text but that are manifestly of different import (*e.g.*, "*sommes d'argent* / proceeds" in art. 2674, para. 3 C.C.Q.); texts that are mistranslations (*e.g.*, "mortgage / *hypothèque*" in s. 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3); and texts with variable linguistic parallels (*e.g.*, "enterprise / *entreprise*" in art. 1525, para. 3 C.C.Q. and "business purposes / *entreprise*" in art. 1842, para. 3 C.C.Q.).

[164] Recall the quotation from Peller above, accompanying note 16.

[165] For a compelling exposition, see F. Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991); Sparer & Schwab, *supra* note 116.

form.[166] *A fortiori*, where a judgment seeks to justify a particular interpretation of a norm, the apprehension of which has remained a matter of successive judicial reformulation, its text cannot be dissociated from its implicit context.[167] A judicial opinion is an exercise in persuasion: it is a subtle interweaving of a statement of a legal norm and the justification for both the content of its normative pith and the form in which it is stated.[168] Judges must be free to use rhetorical techniques that are central to the persuasive force of a text but are not readily translated into discursive form. In addition to their role in convincing the parties, their counsel and the public about the appropriateness of the norm being applied (the *stare decisis* function of judgments), judicial opinions are also aimed at persuading them of the correctness of the decision reached (the *res judicata* function). Modes and means of persuasion, such as explicit argument, rhetoric, metaphor and syntax, are in large measure language-specific.[169]

As a consequence, the ambition of legal bilingualism should not become a pretext for having judges write more bureaucratically simply to facilitate translation. The recent tendency of the Supreme Court of Canada towards model judgments[170] betrays a profound misunderstanding of the opinion-writing enterprise.[171] More than this, the practice of employing "judgment writers", adopted by some Canadian courts, is a tragic distortion of the justificatory process. Given the function of a judicial decision (whether in the interpretation of legislation or previous judicial decisions, or in the apprehension and expression of custom), the case for bureaucratic translation of judicial decisions is not at all compelling. For unlike the case of legislation, here there is not even the pretence that a canonical formulation of a legal norm will serve authoritatively to control its mode of apprehension in the future.[172]

50. If it is true that judgments are fundamentally only invitations to normative discovery and reconstruction, then the case for producing judicial opinions in two languages is diminished. However much appellate judgments are negotiated between judges, in the common-law tradition they are, nonetheless, not the product of a

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[166] This is not to deny that some judgments interpreting statutes have achieved iconic canonical expression: *e.g.*, the rule in *Hicklin* v. *R.* (1868), L.R. 3 Q.B. 360, 11 Cox C.C. 19.

[167] See *e.g.* the rule in *Shelley*'s Case (1581), 1 Co. Rep. 93b, 76 E.R. 206 (K.B.) or the rule in *Tulk* v. *Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143 (Ch.) or the rule in *Donoghue* v. *Stevenson*, [1932] A.C. 562, All E.R. Rep. 1 (H.L.).

[168] The point is nicely developed in Fuller, *supra* note 150 at 84-112, especially at 90-94.

[169] See J.B. White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis.: University of Wisconsin Press, 1985).

[170] Quite apart from this normalization of form, there is an increasing tendency to normalize style. See J.O. Wilson, *A Book for Judges* (Ottawa: Ministry of Supply and Services Canada, 1980) at 79-92. See also L. Maihot, *Écrire la décision: guide pratique de rédaction judiciaire* (Cowansville, Que.: Yvon Blais, 1996).

[171] See "Style, Meaning and Knowing", *supra* note 87.

