

A SEMIOTICS OF LEGAL ARGUMENT*

Duncan Kennedy¹

I

Introduction/Summary

My impression is that when people interested in legality appropriate the theory or philosophy of language, they tend to focus on the rule form and the "facts" in the world to which the rules are applied. For example, what does language theory tell us about the meaning of a statement such as "you must be 35 years old to be eligible for election to the Presidency?" In this paper, I pursue a different kind of borrowing, focusing on what language theory might offer the as yet rudimentary theory of legal argument. By legal argument I mean argument in favor of or against a particular resolution of a gap, conflict or ambiguity in the system of legal rules. In this form of argument, it is the practice to deploy stereotyped "argument-bites," such as, "my rule is good because it is highly administrable." Argument-bites come in opposed pairs, so that the above phrase is likely to be met with, "but your rule's administrability comes from such rigidity that it will do serious injustice in many particular cases."

Starting with the argument-bite as a basic unit, I propose a set of inquiries into legal argument, using language theory as a source of analogies. First, there is the lexicographical or "mapping" enterprise of trying to identify the most common bites. Second, there is an inquiry into the generation of pairs and their clustering into dialectical sequences, rituals of parry and thrust. The response above might be answered, "there will be few serious injustices in particular cases because my rule is knowable in advance (unlike your vague standard) and parties will adjust their conduct accordingly." Third, there is the second-order mapping task of identifying the

major clusters (some candidates: formalities as a precondition for legally effective expressions of intent, compulsory contract terms, liability for unintended injury, existence and delimitation of legally protected interests).

The fourth inquiry is into the consequences of the argument-bite idea for the phenomenology of legal argument. If arguments come in stereotypical bites, then it is at least plausible that (1) they get their meaning from one another, in the sense that words do, (2) that to be intelligible to a legal audience one must stretch one's thought on their Procrustean bed, so that there is always a gap or discontinuity between the subject and his or her argument, something at once constrained and strategic about the choice of distortions, (3) that the course of the legal argument will be at least somewhat independent of the particular topic, that is the particular gap, conflict or ambiguity in the rule system to which it is apparently quite specifically addressed, so that argument is the play of argument-bites (as well as an evocation of the possibilities of a real situation of choice). It is an interesting question whether legal argument is possible in its highly self-serious contemporary mode only because the participants are at least somewhat naive about its simultaneously structured and indeterminate (floating) character.

The rest of this paper is mainly concerned with the first two tasks: that of developing a lexicon and that of attempting to identify some of the operations or transformations of argument-bites that legal arguers use to generate a meaningful exchange.

A. DICTIONARY ENTRIES

The following is a list of argument-bites in random order. It is of course not exhaustive, but rather fragmentary. The two principles of selection will become clear below.

legal protection of the fruits of labor gives an incentive to production

the proposed solution will be easy to administer

no liability without fault

only the legislature can obtain the information necessary to make this decision rationally

the defendant should have looked out for the plaintiff's interests (altruistic duty)

the law, not community expectations, should determine the outcome

the proposed solution lacks equitable flexibility

people have a right to freedom of (this kind of) action

immunity will discourage the plaintiff's desirable activity (e.g. government service)

judges make decisions every day with no more information than they have here

pacta sunt servanda (promises should be kept, period)

liability will discourage the plaintiff from looking out for himself (i.e., from taking precautions)

the proposed rule defeats the defendant's expectation of freedom of action

as between two innocents he who caused the damage should pay

the plaintiff should have looked out for his own interests (been self-reliant)

the role of the judge is to apply the law, not make it

legal protection inhibits competition in markets for goods and ideas

the proposed rule corresponds to community expectations

no such right has ever been recognized at common law, so it's up to the legislature to intervene if there is to be change

there is *prima facie* liability for intentional harm absent an excuse the proposed rule protects the plaintiff's reliance

the common law evolves to meet new social conditions

people have a right to be secure from (this kind of) injury

liability will discourage defendant's desirable activity (e.g. political speech)

liability will encourage the defendant to take precautions

rebus sic stantibus (only as long as circumstances remain the same)

B. ARGUMENT BY MAXIM AND COUNTERMAXIM

I selected this particular randomly ordered list because I can use its members to illustrate a basic structure of legal argument, namely the pairing of arguments as maxim and countermaxim. Another way to put this is to say that a competent legal arguer can, in many [most? all?] cases, generate for a given argument-bite at least one counter argument-bite that has an equal status as valid utterance within the discourse. While responding to an argument-bite with one of its stereotypical counter-bites may be wholly unpersuasive to the audience, it is never incorrect, at least not in the sense in which it would be incorrect to answer an argument bite with an attack on the speaker's character or with a description of the weather.

This selection of argument-bites also allows me to propose a tentative typology, which I will use to order my pairs, but not further explain or justify here. The categories are substantive argument-bites, used to characterize party behavior in relation to the proposed rule, and systemic bites, used to characterize the rule in terms of the institutional values of the legal system. I subcategorize substantive arguments in terms of their sources in general political/ethical discourse as based on morality, rights, social welfare or community expectations. Among systemic bites, I distinguish those that have to do with administrability from those that refer to conflicting theories of the role of courts vis-a-vis legislatures (institutional competence arguments).

