The Politics of Legal Semiotics

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I. Introduction

Over the past fifteen years or so, many American law teachers have begun to address what was formerly a striking anomaly within the rhetoric of legal education. Although traditional legal educators have often maintained that the first year of law school is aimed largely at teaching students to think like lawyers, conventional first-year materials contain virtually no efforts to describe the lawyer's reasoning process. Instead, the typical first-year course is based on a casebook that consists primarily of appellate opinions that serve as examples of legal work product but include no analysis of the skills required to produce it.[1] Moreover, much classroom teaching features a well-trained professor posing hypothetical questions designed to illuminate flaws in judicial reasoning. The apparent idea here is that, by watching the professor at work, students may come to appreciate some subtleties of legal argument. Again, however, a professor using this so-called Socratic method abandons the hope that

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1. For an innovative attempt to break the traditional casebook model by integrating substantive law with methodological training, see J. SINGER, PROPERTY (forthcoming 1993).

she might actually describe to students the reasoning skills that enable her to pose very hard questions.

Sparked in part by the innovative work of Harvard's Duncan Kennedy, a growing number of today's teachers, myself included, have sought to alter the content of first-year classes.[2] Our goal has been to identify and describe the kinds of arguments lawyers make rather than merely to illustrate these arguments. Often this has meant simply noting the similarities between arguments used in widely different contexts. Thus, we might describe how a prosecutor arguing for a good faith exception to the exclusionary rule and a preguant teenager challenging a requirement that she tell a parent of her intended abortion both would use arguments that emphasize the tendency of bright line rules to deter or prohibit too much conduct. Occasionally, we have also sought to illustrate the extent to which legal argument mirrors everyday debate.[3] Always, however, we have clung firmly to the view that labeling and classifying different types of legal argument would serve students well as they are initiated into the profession.

Our emphasis on categories of legal argument, of course, hardly gives us a monopoly on the task of systematizing legal reasoning inside or outside the classroom. Two aspects of Kennedy's creative work and its increasingly broad application to law teaching, however, are somewhat distinctive, and together they create the question that is the subject of this Paper. First, more than other writers, Kennedy and his disciples have tended to focus on recurrent patterns within legal argument. In particular, Kennedy's work and the extensions of Professors Jack Balkin and Joseph Singer have emphasized the frequency with which the same pairs of arguments appear in opposition to each other.[4] Kennedy notes,

2. The pathbreaking teaching materials developed by Duncan Kennedy for his torts class unfortunately remain unpublished. *See* Kennedy, Torts Teaching Materials (1979) (unpublished) (copy on file with the author) [hereinafter Kennedy Teaching Materials]. His early approach to legal thought, however, can be seen in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter *Form and Substance*]; and Keuuedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) [hereinafter *Blackstone's Commentaries*]. A sampling of articles and teaching materials using similar techniques would include Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986) [hereinafter *Crystalline Structure*]; Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197 (1990); Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003 (1985); Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. LEGAL EDUC. 249 (1986); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988); Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); and Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

3. *See* Paul, *supra* note 2, at 928-34.

4. *See, e.g.*, Kennedy, *Form and Substance*, *supra* note 2; Kennedy, *Blackstone's Commentaries*, *supra* note 2; Balkin, *Crystalline Structure*, *supra* note 2; Balkin, *Nested Oppositions* (Book Re-

for instance, that we can often expect one party to argue that a proposed rule is good because it is highly administrable while the other side asserts that the rule's administrability fosters a rigidity that will work serious injustice in particular cases.[5] Moreover, both Kennedy and Balkin have insightfully demonstrated how attorneys and judges may deploy one side of a familiar argument pair in one part of a case only to find themselves arguing the opposing position on a different issue. To borrow one example, the pro-defendant arguments that have led some courts to prefer a negligence standard to a rule of strict liability rhetorically resemble the arguments supporting the oft-adopted, pro-plaintiff rule that tortfeasors are held to an objective standard of care.[6]

Although Kennedy's initial emphasis on argument pairs grew largely from systematic study of legal materials, both he and Balkin have recently noted important similarities between their analyses of legal argument and the strand of linguistic theory known as semiotics.[7] As will be discussed in more detail below, Kennedy and Balkin refer us to semiotics

view), 99 YALE L.J. 1669 (1990) (reviewing J. ELLIS, AGAINST DECONSTRUCTION (1989)); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

5. *See* Kennedy, *A Semiotics of Legal Argument*, in 3 LAW & SEMIOTICS 167, 167 (R. Kevelson ed. 1989) [hereinafter SEMIOTICS]. *See generally* Kennedy, *Form and Substance*, *supra* note 2, at 1687-1701 (detailing pro and con arguments for rules and standards); Schlag, *supra* note 2, at 383-90 (also examining the rules-standards dialectic). For an illustration of these rules-standards arguments with classroom examples, see Boyle, *supra* note 2, at 1056-62.

6. The judicial proponent of a negligence standard, for example, might argue that: (1) defendants should be liable only when they are at fault; (2) a negligence standard encourages social actors to take desirable risks; and (3) the benefits of judicial flexibility outweigh the costs of determining negligence on a case by case basis. This same jurist, however, may turn around and argue that a defendant should be found negligent when violating the "reasonable person" standard even if the particular defendant was not subjectively blameworthy. Here the arguments might be that: (1) fault is not the appropriate issue—since many people would have been more careful, the defendant should not escape liability merely because she was unaware of the risks; (2) an objective standard will force people to become aware of risk, and thus discourage undesirable, dangerous conduct; and (3) the costs of determining subjective fault on a case-by-case basis outweigh the benefits of tailoring liability more closely to the defendant's actual state of mind. *See* Kennedy Teaching Materials, *supra* note 2 (formulating and developing the comparison between negligence and an objective standard of care); Balkin, *Crystalline Structure*, *supra* note 2, at 36-43, 67 (elaborating and discussing the negligence- and objective-standard comparison).

It is crucial to point out that nothing in this demonstration of the rhetorical similarities within opposing positions demonstrates an "objective inconsistency" in the reasonable person standard for negligence. Indeed, it would be possible to defend the rule quite powerfully simply by adopting the right definition of the terms employed in the standard arguments. Thus, to be at "fault" may mean to be negligent under the reasonable person standard. "Desirable risks" may be those undeterred by a "reasonable person standard." *Cf.* Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEXAS L. REV. 1881 (1991) (showing how the classic debate over vehicles in the park may turn on the meaning of park). One challenge for those seeking to map the experience of legal and moral decision making, however, is to describe how and to explain why arguments that are rhetorically powerful in one context seem to suddenly run out in a different context, only to be replaced by their suddenly persuasive rhetorical counterparts.

7. *See* Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI. L. REV. 1119 (1990); Kennedy, *supra* note 5, at 168.

because each scholar has emphasized the ways in which legal concepts draw meaning from their place within broader legal argument, just as semioticians have stressed the ways in which words take meaning from their place within a larger linguistic system. The semiotic flavor of Kennedy's work, then, constitutes my first method of distinguishing it from other attempts to systematize legal reasoning. Following Kennedy and Balkin, I have adopted the characterization "legal semiotics" as a shorthand for this approach.

Those within or even familiar with contemporary legal education, however, would be unlikely to name semiotics as their first association with Duncan Kennedy or his closest colleagues. Instead, Kennedy is best known for his leading role in the Conference on Critical Legal Studies (CLS or "the Crits"), a group whose precise goals or characteristics are notoriously difficult to pin down. It seems fair to say, however, that to the extent the Crits are held together at all, unity comes more from a mutual commitment to a progressive political agenda than from any commitment to semiotic theory. The difficulty, of course, is to define a progressive political agenda general enough to command agreement within as diverse a group as the members of CLS without resorting to platitudes to which every American would readily assent. Who, for example, would quarrel with the so-called progressive goal of creating "a more just and equitable society"?

For purposes of this Paper, I need to confront to some degree the problems of defining a progressive agenda. Consider then the following possible tenets of one brand of progressive politics: (1) We live in a society and a world in which a few people have too much and too many people have far too little; (2) our day-to-day lives are dominated by a network of human relationships in which far too often one person has the effective power to tell another what to do; (3) our thought structures and habits of being, including racism, sexism, and classism, often cloud the ability of privileged and underprivileged people to acknowledge the full extent of propositions one and two; and, here's the kicker, (4) traditional debate includes too little discussion of propositions one, two, and three and, more importantly, tends to underestimate and undervalue the gains (and overestimate and overvalue the costs) that might be experienced from altering current conditions leading to propositions one, two, and three.[8]

8. This brand of progressivism is decidedly individualistic and oversimplified. No mention is made, for example, of a positive role for government in creating communal bonds among the citizens, nor is attention devoted to changing our epistemological methods of coming to know and understand the world. The former omission is designed to avoid splitting the progressive community

My hope is that these four propositions would command sufficiently wide assent within the progressive legal academic community that I might safely use them as a benchmark. I do not wish here to defend progressivism, however. Nor do I believe I have identified a set of principles that definitively distinguishes either Crits or progressives generally from the remainder of the law professoriat. Indeed, a wide array of scholars with differing attitudes toward law and legal institutions might accept all four propositions. Nonetheless, I am relatively confident that propositions one through four (and particularly four) would cause significant debate within the legal academy, and that most Crit writers and most legal semioticians would adopt what I have called the progressive position. The embrace of progressive politics thus constitutes the second distinguishing feature of the "Kennedy-esque" approach to legal reasoning.

We have now reached the heart of the matter, for the juxtaposition of progressive politics and the more arcane topic of legal semiotics raises an obvious question. What intellectual connections, if any, are there between these two seemingly diverse phenomena? Why, in other words, have scholars prominently identified with a progressive political agenda devoted a great deal of time and energy to the systematic study of legal reasoning?

I plan here to offer two preliminary answers. First, I will argue that despite the fancy label, legal semiotics holds significant potential for bringing together people of diverse training and background in ways that will foster a true sense of intellectual community. Second, and equally important, I will explain why legal semiotics can help challenge traditional notions of meritocracy, notions that in my judgment form the most sincere and powerful response to the brand of progressive politics I described above. These arguments will constitute Part IV of this Paper, but it will take me some time to get there, for my approach to the politics of legal semiotics can perhaps only be understood in contradistinction to two better developed explanations of the intellectual relationship between semiotics and progressivism.

Under one view, which I think may fairly be ascribed to at least

into those who favor and those who fear government involvement in social life. The avoidance of epistemology, a topic that would lead us to question the coherence of concepts like government intervention, is based on the difficulty of linking epistemology to what is commonly conceived as a political agenda. Indeed, one might view what follows as a microscopic investigation of whether it is possible to link categories of thought with guidelines for action. Guyora Binder's contribution to this Symposium constitutes a similar, albeit broader, inquiry. *See* Binder, *What's Left?*, 69 TEXAS L. REV. 1985, 1988 (1991) (discussing the relationship between post-structuralist epistemology and radical politics). It would beg the question to define progressivism in terms of the reasoning techniques whose progressive character I mean to examine.

some of the writings of Professor Jack Balkin, there is little or no connection between semiotic study and progressive politics.[9] The idea is simply that semiotic study is valuable for its own sake because it teaches us more about our own legal culture. Why, Professor Balkin might ask, must we press to justify semiotics in terms that would presumptuously link intellectual method to political agenda?