[172] The point is simply that the so-called *ratio decidendi* of any case is never fixed and is always being reimagined every time the case is cited in a subsequent case. See generally, on divergent approaches to extracting the holding of a case, R. Cross, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991).

committee; they are, in the final analysis, the literary product of a single mind.[173] No doubt, it might be imagined that judges could employ both English- and French-judgment drafters, directing each upon conclusion of a case to produce a draft judgment. These two texts might then be compared and a "common" version produced. Yet here, exactly the same types of arguments about textual fidelity as would apply to legislation are even more apposite. By contrast, if the two versions of a judgment must both be original creations of their author, their production will necessarily be serial. For this reason, unless judges are able to write poetry in two languages — that is, unless they can draft originals in two languages such that the previous commitment to a particular expression in one does not commit them to a parallel expression in the other — they should not themselves attempt to write opinions in two languages.

Obviously, few judges are as bilingual or trilingual as Samuel Beckett.[174] Yet the symbolism of legal bilingualism in Canada today requires, at least for Supreme Court and Federal Court judgments, that a text be issued in both English and French. Consequently, translation, rather than the dual craftsmanship suggested in the case of legislation, is inevitable.[175] In other words, it is better to maintain a fidelity to the judgment-writing process at the expense of true normative bilingualism than to maintain a fidelity to normative bilingualism at the expense of judgment-writing. For this reason, the existence of "official translations" should not lead, as it once did, to the court declining to indicate which text is a translation.[176] An explicit acknowledgment of which version is a translation ought, in fact, to free translators from excessive discursivity. It should open the way for them to attempt to capture the rhetorical dimensions of the original, and should encourage them to treat their work as more literary than bureaucratic. A citation to Shakespeare in an English-language original judgment should not automatically lead to its direct translation in the French-language version of the same

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[173] See Klinck, *supra* note 88.

[174] A notable exeeption was, of course, the late Jean Beetz. On Justice Beetz's judgment-writing habits, see G. La Forest, "Jean Beetz — Souvenirs d'un ami" in *Mélanges Jean Beetz* (Montreal: Thémis, 1995) 143 at 146-47.

[175] The expedient of translation is not as free from difficulty as one might think. Imagine the situation of unilingual judges; how will a judge know whether the translation adequately captures the full flavour of the original judgment? How will the judge even know whether the implicit restrictions or extensions of a principle announced in a judgment are conveyed by the translation?

[176] Beginning with the volume [1970] S.C.R., all judgments of the Supreme Court were published in parallel columns in French and English, without an indication of which version was the original and which was the translation. Beginning with the volume [1980] S.C.R., the law reports indicated either "version française du jugement de ..." or "English version of the judgment delivered by ...". Only on rare occasions, such as the judgment of the whole court in *Ford* v. *Quebec (A.G.)* [1988] 2 S.C.R. 712, does the judgment not indicate the language in which it was drafted. The subject matter of the case leading the court to depart from its usual practice — namely, the constitutionality of certain sections of the *Charter of the French Language*, R.S.Q. 1977, c. C-11 — is itself a matter of semiotic significanee.

judgment. Nor, *a fortiori*, should other rhetorical devices, constructions and sayings be literally translated.[177]

Were all judges to be fluently bilingual, dual versions of judgments would be rare. Typically judges would write only in one language, choosing that language on the basis of the total context — language of pleadings, language of litigants, predominant language of extended audience, character of justificatory source material, and rhetorical and syntactical properties of a language — of their literary endeavour.[178] In such a world, their equally bilingual readers would reflect on the choice of language as part of the meaning of the text being interpreted. Until such bilingual dialogue became possible, however, fluently bilingual judges would be required to produce two originals, and unilingual judges would require the services of a translator. Whether bilingual or unilingual, judges would frankly resist the temptations of discursive and bureaucratic writing. The drafting of opinions responsive to metaphor and allusion within a particular language tradition is the temporary and expedient alternative to lulling unilingual readers into believing that official translation can compensate for "partial knowledge and partial prophecy".[179]

51. Enactments and judicial opinions do not exhaust the repertoire of normativity in any legal system — even one that explicitly characterizes itself as embracing legal bilingualism. Less discursive and less explicit norms, such as those found in practice, usage, custom, contract, doctrinal writing, or supereminent or general principles, might exist in only one language, if they are expressed in language at all.[180] Moreover, the practices and processes of official institutions, and of other facilitators of the state legal order, such as lawyers, notaries and legal educators, also have significant normative import.[181] Here again, the relationship of language to norm is often tenuous or even nonexistent.

