Review Article:

REGARDING LEGAL DISCOURSE

Review of OFFICIAL DISCOURSE by Frank Burton and Pat Carlen (Routledge and Kegan Paul, London, 1979)

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1. Introduction - Legal Positivism and the Sociology of Law

A preliminary task in this review involves the placing of Official Discourse within the space of contemporary writing on law since Official Discourse is preeminently a discourse flowing from a disciplinary site which jurisprudential scholars would describe as the sociology of law.[1] At the date of the publication of Official Discourse Burton and Carlen were sociologists teaching in the United Kingdom; Burton was teaching sociology at the City University, London and Carlen was lecturing in criminology at the University of Keele. Sociological models of law present a challenge to the dominant theory of jurisprudence in the United Kingdom which is legal positivism.[2] In examining the text Official Discourse we are regarding a form of jurisprudential discourse which is in competition with and antagonistic to a dominant discourse, legal positivism.

The intellectual antecedents of contemporary legal positivism in the United Kingdom may be directly traced to the work of Jeremy Bentham, John Austin and John Stuart Mill. The leading account of contemporary legal positivism is Hart's The Concept of Law,[3] which is based upon a restatement of Bentham's and Austin's theory that law derives from the will of the sovereign (the so-called "command theory" of law). A useful summary of Hart's jurisprudence may be found in

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1 Lord Lloyd of Hampstead, Introduction to Jurisprudence (London, Stevens, 1979) 369 ff.

2 N. MacCormick, H.L.A. Hart (London, Edward Arnold, 1981) 5.

3 Oxford, O.U.P., 1962.

MacCormick's H.L.A. Hart:[4] briefly, Hart conceives of a legal system as a system of social rules which make certain forms of conduct obligatory and which is governed by the interrelationship of "primary rules" and "secondary rules". Primary rules establish obligations and duties. Secondary rules are parasitic upon the primary rules and relate to them in various ways. Hart postulates three sets of secondary rules which he calls the rules of adjudication, the rules of change and the rule of recognition. The most important of the secondary rules is the recognition rule since that rule confers validity upon the other rules. Duncanson has commented:

> At the summit of the hierarchy there must be something which authorises ... all the subordinate rules of the system. These "rules of recognition" are not themselves validly set by superior rules for there are no superior rules. The status of the rules of recognition is given by the actions and beliefs of officials.[5]

Similarly, MacCormick has stated:

> The rule of recognition ... exists only as a shared social rule accepted as a binding common standard of behaviour by those whose official power qua "legal power" is dependent ultimately upon that very rule. It is possible, but not necessary, for citizens at large ... to share in the attitude of support for the ultimate rule of recognition. But it is sufficient that only governors and officials so accept it ...[6]

This leads us to a related point viz., the strict separation of law and politics in legal positivist theory. In sharp contrast to the European continental and North American juristic tradition with their interest in theories of government and proper relations between citizens and State, legal positivism in the United Kingdom takes the view that such fundamental questions are matters of political morality for the political entity to decide. Legal positivism, as it were, takes the State and the law-making process for granted; "... the law, once made, is binding law which the

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4 Supra n. 2, 20-28.

5 I. Duncanson, "Jurisprudence and Politics", (1982) 33 Northern Ireland Legal Quarterly 1, at 12.

6 Supra n. 2, 22.

courts just have to apply even if they think the political theories which justified it to be wild nonsense".[7] Thus, legal positivism closes off discussion of the process of law-making and leaves ascertainment of the recognition rule in the hands of the officials (judges, governors, bureaucrats etc.).

If legal positivism were no more than a convenient mode of ranking the authority of various laws, its presence as the dominant jurisprudential discourse would arouse little comment. But knowledge, as Foucault reminds us, is intimately linked with power. The relationship between legal positivism and power is illustrated by the view of the High Court of Australia on the authority of the United Kingdom Imperial Parliament in Australia. Some background to this matter is required. Prior to federation the highest ranking source of law for the Australian colonies was legislation of the Imperial Parliament. The Commonwealth of Australia was brought into existence by an Act of that parliament, the Commonwealth of Australia Constitution Act, 1900 (Imp.). According to the orthodox view of the High Court of Australia that legislation did not dispose of the power of the Imperial Parliament to legislate for the Commonwealth and the States; that power fell into desuetude vis-a-vis the Commonwealth as a result of the Statute of Westminster Act, 1931 (Imp.) and the Statute of Westminster Adoption Act, 1942 (Cth.). One effect of the latter Act was to enable the Commonwealth Parliament (but not State Parliaments) to pass legislation which was repugnant to Imperial legislation.

Whilst the legal positivism of Austin and Bentham would hold that the Imperial Parliament could still, subsequent to the enactment of the legislation referred to above, legislate for the Commonwealth (on the basis that a sovereign legislature can never shackle its own powers), the more sophisticated positivism of Hart would deny such a power. Hart's account of such a transformation runs as follows:

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7 Id., 4-5.