An alternative view, and one I think can be drawn from hints dropped in the writings of Professor Duncan Kennedy, is that semiotics is progressive because it highlights the formulaic and relatively indeterminate nature of legal discourse.[10] Under this view, semiotics leads us to distrust the moral authority of legal decisions because we more readily perceive the way in which particular legal outcomes could just as easily have been reversed. Moreover, the structured pattern of legal argument can be presented in this light as illustrating the somewhat inauthentic nature of legal debate. If the traditional legal system tends to translate human disputes into the same rhetorical patterns over and over again, perhaps this is because legal discourse forces citizens to frame their positions in ways not fully reflective of their overall feelings in the situation. By evoking the structure (and thus artificiality?) of legal argument, this view of semiotics thus embraces the progressive agenda of giving voice to

9. Professor Balkin now suggests that I overstate my case in attributing to him the position that there is little or no connection between semiotics and progressivism. Balkin, *The Promise of Legal Semiotics*, 69 TEXAS L. REV. 1831, 1831 (1991). Instead, he argues such a connection exists but stresses that it is "historically contingent." *Id.* To my mind, however, invoking historical relativism at this point begs the important question. No one would argue, and certainly I do not here, that we need search for a connection between semiotics and progressivism that transcends our historical context. Indeed, Professor Balkin and I emphatically agree that post-modernism encourages us to recognize the extent to which knowledge is a product of social circumstances. *Id.* at 1851. Moreover, we are all indebted to Professor Balkin for his continuing refinement of the concept of ideological drift as it pertains to any assertions of trans-historical connection between semiotic method and progressive politics.

The pressing problem, however, is whether there are intellectual connections between semiotics and progressivism as currently practiced, even if those connections may not hold up over time. Nor is this problem diminished by Balkin's indisputable point that conservatives might also make use of semiotics to support alternate agendas. *Id.* at 1835. For if, as Balkin argues, semiotics can be put to different political uses, the challenge is to assess *in context* which uses are more plausible rather than to throw up our hands at the lack of necessary connection between semiotic method and political agenda.

Professor Balkin concedes that the progressive politics of current legal semioticians is not "an accident" and that "there are understandable reasons for the historical emergence of legal semiotics on the left." *Id.* at 1832. I have tried to explain why by identifying the specific contexts both inside and outside the law school classroom in which legal semiotics might have a progressive effect in contemporary America. When I read Professor Balkin's latest Article, however, I remain left with the impression that the only real connection he sees between legal semiotics and political progressivism is that Duncan Kennedy is a contemporary pioneer on both fronts. In this sense, Balkin's position that semiotics has "only the politics of those who make use of it," *id.* at 1831, differs little from the one I attribute to him.

10. For relevant citations to Kennedy's work, see *infra* Part III(B).

the claims of the underprivileged that cannot be readily translated into the structured language of the law.

Both of these views of the connection between semiotics and progressive politics, however, are ultimately unpersuasive. I explain my views on this in Part III. In brief, I argue that any effort to divorce legal semiotics from the progressive goals of its proponents belies the kick semiotics gives to first-year law classes and depends on an unlikely coincidence drawing CLS members to semiotic study. At the same time, there is only marginal progressive bite in the idea that systematic study reveals legal argument to be indeterminate or artificial. The problem is not that the law is relatively determinate. Indeed, I wish to avoid any effort here to address the more general problem of legal indeterminacy.[11] Rather, the central difficulty with attributing a progressive character to demonstrations of legal indeterminacy (or artificiality, for that matter) is the implicit reliance on the existence of alternate forms of moral discourse that are somehow more determinate or authentic. Part III explores in some detail why this reliance may be ill-founded.

I should begin, however, by putting first things first and clarify my reference to semiotic study. This is the task of Part II's introduction to the now burgeoning literature. Even here, however, I must eschew an exhaustive treatment in favor of a schematic description drawn heavily from the works of Professors Balkin and Kennedy, whose writings have inspired my interest in defending the political character of legal semiotics against charges of nihilism, on the one hand, and propagandizing, on the other. I hope with this schematic description to highlight the contribution that this form of study has already made to our understanding of law and to show how semiotics can help illuminate the conceptual disputes that too often threaten to divide the progressive community. I hope also to pave the way for my discussion of the political character of legal semiotics. In the end, I will be content if my description is clear enough to demonstrate why the political character of semiotic study

11. For a clear, thoughtful introduction to indeterminacy within legal argument, see Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987). For a more detailed exploration and defense of indeterminacy claims within the law, see Singer, *supra* note 4. For critical expositions, see Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); and Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986). Finally, those wishing an alternative perspective on the indeterminacy debate that tracks the themes developed in this Symposium might consider the recent contributions of Professor Steven Winter. He has attempted to explain why neither formalism nor radical indeterminacy best captures our understanding of the law. *See* Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441 (1991) [hereinafter *Indeterminacy*]; Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1159-1206 (1989) [hereinafter *Transcendental Nonsense*].

presents questions significant enough to transcend my efforts here to answer them.

II. Legal Semiotics in a Nutshell

Consider the following three aspects of contemporary legal argument presented at increasing levels of abstraction. First, many traditional legal concepts, like fault, causation, and harm, cannot be defined without using other legal concepts, like property and contract rights. Thus, lawyers who forget the extent to which one legal term may depend on another run the risk of circular arguments. We might imagine, for example, a lawyer simultaneously arguing that a property owner has the right to exclude an unauthorized entrant as a trespasser and that a person seeking unauthorized access to privately held land is a trespasser because the property owner has a right to exclude others.

Second, many familiar legal arguments are coherent largely in terms of equally familiar opposing arguments that recur in case after case across a wide spectrum of legal controversies. Here we might imagine an opponent of motorcycle helmet laws stressing the self-determination of long-haired riders in contrast to the proponent's emphasis on preventing unnecessary injuries.[12] Strikingly similar debates might occur concerning the advisability of curfew laws in times of urban strife or on the wisdom of laws banning dangerous narcotics.

Finally, particular legal debates may be rather convincingly linked to more general controversies within political theory. Here, the lawyer stressing the importance of keeping courts from "rewriting contracts" may piggyback on a generalized fear that conscious governmental control of the terms of economic exchange amounts to "creeping social-

12. Perhaps, the most difficult challenge for those emphasizing the patterned nature of legal argument is to overcome understandable charges of reductionism. Thus, it is important to stress the extent to which a stylized dispute between abstract ideas of self-determination and generalized notions of harm prevention would drastically oversimplify any real world debate. To see one difficulty, consider the extent to which proponents of helmet laws might themselves rely on notions of self-determination. Their argument might stress that television advertising, cultural attitudes, and lack of economic opportunities have prevented helmetless riders from developing truly independent selves. From this perspective, helmet statutes are in aid of, not in opposition to, self-determination. Indeed, this example highlights the extent to which categories like self-determination are themselves dependent on additional modes of thought not normally understood as part of the category. Thus, we may tend to consider actions self-determined when not subject to explicit external coercion, while paying little attention to the social phenomena that helped create the selves now secking to determine their own actions. *See generally* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659 (1990).

These complexities aside, however, we can continue to imagine rhetorical sparring that features cyclists' invocation of traditional notions of individual freedom paired with safety advocates' reliance on the harm caused by injured cyclists in terms of medical costs, increased insurance premiums, and psychic damage to automobile drivers involved in motorcycle accidents.

ism."[13] Conversely, an attorney advancing a broad reading of a regulatory statute might ask the court to effectuate the legislature's rejection of "the invisible hand."

Consider next how these three characteristics of legal argument are united by a common conceptual framework. Each describes one way that the content of a particular legal argument depends not only on what the speaker says but also on related arguments that form part of the listener's consciousness.[14] Thus, a speaker may find it unnecessary to explain why a property owner may exclude a trespasser, because the right to exclude is built into the listener's definition of a property owner. The antihelmet advocate may be able straightforwardly to rely on ideas of self-determination because he expects the listener automatically to consider coercive statutes a significantly greater threat to autonomy than other collective pressures. And the opponent of "creeping socialism" gets extraordinary mileage out of the listener's implicit contrast between "our form of government" and a different form that in this century has been linked with antidemocratic values anathema to most Americans.[15]

This tendency of individual legal arguments to take their meaning in part from the broader context of legal thought helps explain why Professors Balkin and Kennedy have analogized their studies of legal reasoning to the semiotic study of language. Each refers us to the seminal work of Ferdinand de Saussure,[16] and Balkin explains that a central tenet of Saussure's semiology is that "sigus [like words or legal arguments] take

13. This stylized form of argument depends heavily on widespread denial of how often contract law involves judicial imposition of terms. It seems safe to say, however, that the image of free contract as an individualist preserve continues to survive despite the overwhelmingly powerful realist critique. For a concise summary of that critique, see Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465, 482-87 (1988) (reviewing L. KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

14. For one view that the role of the listener is crucial to semiotic study, see Grace & Teschner, *Semiotic Contrasts Between Trial and Discovery*, in 3 SEMIOTICS, *supra* note 5, at 127, 128 (explaining language "as an event within a social matrix that gains meaning through the circumstances of its use, and particularly through its effect upon, and interaction with an audience as its environment"); *see also* Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991) (stressing the community's role in shaping selves who share cognitive processes that make persuasion possible).

15. This last example is somewhat more complex because an attorney invoking charges like "creeping socialism" may be described as politicizing the debate rather than relying on the implicit views of the listener. Indeed, there is a strong professional convention against allowing actual legal rhetoric to blur into rank political debate. Thus, we can more easily imagine attorneys stressing the horrors of judicial rewriting of contracts than we can picture courtroom debates about socialism. My claim, nonetheless, is that at the rhetorical level a strong consensus against judicial imposition of contract terms mirrors a collective hostility towards centralized economic planning and that this hostility in turn is best understood as part of a national contrast between our form of government, *i.e.*, "capitalism," and other, less desirable ways of organizing collective affairs.

16. Both refer to F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (W. Baskin trans. 1959). *See* Balkin, *supra* note 7, at 1121; Kennedy, *supra* note 5, at 192.

their meaning from their mutual relationships in a system of signification."[17] In this section I will explore what Balkin means by the mutual relationships of legal concepts and why Kennedy too has applied the semiotics label to his studies of legal reasoning. My concern is not to provide a guide to the complicated subject of semiotics, which remains outside my expertise.[18] Rather, I wish merely to introduce a style of studying legal reasoning that is gaining significance within legal education. As stated above, my central question concerns the political implications of describing legal reasoning in this way.

A. Mutual Entailment of Legal Concepts

Every law professor has watched legal discourse lead beginning students in argumentative circles. Consider the following hypothetical classroom discussion:[19]

Professor: "Please state the issue in today's case."

Student: "The issue is whether the defendant property owner may be held liable when excavations on her land caused subsidence to her neighbor's land thereby injuring the neighbor's home."[20]

Professor: "How did the court resolve the issue?"

Student: "The court ruled for the defendant."

Professor: "Why?"

Student: "Because the defendant had the right to dig on her land."

Professor: "What about the plaintiff's rights?"

Student: "The plaintiff has no right to prevent the defendant from digging."

Professor: "Why not?"

Student: "Because the defendant has no duty to prevent damage to the neighbor's home caused by digging on the defendant's own land."

