A Semiotics of Legal Argument

by

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* This article was first published in Volume 42 of the *Syracuse Law Review*, at page 75, in 1991.

Academy of European Law (ed.),
Collected Courses of the Academy of European Law, Volume Ill. Book 2, 309-365.

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'California (fiction)', *The New Yorker*, 17 March 1973;
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'A Cultural Pluralist Case for Affirmative Action in Legal Academia', *Duke L.J.* (1990) 706 [also in *Sexy Dressing, Etc.*]
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Sexy Dressing, Etc. (1993).

European Introduction: Four Objections

Although *A Semiotics of Legal Argument*, to which this is a European introduction, was written for an American audience, it is shamelessly European-theoretical in its approach. It is an attempt to summarize and extend one of the innovations of American critical legal studies — the appropriation for the analysis of legal argument of the structuralism of Saussure, Levi-Strauss and Piaget. The American introduction gives a post-modern, specifically Derridian, gloss to the enterprise.

In the article, I identify what I claim are the stereotyped 'argument-bites' that legal reasoners use when the legal issue is one that permits a reference to the policies or purposes or underlying objectives of the legal order, rather than a legal issue that can be satisfactorily resolved through deductive rule application or by reference to binding precedent. It is crucial to understanding the article that it is about the choice between two definitions of an ambiguous rule, or between two possible solutions to a gap between rules, or between two conflicting rules. It is not about the application of rules to facts.

Thus, what we have appropriated these famous Europeans for is the American project of radicalizing legal realism. It is striking that European legal scholars, while recognizing them as among the most brilliant, formative characters in their own intellectual tradition, have found no similar use for their work. I think this phenomenon is a key to many interesting current contrasts between European and American legal culture. Here I mean to work on this comparative law question only indirectly, by taking up four objections that Europeans I know have made to the particular appropriation of structuralism and post-modernism that this article represents. I think brief responses to the objections may be a helpful first step in the long-run project.

The four objections are:

(A) in Europe, the policy arguments I identify are not present, at least not in the stereotyped form that I claim they take in American legal materials;

(B) as a theory of law, this is just 'law is rhetoric', well known since the sophists, revived by Perelman, easily refuted by the fact of frequent legal determinacy;

(C) as a theory of law, this is just 'no rule can determine the scope of its own application', well known since Wittgenstein, obvious to anyone who has read Derrida;

(D) European law is so much more formal, certain and legislative than American that the analysis of mere policy argument is of little use East of the Big Water.

A. The Arguments Identified are Not Present as Stereotyped Bites in European Legal Argumentative Practice

I have not read enough European legal arguments, whether in opinions, briefs or arguments of public counsel to be able to respond directly to this objection. But it does seem clear that European lawyers in casual discussion of legal issues use exactly the same argument-bites as do Americans. Moreover, the initial task of generalizing and formalizing legal policy argument was a joint project of German and French scholars (for example, Ihering and Demogue). While leaving open the possibility that policy argument in Europe does not have the stereotypical character that I allege is present in the US, I am skeptical.

My sense is that Europeans do not recognize the bites that I isolate in this article because they are unfamiliar with the analysis of policy argument as a practice. Paradoxically, the characteristic European alternation between a cynical and a formalist legal consciousness enables them to do policy argument unself-consciously, from 'the inside', as though each argument were a tailor-made response to 'the facts'. In cynical legal consciousness argument is experienced as transparently manipulative and instrumental, reflecting the pre-selected partisan interest of the arguer. In the formalist mode, there is an uncritical acceptance of what-ever the judge says as authoritative. Policy argument, which is above all a mediation between partisan or ideological interest and legal logic and universality, doesn't figure on either side of the cynicism/formalism divide.

In the American mode, there is a much larger intermediate area within which neither cynicism nor formalism, but a vague natural law or normative consciousness prevails. I should say that I consider this American mode to be alternately naive and self-serving; I do not think it represents a viable 'third space' between freedom and mechanical constraint. The effort to develop it, however, has led to a kind of self-consciousness about the normative enterprise in law that is lacking in Europe.

I have a sense that this difference between cultures is gradually lessening, in part because of the general phenomenon of American cultural imperialism in law, but in larger part because the development of the law of the European Community has occurred in a fashion strikingly similar to the development of American law. But more of this in the discussion of the fourth objection.

B. The Bites Analysis is Just Another Example of the Theory that Law is Rhetoric

The notion here is that at least since the sophists there has existed a 'nihilist' strand in legal philosophy that denies the 'objective' status of legal reasoning, claiming that it is always possible to argue either side of a legal issue and that the arguments come in stereotyped form as 'topoi'. Is 'this' just 'that'? There is an undeniable link between the approach of this article and that tradition, although the actual influence of Perelman's rhetoric theory is indirect (the rhetoric theory influenced at least a few legal realists, for example, Friedrich Kessler, and thereby critical legal studies).

But there are also important differences between the rhetoric theory and the approach taken here. First, I am not proposing a 'theory of law' in the familiar European legal philosophical sense (positivism, natural law, Scandinavian realism, etc.). This article is a description of the practice of policy argument, understood as one of the many activities of lawyers, judges and legislators. I think of it as a contribution to the positive sociology of legal knowledge.

Second, I don't deny that there is often an experience of determination of the outcome of a legal case by a single, obviously applicable, pre-existing rule, so that resort to policy argument appears unnecessary or even improper. I make no general assertion that law is always indeterminate, or that it is always possible to argue both sides of a question. As a matter of fact, the contrary is quite obviously the case — as a matter of fact, it is not always possible to argue both sides.

At the same time, it is uncontroversial that rule systems contain gaps, conflicts and ambiguities that arguers routinely present as resolved by appeal to non-deductive legal reasons, or what I call, broadly, policy arguments (meaning to include arguments from principles and rights as well as instrumental or consequentialist arguments), as opposed to being resolved by the deductive procedure of rule application. In other words, there is a second experience of legal necessity, different from that of deductive rule application. What is controversial, in legal philosophy, is how to understand this doubleness of the phenomenon of legal necessity.

There are a number of questions here. This article addresses one of them: With what tools do legal arguers generate the experience of necessity in cases that appear to require something more than the deductive application of rule to facts for their resolution? In other words, this article is about the choice among possible definitions for the rule applicable to the facts, a choice made necessary by the existence of gaps, conflicts and ambiguities. Given the experience of non-deductive determinacy, this can be understood as a kind of base line, or fundamental question for the sociology of legal knowledge. I see it as only one part of the general study of the experience of

a legal judgment as legally necessary. (In the positivist tradition, the necessity in question is normative only to the degree that on some independent basis there is a moral obligation to obey the law. Whether or not there is such an obligation, necessity means that there is a non-deductive 'correct', 'objectively required', legal outcome to the problem of rule-definition.)

I undertake the inquiry into the practice of non-deductive legal argument about rule-definition without any pre-commitments as to the ontological status of the necessity that legal arguers sometimes achieve for themselves and their audience. I treat the factual experience of necessity, very much in the post-modern mode, as an 'effect'. This means rigorously constraining oneself to the structural analysis of the textual productions of the arguers, and ignoring their own claims about the ontological status of the necessity they produce — that is, their claims about how their arguments reflect the 'truth' about the positively enacted legal materials or about the logic of legal reasoning (or the two combined). The study of the effect of necessity thus means making a very traditional Continental manoeuvre — that of 'bracketing', or simply putting aside for the time being or maybe forever, the question of the 'essence' of which necessity might be an 'appearance', and concentrating instead on the 'phenomenology' of necessity. Judith Butler has recently adopted a similar approach to the phenomenon of gender identity.