A TYPOLOGY OF ARGUMENT-BITES IN PAIRS

Substantive Arguments

Moral Arguments:

the defendant should have looked out for the plaintiff's interests (altruistic duty)
vs.

the plaintiff should have looked out for his own interests (been self-reliant)
as between two innocents he who caused the damage should pay

vs.

no liability without fault

pacta sunt servanda (promises should be kept, period)

vs.

rebus sic stantibus (only as long as circumstances remain the same)

Rights Arguments:

people have a right to be secure from (this kind of) injury

vs.

people have a right to freedom of (this kind of) action

Social Welfare Arguments:

immunity will discourage the plaintiff's desirable activity (e.g. government service)

vs.

liability will discourage defendant's desirable activity (e.g. political speech)

liability will encourage the defendant to take precautions

vs.

liability will discourage the plaintiff from looking out for himself (i.e., from taking precautions)

legal protection of the fruits of labor gives an incentive to production

vs.

legal protection inhibits competition in markets for goods and ideas

Expectations Arguments:

the proposed rule corresponds to community expectations

vs.

the law, not community expectations, should determine the outcome

the proposed rule protects the plaintiff's reliance vs.

the proposed rule defeats the defendant's expectation of freedom of action

SYSTEMIC ARGUMENTS

Administrability Arguments:

the proposed solution will be easy to administer

vs.

the proposed solution lacks equitable flexibility

Institutional Competence Arguments:

no such right has ever been recognized at common law, so it's up to the legislature

to intervene if there is to be change

vs.

there is prima facie liability for intentional harm absent an excuse

the role of the judge is to apply the law, not make it

vs.

the common law evolves to meet new social conditions

only the legislature can obtain the information necessary to make this decision rationally

vs.

judges make decisions every day with no more information than they have here

C. OPERATIONS IN LEGAL ARGUMENT

The phenomenon of the countermaxim is complex. I want to emphasize that the following remarks are no more than suggestive.

First, argument bites are conventional. What makes a particular sentence an argument bite is nothing more nor less than that people use it over and over again (or use a phrase that is its equivalent in their understanding), with a sense that they are making a move, or placing a counter in the game of argument.

Second, each argument-bite is associated in the minds of arguers not with one but with a variety of counter-bites. The list above illustrates only a few of the modes of opposition of bites. I will shortly attempt a typology of oppositional moves, or operations.

Third, an extended argument for a particular resolution of a gap, conflict or ambiguity in the rule system will be only relatively structured. In other words, only a part of the material will be recognizable as the play of bites. Arguments occur in particular contexts, and these contexts give them content that is arbitrary from the point of view of structural analysis. It is rarely productive to take the structural point of view to the extreme of reducing everything in the argument to the mechanical reproduction of moves or operations.

Fourth, it is nonetheless true that every legal argument within a legal culture is by definition relatively structured. Indeed, this is what we mean when we situate the argument in our legal culture, rather than in lay discourse or philosophical discourse or (to pick an example at random) French legal culture.

By an operation I mean a "transformation" of an argument-bite by "doing something" to it that gives it a very different meaning, but one that is nonetheless

connected to the starting bite. The prototype of an operation, as I am using the term here, is the simple procedure of adding "not" to a phrase, so as to indicate that it is untrue rather than true, as in "I am not French." This phrase is obviously closely related to "I am French," although it has an altogether different meaning [!?!].

The power of structuralist methodology is that it shows that what at first appear to be an infinitely various, essentially contextual mass of utterances (parole) is in fact less internally various and less contextual than that appearance. It does this by "reducing" many of the particular elements of the discourse to the status of operational derivatives of other elements. When I say, "I am French," and you respond, "No, you are not French," there is less going on, less complexity to deal with, than if you responded, "I don't understand your agenda." The reason being that "you are not French" adds a new meaning to the conversation through a simple, familiar transformation of, an operation on, "I am French," rather than by adding what appears, at least at first, an altogether new thought.

A TYPOLOGY OF OPERATIONS

(1) DENIAL OF A (FACTUAL OR NORMATIVE) PREMISE

Argument by denial means accepting the relevance of your opponent's argument but denying one of its factual or normative premises. For example:

(morality)

no liability without fault

vs.

I agree that there should be no liability without fault, but you were at fault here, so you are liable.

(morality) *pacta sunt servanda* (promises should be kept, period)

vs.

there was no promise

(morality) *pacta sunt servanda* (promises should be kept, period)

vs.

True, but I kept my promise

(rights)

plaintiff has a right to security from (this kind of) injury

vs.

this kind of right exists, but defendant did not injure plaintiff

(rights)
plaintiff has a right to security from (this kind of) injury
vs.
no such right exists

(utility)
liability will discourage defendant's desirable activity
vs.
liability will not in fact discourage the activity

(utility)
liability will discourage defendant's desirable activity
vs.
defendant's activity is undesirable

(administrability)
the proposed solution will be easy to administer
vs.
the proposed rule is not in fact administrable

Denial of a factual premise will typically lead to a reframing of the facts presented by the other side so as to support the attack. Classic reframing techniques exploit the ambiguities of crucial concepts like fault, causation and free will to reverse an opponent's presentation (Kelman, Heidt).