Professor: "But haven't we learned that a classic maxim of property

17. Balkin, *supra* note 7, at 1121.

18. Kennedy's and Balkin's works and the sources cited therein provide the most useful introduction to legal semiotics as discussed here. *See* Balkin, *supra* note 7; Kennedy, *supra* note 5. Let me stress, however, that I make no claim that either has accurately assessed the connections between their respective works and linguistic theory. Indeed, this essay is simply not about linguistic theory at all. Those undertaking a broader study concerning the relationships between law and semiotics might consult P. GOODRICH, LEGAL DISCOURSE (1987); B. JACKSON, SEMIOTICS AND LEGAL THEORY (1985); and 1-3 LAW & SEMIOTICS (R. Kevelson ed. 1987-89).

19. This discussion is based on my rather dim recollection of my first year torts class with Professor Duncan Kennedy and my reading of property materials prepared by Professor Joseph Singer. *See* J. SINGER, *supra* note 1.

20. Gilmore v. Driscoll, 122 Mass. 199 (1877), held on similar facts that the defendant was liable for damage done to his neighbor's land in its natural condition, but not for damage to buildings or improvements absent actual negligence. *See id.* at 201.

law is that one may not use land so as to injure the lawful rights of another? Doesn't that maxim impose a duty on the defendant here?"

Student: "No. The defendant has not interfered with the lawful rights of the plaintiff."

Professor: "Why, because the defendant has no duty not to dig?"

Student: "Precisely."

Professor: "So what you are telling me is that the defendant has no duty not to dig because she is in no way interfering with the rights of the plaintiff."

Student: "Yes."

Professor: "And why was it again that the plaintiff has no rights?"

Student (growing a bit nervous): "The plaintiff has no rights because the rule is that the defendant has the right to dig on her own property."

Professor (with hope, tongue now in cheek): "Now I've got it. This case is really simple. The rule here is that defendant's duty is to avoid interfering with plaintiff's lawful rights. Plaintiff has no rights. Why? Because the defendant has no duty. Got it. Are we ready for the next case?"

Class: [Sympathetic Laughter]

There are many grounds upon which to criticize this style of teaching, but it is likely to drive home a central point.[21] The concepts of the plaintiff's rights and the defendant's duties are defined in terms of each other. Thus, in the now familiar language of Professor Wesley Hohfeld's analytics, if the plaintiff has a right to prevent the defendant from digging then the defendant by definition has a duty not to dig.[22] Similarly, if the plaintiff has no right to stop the digging then the defendant is at liberty (or privileged) to dig. It is nonsense then to find normative justifications for a particular plaintiff's lack of rights by pointing solely to a defendant's lack of duty. For the defendant's lack of duty is built into the very definition of the plaintiff having no rights.

The reciprocal relationship between a plaintiff's rights and the cor-

21. The professor might fairly be chastised for using leading questions to make a point at the student's expense. On the other hand, the communicative advantages of interchange are difficult to match. Indeed, for this Paper, in which straightforward expository writing would be the norm, I chose the imaginary discussion as the best way to make my point.

22. Hohfeld's original analyses of legal concepts can be found in Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). For a sustained, insightful effort to explain Hohfeld's contemporary relevance, see Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975. *See also* Balkin, *supra* note 7, at 1120-26 (explaining Hohfeld's relevance to the legal semiotics project discussed herein).

relative idea of a defendant's duties constitutes the most trivial example of the way in which legal concepts are often defined in terms of each other. As Professor Balkin has astutely observed, however, the mechanics of Hohfeldian analytics provide a window into the more general phenomenon of mutually entailed legal concepts.

Consider Professor Balkin's example of the reciprocal relationships between the ideas of fault, harm, causation, property, and contract rights.[23] Balkin asks us to review the conventional arguments that may be raised when an automobile manufacturer fails to install air bags, thus facilitating harm to a driver. Initially, plaintiff's counsel might argue for liability if she can show that the cost of universal air bag installation would approximate $200,000 whereas failure to install airbags will result in predictable losses estimated at $300,000.[24] Because air bag installation would cost less than the harm done, the plaintiff's lawyer will argue that the manufacturer was "negligent" or "at fault." The manufacturer's attorney, however, may respond that in placing cars on the market the manufacturer was simply exercising its property rights to use its productive capability to manufacture a particular car. To require the manufacturer to install air bags (or to pay consumers injured in cars without them) is a straightforward effort to deprive the manufacturer of private property. If plaintiff's counsel responds that the manufacturer's property rights end at the point it begins wrongfully to cause harm to others, Balkin's initial illustration is complete. The plaintiff's last argument reveals that the defendant may be unable to escape discussions of fault through appeal to an alternative legal category like property rights because the idea of fault (in the sense of wrongfully harming another) is built into property rights and forms part of their definition.

And, as Balkin goes on to demonstrate, the opposite is also true. The ability to define fault often depends on delineating the extent of property and contract rights. Here Balkin notes that if the manufacturer's contract rights allow the offer of any bargain to consumers (who after all are "free" to reject it), then the injured driver might be the one at fault for buying the car rather than the manufacturer for producing it. Of course, the manufacturer may no more have such contract rights than the plaintiff can be faulted for buying the car. And, it would be wrong to

23. This entire example is drawn from Balkin, *supra* note 7, at 1126-30.

24. The extreme complexity of attempting to measure human injuries in terms of dollar losses may be safely ignored here. For general discussion of this vexing problem, see Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (criticizing efforts of law and economics scholars to measure costs and benefits in dollars); Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (describing inadequacies of attempts to value rights based on what people are willing to pay for them).

read Balkin as demonstrating anything about the legal system's ability to reach the correct outcome in the airbag dispute. The important point is that any particular judge would be mistaken to make use of contract rights as an unsupported *justification for why* the driver was at fault or vice versa.[25]

Nor will the idea of causation allow us to resolve the airbag controversy without referring to the other legal concepts of fault and property and contract rights. It might be said that the manufacturer should be held liable because its failure to install air bags caused harm to the injured driver. But, of course, both the driver and the manufacturer are "but-for" causes of the driver's injuries. Some other criteria, such as notions of fault, are thus necessary to determine who is the "legal" or "proximate" cause of the harm.

Indeed, ambiguities in the idea of proximate causation serve to further illustrate the mutual entailment of legal concepts and to introduce additional structural aspects of legal argument that Kennedy and Balkin have emphasized. Initially, the idea of proximate causation is best understood largely as placeholder for a series of value judgments concerning tort liability.[26] Thus, if a tenant causes injuries when she accidentally spills stove-boiled water on her child while preparing a bath, a court may be forced to decide whether the landlord's failure to provide heat and

25. There is, of course, a more sophisticated argument that could sensibly link contract rights to fault without falling into vicious circularity. A judge might argue, for example, that a pre-existing rule, of which every citizen was aware, afforded the manufacturer the right to sell a car lacking air bags without any risk of financial consequences. In that event, the driver who purchased the car could be described as at fault for not knowing the rule and not taking precautions, such as purchasing insurance.

Indeed, to the extent that questions of contract rights and fault depend not only on each other but also on the question of what courts have previously said about similar cases, Balkin's example somewhat oversimplifies the air bag problem. A court armed with compelling precedent on behalf of the manufacturer would tend simultaneously to resolve the issues of fault and contract rights. In contrast, a court lacking a specific precedent would likely examine the manufacturer's fault without regard to contract rights because analogous precedents (design defects) have already established a principle of manufacturer liability. The legal system as a whole, then, may be better able to address the air bag controversy than Balkin suggests when he focuses on how definitions of fault and contract rights are mutually parasitic. His overall point, however, remains germane. Lawyers and judges must remember the extent to which legal concepts are mutually defining so as to avoid using one concept vacuously to explain the other.

26. When I say that decisions regarding proximate cause are a substitute for value judgments, I do not mean to draw a radical distinction between people's perceptions of causation and their normative conclusions concerning responsibility. It will, of course, often be impossible to separate one's reaction that a defendant was not the proximate cause of plaintiff's injuries from one's normative conclusion that the defendant should not be held responsible. Judges who cannot transcend this human tendency to blur is and ought, however, will appear to outsiders to be engaged in an elaborate shell game. Imagine, for example, an opinion that denied liability solely on grounds of lack of proximate causation and then explained the absence of proximate causation with the bald assertion that the defendant did not deserve to be held liable.

hot-water plumbing was the proximate cause of the injury.[27] Since the injury would not have occurred had the landlord complied with the housing code, the landlord's breach of duty is a but-for cause of the harm. For a variety of reasons, however, a court might choose not to hold the landlord liable.[28] Ultimately, these reasons are built into the definition of proximate causation such that a finding of no proximate cause comes to mean that the court has good reason to deny liability. This reasoning is not circular so long as everyone understands that the idea of proximate cause is necessary to any effort to separate situations in which liability should be imposed from those in which defendants should not be held responsible. The danger, however, is that lawyers may come to speak as though the absence of proximate cause provides an *explanation or justification* for the denial of liability, rather than simply the beginning of the inquiry.[29] This "thingification" of proximate causation would represent precisely the error that Felix Cohen so powerfully warned us against.[30]

27. *Cf.* Martinez v. Lazaroff, 48 N.Y.2d 819, 820, 399 N.E.2d 1148, 1148, 424 N.Y.S.2d 126, 127 (1979) (finding as a matter of law that landlord's failure to provide hot water was not the proximate cause of injuries suffered when tenant spilled boiling water on his son); Muhaymin v. Negron, 86 A.D.2d 836, 838, 447 N.Y.S.2d 457, 460 (N.Y. App. Div. 1982) (reversing a finding that a plaintiff-tenant whose child died in a tub full of scalding water could not recover in a wrongful death suit against the landlord and ordering a new trial after faulty jury instructions overly circumscribed consideration of the issue of proximate causation).

28. The court might conclude that the landlord was not at fault for this particular injury; that the economics of the housing industry would be harmed by extending liability this far; that ruling for the tenant would produce a flood of unwarranted litigation; or even that the community of landlords would not expect to be held liable under these circumstances. There are, of course, powerful responses to these arguments. The point, however, is that these judgments or others like them are implicit in a decision to deny proximate causation.

29. There is one sense in which talk of proximate cause does have explanatory power. Professor Winter has ably demonstrated that an observer of the legal process will often be able to predict when proximate cause will be found lacking. Courts, he argues, will be troubled about causation in cases where it is difficult to conceptualize the events in terms of what Winter calls a "source-path-goal metaphor." To oversimplify, this means that when the defendant's conduct is clearly perceived as the source of the harm and the path to the injury is short and direct, causation will be found. Winter cites the prototypical auto accident. In contrast, if the source is remote and the path indirect, such as in the hot water example, then causation will become a more recognizable issue. *See* Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1475-78 (1988).

Granting Winter's account as correct, however, still leaves us with two problems. First, from the decision maker's perspective, the task is not to predict how a case is likely to turn out but to provide reasons for the decision. Thus, the decision maker will continue to strive for a more traditionally normative theory of causation that in the end will help give content to the idea of *proximate* cause. Second, as Winter himself points out, the task remains to provide a descriptive account of precisely which sources are likely to seem remote and which paths so indirect as to create a serious causation issue. I note, for example, that my conversations with friends and colleagues have produced widely divergent opinions concerning the appropriate result in the landlord-tenant hot water example.

30. Professor Cohen cautioned us, for example, not to let the legal fiction of the "presence" of a corporation substitute as the "reasons for decision" concerning whether a corporation could be sued in a particular location. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM.