The analysis of the production of legal necessity in legal texts is quite different from the analysis of the production of moral or political-philosophical necessity in discussions of what the law ought to be. (Because in moral or political-philosophical argument there are other sources of normative authority than the rule of recognition, and because any given legal system is likely to exclude categorically some moral and political arguments.) But one might choose to explore the current practice of normative argument in legal philosophy using the same bracketing technique this article applies to positive legal argument.

From the point of view of the normative theorists themselves, such an inquiry would be strictly speaking irrelevant, or, I would say more optimistically, strictly speaking preliminary to normative legal philosophy conceived as the search for a grounding (a normative 'behind') for legal judgment. But the inquiry is irrelevant or preliminary not because it is 'just' a rhetoric theory or because it is 'nihilist', but because it is not about normative judgment.

Analysing the structure of legal argument does not help us figure out what the rule or its application should be as a matter of principle, or if we took rights seriously, or in the ideal speech situation; it even more clearly does not help us figure out whether the notions of principle or of rights or of an ideal speech situation are coherent. (I doubt they are.) The strategy here is based on the idea that the investigation of the effect or phenomenon of legal

necessity is 'interesting' in the short run and likely to have an indirect impact on our normative thinking in the long run.

The study of non-deductive legal argument about rule-definition, in the mode of this article, seems to produce, quite often, an experience of disillusionment akin to that of 'loss of faith' in the religious domain. It is not that the stereotyped and mechanically operational character of non-deductive legal discourse 'proves' anything at all about the possibility of moral grounding. It is just that a large proportion of moral and political-philosophical discourse seems to be a somewhat elaborated version of the legal argument-bites, no less stereotypical and no more self-conscious about the problem of interminable operational transformability. On this reading, the normative legal philosophers have underestimated the challenge of skepticism, perhaps because they have relied on unsophisticated pictures of how law works.

The attempt to plumb the normative 'behind' has been consistently distorted by reliance on particular understandings of the 'surface' or illusory present of legal argument. What is particular about these understandings is sometimes their reliance on common sense or culturally current notions about law that are obviously part of the self-serving ideology of the legal profession. But what is particular is also sometimes the circular derivation of the analysis of the illusory present or surface of legal argument from the very 'meta' commitments (to conceptions of the 'nature' of law or legal determinacy) that the descriptions supposedly validate.

C. No Rule Can Determine the Scope of its Own Application

The third objection is that the insight that policy analysis cannot determine rule-definition is uninteresting, because it follows from the well known point that no rule can determine the scope of its own application. If rules cannot determine outcomes, it would be naive to expect policy arguments to determine rules. A variant of this critique is sometimes stated in post-modernist terms: difference or slippage between the textually affirmed determinacy of the rule as signifier and the signified – a particular instance of rule application – is inevitable. That this should be true of rule-choice as well as of rule application is no surprise.

A first response is that this article does not attempt to establish that policy analysis (broadly conceived) can or can't do anything. It describes how policy analysis works in practice – that is, what its textual content is and how practitioners manipulate it by operating on the elements of that given content. As a matter of fact, it appears that practitioners sometimes use policy argument to generate in their audience the experience of the necessity of a particular choice of rule definition. But this article does no more than describe the tools with which they sometimes succeed and sometimes fail at this task.

The article is also part of a broader attempt at a positive sociology of legal knowledge. The broader goal is to understand how two social practices, norm definition and adjudication 'under' norms, fit into and affect social life. No one seems to think we should jump from the logically impeccable assertion that no rule can determine the scope of its own application to the conclusion that these practices, of positive enactment and adjudication, are irrelevant to understanding what happens in society until we know what does determine the scope of their application, if indeed that can ever be known.

But neither of the two ways of understanding the maxim is much help, at least as of now, in trying to do sociology in the aftermath of the loss of faith in rules as self-applying. In its logical, or Wittgensteinian form, as a proposition about rules, the problem is that the maxim's truth is merely negative, no help in explaining the actual experience of the organization of action through rules. Within that approach, it is common to resort to the notion of a form of life, or interpretive community.

But the assertion of the existence of some mode of intersubjectivity that permits rules to work is no more than the insertion of a 'black box'. We still have to figure out how 'interpretive communities' come into existence and how they function to make both rule application and the resolution of gaps, conflicts and ambiguities possible. This is exactly the level at which the study of non-deductive legal argument becomes a necessity, since it is one of the conspicuous elements of the actual practice of interpretive community.

In the alternative post-modern version, it is wrong to interpret 'difference' as a logically necessary aspect of interpretation – it is merely an event that sometimes subverts the aspiration to presence through textuality. To elevate it to a logical necessity – to treat it as something inevitable, a 'truth' – would land us in the aporetically self-invalidating position of affirming the truth of the impossibility of truth, while at the same time denying the actual experience of determinacy. Deconstruction is rather an event brought about by someone doing the work of deconstruction; whether it will 'happen' in any given case cannot be known in advance, no matter how sure the deconstructer may feel that he or she will succeed.

At this point, the study of the structure of non-deductive legal argument is useful not as a way to instantiate or to endlessly re-prove the truth of the maxim, but as part of the post- or pre-post-modern enterprise of figuring out how the experience of necessity can come into being in the world and yet succumb, endlessly, to undermining.

There are numerous puzzles here. First, if no rule can determine the scope of its own application, what are we to make of the experience of deduction: there sometimes seems to be only one possibly relevant rule, the scope of whose application *seems* to be determined straightforwardly – by applying the definitions of the terms of the rule to facts that have themselves been au-

thoritatively formulated so that they fit the definitions? When this happens, as, let's face it, it does all the time, what is going on? Is the experience always rightly characterized as making a mistake about the truth of the situation?

Legal work can often destabilize the experience of a given case as involving only issues of rule application, in effect generating a gap, conflict or ambiguity where none at first appeared. On the other hand, legal work can often at least apparently resolve into legal necessity a gap, conflict or ambiguity that had at first appeared to require some kind of extra juristic basis for decision. When these things happen, are we to understand them as a process of discovery of an underlying, trans-argumentative reality about the legal materials, or as 'ungrounded?'

This article has nothing to say about these questions. It is about the structure of the practice of non-deductive legal argument. Nonetheless, it poses a challenge for those who believe that there is a form of non-deductive legal necessity, necessity in the choice of a rule definition in the face of a gap, conflict or ambiguity, that is something more than the brute experience of not being able to come up with a plausible counter to a proposed legal solution. But the challenge is not in the form of a logical refutation, not direct in the way that 'no rule can determine the scope of its own application' confronts naive theories of ordering through rules.

The challenge is this: Given the stereotyped content of the argumentative repertoire, and the operational practices by which the repertoire is adapted to particular situations, by what mechanism can we imagine non-deductive legal necessity in rule definition coming into being?

D. The Analysis of Policy Argument is Irrelevant for Europe Because European Law is Formal, Certain and Legislative by Contrast with American Law

The fourth objection is that the kind of policy argument this article describes counts for a lot in the United States (and perhaps in Anglo-Commonwealth countries other than Britain), but not because it has to in the nature of legal reasoning. American culture is notably informal by contrast with European. It is 'freer', in some very desirable senses, but always bordering on *laissez aller*, unbuttoned, without underlying structures of educational, cultural and social discipline.

American law is particularly uncertain, both because of its precedential (as opposed to code) basis and because of federalism. In interpreting a legal corpus that is already notably uncertain, American judges have shown themselves incapable of being or unwilling to be bound by the elements of formality that do exist in the system. They substitute policy analysis for the

missing elements of codification and strict adherence to legal logic. In the process, they arrogate to themselves, and are conceded, a degree of power far greater than would be tolerated in Europe, where it is taken for granted that codes combined with the discipline of legal reasoning subordinate them to legislative authority.