(2) SYMMETRICAL OPPOSITION

The most striking form of oppositional pairing is between two maxims appealing respectively to the plaintiff's and the defendant's points of view as they will always be arguable within a particular cluster. Some examples:

(morality)
the defendant should have looked out for the plaintiff's interests (altruistic duty)
vs.
the plaintiff should have looked out for his own interests (been self-reliant)

(rights)
plaintiff has a right to be secure from (this kind of) injury
vs.
defendant has a right to freedom of (this kind of) action

(utility)
liability will discourage defendant's desirable activity
vs.
immunity will discourage plaintiff's desirable activity

(utility)

legal protection of the fruits of labor gives an incentive to production

vs.

legal protection inhibits competition in markets for goods and ideas

(expectations)

the proposed rule protects the plaintiff's reliance

vs.

the proposed rule defeats the defendant's expectation of freedom of action

(administrability)

the proposed solution will be easy to administer

vs.

the proposed solution lacks equitable flexibility

The operation might be called "Hohfeldian" rather than "symmetrical" opposition, since it was Hohfeld who first identified the ambiguity in our common legal usage of the word "right" that often masks it when we are speaking in the rights' mode (Balkin). Both arguments are, once both are on the table, patently partial or incomplete, just because each ignores its symmetrical pair.

It seems reasonable to describe the relationship as operational because once one has learned the "trick" of appealing to the defendant's right to freedom of action every time the plaintiff appeals to her right to be secure from this kind of injury, one no longer sees the two arguments as independent. Likewise with the defendant's protest that liability will chill his desirable activity, and the plaintiff's symmetrical claim that unless protected he will cut back on his highly beneficial pursuits. The appearance of X in close proximity to Y no longer seems a function of the irreducible particularity of context, but rather of the structure of legal argument itself.

Again, this is not to say that the arguments will always be equally convincing. Quite the contrary. Nor that as a matter of fact the appearance of X on the plaintiff's lips will automatically elicit Y on the lips of the defendant. Y may not occur to the defendant. Or it may seem tactically unwise to invoke a right to freedom of action (suppose the issue is civil liability, and the defendant's conduct is indisputably criminal). Yet when Y does occur in response to X, we experience, if we recognize the operation, the relative coherence or intelligibility, as opposed to the relative arbitrariness of legal discourse. (see points 3 and 4 above).

(3) COUNTER-THEORY

By a counter-theory, I mean a response which simply rejects the normative

idea in the principal argument-bite. There is no quick shift from one point of view to another, as in symmetrical opposition, but direct confrontation.

(morality), no liability without fault

vs.

innocent victims should be compensated

(morality)

pacta sunt servanda (promises should be kept, period)

vs.

rebus sic stantibus (only as long as circumstances remain the same)

(expectations)

the proposed rule corresponds to community practice

vs.

the law, not community practice, should determine the outcome

(institutional competence)

no such right has ever been recognized at common law, so it's up to the legislature to intervene if there is to be change

vs.

there is liability for intentional injury in the absence of an excuse

(institutional competence)

the role of the courts is to apply law, not make it

vs.

the common law evolves to meet new social conditions

(4) MEDIATION

Mediation differs both from symmetrical (or Hohfeldian) opposition and from counter-theory because it acknowledges a conflict of claims and proposes a way to resolve it on the arguer's side. This may be by denying the other party's claim, as when one party argues against the existence of a right claimed by the other. Or it may be by proposing a principle or a balancing test that will settle the matter, either in general or in this particular case. For example, the counter-theory to "no liability without fault" might be "innocent victims should be compensated." "As between two innocents..." on the other hand, acknowledges a claim on both sides, but proposes a principle of liability based on causation to resolve the conflict.

(principle)

no liability without fault

vs.

as between two innocents he who caused the damage should pay

(balancing)

innocent victims should be compensated

vs.

as between two innocents, it is cheapest to let the losses lie where they fall

(balancing) *rebus sic stantibus* (only as long as circumstances remain the same)

vs.

the utility of promise keeping will be undermined if people see their obligations as merely contextual

(principle)

plaintiff has a right to security from (this kind of) injury

vs.

plaintiff's ordinary right must yield to defendant's fundamental right

(balancing)

plaintiff has a right to security from (this kind of) injury

vs.

defendant's right outweighs plaintiff's right

(balancing)

liability will discourage defendant's desirable activity

vs.

plaintiff's activity is more desirable than defendant's

(balancing)

your proposed solution lacks equitable flexibility

vs.

on balance, the gain in certainty outweighs the lack of flexibility in this case

Mediation requires the arguer to acknowledge the conflict between a pair of superficially powerful arguments that we produced above either by symmetrical opposition or by theory and counter-theory. It is therefore an operation performed on a pair, rather than on a single argument-bite. This should serve to emphasize the point that there is no natural or pre-given unit of analysis in the semiotics of legal argument. Sometimes the appropriate unit seems quite clearly to be the bite, sometimes it seems equally clearly to be a pair of bites, a cluster, or, as we will see, the bite with its support system.

(5) REFOCUSING ON OPPONENT'S CONDUCT

(PROPOSING AN EXCEPTION)

Refocusing on your opponent's conduct means particularizing within the general context of your opponent's argument. You concede the premise, but point out that she has behaved in a way that makes the valid premise inapplicable in this case. Refocusing differs from denying that the facts support the argument, or denying the normative premise, because it proposes an exception rather than challenging the argument as a whole.