Consider next the extent to which ignoring the mutual entailment of legal concepts helps lead to the error of believing that the right definition of proximate cause might somehow reduce the difficulty of determining whether the landlord should be held liable. A court ruling against the tenant would no doubt rely heavily on the implicit judgment that the child's injuries were not the landlord's *fault*. Indeed, a sufficiently widespread consensus that the landlord is not to blame would give substantial persuasive power to an opinion finding no proximate causation. One danger then is that an opinion couched in the language of causation will obscure the crucial issue of how to determine whether the landlord is at fault. And, if the court provides no answer beyond hints that the landlord is not at fault because the landlord failed to proximately cause the injuries, then the vicious circle is complete.[31] Accordingly, Balkin's efforts to remind us that we often refer to one legal concept in defining another provide a crucial antidote to some of the worst forms of circular reasoning.

Furthermore, Balkin helps us see how the semiotic perspective links the work of Hohfeld to that of Felix Cohen. For the legal fictions Cohen decries are often made plausible precisely because they rely on other legal concepts that appear less controversial. Cohen mocks judicial attempts to locate a corporate "presence" for purposes of determining whether there is jurisdiction over the corporation.[32] But, as Steven Winter has

L. REV. 809, 812 (1935). For a contemporary reading of Cohen's later work that finds value, or at least inevitability, in the metaphoric reasoning Cohen himself decried in his 1935 Columbia piece, see Winter, *Transcendental Nonsense, supra* note 11, at 1168-71 (discussing Professor Cohen's own use of metaphor in Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950)).

31. Of course, contemporary courts are highly unlikely to employ such straightforwardly circular reasoning. Instead, the doctrine of proximate causation employs the mediating category of foreseeability. Thus, courts ask whether the defendant could have reasonably foreseen the plaintiff's particular injury. But this only heightens the problem, for the idea of foreseeability contains its own ambiguities. Is an accident foreseeable if a defendant would have had to admit it could happen when the scenario was presented to him? (You realize don't you Mr. Landlord that if you fail to provide hot water, people are likely to boil water for bathing and that this poses considerable risks?) Or must the plaintiff show that the landlord would have envisioned the risks without prompting from an imaginary interlocutor? Must the landlord have been able to predict the precise chain of events? (Failure to provide hot water might lead to boiling pots which will need to be carried to the bathroom through the place where the kids normally practice gymnastics so that a somersault may cause a catastrophic capsize.) Or is it enough that the general risk be foreseen? (Using stove-boiled water for bathing creates the possibility of burns.)

To resolve these ambiguities, courts will need to turn to additional ideas to define foreseeability. Here again, the most likely candidate is fault. Thus, we can imagine a court ruling that a defendant need not foresee the precise chain of events, precisely because one idea of fault encompasses responsibility for a general category of risks created by one's own conduct. To the extent then that asking whether the harm was foreseeable is just another way to describe fault, the circularity noted above returns. Alternatively, to the extent that foreseeability is aimed at approximating the economic calculation the defendant might have made in determining whether to alter his behavior, the idea of foreseeability adds even more complexity.

32. *See* Cohen, *supra* note 30, at 810-12.

noted, once the audience is prepared to accept the idea of corporation as legal person, it becomes much easier to argue corporate presence in a particular location.[33] Thus, Cohen's process of thingification may be described as the bundling of mutually defined legal concepts that succeeds only so long as there is no disagreement over the definition and application of one concept in the chain. In short, just as it is easy to demonstrate that a particular plaintiff has a Hohfeldian right if your audience agrees that a particular defendant has a Hohfeldian duty, so too is it easy to disprove proximate cause if the audience a priori believes a defendant blameless.

Finally, consider yet another way to think about the problem of proximate cause, this time in terms that relate legal choices more clearly than legal concepts. I chose the example of the landlord's responsibility for the tenant's injuries in part because of the complications provided by the customary existence of housing codes that require landlords to furnish hot-water plumbing. These codes in effect preclude the landlord from arguing that he was not at fault for failing to provide hot water.[34] Indeed, one way to describe the effect of housing codes on tort liability is that they in large part replace the traditional negligence inquiry with the more cut and dried question of whether the landlord complied with the code.

We now see, however, that the problem of whether the landlord's failure to comply with the code proximately caused the tenant's injuries belies any argument that housing codes have put an end to the fault standard. For considerations of fault reappear in determining whether proximate cause exists. It's as if the system faced two independent choices. First, should landlords be held responsible only when a jury finds them at fault for poor housing conditions? Answer: Considerations of fault should often be disregarded in favor of the more straightforward question of whether the landlord knowingly violated the code.[35] Second, should landlords be held liable for any injuries that would not have occurred if the landlord complied with the code? Answer: Landlords are

33. *See* Winter, *Transcendental Nonsense*, *supra* note 11, at 1166 (citing Cohen, *supra* note 30, at 811).

34. The landlord may, of course, still argue that he did not know of the lack of hot water or that he had made all reasonable efforts to rectify the situation. *See generally* Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 948 (D.C. Cir. 1960) (surveying landlord-tenant eases and adopting the rule that failure to comply with housing codes constitutes evidence of negligence rather than negligence per se); Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 106-09, 116-41 (1982) (exploring the complexities in various judicial approaches to the relationship between housing codes and landlord tort liability).

35. Again, the requirement that the landlord know or should know of the violation and the further requirement that the landlord must fail to take reasonable repair measures illustrates that actual case law has not fully abandoned considerations of fault. *See supra* note 34.

liable only for injuries proximately caused by noncompliance. Recall, moreover, that considerations of fault play a major role in determining which injuries are proximately caused by noncompliance. Balkin and Kennedy use the term "nesting" to describe this sequential ordering of legal questions in which the second issue raises concerns seemingly put to rest by resolution of the first issue.[36] And, this idea of nesting helps lead us on to the next section's discussion of how legal semiotics addresses relationships between legal arguments as well as legal concepts.

Let me pause first, however, to emphasize the extent to which ground already covered may have implications for traditional legal education. Clearly, there are risks in organizing basic courses through use of doctrinal categories. If, for example, concepts of negligence and causation are deeply interrelated, do we send a wrong message if our torts courses are divided into three weeks on negligence and three weeks on causation? Similarly, if it turns out that contract law depends on bargaining once initial entitlements (*i.e.*, property rules) are established, and property rules are often constructed to facilitate economic transactions (contracts), perhaps even the division of courses in the curriculum should be re-examined.[37] At the very least, and this is all I wish to rely on here, students offered this semiotic perspective will be encouraged to see interrelationships that blackletter approaches may tend to obscure. The more important teaching gains come from the arguments developed in the next section.

B. The Mutual Entailment of Legal Arguments

The explicit shift of focus from legal rules to legal arguments consti-

36. Kennedy uses the example of a shopkeeper mistakenly killing a police officer who the shopkeeper believes is a looter emerging from a riotous crowd. *See* Kennedy, *supra* note 5, at 187-91. A court must first decide whether to allow a defense of mistaken self-defense. Here the court ultimately allows the defense in part because of a string of arguments stressing the shopkeeper's right to act freely, and his lack of fault. Yet the court must then decide whether to allow the defense if the shopkeeper was sincere in his belief (a subjective standard) or only if he acted reasonably under the circumstances (an objective standard). Thus the competing issues of liability without fault and the shopkeeper's freedom of action arise again.

Kennedy suggests that a decision favoring the objective standard constitutes a finding of liability without fault, thus evidencing a judicial embrace of contrary "argument bites." *Id.* at 189. Alternatively, one might define fault to include a breach of an objective standard, thus avoiding Kennedy's characterization. In any event, Kennedy's important point is that the same judicial decision may often pose issues in sequential order whereby later issues raise policy and moral questions seemingly resolved in the decision of earlier issues. It is much more difficult to show that this sequential ordering demonstrates anything sinister or contradictory about legal decision making.

For Balkin's more general description of nesting, see Balkin, *supra* note 4. He too identifies the nested relationship between doctrines of fault and proximate cause within tort law. *Id.* at 1683.

37. For a description of a creative effort to challenge the conventional division of first-year subjects by blending contracts with torts, see Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875 (1985).

tutes perhaps the most significant characteristic of contemporary teaching styles that attempt to explain rather than model what it means to think like a lawyer. To take an example I have used before,[38] consider the teaching of *Pierson v. Post*[39] to an introductory property class. Virtually any professor would agree that little is accomplished in teaching the students the rule of the case, which involves an interloper (Pierson) who catches a fox being pursued by a hunter (Post) across unowned land.[40] Instead, *Pierson v. Post* begins many casebooks in part because it serves as a fine vehicle to introduce the conflict between certainty and justice in property rules, the conflict between rewarding investment and encouraging competition, and the conflict between formal and customary law. As often as not, however, this introduction is implicit and seldom referred to in any systematic way.

Suppose, however, that *Pierson v. Post* is used as a springboard for the listing of pairs of legal arguments that can be grouped in a familiar if somewhat formulaic pattern.

	Pro-Pierson (interloper who snares fox)	Pro-Post (hunter who chases but loses fox)
Precedent	• Ancient Writers Demand Possession • Distinguish Contrary Cases (Narrow Holdings)	• Ancient Writers Ambiguous • Times Change-So Should Law
Administrability	• Clear Rule Promotes Certainty	• Flexible Standard Does Justice
Economics	• Encourage Competition • Reward Captors	• Protect Investment • Reward Hunters
Rights	• Right to Act Freely	• Right to Security
Custom	• Law is Independent of Custom	• Law Should Defer to Custom
Morality	• Lack of Courtesy Does Not Establish Wrong	• Pierson Acted Wrongly

The obvious advantage of this form of labeling is that it introduces students to argument forms using heuristic devices that will enable them

38. *See* Paul, *supra* note 2, at 921-22; *see also* P. SCHLAG & D. SKOVER, TACTICS OF LEGAL REASONING 55-62 (1986) (discussing legal reasoning within *Pierson v. Post*).

39. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

40. The rule is that property rights in wild animals attach only upon taking actual possession, mortally wounding the animal and continuing pursuit, or trapping the animal so that escape is impossible. *Id.* at 177-78. Few rules so frequently studied are less likely to come up in day-to-day law practice.

to identify similar arguments in other contexts.[41] Students may be taught, for example, that the rhetorical conflict between clear rules and flexible standards plays an important role both within legal theory and throughout actual litigation.[42] Students may also be taught through enjoyable classroom exercises that each of the dimensions of legal argument listed at the left of the grid should be considered in the course of generating responses to an opponent's position. Underlined above are the arguments most emphasized by the majority (pro-Pierson)[43] and the dissent (pro-Post).[44] In my classroom I customarily highlight the extent to which the two opinions focus on different dimensions,[45] and I ask my students to craft the arguments each side should make to respond to the other on its own terms. This discussion always produces a much richer account of the case than the simple grid presented above.

Thus, when focusing on administrability, students always bolster the dissent with the *counter-theory* that clear rules are less important than justice in individual cases. They usually also learn to *negate* the majority's argument by suggesting that the proposed rule isn't so clear.[46] The better classes also discover how to *flip* the majority argument by highlighting that a clear rule will be uncertain if the rule conflicts with common understanding. Here the point is that it will be awkward and expensive to communicate the court's decision to the affected community, and in the meantime the majority rule will foster quarrels between those who know the legal rule and those who rely on custom. Conversely, those defending the majority's decision on economic grounds always *oppose* the dissent's emphasis on protecting the hunter's investment by stressing the advantages of rewarding the captor as a superior competitor. They usually *negate* the dissent's economic argument by suggesting that those who hunt foxes love the sport so much they will continue to invest in hounds no matter what the obstacles. And, someday I am sure to have a class that will *flip* the dissent's arguments to suggest that placing obstacles in front of foxhunters will actually encourage them to get up earlier and invest in better hounds so as to ensure success in spite of hostile interlopers.