The result is a kind of vicious circle, in which uncertainty in an already informal general culture invites policy analytic approaches that allow judges to usurp the legislative function, which in turn accentuates uncertainty, inviting further policy analysis, and so on. It is not surprising that American scholars are obsessed with determinacy and indeterminacy in adjudication, but it is also not very interesting for Europeans.

Is this at all plausible? What about the alternative theory, that European legal culture is simply undeveloped by contrast with American? Perhaps Europeans do indeed experience legal necessity in situations where Americans see gaps, conflicts and ambiguities arbitrarily rather than rationally resolved. But perhaps the explanation is not the European code system, or unitary national states, or greater mastery of or cultural commitment to the forms of legal reasoning, but innocence, paradoxical willed innocence, for better or worse, of the possibility of non-Marxist legal critique.

If this is the case, the development of the law of the European Community poses already and will continue to pose a profound challenge to the strategic denial of the nature of adjudication. Moreover, the objective, or more broadly the merely rational character of adjudication, its capacity to generate the effect of necessity, is an important building block in the construction of Western culture. Legal necessity is a model for necessity in general (not, of course, the only model). For this reason, the challenge is to something more than the role of judges in European integration or disintegration. This is not the place to explore these questions, beyond the remark that the exclusion from influence on European legal scholarship of the most advanced European critical thinkers in the structuralist and post-modern traditions may be more than an accident. It may be one of the mechanisms through which the undeveloped reconstitutes itself as the merely conservative.

I. Introduction

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 favour 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, existence and delimitation of legally protected interests, liability for unintended injury).

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 an-other, 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, and (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.

II. 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 labour 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
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 the judge has no power to intervene
there is prima facie liability for intentional harm in the absence of 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 the defendant's desirable activity
liability will encourage the defendant to take precautions
rebus sic stantibus (only as long as circumstances remain the same)

III. 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 behaviour 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-à-vis legislatures (institutional competence arguments).

I have omitted the whole category of arguments about the correct interpretation of authorities (e.g., arguments to the effect that a precedent does or does not 'govern', that a statute does or does not 'cover' the case). But it is worth noting that the 'policy' arguments below are often deployed to support a particular interpretation of a case or statute, or to resolve a conflict of authority, as well as to deal with cases understood to be 'of first impression'.

A. A Typology of Argument-Bites in Pairs

1. Substantive Arguments

(a) 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)

(b) 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

(c) Social Welfare Arguments

immunity will discourage the plaintiff's desirable activity
vs.
liability will discourage the defendant's desirable activity

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 labour gives an incentive to production
vs.
legal protection inhibits competition in markets for goods and ideas

(d) 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

2. Systemic Arguments

(a) Administrability Arguments

the proposed solution will be easy to administer
vs.
the proposed solution lacks equitable flexibility

(b) Institutional Competence Arguments

no such right has ever been recognized at common law, so the judge has no power to intervene
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.

B. Remarks on Argument by Counter-Bite

The phenomenon of the countermaxim is complex. 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.

IV. Operations in Legal Argument

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 appears 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. 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.

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 it will always be possible to argue them 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 labour 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

This 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. 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.

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 the judge has no power to intervene
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. The mediator argues for 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 behaviour. 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 behaviour 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 decrease 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. 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.

B. 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 favour 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.

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 counterparts. 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 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...]

V. 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.

A. 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, which 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.

B. 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-disclaimable duty on anyone who enters a contract of this particular kind?

To my mind, one of the most urgent tasks of legal semiotics is 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 defences) 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:

1. Formalities Cluster

(denial)
defendant induced plaintiff's pre-formality or extra-formality reliance, so should compensate plaintiff's loss
vs.
defendant did not induce, plaintiff did not rely, plaintiff was not injured

(symmetrical opposition)
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

(focusing on opponent's conduct)
defendant induced plaintiff's pre-formality or extra-formality reliance, so should compensate plaintiff s loss
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

(symmetrical opposition)
the proposed formality will be easy to administer
vs.
the proposed formality lacks equitable flexibility

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

(refocusing on opponent's conduct)
the proposed formality lacks equitable flexibility
vs.
because the parties can adjust their behaviour to the formality if they want to, it is paternalistic to disregard it after the fact

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

(mediation)
the proposed formality will be easy to administer
vs.
the inability of weak parties to master the proposed formality will unacceptably 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.

2. Compulsory Terms Cluster

(counter-theory)
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

(counter-theory)
the defendant should not be bound because the plaintiff had superior bargaining power
vs.
the law has no concern with unequal bargaining power

(flipping)
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

(counter-theory)
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 over-reaching

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 discussion of 'nesting', below, is situated in the cluster that arguers invoke when they have identified the legal issue as involving the definition, through specifying defences, of the contours of a legally protected interest.

C. Concluding Remark on the Interdependence of the Meanings of Argument-Bites

The claim that words 'get their meanings' not from the things or ideas they signify but from their relationships with other words is often presented in a way that is, to put it mildly, mystifying. I want here to make an analogous claim about argument-bites, but one that seems to me relatively straight-forward.

When a practised legal arguer puts forward a proposition such as 'there should be no liability without fault', he or she does so with a professionally heightened sense of those words as 'rhetoric'. The legal arguer is more aware than the lay arguer, either consciously or close to consciously, that there are counter-arguments derivable by operation, that 'no liability without fault' can be supported by sub-arguments based on rights, social welfare, administrability, and so forth, and that this argument is associated with the other arguments in a doctrinal cluster.

To say that the 'meaning' of 'no liability without fault' depends on its existence in relationship to 'as between two innocents, he who caused the damage should pay', is to say that if we imagine eliminating the latter phrase from the vocabulary of argument-bites, then 'no liability without fault' would *ipso facto* become a different, and likely a more powerful or valuable argument than it is when it is counterable by 'as between two innocents...' Of course, there would still be other counters, such as 'but you were at fault'. And the situation might be one in which 'no liability without fault' seemed a weak or obtuse moral position, even though no stereotyped, familiar 'as between two innocents...' counterbite was available.

It is even possible that working ad hoc, or opportunistically, the other side might develop the very words 'as between two innocents'… as their considered response to the deployment of 'no liability without fault' in a particular case. But then 'as between two innocents...' would be a somewhat surprising, complex, hard to evaluate, hand-crafted utterance, without the resonance that comes from repetition in thousands of other cases. It might carry the day, but if it did so, it would be as an example of the power of invention tailored to context.

It may at first seem hard to reconcile this thought-experiment, in which we imaginatively eliminate a bite from the lexicon, with the idea that we

'generate' 'as between two innocents...' from 'no liability without fault' by the 'operation' of 'mediation'. If this is the case, how could 'as between two innocents...' not be part of the vocabulary of bites?

The answer lies in the fundamental proposition that the possibility of generating a bite by counter-theory does not guarantee that such a bite has in fact been generated, or indeed that such a counter-bite will ever be part of the vocabulary. The system of bites, counter-bites, support systems and clusters that exists at a given moment is a product of the actual history of a particular legal discourse, at the same time that it is the product of the logic of operations. An existing system is always incomplete, looked at from the point of view of possible operations, and always changing as new bites enter the lexicon and others change their form or fall out of use altogether.

Each change of this kind alters the possibilities of legal discourse, because it changes what is available to the arguer as stereotyped argument to be deployed across the range of fact situations as they arise. But each change also changes the meaning and effectiveness of the other bites in the system, because it changes arguers' conscious or unconscious expectations about what will be said in response to those bites. To take a recent example, the phrase 'defendant should be liable because she is the cheapest cost avoider' is a new argument-bite. Its presence in the repertoire of numerous legal arguers has changed the meaning of (lessened the value of) 'no liability without fault' and also of 'as between two innocents...' because neither of them seems at all responsive to it, though both belong to the same cluster of arguments about liability for unintentional injury.