Because there is an almost infinite number of ways in which we can imagine refocusing, it is arguable that we are slipping here over the line between an operation and the multiplicity of arbitrary, contextual, opportunistic, strategic behavior. Yet there is a patterned quality to the responses below. They are quite abstract, and it is easy to apply them in dozens and dozens of contexts without submerging the abstraction in particularity. Refocusing seems at least to merit tentative status as an operation.

(morality)

no liability without fault

vs.

this injury was an anticipated cost of doing business (Pinto)

(morality)

innocent victims should be compensated

vs.

plaintiff could have gotten out of the way (LeRoy Fibre)

(rights)

plaintiff has a right to security from (this kind of) injury

vs.

plaintiff has forfeited his rights by his conduct in this case

(rights)

defendant has a right to freedom of (this kind of) action

vs.

defendant has forfeited his rights by his conduct in this case

(utility)

immunity will discourage plaintiff's desirable activity

vs.

but if there is liability, plaintiffs will behave strategically (blackmail defendants)

(utility)

liability will discourage defendant's desirable activity

vs.

but if there is immunity, defendants will behave strategically (blackmail plaintiffs)

(administrability)

the proposed solution lacks equitable flexibility

vs.

because the parties can adjust their behavior to the rule, its lack of equitable flexibility is not important

(administrability)

the proposed solution will be easy to administer

vs.

the inability of some parties to master the formality will accentuate inequality of bargaining power

There is an interesting and important set of stereotypical responses to refocusing, such as that "the exception would swallow the rule," and "the distinction is illusory" ("collapsing the distinction"). Not to mention "loopification." But for another time.

(6) FLIPPING

Flipping is appropriating the central idea of your opponent's argument-bite and claiming that it leads to just the opposite result from the one she proposes:

reverse fault: when a person who innocently injures another innocent refuses to compensate, he is at fault

reverse competition: only the establishment of legal rights to economic advantage will prevent cut throat competition from leading to monopoly

reverse community expectations: following community expectations would be undemocratic because those expectations have been significantly formed by the prior course of judicial decision

reverse unequal bargaining power: interfering with freedom of contract will lead to pass-through of the cost and impoverish the people you are trying to help

reverse paternalism: to insist in the face of people's actual failings that they be self-reliant is to impose your values on them

reverse administrability: the pursuit of rules in this area has spawned such complexity that a general equitable standard would increase rather than decreasing certainty

reverse institutional competence: leaving the decision to the legislature is a form of lawmaking because it establishes the defendant's legal right to injure the plaintiff

(7) LEVEL SHIFTING

It is permissible to answer an argument-bite for the plaintiff with a pro-defendant argument-bite from another pair. Indeed, this is one of the most common ways to argue. I say your rule lacks administrability. You respond that your rule tailors liability to fault. And so on (David Kennedy). Level shifting is a highly "permissive" operation, meaning that there are lots of maxims to choose from when changing the subject. But there is an important restriction. For the shift to make sense, it must be to an argument-bite associated with the particular legal issue at hand. To use a phrase from the next section, it must be to another bite within the cluster.

CONCLUDING REMARK ON OPERATIONS

It is easy to fall into the error of believing that what I have been calling operations are a true "logic of legal discourse." We may be able to transform "plaintiff has a right to security from (this kind of) injury" into, "defendant has a right to freedom of (this kind of) action," by the operation of "symmetrical opposition." But it most certainly does not follow (a) that any other maxim can be so transformed, or (b) that any maxim that can be will in fact be so transformed by lawyers and judges in practice. Sometimes yes, and sometimes no, depending on . . . "The circumstances." I have little confidence that we will be able to establish the actual "scope" of operations in legal argument other than by trial and error.

I constructed my typology in a relatively empirical or pragmatic fashion, by first listing familiar arguments, then inventing a typology, then playing with items and abstractions until time ran out. There was a temptation, once I had defined a set of operations, to invent arguments that are not part of the vocabulary in use, but "ought to be." For example, symmetrical opposition seems a particularly important operation, and it would be satisfying if one could carry it out on every item in the dictionary. As I set out to list examples, I was often in doubt, and found myself trying hard to "come up with" an argument-bite that would show the generality of the operation. For example, is the following pair a "genuine" instance of symmetrical opposition?

(institutional competence)

a decision for the plaintiff would be law making, not law application

vs.

a decision for the defendant would be law making, not law application

I am not sure.

The answer would seem to require a more precise definition of "symmetrical opposition" than I gave above. A more precise definition might well throw into question some of the examples of the operation that at first seemed paradigmatic, and also lead to the generation of new examples. And so on.

The appeal of this activity, of working toward an exhaustive mechanics of transformation, is that it gives the illusion of mastery of a whole discourse. But as I said before, every actual instance of an extended argument in favor of a particular resolution of a gap, conflict or ambiguity in a rule system contains large quantities of contextual matter. The contextual matter influences the formulation of the argument-bites that are its grid.

The problem is deeper yet. The distinction between a bite and a merely contextual argument is so blurry, and so much in motion through time, that there is no hope of a definitive dictionary or of a definitive typology of operations (any more than there is with a living language). For example, the distinction between social welfare arguments about activity levels and about precautions was clearly formulated for the first time well after I began to work on this project (Shavell).

Given the intractability of the discursive mass from which one must mine argument-bites, and the ease with which one can construct them once one has devised some operations, constructed bites threaten to force out their rougher but authentic siblings.