> "At the beginning of a period we may have a colony with a local legislature, judiciary, and executive. This constitutional structure has been set up by a statute of the United Kingdom Parliament, which retains full legal competence to legislate for the colony; this includes power to amend or repeal both the local laws and any of its own statutes, including those referring to the constitution of the colony. At this stage the legal system of the colony is plainly a subordinate part of a wider system characterized by the ultimate rule of recognition that what the Queen in Parliament enacts is law for (inter alia) the colony. At the end of the period of development we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a 'local root' in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed. Hence, though the composition, mode of enactment, and structure of the local legislature may still be that prescribed in the original constitution, its enactments are valid now not because they are the exercise of powers granted by a valid statute of the Westminster Parliament. They are valid because, under the rule of recognition locally accepted, enactment by the local legislature is an ultimate criterion of validity."[8]

To generalise, a majority of the judges of the High Court of Australia would accept this description of "... a new legal system [emerging] from the womb of an old one...."[9] as applicable to the sequence of legislation previously mentioned.

An objection to this theory is that it does not take account of political reality and political power. It can be argued that the Hartian description overlooks the fact that, upon federation, ultimate political power in Australia passed to the Commonwealth. This view has been expressed by one High Court judge, Murphy J.,

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8 H.L.A. Hart, The Concept of Law (Oxford, O.U.P., 1962), 116-117.

9 Id., 116.

in cases such as Bistricic v. Rokov,[10] Robinson v. Western Australian Museum[11] and China Ocean Shipping Co. and Others v. South Australia.[12] In these cases Murphy J. has argued (contrary to all other members of the High Court) that the legal supremacy and legislative authority of the Imperial Parliament over overseas territories is linked to political control. Thus, (and despite the fact that the Statute of Westminster applied only to the Commonwealth), upon federation the Imperial Parliament surrendered political control of Australia and thereafter no longer possessed the power to legislate for the Commonwealth and the States. In passing, it should be noted that the views of Murphy J. are not quite as unorthodox as they may appear. Morison has described the theory as a variation of Austinian positivism.[13] To this extent, Murphy J. does not venture outside the bounds of the positivist discursive formation.

The foregoing discussion may give some idea of the power of legal positivist discourse. It is a discourse which, as we have seen, can legitimate the acquisition of supreme legislative power by the Commonwealth of Australia. It is, therefore, a dominant jurisprudential discourse - it can do something which other legal discourses arguably cannot. The discourse of legal positivism is one which has an effect in the field of non-discursive practices, particularly in the political field. For precisely this reason, a legal discourse which views its object (law) as imbedded in political and economic concerns may find itself in competition with and antagonistic to the discourse of legal positivism. Such a possibility is particularly acute in the case of sociological approaches to law. The following passage summarises some of criticisms of positivism articulated by legal sociologists:

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10 (1976) 11 A.L.R. 129.

11 (1977) 16 A.L.R. 623.

12 (1979) 27 A.L.R. 1.

13 W. Morison, The System of Law and Courts Governing New South Wales (Sydney, Butterworths, 1979), 17-19.

> The gravamen of the sociological complaint is that analytical work upon legal ideas takes for granted the ideological scheme within which lawyers in general and a fortiori lawyers within a particular national tradition do their work. The task of understanding law is a task of seeing it as a manifestation of ideology located within a larger politico-economic framework of which it is but a part. This cannot be achieved within the four corners of 'analytical jurisprudence' which elucidates lawyers' concepts from inside the taken-for-granted assumptions either of legal systems at large or of a single legal system.[14]

Legal positivism largely closes off political and ideological questions. Legal sociologists wish to rupture this closure. We are thus presented with two competing legal discourses; the purpose of this review is to explore the relationship between them.

2. Paradigms and the Technique of Universe Maintenance

In the philosophy of science, the past two decades have seen an increasing dissatisfaction with the claims to objectivity made by scientific knowledge (the so-called "myth of the scientific method") and an increasing reliance upon a conceptual approach to understanding. Kuhn in The Structure of Scientific Revolutions[15] has advanced the notion that the conceptual framework or "paradigm" through which we view phenomena already involves a process of interpretation of the phenomena.[16] As the title of his book suggests, Kuhn thinks that paradigm shifts are comparatively abrupt; Toulmin thinks change is more gradual.[17] In any event, Kuhn argues that change occurs when a sufficient number of contradictions accumulate within a paradigm to warrant substitution for a new

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14 Supra n. 2, 5.

15 Chicago, U. of Chicago Press, 1970.

16 Id., 43 ff.

17 S. Toulmin, Human Understanding (Princeton U.P., 1972), 121-122.

paradigm.[18] Goodrich has argued that the Kuhnian model of paradigm shift is inapplicable to the social sciences,[19] but it may be that Kuhn's stress upon conceptual frameworks or paradigms as a way of viewing phenomena can be usefully retained in the social sciences.[20] The transformative Kuhnian model is thought by Goodrich to be inapplicable to the social sciences because of the common presence of a variety of frequently competing and contradictory paradigms within a single discipline. Goodrich states:

> The effect of these contradictions is not that the anomaly-ridden paradigms are immediately abandoned. The effect is rather that a political struggle ensues as between the opposed models of the object [e.g., law]. A relationship of power develops between the separate competing conceptions or models.[21]

It is argued that just such a political struggle or power relationship has developed between the competing legal discourses of legal positivism and the sociology of law.