41. For that reason alone, I urge readers to consult sources collected in note 2, *supra*, for descriptions of this teaching style that avoid the inevitable reductionism to which I am forced to resort in this brief account.

42. *See generally* Kennedy, *Form and Substance*, *supra* note 2; Schlag, *supra* note 2.

43. *Pierson*, 3 Cai. R. at 179 (stressing the importauce of a clear rule to prevent future quarrels).

44. *Id.* at 180-82 (Livingston, J., dissenting) (emphasizing the nced to encourage investment in fox hunting).

45. *See supra* notes 43-44.

46. How, for example, can one tell if a fox hit with an arrow but still running is mortally wounded?

Building on the earlier efforts of Professor Mark Kelman and Professor Jennifer Jaff, Kennedy's most recent work calls our attention to the italicized words and phrases of the preceding paragraph.[47] He notes that techniques like those used by my students represent typical "operations" performed by lawyers across a wide variety of contexts.[48] To repeat one example, the students who shift the focus away from rewarding the plaintiff's investment and onto the defendant's role as a superior competitor have engaged in a time-honored technique available for virtually every dispute. If focus on one party's role seems to argue for one outcome, perhaps a focus on the other party's role will point in the opposite direction. The least we owe our students is to alert them to this teclmique (and the others listed above) if by no other means than giving names to what Kennedy calls these "operations." At the same time, explicit focus on the structure of arguments presented in the *Pierson v. Post* grid will enable students to master patterus that recur across a wide range of common-law cases.

Both the structure of arguments outlined in the grid and the operations described in the classroom example further illustrate why Kennedy and Balkin have coined the phrase "legal semiotics." The key point here is that the structured pattern of argument and the operations Kennedy describes make sense only in reference to an argument for a particular outcome *as contrasted with an identified alternative.* Just as linguistic senriotics teaches us that words take their meaning in part from the linguistic system in which they operate, so too the pattern of argument above reveals that legal arguments gain coherence largely from the context of other arguments likely to be raised within a particular dispute. So, for example, in *Pierson v. Post*, the majority concludes that ownership of wild animals requires actual possession, mortal wounding, or trapping with no possibility of escape. This is a "clear rule" generating the familiar play of administrability arguments described above only if the rule is contrasted with the dissent's option of granting ownership to anyone with "a reasonable prospect of capture." A later case, however, might find a hunter who has shot and mortally wounded a fox arguing with a landowner who has recovered the bleeding fox running across his land. The landowner might ask the court to adopt a rule granting ownership of wild animals to the owner of land on which they are found. In this context, the hunter seeking to impose the rule of *Pierson v. Post* might fairly

47. For explanations and examples of all the terms, see Kennedy, *supra* note 5, at 172-81. The earlier works are Jaff, *supra* note 2 (discussing "frame-shifting" as an important component of legal argumentation), and Kelman, *supra* note 2 (arguing that legal argument is possible only after fact patterns are established).

48. *See* Kennedy, *supra* note 5, at 172-81.

be described as arguing for a fuzzy outcome turning on the fox's anticipated life expectancy.[49] In contrast, the landowner is proposing the so-called clear rule that location determines ownership. To repeat, contemporary teaching styles that emphasize a student's ability to master argument types and generate legal arguments of her own depend heavily on the legal system's convenient tendency to structure disputes into an adversarial presentation of two contrasting but plausible outcomes. In this sense, at least, the arguments lawyers use significantly rely on the arguments of their opponents.

C. *Bringing Cases to Life*

One particularly controversial aspect of legal semiotics as described thus far involves the fledgling effort to establish some relationship between the paired arguments in legal rhetoric (*e.g.*, encourage stiff competition versus protect large investment) and the grander style debates in political theory (*e.g.*, social Darwinism versus enlightened capitalism). The classic attempt is Kennedy's two-part suggestion that (1) the constellation of legal arguments supporting bright line rules tends to resemble the group of arguments often arrayed in favor of individualistic political theories, and correspondingly (2) legal arguments supporting flexible standards are often similar to arguments supporting more altruistic political views.[50] As the title of his article suggests, Kennedy's argument can be read to focus on the question of the relationship between form and substance.[51] I propose here, however, to explore his hypothesis and some

49. For a detailed and sophisticated demonstration of how a focus on context can disrupt the familiar play of arguments, see Schlag, *supra* note 2, at 405-18.

50. *See* Kennedy, *Form and Substance*, *supra* note 2, at 1685. As Kennedy uses the terms, a bright line rule might be that "only those 18 or over may enter contracts." In contrast, a flexible standard might allow "mature persons" to enter contracts. *Cf. id.* at 1696 ("[T]he rigid rule that twenty-one year olds are adult for purposes of contractual capacity makes their change of status more conspicuous; it puts them on notice in a way that a standard (*e.g.*, undue influence) would not.").

51. Unlike Kennedy's ideas about rules and standards, which directly consider possible relationships between form and substance, the investment-competition example provided earlier, *see supra* text accompanying notes 39-49, arguably considers only the relationship between one kind of substance and another. To my mind, however, it would be a mistake to insist on a sharp differentiation between these two inquiries. My concern is with teaching methods that direct students to consider how arguments in particular cases can be linked to broader arguments about the appropriate structure of society. Clearly, familiar legal rhetoric involves disputes over both the form of legal directives and the substantive desirability of competing outcomes. The same may be said about debates within political theory. After all, is an argument for a democratic society one of form (*i.e.*, structure of rules governing the allocation of power) or one of substance (*i.e.*, normative ideal for sharing of benefits and responsibilities)? Thus, since both legal and political rhetoric contain a significant degree of so-called formal and substantive argument, I will devote little time worrying whether form can be successfully separated from substance.

reactions to it as a semiotic strategy for linking legal doctrine to political theory within the context of classroom teaching.

At first blush, Kennedy's argument is disarmingly compelling. There does seem to be a strong correlation between the rhetoric lawyers employ in favor of bright line rules and the language chosen by proponents of individualistic philosophies.[52] Compare, as Kennedy does, the argument that a court should strictly enforce a rule requiring a sigued, written contract with the general tenor of political dialogue supporting a relatively laissez faire economy.[53] Both the lawyer and the unabashed capitalist may stress the advantages of forcing people to comply with minimal but explicit directives of the legal system. Each may argue, in other words, that the state should not intervene to protect citizens who suffer as a result of their own failure to master the system. Accordingly, just as the state should not grant relief to a party who failed to procure the requisite written contract, so too the state should not worry if the laws of economic exchange result in some persons having significantly fewer resources than others.[54] More broadly, just as the rule advocate fears the bias and unpredictability that may arise from conscious judicial imposition of flexible standards, so too the staunch capitalist fears the bias and unpredictability (not to mention alleged inefficiency) that will result from explicit government regulation of economic affairs.[55]

52. As Mark Kelman has properly cautioned, it is important not to overstate Kennedy's claims. *See* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 54-63 (1987). Thus, Kennedy does not argue that the advocacy of rules is necessarily linked to promotion of individualism. Rather, Kennedy speaks merely of an analogy between arguments that have actually been employed within both legal and political rhetoric. *See* Kennedy, *Form and Substance*, *supra* note 2, at 1737-40.

53. *See* Kennedy, *Form and Substance*, *supra* note 2, at 1739, 1745-51. As Kennedy's resurrection of Robert Hale's work has taught us, the very notion of laissez faire may be fatally incoherent. *Id.* at 1749 (citing Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943)). It is virtually impossible to imagine a state that fails to intervene in the economic affairs of the citizenry, since the basic rules of property and contract themselves constitute state intervention without which our modern economy could not function in its current fashion. *See generally* Singer, *supra* note 13, at 482-95. Thus, by relatively laissez faire I mean an economic philosophy that strongly supports state intervention to establish basic property and contract rules but tends to oppose other forms of intervention such as consumer safety regulations or national health insurance. Following Kennedy, I eall this "capitalist" philosophy individualistic because of its rhetorical emphasis on taking care of one's own. Kennedy, *Form and Substance*, *supra* note 2, at 1713-16.

54. I prefer to describe proponents of bright line rules and classic laissez faire capitalism as sharing a mutual faith in what I eall sequentialism. *See generally* Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. (forthcoming 1991). Thus, the preferred legal strategy for these groups is *first* to establish a set of legal rules and then expect citizens and society generally to conform to them. Breaches of this strategy result when lawmakers attempt to alter or bend the rules to fit changing social conditions (*e.g.*, relaxation of formalities). And, the strategy fails altogether when a contemporaneous assessment of social conditions is built into the determination of what the rule actually is.

55. For an explicit defense of legal rules within the confines of a paean to capitalist virtues, see M. FRIEDMAN, CAPITALISM AND FREEDOM 25-27 (1962).

The most intriguing question, of course, is to describe the psychological stance of the so-called individualist/rule advocate. As described above, my view is that both individualism and legal rules

The problems with Kennedy's argument, however, are rapidly becoming well known. As Jack Balkin has illustrated, the strength of Kennedy's connection between rules and individualism stems in part from his choice of contract law as the principal point of analysis. In tort law, for example, it might be argued that altruistic political philosophies would favor the bright line rule of strict liability over the more individualistic negligence standard.[56] Mark Kelman makes a similar point when he notes the altruistic motivations behind regulations establishing bright line time periods during which consumers might cancel otherwise valid contracts.[57] And Kelman also points out the wide variety of contexts in which vigorous controversy over rules and standards occurs outside traditional debate between individualism and altruism. Here Kelman refers to situations such as death-penalty sentencing and welfare rights.[58]

Pierre Schlag has gone still further in challenging our ability to link rules and standards with alternative substantive outlooks.[59] Most tellingly, Schlag notes the extent to which the familiar defense of bright line rules overestimates our ability to uncontroversially determine the scope

depend heavily on chronology. *See supra* note 54. Thus, individualist philosophy often rests on the idea that social life occurs only *after* fate has handed each of us certain talents and capabilities. *See generally* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Duties to others involve a collective imposition of rules and redistribution of resources in an already existing system. Rule advocates seek to pattern any such collective efforts along the same sequentialist lines. First, we collectively establish the rules of society, in particular property and contract rights, and then we let the chips fall where they may. In my judgment, problems with what I am referring to here as *sequentialism* are a more appropriate target for progressives than the more general attack on what others have called liberalism. *See generally* Paul, *supra* note 54. But this is a subject for another day.

56. *See* Balkin, *Crystalline Structure*, *supra* note 2, at 45-48. Of course, as Mark Kelman points out, Balkin's argument implicitly assumes the standpoint of duties owed by the defendant to the plaintiff. M. KELMAN, *supra* note 52, at 57-58. From the opposite perspective, a strict liability rule is indeed highly individualistic in that it allows the *plaintiff* to rely on excessive formality to take advantage of the defendant by holding her liable for harm that was not her fault. Similarly, the negligence standard is arguably altruistic from the plaintiff's point of view, since here the plaintiff expects compensation only when she has reason to blame the defendant for her injuries. The complication of standpoint, of course, only deepens the problem of demonstrating a direct correlation between rules and individualism or between standards and altruism.