The emergence of 'she is the cheapest cost avoider' has also changed the two traditional bites in a more subtle way. 'No liability without fault' has as part of its support system a 'social welfare argument' to the effect that 'there is no social interest in shifting the costs of blameless activity'. On the other side, 'as between two innocents...' is supported by 'activities should be made to internalize their true social costs'. It is still unclear to what extent, if any, these support-bites retain coherence after the emergence of 'she is the cheapest cost avoider'. Even if it turns out that the support bites are still sensible, the primary bites will change their meaning because they will evoke, between them, only a part rather than the whole of the available stereotyped economic arguments for fault and strict liability.

I think it probable that 'she is the cheapest cost avoider' will disappear from the lexicon, rather than persisting until a new equilibrium is reached. But if the new bite does persist, it is not at all likely that it will do so without affecting the whole system. The analogy (present to the mind of Saussure when he developed this analysis at the turn of the century) is to the impact of the ap-

pearance of a new commodity on the prices of all other commodities in a Walrasian general equilibrium system.[1]

VI. 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-defence. In *Courvoisier v. Raymond*,[2] a shop-keeper shot and injured 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 defence of mistake in self-defence 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 defence to the commission of an intentional tort.

Some of the considerations commonly advanced in favour of and against the defence 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-defence 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-defence
> 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 defence
> vs.
> no court has recognized this defence before

[1] F. De Saussure, *Course in General Linguistics* (R. Hams trans. 1986) 112-14.
[2] 23 Colorado Reports 113, 47 Pacific Reporter 284 (1896).

deciding the precise contours of a mistake defence 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 favour of a defence 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 behaviour 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-defence

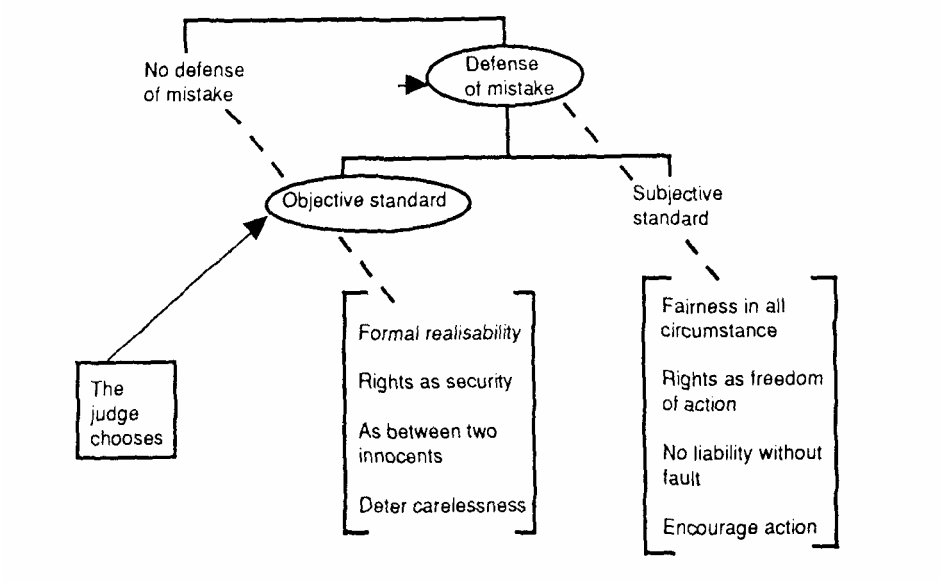
the community does not expect more of people in danger than that they act in good faith
vs.
the community expects people in danger to act reasonably

adjusting the standard to the actual character of the defendant allows equitable flexibility
vs.
a 'subjective good faith' standard is hopelessly vague and manipulable

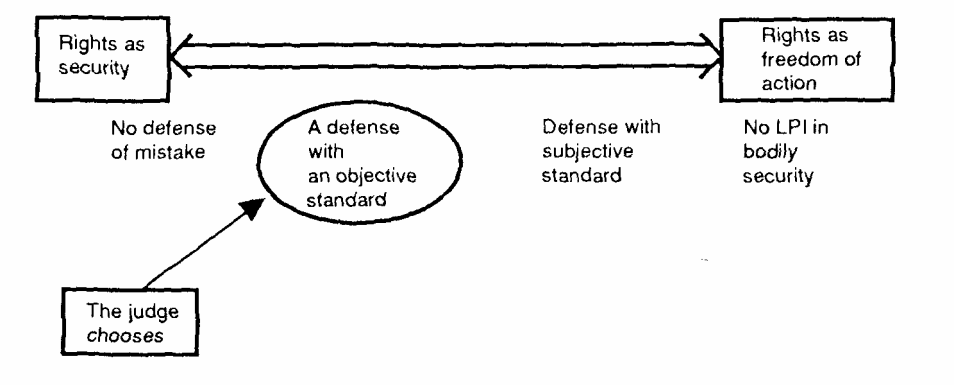
this is the first time the court has imposed a reasonableness limitation on the right of self-defence
vs.
reasonableness is the general rule in defining permissible conduct

'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 defence 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 honour the pro-defendant arguments in creating the defence, but to honour 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 versus 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 counter-argument are presented as simply 'correct' as applied to the general question, without this presentation binding the arguer in any way on the nested subquestion. 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 defence 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 favour 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.

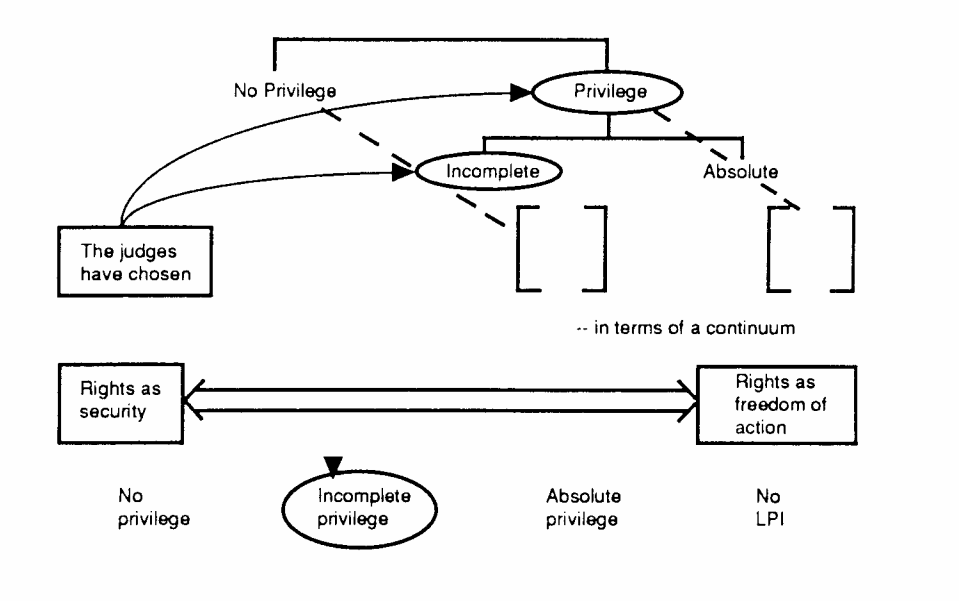
My sense is that the reason for this is that the nesting presentation is associated with 'objectivity'. Judges prefer it because it harmonizes with the stereotypically judicial pole in the judge/legislator dichotomy. But that argument is for another place. For the moment, let me emphasize the general character of the nesting schema by offering another, much briefer example. In the case of *Vincent v. Lake Erie*,[3] 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 ship owner 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? If so, then in most cases it would follow not only that the ship-owner would have to compensate the dock owner for the damage, but also that the dock owner could, in self-defence, repel or unmoor the ship, and that the ship owner would be subject to an injunction against continuation, and potentially liable for punitive damages. In this case, the court was clearly unwilling to subject the ship owner to civil or criminal penalties, or to an injunction that would have forced his departure (had circumstances permitted), or to unmooring by the dock owner. But the court held that the ship-owner had to pay the dock owner compensation, so that although the destruction of the dock was privileged, the privilege was incomplete rather than absolute.