Furthermore, as I developed my typologies, I found myself repeatedly rewriting the one sentence bites in the dictionary, so that they would "fit" better. Legal semiotic discourse seems (at every moment, and why not?) to replace its object of study with a pseudo-object more amenable to its internal requirements. Why not: the more of legal argument and the less semiotic invention we include in the object of study, the more interesting the analysis will be, by which I mean the more political it will be, the more capable of disquieting power.

[And then there is the possibility that the academic study of operations might influence those very operations...]

E. SUPPORT SYSTEMS AND CLUSTERS

In this section, I extend the notion that argument-bites get their meaning, and legal argument gets its intelligibility, from the system of connections between bites.

1. SUPPORT SYSTEMS

An argument can be more or less developed. At one extreme, it may be one sentence long: "no liability without fault." At another, that one sentence is supported by pages of material. Some of this material will consist of reasons why we should accept the one sentence argument. These reasons may themselves be conventional, to the point that they are best understood as argument-bites, and as constituting a "support system" for the "lead" bite. Since the system of supporting bites is implicitly present in the mind of the arguer when she deploys the lead bite, it should be understood as one of the sources of that bite's meaning, just as the opposing bites everyone knows we can generate through operations are part of that bite's meaning.

I suggested above that we categorize arguments in four substantive modes (morality, rights, utility and expectations), and two systemic modes (administrability and institutional competence). We often use substantive modes as "ultimates," or arguments that do not need further justification. By contrast, it is more common within legal discourse to see institutional competence and administrability arguments as in need of support from the substantive arguments. But this is only a matter of convention. In our legal culture, people think of morality, rights, etc., as providing explanations for action that are satisfactory in themselves, but they also from time to time choose to "go behind" them. The distinction between substantive and systemic modes is one of degree only. In fact, bites in each mode can support bites in each of the other modes, producing a complex system.

We support institutional competence arguments with subarguments in each of the substantive modes. For example:

judges should be restricted to law application because it is inefficient for them to engage in law making

vs.

judges should evolve the common law because this will be better for the general welfare than always waiting for the legislature

private actors have a right to be free of liability except where there is precedent

vs.

the community expects people who injure others without an established privilege to be held liable

it would be unfair to the parties for the judge to resolve their case without the kind of information that only the legislature can obtain

vs.

it is immoral for the judges to decline jurisdiction on the grounds that someone else might have been able to decide more competently

The above arguments are reversible ("it is immoral for the judge to meddle with the parties without the kind of information only the legislature can obtain," etc.). We also support institutional competence arguments with administrability arguments: "judges should apply, not make the law," with, "otherwise there will be hopeless uncertainty."

We support administrability arguments with subarguments in the four substantive modes (the certainty of rules—as opposed to the uncertainty of standards—benefits everyone in the society by eliminating unnecessary disputes"). And also with institutional competence arguments ("only a regime of rules, and not a regime of standards, is consistent with the judicial role of law application, as opposed to law making"). In other words, the two types of systemic argument are mutually supporting.

The appeal to expectations can be used in an ultimate way: 'The proposed rule is bad because it would violate the expectations of the parties, period.' But expectations arguments are often supported in the other three modes: "people have a right to have courts follow their expectations," "it is socially beneficial for courts to follow expectations," "it would be immoral for courts to frustrate expectations." Moreover, we can toss in systemic reasons for following expectations: "following expectations will give law certainty, whereas courts following their own views would be hopelessly uncertain:" 'The non-democratic nature of courts means they have to follow expectations or be guilty of usurpation.' And so on through the other substantive modes.

The ability to generate the support system for an argument-bite, picking and choosing among its elements to fit the context, is as important to the arguer as the ability to "counter-punch" an opponent's bites. Our ability to understand and assess the value of an argumentative sequence is heavily dependent on our imaginative ability to place each bite in its implicit support system, and understand the response to the bite as also a response to that system.

2. CLUSTERING

Although this is not the place for a full discussion, at least a few preliminary thoughts on clustering seem necessary in order to fill out the ways in which argument-bites acquire meaning. A cluster is a set of arguments that are customarily invoked together, when the arguer identifies his raw facts as susceptible of posing

a particular kind of legal issue. Argument-bites acquire meaning not only through their oppositional relationship to bites we generate through operations, and not only from their relationship to bites they support and are supported by, but also from the other members of the cluster.

From the great mass of facts, the lawyer selects those that he or she thinks can be cast as "relevant" to one of the preexisting rule formulae that together compose the *corpus juris*. Then the lawyer works to recast both facts and formula so that the desired outcome will appear compelled by mere rule application. The argumentative apparatus we have been discussing is, remember, deployed in order to resolve a gap, conflict or ambiguity in the rule system. The problem is situated for the participants according to which rule or rules need interpretation. The rule, in turn, is situated in one of the conventional or intuitive arrangements of the *corpus juris*. But it is also situated on a map of "types of legal issues" that occur over and over again in different parts of the *corpus juris*. Some examples of these recurring problems are:

- (1) Should judges grant any kind of legal protection to the interest asserted by plaintiff? If so, what degree of protection?
- (2) Should judges impose liability for this type of unintended, non-negligent injury?
- (3) Should judges require a formality before recognizing an expression of intent as legally binding? How should they deal with failure to comply?
- (4) Should judges impose a non-disclaimability duty on anyone who enters a contract of this particular kind?