This presents the practice of legal bilingualism with a paradox: should these other forms of normativity be rendered into language, or should they be excluded from what is defined as "law". For reasons already given, they cannot all be rendered into language. Even those that can will often be produced only in one language version such that the bilingual project can only be achieved through a derivative translation.[182]

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[177] Thus, *ceteris paribus*, "putting one's foot in one's mouth" ought to be rendered as "se mettre les pieds dans les plats" and "se noyer dans un verre d'eau" ought to be rendered by "making a mountain out of a mole-hill". Indeed, entire literary constructions — extended metaphors, or the use of irony rather than paradox — cannot simply be transposed from one language to another.

[178] Of course, on occasion, judges might also choose to write judgments in both French and English for similar contextual reasons, or because they believe their ideas can be best expressed through a metaphoric "*autrement dite*" rather than the simile "in other words". Here the aspiration is not to replicate what is said in one language but rather to enrich understanding by saying it differently.

[179] Paraphrasing 1 Corinthians 13: 9. Of course, given the political dynamics of Canadian law and the demographics of the Canadian legal profession, this means that, except in Quebec, judgments written in the French language are rarely read. See Deschênes, *supra* note 132 at 33-40.

[180] See generally Brierley & Macdonald, eds., *supra* note 44 at 128-30.

[181] R.A. Macdonald, "Les vieilles gardes" in Belley, cd., *supra* note 38, 233; Macdonald, *supra* note 137.

[182] This is the semantic point canvassed in Part I.

In addition, they cannot be banished from the domain of "official" law. Even the most comprehensive codification of norms ultimately rests on general principles not textually expressed.[183] The practice of legal bilingualism requires coming to terms with these forms of normativity as they are and abandoning the pretence of translating them into language, or converting single-language representations into bilingual representations through bureaucratic translations.[184]

52. Achieving legal bilingualism presupposes legal authors and audiences that would be willing and able to explore the symbolism of law by reference to legal texts in two languages. These authors and audiences would not confuse text and norm. They would see statutes as canonical expressions of a means for apprehending legal norms and would find meaning through both language versions. They would have no need for translated judgments of any kind, although were two originals of a judicial opinion to be produced, they would find meaning through both versions, as they would in the case of legislation. In all cases, the search for legal normativity would be the product of bilingual dialogue. The "translation process" would be one of normative meaning to textual expression and *vice versa*; it would not be of English to French or *vice versa*. Legal bilingualism would ultimately require bilingualism in all its practitioners. Rather than encouraging or even allowing two distinct official legal cultures to form around two languages, the practice of legal bilingualism would draw on both languages to construct one official legal culture. In Canada today, that official legal culture is neither French nor English, neither civil law nor common law; it is all these together, with the ambiguity that such complexity implies.[185]

Until such a state is reached, translations of non-legislative and non-judicial materials from one language to the other will continue. But this temporary bow to the imperatives of the present should not inhibit ambitious of a different *timbre*. Producing a set of materials now, through which the unfortunate practice of legal dualism may be facilitated, may be a necessary transitional step towards (and a necessary price to pay for) the achievement of legal bilingualism in the future.

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[183] This is the epistemological point canvassed in Part II.

[184] For example, there is currently a superb translation of R. Dussault & L. Borgeat, *Traité de droit administratif*, 2d ed. (Sillery: Presses de l'Université Laval, 1984-1989) by M. Rankin under the title *Administrative Law: A Treatise* (Toronto: Carswell, 1985-90). Would the translator's time have been better served rewriting the book and refocussing it towards an English-speaking audience? How much additional effort would this have required? Compare R. David & C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, 10th ed. (Paris: Dalloz, 1992) with R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (London: Stevens, 1985), an adaptation of the 8th edition of the French-language original and an example of beneficial recasting in the translation of a doctrinal work.