The arguments that courts and commentators advance in favour of 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 courts and commentators consider the question of simple money compensation for the destruction of the dock, they redeploy the inventory. This time, they come down on the side of compensation, explaining them-selves by adopting the rhetoric of certainty, as between two innocents, the right of security, and so forth, the very arguments they rejected when deciding the prior question. This can be represented as 'nesting' or in continuum terms:

[3] 109 Minnesota Reports 456, 125 Northern Western Reporter 221 (1910)



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.

VII. 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 of 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.

Appendix

There is now a small but substantial literature that adopts the general approach to legal argument described in this paper.[4] The more general post-modern approach to legal theory now has a literature too large to list fully.[5]

[4] The contributions I am aware of are: D. Kennedy, *International Legal Structures* (1987); Bakkan, 'Constitutiona1 Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought', 27 *Osgoode Hall Law Journal* (1989) 123; Boyle, 'The Anatomy of a Torts Class', 34 *American University Law Review* (1985) 1003; Frug, 'The Ideology of Bureaucracy in American Law', 97 *Harv. L. Rev.* (1984) 1276; Gordon, 'Unfreezing Le-gal Reality: Critical Approaches to Law', 15 *Florida University Law Review* (1987) 195; Heidt, 'Recasting Behavior: An Essay for Beginning Law Students', 49 *University of Pittsburg Law Review* (1988) 1065; Jaff, 'Frame-shifting: An Empowering Methodology for Teaching and Learning Lega1 Reasoning', 36 *Journal of Legal Education* (1986) 249; Kelman, 'Interpretive Construction in the Criminal Law', 33 *Stanford Law Review* (1981) 591; Paul, 'A Bedtime Story', 74 *Virginia Law Review* (1988) 915; Schlag, 'Cannibal Moves, An Essay on the Metamorphoses of the Legal Distinction', 40 *Stanford Law Review* (1988) 92; Schlag, 'Rules and Standards', 33 *UCLA Law Review* (1985) 379. The most complete presentation of the basic ideas in the field, and of the canonical examples, is Balkin, 'The Crystalline Structure of Legal Thought', 39 *Rutgers Law Review* (1986) 1. *See also* Balkin, 'Taking Ideology Seriously: Ronald Dworkin and the CLS Critique', 55 *UMKC Law Review* (1987) 392; Balkin, 'Nested Oppositions', 99 *Yale Law Journal* (1990) 1669; Balkin, 'The Hohfeldian Approach to Law and Semiotics', in R. Kevelson (ed.) 3 *Law & Semiotics* (1989) 31.

[5] The works that I've read that are closest in inspiration to this essay are: M. Kramer, Legal Theory, Political Theory, and Deconstruction: Against Rhadamanthus (1991); Ashe, 'Zig-zag Stitching and the Seamless Web: Thoughts on Reproduction and the Law', 13 *Nova Law Journal* (1989) 355; Balkin, 'Deconstructive Practice and Legal Theory', 96 *Yale Law Journal* (1987) 743; Berman, 'Sovereignty in Abeyance: Self-Determination

According to Jack Balkin,[6] the idea of discussing legal discourse as deployed in dyadic choices between possible legal rules was 'borrowed from various Structuralist thinkers'. In a footnote, he cites C. Levi-Strauss, *The Raw and the Cooked* (1969) and C. Levi-Strauss, *Structural Anthropology* (1963, 1976).[7] It is also a commonplace that critical legal studies approaches to legal reasoning are 'just' a revival of legal realism.[8] Well, which is it?

It seems to me that the version of legal semiotics represented by this paper is a kind of jerry-built amalgam of elements from realism and structuralism, but not an 'application' or 'revival' of either. Though there is an element of fatheadedness in 'tracing the origins of my thought', that is just what I'd like to do briefly in this appendix. My goal is not to settle the question of origins and influences (impossible to do in any case) but to contribute some raw material for the study of borrowing.

As I see it, there are three basic elements to the proposed semiotics of legal argument. These are: (1) the idea of reducing the 'parole' of legal argument to a 'langue' composed of argument-bites, (2) the idea of relating the bites to one another through 'operations', and (3) the idea of 'nesting', or the reproduction, in the application of a doctrinal formula, of the confrontation between argument-bites that the formula purported to resolve.

and International Law', 7 *Wisconsin International Law Journal* (1988) 51; Boyle, 'The Politics of Reason: Critical Lega1 Studies and Local Social Thought', 133 *U. Pa Law Review* (1985) 684; Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *Chicago Legal Forum* (1989) 139; Dalton, 'An Essay in the Deconstruction of Contract Doctrine', 94 *Yale Law Journal* (1985) 997; Frug, 'Argument as Character', 40 *Stanford Law Review* (1988) 869 ; Frug, 'Rereading Contracts: A Feminist Analysis of a Contracts Casebook', 34 *American University Law Review* (1985) 1065; Heller, 'Structuralism and Critique', 36 *Stanford Law Review* (1984) 127; Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship', 21 *New England Law Review* (1986) 209; Kennedy, 'The Turn to Interpretation', 58 *Southern California Law Review* (1985) 1; Kennedy, 'Spring Break', 63 *Texas Law Review* (1985) 1277; Olsen, 'The Sex of Law', D. Kairys (ed.), *The Politics of Law* (2nd ed., 1990); Peller, 'The Metaphysics of American Law', 73 *California Law Review* (1985) 1152; Schlag, '"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction', 11 *Cardozo Law Review* (1990) 1631; Torres & Milun, 'Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case', *Duke Law Journal* (1990) 624. *But see also* Cardozo Law Review Symposium on Deconstruction and the Possibility of Justice (1990); W. Mitchell (ed.), The Politics of Interpretation (1983); M. Minow, Making All the Difference (1990). The longer this list got, the more arbitrary it began to seem. I am not suggesting a canon, and have only read a part of the 1iterature.

6 'The Crystalline Structure of Legal Thought', 39 *Rutgers Law Review* (1986) 1, 5 n.9.

7 *See also* Balkin, *supra* note 4, at 40-41, and Balkin, 'The Domestication of Law and Literature', 14 *Law and Society Inquiry* (1989) 787, 806 n.24 .

8 E.g., Duxbury, 'Robert Hale and The Economy of Legal Force', 53 *MLR* (1990) 421.

A. Argument-Bites

The first idea, like the other two, was probably occurring to a lot of different people at more or less the same time. For me, it was a way to radicalize, for the purposes of a law school paper debunking 'policy argument' in constitutional law, Llewellyn's famous article *Canons on Statutes*, which was reprinted as an appendix to *The Common Law Tradition: Deciding Appeals*.[9] Llewellyn had no interest in extending his critique of statutory interpretation to legal reasoning in general. The realists as a group were more preoccupied with the critique of what they saw as formalist argumentative techniques than they were with reflection on their own beloved alternative of policy analysis.