To my mind, one of the most important tasks of legal semiotics should be to identify other clusters of this kind. A disproportionate number of the bites discussed above come from the particular "cluster" that arguers deploy in debates about the definition and delimitation (through defenses) of legally protected interests. There is a distinct intentional torts bias to the whole discussion. Nonetheless, we could begin to break the bites out into clusters as follows:

FORMALITIES CLUSTER

defendant induced plaintiff's pre-formality or extra-formality reliance, so should compensate plaintiff's loss

vs.

protecting plaintiff's reliance would defeat defendant's expectation of freedom of action up to the moment of formality reverse expectations: following defendant's expectation of enforcement of the formality would be undemocratic because that expectation is the product of the prior course of judicial decision, rather than of the community's moral sense

defendant induced plaintiff's pre-formality or extra-formality reliance, so should compensate plaintiff's loss

vs.

plaintiff did not rely, defendant did not induce, plaintiff was not injured

defendant induced plaintiff's pre-formality or extra-formality reliance, so should compensate plaintiff's loss

vs.

it was unreasonable for plaintiff to rely without the protection of a formality vs. defendant shouldn't have expected the absence of a formality to protect him from equitable obligation

vs.

plaintiff's reliance was the product of gullibility and wishful thinking

vs.

defendant was manipulating the formality with full knowledge of the plaintiff's ignorance and naïveté

the proposed formality will be easy to administer

vs.

the proposed formality is not in fact administrable

reverse administrability: the pursuit of rules in the area of formalities has spawned such complexity that a general equitable standard would increase rather than decreasing certainty

the proposed formality lacks equitable flexibility

vs.

because the parties can adjust their behavior to the formality, its lack of equitable flexibility is not important

reverse paternalism: to insist in the face of people's actual failings that they self-reliantly adjust their behavior to the formality is to impose your values on them

the proposed formality will be easy to administer

vs.

the inability of some parties to master the formality will accentuate inequality of bargaining power

reverse unequal bargaining power: undermining the formality will lead to pass-through of the cost and impoverish the people you are trying to help

COMPULSORY TERMS CLUSTER

the defendant should not be bound because his choice was unwise

vs.

second-guessing the defendant's choice is paternalistic unless he is an infant or insane

the defendant should not be bound because the plaintiff had superior bargaining power

vs.

the law has no concern with unequal bargaining power

courts increase social welfare by refusing to enforce contracts based on unequal bargaining power

vs.

interfering with freedom of contract will lead to pass-through of the cost and impoverish the people you are trying to help

it's not the role of the courts to make contracts for the parties

vs.

since the equity of redemption, courts have always intervened against overreaching

And so on.

I argued that the distinction between counter-argument by operation and mere contextual or opportunistic counter-argument is blurred. Likewise for support systems and clusters. The formalities cluster blurs into the compulsory terms cluster. In a given context, it will be hard to distinguish between formulaic argument-bites from a cluster and arguments more "authentically" emerging from the facts. A given argument-bite ("no liability without fault") may appear in many clusters, along with some but not all of its counter-bites.

It may well be impossible to establish an exhaustive list of operations, or to correctly delimit the clusters extant at a given moment in the history of legal argument. A given argument bite's countermaxims, support system and cluster are three indefinite series of associated items. The point is that we listen to the bite, when an opponent deploys it in a particular doctrinal context, with the other members of the cluster already in mind. What we hear depends on those unspoken bites, just as it depends on each bite's support system and countermaxims.

The following discussion of "nesting" is situated in the cluster that arguers invoke when they have identified the legal issue as involving the definition, through specifying defenses, of the contours of legally protected interests.

E. NESTING

"Nesting" is my name for the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle. Take the case of killing in mistaken self defense. In *Courvoisier v. Raymond*, a shopkeeper shot and killed a person he thought was a looter emerging from a crowd of rioters. The person was in fact a policeman coming to his aid. In this fact situation, the courts have initially to decide whether there should be a defense of mistake in self-defense situations. A court taking up the question for the first time has to decide it in the context of considerable doctrinal conflict over when mistake is a defense to the commission of an intentional tort. Some of the considerations commonly advanced in favor of the defense are:

the shopkeeper shouldn't have to pay because he was not at fault

vs.

the shopkeeper should pay because as between two innocents he who caused the damage should pay

people have a right to act in self-defense when they believe they are in danger

vs.

people have a right to security of the person as they go about their lawful business

imposing liability would discourage people from the desirable activity of self-defense

vs.

refusing to impose liability would discourage people from assisting others in trouble

people expect to be able to defend themselves when they feel they are in danger

vs.

people don't expect to be harmed arbitrarily

allowing mistake is an example of equitable flexibility in imposing liability

vs.

the vagueness of a mistake standard will lead to uncertainty avoided by a rigid rule of compensation for deliberate injury

there are many analogies for this defense

vs.

no court has recognized this defense before

deciding the precise contours of a mistake defense requires input that only the legislature can command

vs.