57. M. KELMAN, *supra* note 52, at 58. Kennedy has a somewhat convincing response here in that he explicitly reserves his arguments to cases about the form of state intervention rather than issues of whether the state should intervene. *See* Kennedy, *Form and Substance*, *supra* note 2, at 1741-42. Thus, the altruistic motives of consumer protection advocates are presumably aimed at getting some form of consumer relief. These same altruists might also prefer the politically less acceptable alternative of granting consumers power to revoke contracts within a reasonable time. They would certainly favor waiver of the strict statutory filing period if a consumer could show good reason for the delay.

58. M. KELMAN, *supra* note 52, at 56-57. His point is that committed altruists might likely argue vociferously for rule-like welfare entitlements. Similarly, the death penalty poses a complexity for the very notion of altruism (is mercy toward a murderer altruistic or does it show lack of concern for the victim?) and also raises strategic questions. Should death penalty opponents argue for more discretion in sentencing (hoping for mercy) or should they press for more rule-like factors that make imposition of the penalty more difficult?

59. *See generally* Schlag, *supra* note 2.

of the rule's application. At first glance, for example, it may appear that a rule granting a landowner the right to dig for water would provide greater certainty and less room for administrative discretion than a "flexible standard" limiting the landowner to reasonable uses of underground water.[60] But this will only be true after a court has decided that a particular dispute involves the underground water rule. Suppose instead that the landowner's careless digging for water results in subsidence of a neighbor's soil.[61] Perhaps this dispute involves subsidence damage, not water rules, and thus the bright line rule will not solve it at all. The point, of course, is that the original rule cannot be invoked to determine whether the subsidence dispute is *really about* underground water.[62]

Moreover, Schlag convincingly tells us, the link between rules and individualism (or standards and altruism) is somewhat tenuous.[63] As Schlag puts it, a hopeful individualist may argue for bright line rules on grounds that legal classifications will so closely fit real life that citizens can master rules, which in turn will help facilitate individual life prospects. So too, however, a despairing altruist may prefer rules as the best way to keep complicated social life from degenerating into chaos. Similarly, a hopeful altruist may champion standards as an attempt to build

60. *See, e.g.*, Acton v. Blundell, 12 M. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843) (holding that a landowner ordinarily has the absolute right to use underlying water regardless of how such use affects neighboring landowners).

61. *See, e.g.*, Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21 (Tex. 1978) (announcing the rule that recovery may be had in future cases for negligent withdrawal of water from the land that causes severe subsidence in others' lands).

62. A point largely lost on the *Friendswood* majority.

Schlag, however, does make the same point in the more evocative language of deconstruction. He notes the impossibility of applying any rule without first determining the context within which it is to be interpreted. The problem, of course, is that the rule itself cannot determine the context. Accordingly, the rule alone has no power to produce results more certain than those obtained by applying flexible standards. After all, determining the proper context may itself be an uncertain proposition. *See* Schlag, *supra* note 2, at 407-18.

In my judgment, Schlag somewhat overstates the case. First, I am not sure that individual decision makers find themselves very often in a position to imagine alternate contexts nearly to the same extent that they find themselves able to choose between rules and standards. Indeed, I wonder to what extent the invocation of alternate contexts may depend upon a greater degree of decision-making autonomy than the individual possesses. *See generally* Schlag, *"Le Hors De Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) (eloquently describing why traditional legal thought falsely privileges individual decision making). Second, I see the legal disputes involving rules and standards often to be colored by a background context that prefers unrestricted private conduct. Thus, in my example involving groundwater, I find a predictable correlation between the judges who support bright line rules and those who wish to find the rules applicable in a situation where so holding will relieve a defendant of liability. If the background context whereby "everything is permitted unless explicitly forbidden" does form part of our collective consciousness, then the problem of choosing contexts will not be as severe as Schlag contends. Finally, I am not persuaded that the task of choosing context is either formless or that it looks exactly like the dialectic choice of rules and standards. But all this too is a subject for another day.

63. *See* Schlag, *supra* note 2, at 418-22.

widely shared community values into the law. Then again, standards may be the choice of the despairing individualist who sees the world as too hopelessly complex ever to be governed through explicit directives.[64] In sum, Kennedy's description of similarities between the rhetoric of rule-proponents and the rhetoric of individualism may not have established an unambiguous intellectual connection between the two.

In my judgment, however, all these criticisms of Kennedy's work miss the central contribution of teaching students to focus on the link between debates over legal form and controversies concerning underlying substance. By systematizing the rhetoric employed within legal and political debate, Kennedy's brand of legal semiotics serves as a powerful antidote to the woes of the complacent depoliticization of more traditional legal education. Accordingly, to stress the arguable reductionism within Kennedy's account is to ignore the still greater reductionism at the root of more uninformed efforts to link law with politics.

Consider the standpoint of the intellectually curious law student commencing a three-year course of study. She may begin school understandably suspicious of the claim that pre-existing formal law determines case outcomes independent of more openly political considerations. In the 1990s this suspicion may stem from watching the Supreme Court's shifting decisions concerning the constitutionality of anti-abortion laws. No one could dispute that judicial changes in part reflect the philosophies of the Presidents who have selected recent court appointees. It is extraordinarily tempting, then, for the young law student to cling to political labels and demand that her professors explain judicial decisions in terms of the liberal or conservative biases of individual judges. Indeed, a particular version of youthful naivete, now commonly referred to as vulgar Marxism, may impel the student to seek explanations rooted solely in the class biases of the judiciary.[65]

Even a mediocre legal education, however, will quickly and rightly undermine our young student's confidence in her ability to easily explain or predict results in terms of either conventional or class-based politics.[66]

64. *See id.* at 420.

65. As an historical matter, it seems clear to me that critical legal studies grew largely as a reaction to rather than as a product of such reductionist accounts. *See generally* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986) (describing critical legal studies as a revolt against the objectivist view that any general form of government requires any particular set of institutional arrangements).

For a description of the term "vulgar Marxism," see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 722-25 (1985).

66. I do not mean to suggest that it is impossible to construct sophisticated and persuasive efforts to explain a whole range of judicial outcomes in terms of class bias. I do mean that this task is outside the intellectual grasp of most beginning students and that any such class-based explanations can expect to encounter stiff intellectual resistance within the academy.

As it turns out, judges who seem conservative on some issues often appear liberal on others.[67] Indeed, there appear to be different brands of liberalism and conservatism that often point in opposite directions.[68] Similarly, upper middle class courts often decide cases in ways that at first glance appear to further lower class interests.[69] In fact, the more dedicated the student and the harder she tries to make sense of legal outcomes in terms of a unified alternative theory, the more quickly she may become convinced that judicial results are not readily explainable in terms of political ideology.

This same mediocre legal education thus risks sending the student a misleading and dangerous message. Few would argue that the development of competing political ideologies can be explained in terms of the need to satisfy the independent demands of competing legal systems. Similarly, it is difficult to explain legal rules as the direct product of political ideology. Accordingly, the student who learns that law cannot explain politics, and vice versa, may jump to the erroneous conclusion that law and politics are largely separate realms each entitled to its own domain.[70] And, of course, nothing is more certain to deaden the law

67. And as Jack Balkin concisely explains, liberals and conservatives are often inconsistent when looked at through the framework of attitudes toward individualism. Thus, Balkin writes: "American liberals take relatively Individualist positions in areas of free speech, reproductive freedom, and criminal law, while taking relatively Communalist positions with respect to economic regulation and accident compensation. The position of American conservatives tends to be exactly the reverse." Balkin, *Crystalline Structure*, *supra* note 2, at 69.

68. For a particularly nice effort at describing alternate brands of conservatism and demonstrating the underlying theme that holds them together, see West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (arguing that conservatives are held together by a common deference to authority even as they disagree over which authority is to be deferred to).

69. The student committed to class analysis may, of course, always argue that although a particular decision seems to favor the lower classes, it in fact supports the ruling class by quelling discontent and ensuring the perpetuation of the class system. The danger here is that this argument threatens to turn class analysis into a self-fulfilling prophecy. Any decision straightforwardly favoring the ruling class can be described as a product of naked greed, whereas any alternate decision becomes the result of enlightened self-interest.

70. We do after all have different graduate departments for law and political science.

The fallacy here strikes me as deeply resonant with the themes developed in this Symposium. One who hopes to find that politics can explain law in fact already believes that politics and law are separate. How else could the former be sufficiently distanced to explain the latter? Thus, when it turns out that politics cannot readily explain law, the now-refined view is (surprise!) that law and politics are separate. Only now the two are separate in a way that suggests one has nothing to do with the other.

Compare this point with Steven Winter's argument found in his foreword to this Symposium, *see* Winter, *Foreword: On Building Houses*, 69 TEXAS L. REV. 1595, 1602-10 (1991), and in an earlier work, Winter, *Transcendental Nonsense*, *supra* note 11, at 1117-29: Traditional epistemology, he suggests, begins with the idea that there is a radical distinction between the external world (the objective) and the internal life of the mind (the subjective). One approach to philosophy and linguistics would seek to describe the latter in terms of the former. In other words, the way we think and the words we choose are directly determined by the external world. A flat rejection of this conventional approach, however, threatens to ratify its basic premise. For if one argues that the internal life of the mind is not *explainable* in terms of the external world, one risks once again reestablishing the

school experience than the student's perception that she is relentlessly being asked to discount the obvious emotional connection between legal results and deeply held political convictions. Yet there is every reason to suspect that she will draw precisely this lesson from the law school's legitimate attack on reductionist accounts of the law.

It is here that the importance of legal semiotics becomes apparent. The classroom challenge is to convey to the student some sense of connection between legal decision making and political ideology that escapes the trap of trying to explain one in terms of the other. This is precisely the contribution to legal education of Kennedy's *Form and Substance in Private Law Adjudication* and ensuing efforts to blend its message with classroom technique. The crucial point is to show students that the play of arguments often invoked in legal controversy resembles in crucial ways the play of arguments invoked in political debate.[71] Thus, a seemingly technical case about expanding the doctrine of mistake in contract formation mirrors and thus is partly about a contest of political visions. This is not because a liberal will always favor expanding the doctrine of mistake, or because class analysis indicates which outcome will favor the ruling class. No, the case is about political visions because the advocates invoke principles and counterprinciples that transcend the context of the dispute and lie at the heart of a wide range of debate. It may be a coincidence that the attorney seeking a flexible doctrine seems to be invoking altruist themes.[72] Or it may be that there is a deep-seated connection between altruism and flexible standards. The important point is that in some very important contexts there is such a connection. Students alerted to it may recover confidence that their legal education is relevant to the broader themes they entered school caring about.

Moreover, a teaching style that stresses the paired arguments described in the *Pierson v. Post* grid undercuts the reductionism inherent in simpler accounts of the relationship between doctrine and politics. It would be folly to contend after considering *Pierson* alone that courts routinely adopt "the capitalist position." What any study of private law reveals is that both courts seeking to protect investments and courts hop-

distinction between objective and subjective that formed the core of the traditional approach. The risk, of course, is that as long as causal explanation is perceived as the only relevant way to intellectually connect objective and subjective, the objective and the subjective will be viewed as unrelated and distinct.

71. This is, of course, completely unsurprising when one considers that this same play of arguments is also commonly invoked in everyday moral debate. *See infra* Part III(B); *see also* Paul, *supra* note 2, at 928-34 (illustrating legal semiotics through use of typical, nonlegal debate).