The extension of the 'bites' analysis from statutory interpretation to policy discourse meant rejecting the ‘reconstructive’ impulse among the realists, which seemed (in 1970) to be an evasion of the more 'irrationalist' or 'existential' implications of their own work. Policy discourse at the time seemed deeply implicated in, indeed the major vehicle of the Cold War Liberalism against which the anti-war movement, the civil rights movement and the women's movement were then aligning themselves.

The source in structuralism of the idea of reducing legal argument to bites was Levi-Strauss’s discussion of 'bricolage' in the first chapter of *The Savage Mind*.[10] Levi-Strauss relativizes the distinction between rationality or technical reasoning and the activity of myth making. In spite of its pretensions to fit precisely whatever phenomenon it addresses, technical reasoning is inevitably the 'jerry-building' (bricolage) of an edifice out of elements borrowed from here and there, elements initially meant for other purposes (and themselves therefore jerry-built of yet other, earlier bits and pieces). Legal argument, understood as the deployment of stereotyped pro and con argument fragments, seems a particularly good example of bricolage masquerading as hyper-rationality.

At first, this idea seemed useful mainly for classroom teaching. It was the basis for 'mantras' of argument and counter-argument about contract formalities, for example. I used it, tentatively, in *Form and Substance in Private Law Adjudication*,[11] in developing the stereotyped pro-con exchange of arguments about the choice between rules and standards, and in a discussion of the problem of the conflict of rights in *The Structure of Blackstone's Commentaries*.[12] When I switched to teaching torts, I incorporated it into teach

[9] K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 521-35.
[10] C. Levi-Strauss, *The Savage Mind* (1966) 16-22 (hot book in 1970).
[11] Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harv. L. Rev*. (1976) 1685.
[12] Kennedy, 'The Structure of Blackstone's Commentaries', 28 *Buffalo Law Review* (1979) 205, 355-60.

ing materials, beginning with what then seemed the pair of pairs: no liability without fault vs. as between two innocents.

This article attempts a further incorporation of structuralist ideas by recasting the 'canons' analysis of argument-bites in the terms of F. Saussure, *Course in General Linguistics*.[13] This represents a circuitous return to origins, since the idea of bricolage was itself an adaptation of the Saussurian theory of the sign.[14] I'm sure there are disadvantages to assimilating legal argument to the general analysis of signs. But the move seems to make available for legal semiotics many insights of the more general study that will advance the specifically legal enterprise.

It is a problem that discussions of Saussurian linguistics in the American intellectual community often make it sound as though signs 'get their meaning from each other' in a way that utterly divorces them from their referents, indeed in a way that suggests that they 'signify' nothing but their relations among themselves. In the 'Concluding Remark on the Interdependence of the Meanings of Argument-Bites', in the text, I propose a much less metaphysical rendering of Saussure's insight.

B. Operations

The second element in the proposed semiotics of legal argument is the notion of an 'operation'. Jack Balkin is right in associating this idea with Hohfeld.[15] When Hohfeld pointed out the ambiguity in the common legal usage of the word 'right', that it sometimes meant 'privilege' and sometimes 'claim', he suggested the possibility of answering every privilege-assertion with a claim-assertion.[16] This seems to me the prototypical operation.[17]

A second realist origin is in the early twentieth-century debate about the social utility of more or less extensive protection of intangible property rights. Holmes dissent in the *Northern Securities* case,[18] along with his concurring opinion in *International News Service v. Associated Press*,[19] Learned Hand's opinion in *Cheney v. Doris Silk* Co.,[20] and Chafee's article,

[13] F. Saussure, *Course in General Linguistics* (1916, R. Hams trans. 1986) (hot book for me in the Spring of 1989).
[14] *See* Levi-Strauss, *supra* note 10, at 18.
[15] *See* Balkin, *supra* note 4, at 32-35.
[16] Hohfeld, Fundamental Conceptions as Applied in Legal Reasoning and Other Essays (1923).
[17] *See* Kennedy & Michelman, 'Are Property and Contract Efficient?', 8 *Hofstra Law Review* (1980) 711; Singer, 'The Legal Rights Debate in Analytical Jurisprudence, from Bentham to Hohfeld', *Wisconsin Law Review* (1982) 975.
[18] *Northern Sec. v. United States*, 193 U.S. 197 (1904) (Holmes, J., dissenting).
[19] 248 U.S. 215 (Holmes, J., concurring).
[20] 35 F.2d 279 (2d Cir. 1929).

Unfair Competition,[21] suggest a formal procedure for generating utilitarian 'pro-property' and 'pro-competition' arguments in any antitrust or unfair competition case.[22]

The structuralist element in the theory of operations was borrowed from J. Piaget, *Six Psychological Essays*.[23] Until recently, it has seemed to me that the main value of Piaget's work for legal analysis lies in his theory of 'accommodation' and 'assimilation' in the development of 'schemas'.[24] A number of us have used these or roughly equivalent ideas from other sources in trying to work out a picture of the historical transformations of American legal 'consciousness'.[25] A second use of the Piagetian approach is in trying

[21] Chafee; 'Unfair Competition', 53 *Harv. L. Rev*. (1940) 1289.
[22] *See* Peritz, 'The "Rule of Reason" in Antitrust: Property Logic in Restraint of Competition', 40 *Hastings Law Review* (1989) 285; Rogers, 'The Right of Publicity: Resurgence of Legal Formalism and Judicial Disregard of Policy Issues', 16 *Beverly Hills Bar Association Journal* (1982) 65.
[23] J. Piaget, *Six Psychological Essays* (D. Elkin (ed.) 1967) 130-31.
[24] *See* J. Piaget, Play, *Dreams and Imitation in Childhood* (C. Gattegno & F. Hodgson trans. 1962). *See also* J. Piaget, *The Child and Reality* (1976) 63-71.
[25] *See* W. Forbath, *Law and the Shaping of the American Labor Movement* (1991); H. Hartog, *The Public Property and Private Power: The Corporation of the City of New York in American Law* (1983) 1730-1870; M. Horwitz, *The Transformation of American Law* (1977) 1780-1860; R. Steinfeld, *The Disappearance of Indentured Servitude and the Invention of Free Labor in the United Slates* (1991); M. Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (1981); Alexander, 'The Dead Hand and the Law of Trusts in the 19th Century', 37 *Stanford Law Review* (1985) 1189; Alexander, 'The Transformation of Trusts as a Legal Category, 1800-1914', 5 *Law & History Review* (1987) 303; Casebeer, 'Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited', 6 *Cardozo Law Review* (1985) 765; Fineman & Gabel, 'Contract Law as Ideology', in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (2nd ed., 1990); Fisher, 'Ideology, Religion and the Constitutional Protection of Private Property: 1760-1860', 39 *Emory Law Journal* (1990) 65; Freeman, 'Legitimizing Racial Discrimination through Anti-Discrimination Law', 62 *Minnesota Law Review* (1978) 1049; Frug, 'The City as a Legal Concept', 93 *Harv. L. Rev.* (1980) 1057; Gordon, 'Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920', in G. Geison (ed.), *Professions And Professional Ideologies In America* (1983) 70-110; Gordon, 'Critical Legal Histories', 36 *Stanford Law Review* (1985) 57; Hager, 'Bodies Politic: The Progressive history of Organizational "Real Entity" Theory', 50 *University of Pittsburg Law Review* (1989) 575; Hurvitz, 'American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts and the Juridical Reorientation of 1886-1895', 8 *Industrial Relations Law Journal* (1986) 307; Jacobson, 'The Private Use of Public Authority: Sovereignty and Associations in the Common Law', 29 *Buffalo Law Review* (1980) 599; Kainen, 'Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State', 31 *Buffalo Law Review* (1982) 381; Katz, 'Studies in Boundary Theory: Three Essays in Adjudication and Politics', 28 *Buffalo Law Review* (1979) 383; Kelman, 'American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers', 58 *St. John's Law Review* (1983) 1; Kennedy, 'Primitive Legal Scholarship', 27 *Harv. Int'l L.J.* (1986) 1; Kennedy, 'Toward an Historical Under-standing of Legal Consciousness: The Case of Classical Legal Thought, 1850-1940', in J. Spitzer (ed.), *Current Research in the Sociology of Law* (1980) Vol. 3; Kennedy, *supra* note 12; Kennedy, 'The Role of Law in Economic Thought: Essays on Fetishism of Commodities', 34 *American University Law Review* (1985) 939; KIare, 'The Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941',

to understand how judges decide cases by 'assimilating' or recasting the facts to fit the legal materials that exist at a given moment, while 'accommodating' or recasting the materials to fit the irreducible particularity of the facts.[26]