There has been a certain amount of theorising concerning the relationship between alternate views (paradigms, models) of the same object. As Goodrich observes, it may be that the Kuhnian account of such relationships is of little utility in the social sciences. Foucault, writing on the formation of discursive strategies, has suggested certain guidelines which may be paraphrased and tabulated as follows:

1. Determine the possible points of diffraction of discourse. These may be characterised as points of incompatibility, points of equivalence or link points of systematization.

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18 T. Kuhn, The Structure of Scientific Revolutions (Chicago, U. of Chicago Press, 1970), 52 ff.

19 P. Goodrich, "The antinomies of legal theory: an introductory survey", (1983) 3 Legal Studies 1, at 2.

20 M. Masterman, "The Nature of a Paradigm", in Lakatos & Musgrave (eds.), Criticism and the Growth of Knowledge (Cambridge, C.U.P., 1970), at 59 ff.

21 Supra n. 19, at 2, emphasis added.

2. Study the economy of the discursive constellation to which the particular discourse belongs. What is the role played by the discourse under scrutiny in relation to contemporary or related discourses?

3. Finally, Foucault suggests that the theoretical choices made in formulating a discursive strategy are determined by another authority which he principally characterises as the "... function that the discourse under study must carry out in a field of non-discursive pratices". Note here that this authority, "... involves the rules and processes of appropriation of discourse ... in the sense of the right to speak ... and the capacity to invest this discourse in decisions, institutions or practices...".[22]

It will assist subsequent discussion if we apply Foucault's strictures to the competing paradigms or discursive strategies under consideration. First, as to points of incompatibility, it is arguable that legal positivism, with its lack of interest in the law-making process, operates within a closed system. Closure, on this view, occurs at the summit of the positivist hierarchy i.e., at the recognition rule. Theorising on political, economic, ideological, societal or organizational matters is largely absent. By contrast, legal sociologists view law as an object imbedded in these matters, and, indeed, as a product of them. Hence, incompatibility is heightened when the perspective of the legal sociologist is Marxist. Points of superficial equivalence are a focus upon an object (law) and an interest in behavioural norms but definitions and perspectives on both matters diverge widely.

Second, it has been suggested that, when considering the role played by a discourse in relation to a related discourse, the proper object of scrutiny is "the inter-discursive relations of power".[23] In the United Kingdom, legal positivism is

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22 M Foucault, The Archaeology of Knowledge, trans. A. Sheridan Smith (London, Tavistock, 1972), at 65-68.

23 Goodrich, supra n. 19, at 2.

the dominant jurisprudential discourse. As a consequence the relationship between the two paradigms exhibits the characteristics of an unequal power relationship. The easiest way to grasp this point is to consider the educational sites in which each discourse is entrenched in the United Kingdom -legal positivism is associated with Oxford, the sociology of law with more recent educational institutions.

Thirdly, we may consider the function of the two discourses in a field of non-discursive practices such as the political, the economic and the pedagogic. To generalise, we can observe that legal positivism supports the Westminster system of government, takes little interest in economic theory other than that endorsed by the present system and, in the pedagogic sphere (the law schools) incultates "professionalism" and an absence of critical thinking about the law-making process on the law as practised. By contrast, all these matters are scrutinised or attacked by (especially Marxist) legal sociologists.

The writer has no doubt that these comparisons are, at best, simplistic; the aim, however, is to do no more than to sketch out in a loose fashion some of the relationships between the two forms of legal discourse. Of the three areas of questioning noted above, it is the third, the function which the discourse plays in non-discursive practices, which is of most interest. Goodrich comments:

> The vital point is that discourse is socially organised around rules and procedures effectuating the appropriation and restriction of discourse to particular social groups and institutions; which institutions alone are eventually authorised to speak of particular objects.[24]

Here two strategems deployed by a (typically) dominant discourse against its competitors are identified. The question of paradigmatic strategems will be examined later; here, it is important to note that the function played by the discourse of legal positivism can be identified as supportive of the political and economic status quo. Further, its perpetuation is ensured by the fact that it is the dominant jurisprudential legal discourse taught in law schools. Obviously, those

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24 Id., 3.

whose interests are supported by this discourse will entrench and defend it. Hence, the principal function played by the discourse of legal positivism in non-discursive practices is one of legitimation.

In order to understand the stratagems employed by competing paradigms, it is useful to consider the theorising of Berger and Luckman which, to a certain extent, anticipates Foucault. Berger and Luckman in The Social Construction of Reality introduce the concept of the "symbolic universe" in their discussion of legitimation. They state:

> Symbolic universes constitute the fourth level of legitimation. These are bodies of theoretical tradition that integrate different provinces of meaning and encompass the institutional order in a symbolic totality ... [t]o reiterate, symbolic processes are processes of signification that refer to realities other than those of everyday experience. It may be readily seen how the symbolic sphere relates to the most comprehensive level of legitimation.[25]

Later they comment:

> The crystallization of symbolic universes follows the previously discussed processes of objectivation, sedimentation and accumulation of knowledge. That is, symbolic universes are social products with a history. If one is to understand their meaning, one has to understand the history of their production. This is all the more important because these products of human consciousness, by their very nature, present themselves as full-blown and inevitable totalities. We may now inquire further about the manner in which symbolic universes operate to legitimate individual biography and institutional order. The operation is essentially the same in both cases. It is nomic, or ordering, in character.[26]

When a symbolic universe becomes problematic, certain conceptual devices are deployed in an effort to maintain the symbolic universe.