courts do this kind of thing every day

Please resist the impulse to assess the strength of these arguments as they appear in this context. What we are concerned with is "nesting," a formal attribute of legal argument. Nesting occurs as follows. Let us suppose that the court accepts the argument in favor of a defense of mistake. It looks as though the defendant has won. But now suppose the plaintiff argues that the defendant's mistake was "unreasonable," meaning that a person of ordinary intelligence and caution would not have shot, under the circumstances, without more indication that he was in danger. Suppose the plaintiff concedes that the defendant acted in the good faith belief that he was in danger. Suppose the defendant in turn concedes he was less intelligent and cautious than the average man in the community. In deciding whether reasonableness should matter, a court that has accepted the argument cast in the form above will consider a new version of the inventory:

if the plaintiff acted in good faith, he was not at fault

vs.

as between two innocents, he who caused the damage should pay

people are entitled to be judged according to their actual capabilities

vs.

people have a right to protection from the unreasonable behavior of others

an objective standard will deter people from defending themselves

vs.

a subjective standard will deter people from going to the aid of others

a subjective standard will encourage people like the plaintiff to pay attention to the actual danger they face in helping out

vs.

a subjective standard will encourage carelessness by people contemplating self-defense

the community does not expect more of people in danger than that they act in good faith

vs.

the community expects people in danger to act reasonably

adjusting the standard to the actual character of the defendant allows equitable flexibility

vs.

a "subjective good faith" standard is hopelessly vague and manipulable

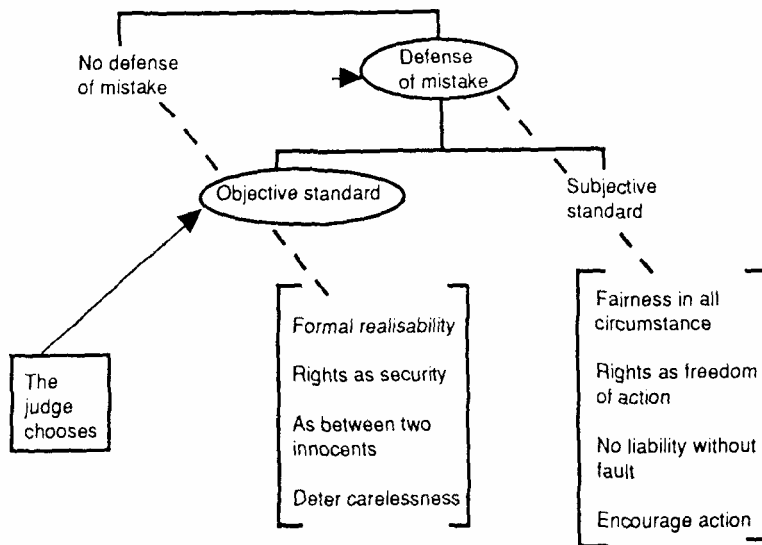
this is the first time the court has imposed a reasonableness limitation on the right of self-defense

vs.

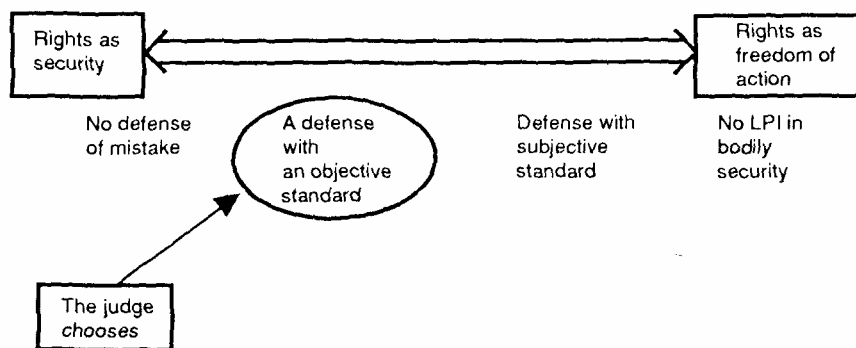
reasonableness is the general rule in defining permissible conduct

"Nesting" is the reappearance of the inventory when we have to resolve gaps, conflicts or ambiguities that emerge when we try to put our initial solution to a doctrinal problem into practice. In this case, we first deploy the pro and con argument-bites in deciding whether or not to permit a defense of mistake. We then redeploy them in order to decide whether to require that the mistake be reasonable. In this case, the courts have in practice chosen to honor the pro-defendant arguments in creating the defense, but to honor the pro-plaintiff (reasonableness) arguments in defining its contours.

This situation can be represented visually as follows:



We might also represent the choice in terms of a continuum, as follows:



I would argue that this second representation in terms of a continuum conveys far less of the structure of legal argument than the nesting diagram, for two reasons.

First, practitioners of legal argument proceed, both within a given case and over a series of cases, from the more general choices to the more particular, arguing and then re-arguing, rather than debating the merits of a point on the continuum vs. all the other points on the continuum. This, indeed, is one of the more powerful of all the conventions of legal argument.

Second, an equally powerful convention of legal argument is that argument and counterargument are presented as simply "correct" as applied to the general question, without this presentation binding the arguer in any way on the nested sub-question. In other words, the judge can, without violating any norm of legal argument, state that "equitable flexibility is so important that it requires us to accept a defense of mistake here," and then turn around and state that "certainty is so important that we are obliged to reject a 'good faith' test in favor of reasonableness."