This essay extends the Piagetian notion of a schema to legal argument about the choice between two possible rules or between two interpretations of a rule. Arguing about a choice is like sucking or shaking an object: it is an acquired cognitive procedure, a 'praxis', a pre-structured 'response' to a 'stimulus'. The stimulus is the demand for justification of an outcome. The structured response, in this model, is an argument for a rule, or for an interpretation of a rule, that will produce that outcome.

The goal is to catalogue the particular 'operations' through which an arguer moves among argument-bites to construct the case for an outcome. The focus is on the identification of the very particular schemas linking one argument-bite with another. The crucial Piagetian concept here is that of 'reversibility' of schemas.[27] When an arguer has attained the capacity to move from any bite to all others associated with it, and back again, he or she can, first, build an argument's initial rough draft simply by reaction to the

62 *Minnesota Law Review* (1978) 265; Krauss, 'On the Distinction Between Real and Personal Property', 14 *Seton Hall Law Journal Review* (1984) 485; May, 'Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis', 50 *Ohio State Law Journal* (1989) 257; Mensch, 'The History of Mainstream Legal Thought', in D. Kairys (ed.), *The Politics Of Law* (2nd ed., 1990); Mensch, 'Freedom of Contract as Ideology', 33 *Stanford Law Review* (1981) 752; Mensch, 'The Colonial Origins of Liberal Property Rights', 31 *Buffalo Law Review* (1982) 635; Minda, 'The Common Law, Labor and Antitrust', 11 *Industrial Relations Law Journal* (1989) 461; Nerkin, 'A New Deal for the Protection of 14th Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory', 1 *Harvard Civil Rights – Civil Liberties Law Review* (1977) 297; Nockleby, 'Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort', 93 *Harv. L. Rev.* (1980) 1510; Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', 96 *Harv. L. Rev*. (1983) 1497; Olsen, 'The Sex of Law', *supra* note 5; Peller, 'In Defense of Federal Habeas Corpus Relitigation', 16 *Harv. L. Rev.* (1982) 579; Peritz, 'The "Rule of Reason" in Antitrust: Property Logic in Restraint of Competition', 40 *Hastings Law Review* (1989) 285; Rogers, 'The Right of Publicity: Resurgence of Legal Formalism and Judicial Disregard of Policy Issues', 16 *Beverly Hills Bar Association Journal* (1982) 65; Siegel, 'Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation', 70 *Virginia Law Review* (1984) 187, 250 - 59, 262; Simon, 'The Invention and Reinvention of Welfare Rights', 44 *MLR* (1984) 1; Singer, *supra* note 17; Steinfeld, 'Property and Suffrage in the Early American Republic', 41 *Stanford Law Review* (1989) 335; Stone, 'The Postwar Paradigm in American Labor Law', 90 *Yale Law Journal* (1981) 1509; Sugarman & Rubin, 'Towards A New History of Law and Material Society in England, 1750-1914', in G. Rubin & D. Sugarman (eds.), *Law, Economy and Society: Essays in the History of English Law 1750-1914* (1984); Tarullo, 'Law and Politics in Twentieth Century Tariff History', 34 *UCLA Law Review* (1986) 285; Vandevelde, 'The New Property of the 19th Century', 29 *Buffalo Law Review* (1980) 325.

[26] *See* Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology', 36 *Journal of Legal Education* (1986) 518; Kelman, 'Interpretive Construction in the Criminal Law', 33 *Stanford Law Review* (1981) 591.

[27] *See* J. Piaget, *supra* note 23, at 130-31.

opponent's formulation of his case, second, anticipate an opponent's argument simply by examining what she herself will say, and, third, carry on an internal version of the argument playing both parts.

On a quite different level, the experience of legal argument as operations defines the 'tone' of modern legal consciousness, the loss of the sense of the organic or unmediated in legal thought.

As with the adoption of a Saussurian framework, reliance on Piaget has its dangers. It is common in the American intellectual community to think 'Piaget is a structuralist', and that 'therefore' he believes (1) that particular schemas and operations are innate, and (2) that 'the structures determine what people think and do'. First, the borrowing of Piagetian formalizations of the phenomena of reasoning (schema, accommodation, assimilation, operation, reversibility) does not at all imply borrowing whatever theory Piaget holds about their proper interpretation. While the biological status of 'conservation of the object' is a tough question, it would be absurd to argue that either 'no liability without fault' or 'as between two innocents' is either innate or what 'determines' an outcome.

Piaget's work on moral reasoning would appear to be the most relevant to legal reasoning, because Piaget there adapted his cognitive psychology to purposes not unlike ours here.[28] But his stage theory of moral development is about as far as one can get from the approach of this paper. The idea of 'justice' toward which he sees children tending seems no more than a hodgepodge, an inadequately analysed combination of cooperation, consent, autonomy, mutual respect and 'reason'.[29] He seems obtuse about the 'operational' character of moral argument that his own work on cognition suggests. The adoption of the Saussurian framework represents for me the rejection of the notions that arguments determine outcomes by being correct (within the framework of a particular stage), and that there is a privileged or 'highest' mode of argument.

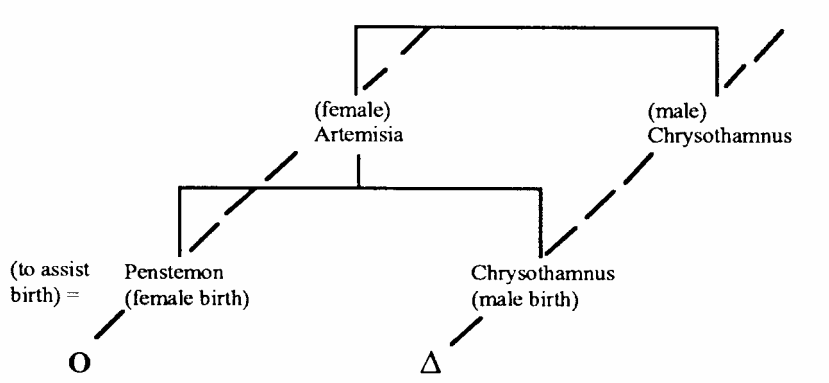
Second, the common American understanding of Piaget's structuralism as a determinism analogous, say, to orthodox Marxism or socio-biology in social theory, or to orthodox Freudianism or behaviourism in psychology, is a misunderstanding. He seems most open to that charge when he is closest to discussing justice,[30] but this is where he is least useful to lawyers. As a cognitive psychologist, he seems closer to Levi-Strauss, for whom some structure is always given, but given as langue rather than as parole, and always changing.