Legal positivism may be described as a particular symbolic universe. According to Berger and Luckman, every symbolic universe is incipiently

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25 P. Berger and T. Luckman, The Social Construction of Reality (Harmondsworth, Penguin, 1967), at 113.

26 Id., 115.

problematic; the question is the degree to which it has become problematic.[27] Thus, the mere transmission of the symbolic universe from one generation to another may require an application of the techniques of universe-maintenance described by Berger and Luckman as "therapy" and "nihilation".[28] An example of "therapy" is provided by Glanville Williams' attempt to incorporate the linguistic theories of Ogden and Richards[29] into the frame-work of "black-letter" legal analysis.[30] Similarly, Hart has incorporated, inter alia, the linguistic philosophy of Gilbert Ryle, J.L. Austin and Wittgenstein.[31] The general argument here is that glaring defects in Austinian legal positivism had produced a form of legitimation crisis (a highly problematic symbolic universe) and that Hart resolved this crisis by relocating the institutional order in the symbolic universe of legal positivism. Note that there are obvious similarities between Berger and Luckman's notion of a "symbolic universe", Duncanson's use of the term "domain theory" to describe modern positivism,[32] and Goodrich's use of the concept of a "dominant discourse".[33] All these writers appear to be describing more or less the same phenomenon i.e., the capacity of a particular theoretical order to perpetuate itself by all possible means. There are striking parallels between Berger and Luckman's description of two specific techniques of universe maintenance (therapy and nihilation) and Goodrich's description of the way in which a dominant discourse will marginalise or define out an antagonistic body of knowledge thereby excluding it

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27 Id., 124.

28 Id., 130.

29 Ogden and Richards, The Meaning of Meaning (London, Kegan Paul, Trench, Trubner & Co., 1923).

30 G. Williams, 'Language and the Law I-IV', (1945) 61 Law Quarterly Review, 71, 179, 293 and 384.

31 MacCormick, supra n. 2, 12-19.

32 Supra n. 5, 5.

33 Supra n. 19, 19.

from the terrain of intellectually legitimate research.[34]

Thus far, the writer has discussed the manner in which a dominant discourse maintains itself. Now it is interesting to note that descriptions of this sort of activity focus upon the strategems of a dominant discourse. What is striking about Official Discourse is the manner in which a "minor" legal discourse employs precisely the same devices in an attempt to discredit the dominant discourse of legal positivism.

3. Official Discourse

The intention of the authors of Official Discourse was to read official discourses (in particular, the reports of Royal Commissions on law and order) in order to, "deconstruct official texts and to expose for analysis the structures of knowledge and modes of knowing realised in state publications".[35] Burton and Carlen, unlike Hart, are not in the business of weaving new clothes for the Emperor, rather they seek to demonstrate the Emperor's nakedness. Goodrich comments:

> Their desire is clearly political, an intention to deconstruct the theoretical antinomies and repressive techniques of official discourse and its positivist jusitifications.[36]

Chapter Two of Official Discourse is entitled "Discourse Analysis" and constitutes the principal expression of the authors theoretical and methodological position. They begin by claiming that discourse analysis has displaced epistemology (the theory of the method or science of the grounds of knowledge) by its focus on discourse (the communication of thought by language) as the primary site of analysis. Reliance is placed on Lacan's statement that there is no knowledge without discourse. This statement asserts that the discourse by which knowledge is

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34 Id., 2.

35 Official Discourse (hereafter 'OD'), 13.

36 Supra n. 19, 19.

communicated has primacy over an analysis of the knowledge-claims made within the discourse. Burton and Carlen put it this way:

> Epistemology's concern with the roots of knowledge has been superceded by analyses of the modes of knowing. This displacement has proceeded (or not) precariously, contradictorily and in non-linear fashion. Many of the traditional discourses have produced one or more of the new savants: within philosophy, Gaston Bachelard; within linguistics, Ferdinand Saussure and Emile Benveniste; within anthropology, Claude Levi-Strauss; within literary criticism, Jacques Derrida; within psychoanalysis, Jacques Lacan; within Marxism, Louis Althusser and Michel Foucault.[37]

The authors make it clear that their main debt is to Foucault. The Foucault in question is the Foucault of The Archaeology of Knowledge since all quotations of Foucault in Chapter Two are taken from the text. The authors state:

> To the works of Foucault we have turned most frequently; not because these works provide expositions about how discourse analysis should proceed, but because in reading these discourses, and in the absence of the analyst, we have been forced to work within the analytic spaces which have made possible the discursive knowledge. For that reason we do not attempt expositions of works which may (or not) have influenced this discourse ... Instead, the (unanswered) questions which we pose are posed within the bricolage of the unfinished works of others. They provide the framework for this chapter.[38]

By way of preliminary comment, recall the conceptual devices of universe-maintenance, "nihilation" and "therapy". When Burton and Carlen assert that discourse analysis has displaced epistemology they are attempting to nihilate the philosophical basis of legal positivism. Similarly, the roll-call of "new savants" signals the authors' intention to therapise or appropriate from these discourses that which is useful in their attack on legal positivism. Two problems immediately arise; first, is it possible to tear from the works of the "new savants" that which is useful and coherently place these concepts out of context under the umbrella of discourse analysis? If the answer to this question is in the affirmative and a powerful vehicle for attacking legal positivism is constructed, a second problem

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37 OD, at 15.