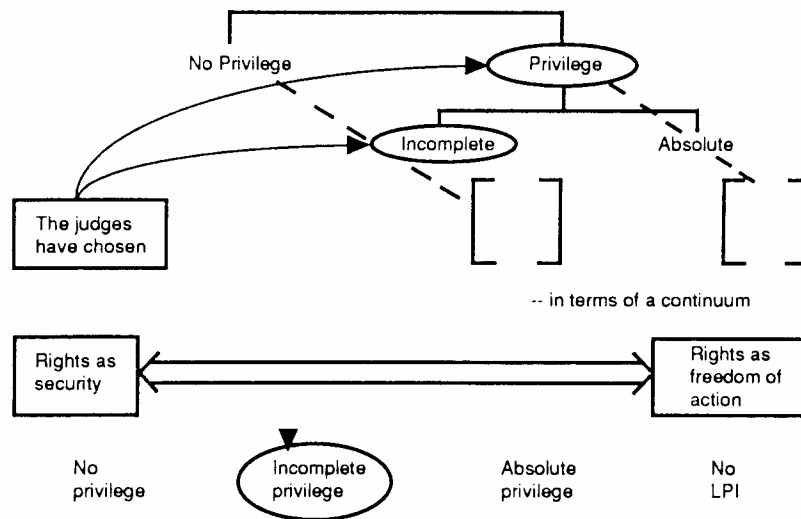
Of course, it may be true that what the judge is "really" doing is "balancing" the conflicting policy vectors to determine just that spot on the continuum where the benefit of certainty comes to outweigh the benefit of flexibility. Moreover, in some courts and in some doctrinal areas it is permissible for the judge to present the decision in this way. The nesting presentation is nonetheless privileged in argumentative practice.

My sense is that the reason for this is that the nesting presentation is associated with "objectivity." Judges prefer it because it harmonizes with the stereotypically judicial pole in the judge/legislator dichotomy. But that argument is for another place. For the moment, let me emphasize the general character of the nesting schema by offering another, much briefer example. In the case of *Vincent vs. Lake Erie*, a ship's captain chose to remain moored to a dock during a storm, and even reinforced his mooring lines, in spite of the fact that the ship's heaving against the dock was visibly damaging it. The question was whether the shipowner had to compensate the dock owner for the damage.

In this case, the nesting sequence begins with the question whether or not there should be a privilege of necessity. In other words, was the destruction of the dock a legal wrong, subjecting the defendant to an injunction against continuation, potentially to punitive damages, and certainly to compensatory damages? The court decided that since the property saved was much more valuable than that destroyed, the ship owner should not be subject to civil or criminal penalties or to an injunction (had circumstances permitted) that would have forced his departure. The court then decided that although the destruction of the dock was privileged, the privilege was conditional rather than absolute, meaning that the shipowner had to pay the dock owner compensation.

The arguments that courts and commentators advance in favor a privilege of necessity are familiar from the previous exercise. They include ideas like "equitable flexibility," the absence of fault, the right to self preservation, the social desirability of preserving the more valuable piece of property, and so forth. These arguments prevail on the issue whether the ship owner has acted criminally, will be enjoined, or will be made to pay punitive damages.

When the court has to consider the question of simple money compensation for the destruction of the dock, the parties redeploy the inventory. This time, the court comes down on the side of compensation, explaining itself by adopting the rhetoric of certainty, as between two innocents, the right of security, and so forth, the very arguments it rejected when deciding the prior question. This can be represented as "nesting" or in continuum terms:



Nesting represents the conservation of argumentative energy. Within a given topic or cluster, there are far fewer arguments deployed than one would expect if one paid attention only to the seemingly endless variety of issues and sub-issues that arise. But nesting also represents the conservation of argument-bites. The play of bite and counter-bite settles nothing (except the case at hand). As between the bites themselves, every fight is a draw, and all combatants live to fight another day, neither discredited by association with the losing side nor established as correct by association with a winner. There are no killer arguments outside a particular context.

Conclusion

Although the above is very tentative and obviously radically incomplete, I hope it is already apparent that it might be disquieting. In the introduction to this paper, I put this in the language of post-structuralism, for reasons that may be clearer at this point. The argument-bites I focused on (how typical?) are defined by their counter-bites. Legal argument has a certain mechanical quality, once one begins to identify its characteristic operations. Language seems to be "speaking the subject," rather than the reverse. It is hard to imagine that argument so firmly channeled into bites could reflect the full complexity either of the fact situation or the decision-maker's ethical stance toward it. It is hard to imagine doing this kind of argument in utter good faith, that is, to imagine doing it without some cynical strategy in fitting foot to shoe. But I admit that these rather unconventional conclusions (unconventional within law, I mean) are only suggested by the above. The development of the linguistic analogy for legal argument may end up taking us in quite the opposite direction for all one can tell for sure at this point.

*Note: This article is an attempt to develop and systematize an outline of intentional torts prepared for my students in 1979. At that time I had done no reading in linguistics or semiotics, and my knowledge in both fields is still primitive at best. I have read Saussure's Course in General Linguistics, and here try to marry it to Llewellyn's article on canons of statutory interpretation. I have also profited greatly from the work on legal argument of Mark Kelman, David Kennedy, Pierre Schlag, James Boyle, Gary Peller, Jeremy Paul, Jennifer Jaff and Jack Balkin. Errors are mine alone.

NOTES

1. Duncan Kennedy is Professor of Law at the Harvard Law School.