[28] *See* J. Piaget, *The Moral Reasoning of the Child* (Gabain, trans. 1965).
[29] *Ibid.,* at 84-108.
[30] *Ibid.*

C. Nesting

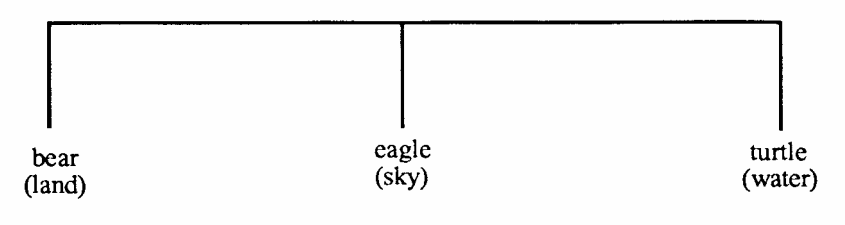
The third element in the proposed semiotics of legal argument is 'nesting', or the reproduction of particular argumentative oppositions within the doctrinal structures that apparently resolve them. This idea owes a lot to the basic realist pedagogical technique of presenting the student with a series of hypotheticals that cause him or her to produce contradictory arguments over a sequence of cases. But I also borrowed it quite directly from C. Levi-Strauss's *The Savage Mind*,[31] in the ambiguous mode of bricolage.

There are three relevant notions, each with a nesting diagram, in *The Savage Mind*. The first[32] is that the elements of a system of plant classifications are arranged in oppositions that correspond to social divisions and practices. These oppositions are sometimes used and reused according to a nesting pattern. His example is the use of Chrysothamnus as a signifier of maleness in opposition to Artemisia (sagebrush), signifying the feminine. The Navaho (according to Levi-Strauss) employ this general North American system, but also categorize Chrysothamnus as a feminine plant because it is used in assisting childbirth. He explains the 'logic' of the system as follows:

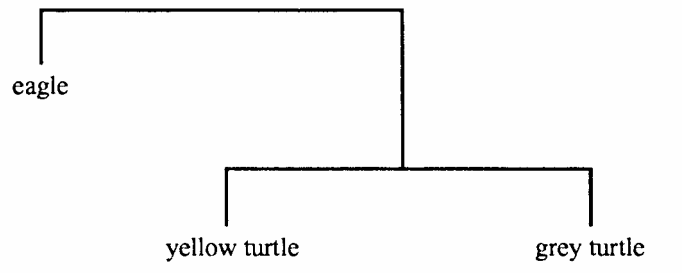


Chrysothamnus is male in the 'main opposition', and plays the male role when it is reemployed within the female division. This synchronic presentation contrasts with a later exploration of the diachronics of structures.[33] Levi-Strauss discusses how the structure we see may be unintelligible without understanding its history. He imagines a tribe divided into three clans, with each name symbolizing an element:

[31] C. Levi-Strauss, *supra* note 10.
[32] *Ibid.,* at 48.
[33] *Ibid.,* at 67-68.



He continues: 'Suppose further that demographic changes led to the extinction of the bear clan and an increase in the population of the turtle clan, and that as a result the turtle clan split into two sub-clans, each of which subsequently gained the status of clans. The old structure will disappear completely, and be replaced by a structure of this type:

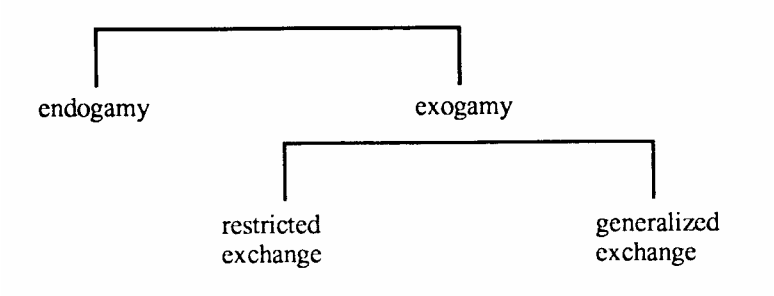


Levi-Strauss speculates that 'after this upheaval the three clan names might survive only as traditionally accepted titles with no cosmological significance'. But it is also possible that the tribe will understand what has happened as a 'logical' transformation of the original system. The new scheme might be intelligible because ‘there were originally three terms, and the number of terms is still the same at the end. The original three terms expressed an irreducible trichotomy while the final three terms are the result of two successive dichotomies; between sky and water and then between yellow and grey’.[34]

Then comes what seemed to me the punch line: “It can be seen therefore that demographic evolution can shatter the structure but that if the structural orientation survives the shock it has, after each upheaval several means of restablishing a system, which may not be identical with the earlier one but is at least formally of the same type’.[35]

[34] *Ibid.,* at 68.
[35] *Ibid.*

A third suggestive passage contrasts endogamy with exogamy. According to Levi-Strauss, exogamous systems practise either 'restricted' or 'generalized' exchange, with the former indicating that marriage partners for group A must be from group B, but not from groups C, D, etc. This leads to the following diagram:

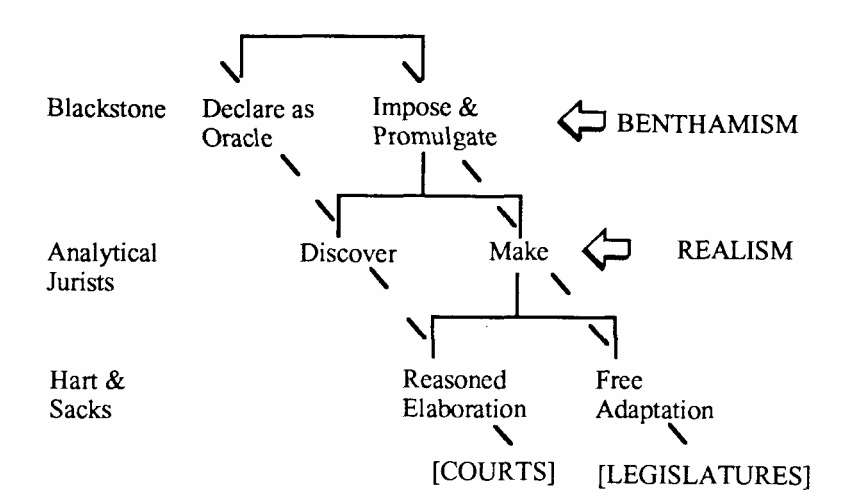


Levi-Strauss comments: 'It will be seen that restricted exchange, the "closed" form of exogamy, is logically closer to endogamy than the "open" form, generalized exchange'.[36]

Back to law. It seemed to me, as an amateur left-wing jurisprude in 1970, that the Hart & Sacks *Legal Process* materials of 1958 represented the current liberal orthodoxy, and played a role in legitimating the passive response of academics and judges to the 'crises of the time'. In a paper critiquing those materials, I argued that they were but the latest in a succession of responses to attacks on the distinction between legislation and adjudication. Each attack had managed to discredit an earlier version of the distinction, but had led to a new version of similar structure. My diagram was utterly contextual, but turned out (to my surprise and delight) to look very like the Levi-Strauss prototypes described above:

[36] *Ibid.,* at 123.

Transformation of Utopian Rationalist Thought



There are several steps between this and the classroom diagrams of *Courvoisier v. Raymond* and *Vincent v. Lake Erie*. I won't try to work them out here.[37] Nesting is first of all something that happens, a phenomenon. It is also quite mysterious, and needs further study and interpretation.[38] I admit to a prejudice in favour of trying to 'discover' things like this, as opposed to elaborating internally the realist or structuralist (or whatever) paradigms on whose intermixing discovery seems to be dependent.

[37] *See* Kennedy, *supra* note 11; Kennedy, *supra* note 12.
[38] *See* Balkin, *supra* note 4.

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