38 Ibid.

arises viz., what is to be erected in place of positivism? This question would seem to lead a proponent of discourse analysis back into epistemological concerns. The problem of replacement is fundamental to the critique mounted by Burton and Carlen for reasons which will be indicated subsequently.

4. Methodological Coherence?

The question of the methodological coherence of Official Discourse can be quickly answered - Burton and Carlen espouse bricolage and promptly cite Derrida who states that, "[t]he only weakness of 'bricolage' is a total inability to justify itself in its own discourse" . A salient characteristic of bricolage is an absence of method Burton and Carlen embrace incoherence, employing the most convenient materials at hand for their task of demolishing legal positivism. The result is a conceptual Heath-Robinson machine which flails about in a heavy fog of French theorising. The parts of this machine are greater than the whole and it may assist subsequent discussion to enumerate some of the cannibalised theories and concepts:

(a) From Levi-Strauss, the concept of bricolage;

(b) from Foucault, the concept of discourse analysis;

(c) from Lacan (reinterpreting Saussure) a focus on the signifying chain with a resultant de-centring of the subject;

(d) from Lacan, the concepts of the "Imaginary", the "Other", the "Symbolic", and "Desire";

(e) from Bachelard the problem of replacing the philosophy of "as if" with the philosophy of "no" and "why not?";

(f) critiques of epistemology developed by Marxist scholars such as Althusser, Timpanaro, and Hindess and Hirst; and

(g) the semiotic theories of Barthes, Derrida and Kristeva.

This diverse body of theory (and the list is not exhaustive) is of great attraction to those who, for intellectual or ideological reasons, find modern legal positivism, as exemplified by Hart and MacCormick, unconvincing It might be possible to weld

together current writings in Marxism, psychoanalysis and semiotics into a coherent body of theory but, in the view of the present writer, this cannot be achieved by avoiding the formidable theoretical problem of aligning at least three contradictory discourses and opting for bricolage.

Hawkes has described bricolage in the following terms:

> The term bricolage is defined in [Levi-Strauss's] two major works on the primitive mind; Totemism (1962) and The Savage Mind (1962). It refers to the means by which the non-literate, non-technical mind of so-called 'primitive' man responds to the world around him. The process involves a 'science of the concrete' ... which ... orders into structures the minutiae of the physical world ... by means of a 'logic' which is not our own. The structures, 'improvised' or 'made-up' ... as ad hoc responses to an environment, then serve to establish homologies and analogies between the ordering of nature and that of society, and so satisfactorily 'explain' the world and make it able to be lived in. The bricoleur constructs the totemic 'messages' whereby 'nature' and 'culture' are caused to mirror each other.[39]

The extent of Burton and Carlen's theoretical abrogation is indicated by the following passage:

> A significant feature of bricolage is clearly the ease with which it enables the non-civilized, non-literate bricoleur to establish satisfactory analogical relationships between his own life and the life of nature instantaneously and without puzzlement or hesitation. His 'totemic' logic is not only structured but structuring: its use of myth enables it to move effortlessly from one conceptual level to another ...[40]

Obviously, the use of bricolage is well-suited to the eclectic conceptualising of Official Discourse. It is a rather grand way of justifying the total absence of any methodological technique apart from expediency. Here, the writer agrees with Goodrich who considers that, "their whole methodology condemns them to obscurity ...".[41]

Two substantive defects of Official Discourse flow from the authors' choice

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39 T. Hawkes, Structuralism and Semiotics (Berkely, U. of California Press, 1977), 51.

40 Ibid.

41 Supra n. 19, at 17.

of bricolage as a methodological technique viz., unintelligibility and excessive eclecticism. As to unintelligibility, Goodrich states:

> ... the substantive analysis ... is unhappily lodged between lengthy and often unintelligible chapters of theoretical exegesis ... it can only be assumed that in an attempt to rigorously flee from traditional legal philosophy and to radically distance their version of 'discourse analysis' from the dominant empiricist conceptions of theory, they hazardously outstep the bounds of discursive intelligibility.[42]

Sociologists are notorious for their jargon-laden prose but, in Official Discourse, the influence of the "new savants" has compounded the problem. Sturrock and others have argued that, in the case of Barthes, Foucault, Lacan and Derrida, extravagance in prose-style is part of intellectual purpose.[43] This is particularly so in the case of Lacan[44] and one can readily see good reasons for it. But debate on this point continues;[45] Bowie, for example, has parodied Lacan's argumentation in the following manner:

> Ellipsis is a characteristic mode of unconscious mental functioning; so that if I omit main pieces of evidence in stating my case the rules of the unconscious are being obeyed and the truth is being told.[46]

This style of ratiocination is evident throughout Official Discourse, particularly in Chapter Two in which the authors' theoretical assumptions are outlined. There may be some justification for elliptical argumentation when one is writing about the unconscious but it is hard to see what possible reason can justify such lacunae when one is describing discourse analysis. Chapter Two of Official Discourse is characterised by elliptic arguments and a failure to explain adequately the concepts borrowed by the authors. There is a thin line between ludic and ludicrous

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42 Id., at 16.