[185] In talking of bijuralism and bilingualism, I do not mean to imply that the configuration of the official legal order in Canada ought to be (or even is today) merely "bi". Increasingly, the "multi" features of Canadian law flowing from a better understanding of Aboriginal justice are being acknowledged (see Macdonald, *supra* note 124). The observations advanced here in relation to legal bilingualism apply *a fortiori* in multilingual legal environments.

Conclusion

53. In the Introduction, the story of the Tower of Babel was presented, theologically, as teaching that in the past, when human beings had but one language, they were able to undertake a conquest of the heavens. Only God's wrath prevented them from building upon the unity of their speech.

But now another theological reading of Genesis 11 suggests itself. We were misguided in believing that a single language would give us the power to reach absolute heights. Far from being wrathful, God saved us from our hubris. To assure that we would never fall prey to it again, we have been blessed with a multiplicity of languages. The existence of these languages allows us to reflect on the relationship between language and knowledge.[186]

On this reading of Genesis 11, the problem of Babel is, fundamentally, that of human individuality. Information and facts are a secondary part of all intersubjective communication; myth, fiction and metaphor primarily characterize human language and differentiate it from animal sign systems. *Pace* Wittgenstein, we can know more than we can say. Indeed, the lesson of Babel is really one of legal pluralism. It is a lesson about the capacity of human beings to construct and reconstruct meaningful communicative symbolisms for the expression of normativity.

54. The problem that initially gave rise to this essay was how to account for the phenomenon of official legal bilingualism. Is it possible to imagine a legal bilingualism that does not reside in dualism? What does legal bilingualism imply about the role and character of legal translation? The thesis of this essay has been that the existence of a multiplicity of legal languages has much to teach us about the relationship between the different forms of symbolism found in law and the different ways in which these symbolisms are deployed to generate meaning.

The possibility of legal bilingualism teaches that to pursue the goal of a universal communicative discourse through formal rationality in law is both futile and presumptuous: law is more than discursive language; legal knowledge is more than the rationalistic interpretation of texts. The possibility of legal bilingualism also teaches that language cannot be equated with law: legal knowledge and legal text are often mutually constitutive; but law is also grounded in nonlinguistic meaning; the boundaries of legal normativity extend to the boundaries of human communicative symbolisms.

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[186] Compare the account of Babel in *The Book of J*, trans. D. Rosenberg (New York: Grove Weidenfeld, 1990).

These lessons are not, however, just the lessons of legal bilingualism. They are the lessons of law. Taking the claims of legal bilingualism seriously, and imagining the semantic and epistemological foundations of legal normativity adequate to meet its claims, is a heuristic for reconceiving law in a manner that overcomes the strictures of Kabbalists and critical legal theorists alike. It is to conceive law as hermeneutic aspiration.[187] Far from being a source of despair in their complexity and in the intellectual demands they place upon those who would practice legal bilingualism, these lessons are liberating.[188] They reveal that legal understanding can only come from accepting and adopting the multiplicity of expression, linguistic and nonlinguistic, as our own.[189]

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[187] For a like conclusion, see de Sousa Santos, *supra* note 123, who calls for a paradigmatic transition in the understanding of law.

[188] Of course I acknowledge that this essay has not addressed the question of social power. Yet no such claims modify the analysis and conclusions presented here. This essay speaks equally to the concerns of A. Hunt in *Explorations in Law and Society* (New York: Routledge, 1993), and those of J. Vining in *From Newton's Sleep* (Princeton: Princeton University Press, 1994).

[189] For further development of this theme, see R.A. Macdonald, "Multiple Selves and Critical Legal Pluralism" (Law and Society Association Annual Meeting, Strathclyde University, Glasgow, 1996) [unpublished].