72. "It is not my client's fault that he misunderstood the factual premises behind the purported contract. It would be unfair now to hold him to a deal he would not have made had he known the truth simply to protect the other side's reliance on formal indicia of a valid contract."

ing to encourage competition view themselves as fostering a productive capitalist economy. And, of course, these competing goals often point to opposite results within the context of particular cases. The proper conclusion from this insight, however, is not that capitalist politics have nothing to do with legal outcomes. Rather, the point is to illustrate that tensions within legal doctrine are often reproduced within broader political discussion and vice versa. Thus, a legal semiotic approach to *Pierson v. Post* might encourage students to see the case as reflective of tensions within capitalist ideology (*i.e.*, the ideology of private property) as well as demonstrative of the legal system's search for bright line property rules.

Ultimately, an explicit focus on the connections between legal and political rhetoric will serve to enliven the law school classroom without degenerating into shoddy partisan analysis. Consider, for example, a discussion of the at-will employment contract that permits a worker to be fired for good reason, bad reason, or no reason at all. It might be emotionally satisfying to criticize judicial support for such contracts on the grounds that upper middle class judges tend to empathize with employers.[73] But aren't judges capable of transcending their initial reactions, and don't they rule against employers in other contexts? Without a considered answer to "why not here?" this form of political analysis gains merely a limited political charge in exchange for severe damage to intellectual integrity. Alternatively, however, students might be asked to consider the extent to which a proponent of the at-will rule might employ rhetoric that affirms economic transactions as voluntary despite an inequality of bargaining power. Similar rhetoric supports a whole variety of Republican political positions including recent Presidential opposition to legislation banning the hiring of replacement workers and extending all the way to hostility to tax increases.[74] Of course, it would be folly to

73. But, as David Kairys writes:

> [A] common orthodox Marxist explanation is that law is a "superstructural" phenomena that is mysteriously governed and determined by an underlying "base" of economic relations and/or instrumentally controlled by the ruling elite or class. But the law is not simply an armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped.

Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 6 (D. Kairys rev. ed. 1990).

74. Just as judges might view judicial limits on at-will contracts as disturbing arrangements set by the private market, so too the campaign against taxes hinges on public hostility to additional alterations of the allocation of wealth already set through private transactions. *See generally* Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFFALO L. REV. 685 (1989) (discussing the role of official rhetoric in creating public acceptance of increased taxes). More obviously, President Bush's opposition to the ban on hiring replacement workers, *see* Kilborn, *Ban on Replacing Strikers Faces Veto Threat*, N.Y. Times, Mar. 7, 1991, at A18, col. 4, hinges on the view that the current allocation of power between management and labor is producing contracts negotiated in good faith. Of course, since that allocation of power

suggest that anyone supportive of the at-will rule would oppose tax increases or vice-versa. Asking students to consider the rhetorical stance of parties in both cases, however, provides a mechanism for more intelligently bringing politics back to academic discussions of law. The question remains whether this discussion of politics leads in any particular direction. To this problem, we now turn.

III. Selling Legal Semiotics Short

As noted at the outset, contemporary legal scholars engaged in systematizing legal argument are often self-identified champions of progressive politics.[75] Two principal arguments have to this point formed the link between progressivism and legal semiotics. First, the process of carefully analyzing patterns and contradictions within legal thought is often said to rescue the analyst from otherwise untenable confusion. Intellectual clarity thus creates greater freedom to mold the law in accord with the analyst's own (progressive) political vision.[76] Second, as described briefly above, the careful systematization of legal argument often reveals the replication of patterns of opposed arguments occurring across a wide variety of contexts. If, no matter what the content of the dispute, the parties find themselves fighting over rights to security versus rights to freedom of action or over whether the decision maker should adopt a rule or a standard, then perhaps legal discourse is transforming real con-

is so clearly established by federal statutory intervention, no one can plausibly claim that the current arrangement is a neutral product of the market.

75. *See, e.g.*, D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, at i (1983) (suggesting "ways in which left students and teachers . . . can make the [law school] experience part of a left activist practice of social transformation"); Balkin, *supra* note 7, at 1141 (defending legal semiotics in part for its role in stimulating progressive change); Singer, *supra* note 4, at 52-54 (refuting charges of nihilism and defending the possibility of marrying anti-foundationalist epistemology to progressive politics).

76. I view this argument as a fair encapsulation of some of Jack Balkin's ideas concerning the political character of semiotics. Thus, Balkin is clearly attracted to the idea that semiotic study will reveal false assumptions that, when corrected, may point in a progressive direction. *See* Balkin, *supra* note 7, at 1141. Consider, for example, his argument that a semiotic understanding of a term like "democracy" might help us to recognize ways that judicial review could enforce as well as interfere with democratic ideals (*e.g.*, where voting qualifications or massive expenditures on political campaigns subvert the so-called democratic process). *See id.* at 1136-37. Balkin goes even further when he suggests that "deconstruction itself does not have a politics, or rather, it has only the politics of those who make use of it." Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1613 (1990). Here, of course, I take the liberty of assuming that Balkin views deconstruction and semiotics in a similar light.

I do not mean to suggest, however, that Balkin is insensitive to the fact that semiotic study may help a progressive individual revise her own ideas just as it may help her demystify the prevailing ideology of the legal system. *See* Balkin, *Crystalline Structure*, *supra* note 2, at 76-77 (asserting that semiotic study may challenge preconceived intuitions and produce re-evaluation of moral and legal positions).

flict into artificial controversy.[77] From this perspective, a studied exposition of patterned argument may highlight ways in which people are being funneled into a formulaic vocabulary that sidetracks them from expressing their true grievances.[78] Once they learn the pattern of legal discourse, they may again be free to introduce moral and political concerns that will take society in a progressive direction.

Although both these arguments capture important aspects of the legal semiotics project, each is ultimately unsuccessful in demonstrating a powerful link between legal semiotics and progressive politics. The problem in both cases is the implicit appeal to an alternative realm of normative decision making that, unlike law, will be free of the formulaic, structured arguments that semiotics describes.[79] Consider the progressive who believes that demonstration of law's structured character will demystify law and thus pave the way for insertion of personal politics. Her implied claim is that her own ability to make normative, political judgments in some way transcends (precedes?) the structure of legal argument that semiotics makes clear. Alternatively, consider the argument that legal semiotics will vindicate those moral claims of the everyday citizen that happen to translate poorly into formulaic legal rhetoric. The unstated message here is that citizens comprehend their grievances in terms sufficiently different from the terms used in legal rhetoric that exposing the latter will give life to the former. If, as there is reason to suspect, it nonetheless turns out that ordinary moral discourse (argument two) and internal subjective decision making (argument one) both share the structured character that semiotics highlights within legal discourse, then neither lay discourse nor liberated political action can successfully serve as a starting point for a progressive political movement. The task

77. "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." Kennedy, *supra* note 5, at 168.

78.

> 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 channelled into bites could reflect the full complexity either of the fact situation or the decision-maker's ethical stance toward it.

Id. at 192.

79. For an insightful and sustained effort to show how critical legal thought is seriously compromised by its frequent reliance on a human subject supposedly liberated from socially constructed discourse, see Schlag, *The Problem of the Subject*, 69 TEXAS L. REV. 1627 (1991). *See also* Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory*, 34 AM. U.L. REV. 1231 (1985) (discussing similar issues); Schlag, *supra* note 62 (demonstrating how deconstruction will be misunderstood so long as the student insists on a radical separation between the self who makes normative decisions and the "techniques" the self employs to make those decisions).

ahead, then, is to explore the weaknesses of the principal arguments linking progressivism and semiotics and to propose alternatives.

A. Demystification

Let's begin by examining the extent to which legal semiotics does indeed serve a valuable role in demystifying the legal system's pretensions to political neutrality. Balkin's description of how legal concepts are often defined in terms of one another, for example, helps remind us to beware of judicial opinions that justify harsh outcomes through appeals to abstract concepts.[80] Thus, we may readily identify a court as question-begging when it sanctions legislative withdrawal of welfare payments on the ground that these benefits are not "property."[81] After all, the claimant's constitutional challenge is based on the idea that the benefits are "property," and thus the court's job is to explain and justify why they are not, rather than to pretend to find the answer in the concept itself.[82]

Moreover, the project of classifying legal arguments often plays a key role in illuminating political assumptions that lie behind many uncontroversial legal doctrines. One favorite hypothetical I use with my constitutional law students involves a public school deciding that my son is not ready for algebra in the eighth grade, despite the fact that one quarter of his classmates will be offered the course. Why, I ask, aren't his equal protection rights violated when the state provides a benefit to

80. *See supra* Part II(A), text accompanying notes 23-36. The credit here, of course, goes to Felix Cohen, Wesley Hohfeld, and the rest of the legal realists. *See generally* Singer, *supra* note 13, at 475-503.

81. Bowen v. Gilliard, 483 U.S. 587 (1987), provides a recent example in which the Court rejected a claim that reduced benefit levels constituted an unconstitutional taking of property. In *Bowen*, recipients of Aid to Families of Dependent Children had challenged a statutory requirement that family members treat support payments to one child within the family as income to the family. *Id.* at 589-97. The Court found that "the family members other than the child for whom the support is being paid certainly have no takings claim, since *it is clear that they have no protected property rights to continued benefits at the same level.*" *Id.* at 605 (emphasis added). It would be misleading, however, to accuse this particular opinion of circular reasoning, since to a considerable extent the case merely parrots holdings of earlier cases and thus arguably relies on precedent and not abstract concepts. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) (presenting the landmark argument for treating welfare benefits like property); Simon, *Rights and Redistribution in the Welfare State*, 38 STAN. L. REV. 1431, 1488-91 (1986) (suggesting that property rhetoric is a poor strategic choice for progressives defending systems based on need).

82. For general discussions of the problems involved in deriving concrete outcomes from the abstract notion of property, see Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69-82 (J. Pennock & J. Chapman eds. 1980); Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622, 1632-37 (1990); Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239 (1986).

Any contemporary case involving welfare benefits may, of course, appeal to earlier precedent settling the question and thus avoid question-begging in the same way as *Bowen* might. But there is always the first case to consider the issue, and semiotics will help us to at least insist that the court of first impression provide answers that do not take us in circles.

others but not him? The point, of course, is not whether a court might persuasively rule against him. Rather, my hope is that because the child's argument has a similar form (or structure) to arguments made by the more conventional equal protection plaintiff (the citizen denied a public job on grounds of national origin, for instance), students will begin to see the extent to which cultural norms influence legal outcomes. And, given the vociferousness of my students' defense of the school board, I can testify to the depth of the cultural norm supporting ability grouping.

Perhaps most important, legal semiotics' relentless emphasis on the structure of opposing arguments will lead students to question the naturalness of any legal outcome.[83] For if traditional positions are justified largely in terms of legal arguments that are the subject of semiotic study, students will be well armed with contradictory arguments that may lead to unconventional results. Thus, legal semioticians may create arguments that the Constitution requires socialism[84] or invent hypotheticals in which workers keep manufactured products and pay capitalists rent for providing materials and management.[85] In this sense, legal semiotics in its very essence is oppositional to the status quo. Thus, if conservatism is defined, albeit unfairly, as unreflective acceptance of things as they are, semiotics will be anti-conservative if only in its ability to create reflection. To deny this aspect of the legal semiotics project is to ignore the extent to which students may find their improved argumentative skills liberating and, in any event, will find the semiotics classroom exciting.[86] Indeed, from the perspective of the teacher-student hierarchy, there is a distinctly progressive flavor to legal semiotics' contribution in empowering students to question authority.[87]

There is a considerable distance, however, between the anticonservative politics of student empowerment and the brand of progressive politics outlined in the introduction. Students encouraged (and more importantly taught systematically how) to consider alternatives to the sta-

83. *See generally* R. UNGER, *supra* note 65, at 21-22 (identifying the challenge to the naturalness of particular social institutions as among CLS's principal contributions).