43 M. Sturrock (ed.), Structuralism and Since (Oxford, O.U.P., 1979), 17-18.

44 See M. Bowie, 'Jacques Lacan', in Sturrock, op. cit. n. 43, 142-152

45 See Timpanaro cited in Sturrock, op. cit. n. 43, 147.

46 Id., 149.

discourse.

A good example of the defects identified above is Burton and Carlen's use of the Lacanian "Other". The concept is crucial to the theoretical apparatus of Official Discourse yet the one page description given[47] makes no mention of even the basic definition - for Lacan as for Freud the primal Other is the father within the Oedipal triangle and the inaugurating agent of Law. Further, it is plain that Lacan uses the term in a variety of senses:

> The reader of Lacan may find himself wondering about the credentials of a term which ranges so promiscuously between arguments: what is this 'Other' that it should be enobled by a capital letter and so freely convertible? How can the term remain useful as an operational device when it may be variously defined as a father, a place, a point, any dialectical partner, a horizon within the subject, a horizon beyond the subject, the unconscious, language, the signifier? Could it be that the capital letter is employed to give an untidy omnium gatherum a false aura of authority?[48]

It is possible to give intelligible accounts of the Lacanian "Other"[49] but this is not something which Burton and Carlen attempt, whence the charge of ellipticism and unintelligibility.

The use made by Burton and Carlen of Lacanian theory also demonstrates another danger of bricolage - excessive eclecticism. Burton and Carlen are aware of this problem - consider, for example, this drollery, "... useful though Lacan's imagery has been to us, we were aware throughout of the problem of implying that the state has an 'unconscious'"[50] - but seem powerless to avert it. Similar problems arise from the fact that the various disciplines appropriated by Burton and Carlen have widely differing theories of the subject. The resolution of such problems is left to a reference to "the limits of theory" and a "resort to

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47 OD, at 22-23.

48 Supra n. 44, 136.

49 Id., 134 ff; see also T. Eagleton, Literary Theory (Oxford, Basil Blackwell, 1983), 174.

50 OD, at 25.

metaphor".[51] In the end, one is driven to agree with Goodrich who comments:

> While it is certainly true that there is no 'ready made' or available theory of discourse analysis upon which to base a critique of positivist jurisprudence, there is no great merit attendant upon a wholesale and frequently uncritical purchasing of concepts from a myriad of theoretical disciplines. The current nascent theory of discourse anlaysis is unlikely to be productive or effective if haphazardly constructed from the arcana ... of structural and generative linguistics, structural anthropology, psychoanalysis, hermeneutics, marxism and rationalist philosophy. The rapid acquisition and incorporation of these discourses merely produces a most bizarre pemican of concepts whose substantive application is often a matter of guesswork or political mysticism.[52]

5. R placement

In the fourth part of this review, the writer argued that the authors' methodology fundamentally affected any possibility of mounting a sustained, intelligible and successful attack on legal positivism. There is a deal of irony in the fact that Burton and Carlen cite Foucault on the formation of discursive strategies and relationships between competing discourses and then proceed to erect a methodological barrier that precludes any relationship. It is precisely this non-engagement, this non-competition with positivist jurisprudence which leaves it enthroned upon its discursive site. Hence Goodrich's criticism that Burton and Carlen's analysis is "... ungrounded in the sense of bearing no visible or intelligible relation to the discourse they seek to deconstruct".[53]

A major problem of Official Discourse was earlier identified as one of replacement. According to Goodrich, Burton and Carlen fail to provide, "... a competing or viable alternative to the justificatory practices which they are seeking to deconstruct".[54] Part of the problem here may reside in Burton and

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51 See the discussion at 119-136.

52 Supra n. 19, 16.

53 Id., 18.

54 Id., 19.

Carlen's reliance on Foucault. The authors state that "Foucault ... specifies that discourse analysis must give primacy to its theoretical object - discourse".[55] Such an unremitting focus on discourse per se may be one reason for the "discursive and political vacuum"[56] which lies at the heart of Official Discourse. Another reason might be postulated as follows - any viable alternative would appear to lead Burton and Carlen back into epistemology, a subject explicitly abandoned by them. In the event, Burton and Carlen provide neither an adequate theory of discourse analysis nor a political theory to support and inform that analysis.

6 Conclusions

In the second part of this review the relationship between legal positivism and the sociology of law was framed in terms of competing paradigms or models of an object, law. The salient characteristic of that relationship was identified as one of power. In terms of a power relationship the critique mounted in Official Discourse against legal positivism might be accounted a failure. Indeed, it is tempting to argue that "conventional" criticisms of positivism have been and will be more successful. For example, it occurs to the present writer that Hart's thesis that the recognition rule is what the officials believe it to be might be challenged by an analysis of official behaviour based upon organizational theory. Recall here, however, Berger and Luckman's conceptual devices of universe-maintenance, "therapy" and "nihilation". The problem with "conventional" criticisms of positivism is that they lend themselves to "therapy". If it is argued that legal positivism has no adequate theory of society or the way bureaucrats and other officials behave, or does not take account of post-Saussurian linguistic theory, then it may be anticipated that legal positivism, like some awesome jurisprudential Pac-Man, will gobble up (appropriate) such criticisms for its own ends of universe-

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55 OD, at 16-17.

56 Supra n 19, at 15.

maintenance. Given this gloomy prospect (which is, after all, the fate of most critical jurisprudential theorising on legal positivism), Burton and Carlen's Official Discourse takes on the aspect of a Promethean enterprise. Further, it may appear that, absent a competing and viable alternative to legal positivism, texts such as Official Discourse are equally susceptible to appropriation.

More positively, Official Discourse highlights a number of pitfalls which subsequent writers in this vein should avoid. First, bricolage as methodology in this area will not work. It is a dangerously attractive way of eliding the theoretical difficulties involved in aligning contradictory discourses into a coherent theoretical body designated as discourse analysis. It is, at least theoretically, possible to align structuralism and Marxism.[57] Further, Dreyfus and Rabinow have suggested that Foucault has abandoned the, "illusion of autonomous discourse" and claim that his "theory of discursive practices is untenable".[58] This large claim may be unsupportable, but it does indicate that there is an exit from the theoretical trap of focussing upon discourse at the expense of other social practices. Again, the post-structuralist hermeneutic technique of deconstruction may be aligned with structuralism.[59] Lacan is a difficult case. Eagleton has recently demonstrated how Lacanian theory can usefully be imported into literary theory,[60] but it remains to be seen exactly how (Lacanian linguistic theory aside) the Lacanian corpus can be used in political theory (does the State have an unconscious or a phallus?).

A related problem highlighted by Official Discourse is that of appropriating the often contradictory corpus of modern French philosophy without regard for the

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57 For example, L. Althusser, Reading Capital (London, New Left Books, 1970).

58 H. Dreyfus & P. Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics (Brighton, Harvester, 1982).

59 P. Lewis, 'The Post-Structuralist Condition', (1982) 12 Diacritics 1, at 2 ff; contra C Norris, Deconstruction: Theory and Practice (London, Methuen, 1982), 3.

60 Supra n. 49, 151 ff.

context in which that work has been produced. Lacan in Ecrits relates his concepts of "lure" and "meconnaisance" and Sheridan's translation construes the latter term as a "failure to recognise" or "misconstruction".[61] Both terms aptly describe some approaches to contemporary French thought. Lewis, writing in Diacritics, speaks sharply of "... the [North American] academic communities most severely infested with the germs of French theory..."[62] and muddled accounts of post-structuralist thought emerging therefrom. Significantly, Lewis praises Modern French Philosophy by Vincent Descombes[63] as a clear exposition of its subject. Descombes' account begins with a cautionary regarding "the characteristics of the domain in which philosophical utterance circulates" in France.[64] In France, philosophy is closely tied to political and literary opinion. Further, philosophy occupies a significant place in the educational system, especially in the Baccalaureat. Regarding the latter, Descombes states:

> ... the teaching of philosophy in France is ... determined by the ... syllabus. Officially, the Syllabus, this masterpiece of rigour and coherence, is fixed by unanimous consent. In reality it is the outcome of a compromise between various prevailing tendencies, and this is why the much celebrated Masterpiece is so frequently overhauled. Charged by some with propagating a reactionary ideology, by others with eliminating whatever still remains of authentic philosophy in the preceding syllabus, successive versions reflect the momentary balance of political forces ... in the country at large.[65]

Finally, one may mention the presence of a cultural context in which philosophical debate is encouraged. So, quite apart from the question of dissimilarity in philosophical tradition, political, literary, educational and cultural factors exert significant influences upon the expression of philosophical thought in France.

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61 J. Lacan, Ecrits, trans. A. Sheridan (London, Tavistock, 1977), xi.

62 Supra n. 59 at 4.

63 V. Descombes, Modern French Philosophy, trans. L. Scott-Fox & J.M. Harding (Cambridge, C.U.P. 1980).

64 Id., 5.

65 Ibid.

These matters are discussed in a useful account of the past twenty-five years of intellectual and political ferment in France by Francois Chatelet entitled "Recit".[66] The relevance of all this is apparent - one must handle contemporary French philosophical utterances very carefully. One should not read the evolving thought of a thinker such as Foucault as if it represented a fixed, final position. Drefus and Rabinow, for example, identify three major themes in Foucault's writings:

> The first is his shift from an exclusive emphasis on discursive formations during the mid-1960s to a broadening of analytic concerns to include once again nondiscursive issues: the move to cultural practices and power. Second is his focus on meticulous rituals of power centering on certain cultural practices which combined knowledge and power. Third is his isolation of bio-power, a concept which links the various political technologies of the body, the discourses of the human sciences, and the structures of domination which have been articulated over the last two hundred and fifty years (and particularly since the beginning of the nineteenth century).[67]

One mistake which the authors of Official Discourse appear to have made was to take Foucault's emphasis on discursive formations as a philosophical fiat rather than as a stage in Foucault's thinking.

Earlier in the concluding section of this review it was indicated that there was some possibility of aligning the contradictory discourses used by the authors into a coherent theoretical body. Assuming success on this front, a theory similar to that of Burton and Carlen's might demonstrate that positivist legal discourse is "epistemologically incoherent" yet nonetheless "ideologically functional".[68] This would appear to leave us with an "epistemologically" coherent but ideologically dysfunctional form of alternative legal discourse unless one adheres to Gramsci's

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66 F. Chatelet, 'Recit' in M. Morris and P. Patton (eds.), Michel Foucault: Power, Truth, Strategy (Sydney, Feral, 1980), 14-27.

67 Supra n. 58, 184.

68 Supra n. 19, 18.

view that superstructure can influence infrastructure.[69] The logic of this argument is that it is unlikely that a power-conditioned "minor" paradigm of law will displace a dominant paradigm until the actual material base of that discourse is displaced. But two notions advanced in Foucault's most recent work indicate an alternative answer deriving from Foucault's descriptions of power and normalizing technologies which Drefus and Rabinow have compared to Kuhnian paradigms. Power without the king means a polyvalent theory of power,[70] and normalizing paradigms imply the possibility of nonnormalizing paradigms.[71] Both notions remain largely unexplored but by implication indicate that the merit of a work such as Official Discourse may reside in its presence as a point of resistance to a dominant discourse.

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69 See J. Joll, Gramsci (Glasgow, Fontana, 1977), 8-9.

70 See A. Sheridan, Michel Foucault: The Will to Truth (London, Tavistock, 1980), 183.

71 Supra n. 58, 198

BIBLIOGRAPHY

Althusser, L. (1970) Reading Capital (London: New Left Books).

Berger P. and Luckman, T. (1967) The Social Construction of Knowledge (Harmondsworth: Penguin University Books).

Bowie, M. (1979) 'Jacques Lacan' in M. Sturrock (ed.), Structuralism and Since (Oxford: O.U.P.).

Burton, F. and Carlen, P. (1979) Official Discourse (London: Routledge and Kegan Paul).

Chatelet, F. (1980) 'Recit' in M. Morris and P. Patton (eds.), Michel Foucault: Power, Truth, Strategy (Sydney: Feral Publications).

Descombes, V. (1980) Modern French Philosophy, trans. L. Scott-Fox and J.M. Harding (Cambridge: C.U.P.).

Dreyfus, H.L. and Rabinow, P. (1982) Michel Foucault: Beyond Structuralism and Hermenutics (Brighton: Harvester Press).

Duncanson, I. (1982): 'Jurisprudence and Politics', Northern Ireland Legal Quarterly 33: 1.

Eagleton, T. (1983) Literary Theory (Oxford: Basil Blackwell).

Foucault, M. (1972) The Archaeology of Knowledge, trans. A.M. Sheridan Smith (London: Tavistock).

Goodrich, P. (1983) 'The antinomies of legal theory: An Introducutory survey, Legal Studies 3: 1.

Hart, H.L.A. (1962): The Concept of Law (Oxford: O.U.P.).

Hawkes, T. (1977) Structuralism and Semiotics (Berkeley: University of California Press).

Joll, J. (1977) Gramsci (Glasgow: Fontana Paperbacks).

Kuhn, T. (1970) The Structure of Scientific Revolutions (Chicago: The University of Chicago Press).

Lacan, J (1977) Ecrits, trans. Alan Sheridan (London: Tavistock).

Lewis, P. (1982): 'The Post-Structuralist Condition', Diacritics 12: 1.

Lloyd, Lord (1979): Introduction to Jurisprudence (London: Stevens).

MacCormick, N. (1981): H.L.A. Hart (London: Edward Arnold).

Masterman, M. (1970): 'The Nature of a Paradigm' in Lakatos and Musgrave (eds.), Criticism and the Growth of Knowledge (Cambridge: C.U.P.).

Morison, W. (1979) The System of Law and Courts Governing New South Wales

(Sydney: Butterworths).

Norris, C. (1982) Deconstruction: Theory and Practice (London: Methuen).

Ogden and Richards (1923) The Meaning of Meaning (London: Kegan Paul, Trench, Trubner and Co. Ltd.).

Sheridan, A. (1980) Michel Foucault: The Will to Truth (London: Tavistock).

Sturrock, M. (ed.) (1979): Structuralism and Since (Oxford: O.U.P.).

Toulmin, S. (1972) Human Understanding (Princeton: Princeton University Press).

Williams, G. (1945) 'Language and the Law - I - IV' Law Quarterly Review 61: 71, 179, 293 and 384.