84. *See* Singer, *supra* note 4, at 22-23 (noting that if publicly chartered corporations are agents of the state and Marx was correct that employers expropriate surplus value, then the capitalist system may constitute an unconstitutional taking without just compensation); Tushnet, *Dia-Tribe* (Book Review), 78 MICH. L. REV. 694, 696-705 (1980) (reviewing L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)) (suggesting that then-existing precedents could be used plausibly to argue for socialism).

85. Fischl, *supra* note 11, at 527-28 (asking students to consider why the legal system does not treat the manufactured product as the worker's property rather than as the property of the employer).

86. Even if semiotics is conceived in narrow terms, then, I think it would be wrong to claim, as Balkin does for deconstruction, that semiotics simply has no politics. *See supra* note 76.

87. *See* Jaff, *supra* note 2, at 258-63 (describing semiotic techniques as student-empowering methodologies).

tus quo may be intellectually more free to advance progressive positions. But they will also be intellectually freer to argue for greater individualism, more social hierarchy, and greater inequalities of wealth distribution. Within the context of classroom teaching, this may be a very good thing. After all, most legal semioticians are more committed to their academic values than their progressive politics: we want our classes to stimulate thought, not dispense propaganda. Nonetheless, from a broader perspective, many of us feel a deep connection between our methods for provoking intellectual exchange and our goals for a more progressive society. We wonder whether this connection is purely intuitive or indeed whether we can articulate its cognitive roots.

And, it is at this point that the demystification strategy will fail us. For reliance on demystification simply transfers all the important discussion concerning correct outcomes from the realm of (now-demystified) legal debate to the still more mysterious place in which each of us is to form his or her own political values. Won't it be the case, however, that in deciding whether I wish to become a progressive (or a conservative for that matter) I will encounter precisely the same mind-numbing set of contradictory arguments that legal semiotics has so carefully taught me? And, if I do encounter these arguments—in other words, if I am deeply conflicted, let's say, over the wisdom of merit-based systems versus more egalitarian approaches—then the "demystification" of legal argument will leave me free to be conflicted rather than free to be progressive.[88] In short, in the absence of an alternate normative dialogue that persuasively makes the case for progressive politics, a demonstration that legal argument is formulaic cannot push society in progressive directions. Worse still, to the extent that normative dialogue appears to mimic precisely the legal arguments shown to fall within formulaic structures, the self's ability to formulate her own politics may be deeply threatened.[89]

88. Nor is it likely that teachers of legal semiotics can rely on students' self-interest to overcome their moral ambivalence. Initially, because we speak here of personal matters that are in many ways self-definitional, it will be difficult for the troubled student to identify a self-interest wholly separate from her queries concerning her political perspective. But even if we ascribed to the student a more materialistic self-interest, it is difficult to assume self-interest will steer a course toward progressive politics. Thus, even if one believed that the struggle against economic domination would likely help persuade the average citizen to develop some version of a progressive politics, it is much harder to make that argument concerning the average law student, whose material life prospects might be enhanced by perpetuating many current inequalities.

89. In this sense, Balkin's original response to the charge that legal semiotics may promote cynicism is somewhat superficial. He correctly notes that the mere demonstration that conflicting arguments can be made in many situations does not prove that all the arguments are equally good. Indeed, he stresses that the possibility of conflicting positions only strengthens our responsibility for the positions we take, especially since these positions affect human lives and fortunes. *See* Balkin, *Crystalline Structure*, *supra* note 2, at 75. But what positions are we to take? In what language are we to speak that enables us to distinguish a good argument from a bad one? Balkin's implicit

It is perhaps for this reason that much contemporary legal scholarship ignores the question of how the individual develops his or her own politics.[90] Nowhere is this omission more intriguing than in Duncan Keunedy's account of the phenomenology of judging.[91] Kennedy examines the situation of a hypothetical federal district judge who experiences a conflict between "how [he] wants to come out"[92] and his initial perception of the way the law would likely decide the case. Kennedy's textured description of the different ways the judge might feel bound (and not) by existing law constitutes a significant advance over more superficial treatments of indeterminacy within law.[93] But what Kennedy never tackles is the reasoning process by which his imaginary judge developed the set of

message is that this question is for each of us to answer as we seek "progressive refinement of our moral and legal intuitions." *Id.* at 77. The problem, however, is that each of us has now carefully considered the extent to which our personal politics are so difficult to defend that we are not quite sure why we still cling to them. Our fear of becoming cynical, then, is not that we will stop caring about important issues, but that we will care so much as to be constantly unsure what to do. At some point, paralysis and cynicism will become hard to distinguish.

Although I don't wish to belabor the point, Professor Balkin's current formulation strikes me as only marginally better. To be sure, he acknowledges what I call the threat to the self's ability to formulate her own politics. Balkin, *supra* note 9, at 1851. But the problem is not, as he now identifies it, that the semiotics student will experience both legal and everyday discourse as "rhetorizable" and thus "inauthentic." *Id.* at 1847. Rather, the difficulty is that focusing on one's own embrace of contradictory arguments may undermine one's view that her deepest political beliefs are anything more than a mere assertion of will. Thus, in the example Balkin provides, *id.* at 1849-50, Lawyer *A*, who favors a negligence standard for drug manufacturers, will quite sincerely invoke arguments that she herself is likely to reject in other contexts. Moreover, the phenomenon of shifting from one argument to its rhetorically matched opposite will occur both inside and outside of legal discourse. Accordingly, what Lawyer *B* should say is not that there are obvious counterarguments but that there are obvious counterarguments that Lawyer *A* would herself accept in other circumstances. To be true to herself Lawyer *A* would then be forced to explain why she picked the set of what Balkin calls individualist arguments in the context of affixing a negligence standard for drug manufacturers whereas she prefers what Balkin calls communalist arguments in other contexts. And to the extent that this explanation was itself refutable with "rhetorizable" counterarguments that Lawyer *A* would also accept, the process of explanation for which set of arguments to pick would continue, perhaps indefinitely. To my mind, no amount of post-modernist self-congratulation about the extent to which one's arguments are themselves part of the process of social construction will render "unnecessary," *id.* at 1849, the anxiety produced when one can explain one's most deeply held beliefs only with arguments that one will accept sometimes but not always.

90. Roberto Unger is the most notable exception. *See generally* R. UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

91. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986). The omission is intriguing because Kennedy's essay is highly sensitive to the problem on an internal level, *see infra* note 94, and devotes considerable energy to demonstrating that the judge's personal politics are open to normative shaping by law and other factors. *Id.* at 548-58.

92. *Id.* at 519.

93. The bulk of Kennedy's essay is devoted to describing different ways that the judge might experience existing doctrine that at least initially appear to cut against his preferred outcome. *See id.* at 527-59. The more jurisprudential conclusion is that the *process* of deciding a case will take the judge through cases in which it feels like legal rules firmly govern the outcome as well as through cases in which the rules seem meaningfully conflicted or open-ended. But since the process is the crucial point, it is intellectual balderdash to seek general conclusions concerning whether the law is determinate or indeterminate. How can you even answer that point for a particular case until you

political views that gave him a clearly defined sense of "how [he] wants to come out."[94] Thus, what Kennedy has done is to rhetorically separate the progressive self (the judge) from the legal materials with which the judge is assigned to work.[95] Within this context he eloquently explains how the law may or may not constrain the progressive actor. And, he does a wonderful job of demonstrating that claims of total or minimal constraint greatly oversimplify the problem. He thus does traditional demystification one better by demystifying broader claims of demystification. But the basic problem still remains.

A judge who reads Kennedy's essay may find it, as I do, to be an extraordinarily convincing account of the legal reasoning process. She may, if she is already a political progressive for reasons she cannot quite explain, find that Kennedy's work inspires her to greater levels of judicial creativity.[96] But it will be exceedingly difficult to discern the links between Kennedy's phenomenological account (which makes use of many of the semiotics techniques described above) and his progressive politics. For indeed, Kennedy says not one word about why his imaginary judge's instincts are with the workers, and not the employer, in the hypothetical dispute he describes.[97]

have thought about it? In short, the question of whether the law is indeterminate is itself indeterminate. *See id.* at 560-62.

For general comments on indeterminacy within law, see the sources collected, *supra* note 11. For insightful comments on Kennedy's essay, see especially Winter, *Transcendental Nonsense*, *supra* note 11, at 1180-98.

94. In this sense, "how [the judge] wants to come out" plays the role in Kennedy's essay of what Pierre Schlag calls a "theoretical unmentionable." Schlag, *supra* note 62, at 1660. Kennedy needs the reader to have a clear sense of how the judge wants to decide the case in order to create a believable conflict between "how [the judge] wants to come out" and the felt constraints of the law. To explain the rationale for the judge's preferences, however, would force Kennedy to embrace a normative dialogue that might turn out to look just like the legal discourse he deconstructs within the essay. Thus, "how [the judge] wants to come out" does the important theoretical work while the origins of the preference remain unmentionable.

To be fair, however, it is important to recognize that Kennedy repeatedly stresses that the judge's politics are relative, are open to influence by the law, and that what is meant by the law is no more than the judge's own internal perception of external constraints. *See* Kennedy, *supra* note 91, at 548-58. Thus, there can be little doubt that Kennedy is aware of the importance of giving content to the judge's political perspective. He might have disclaimed the project as beyond the scope of his essay's treatment of only some aspects of the internal phenomenology of judging.

95. Kennedy struggles mightily not to fall victim to this problem. He stresses that the law has normative power to influence the judge and that indeed the law is little more than one part of the judge's internal normative process. *See id.* at 548-58. A full account of the judge's phenomenology, however, would need to do more than pay lip service to these obvious points. As Kennedy candidly admits, the judge is the ultimate source of normative authority in his own account. *See id.* at 557. Accordingly, we need to know the inner workings, that is, (what *constitutes*) the judge.

96. It should be abundantly clear that judicial creativity by itself has no apparent political tilt. If anything, one might expect progressives to have mixed feelings about an institution that enables electorally unaccountable public officials to make decisions concerning the fate of others' lives.

97. Kennedy relies instead on the judge's character as a left-leaning progressive. He contends that the judge's character will have been shaped by his experience and by his encounter with legal texts. Kennedy, *supra* note 91, at 519-22. This account creates enormous advantages in terms of

A similar point can be made concerning certain passages within Joseph Singer's antifoundationalist version of CLS, *The Player and the Cards: Nihilism and Legal Theory*.[98] The central message of this extraordinarily lucid article is that the absence of definitive-reasoning procedures to ground legal or moral choices does not compel a nihilistic or cynical attitude toward moral decision making. Nor can there be any doubt that this message is correct. As Singer explains, it is quite possible to be passionately committed to one's moral stance without being able to prove that stance correct through use of uncontested techniques of legal or moral reasoning.[99] The real question involves the kind of thought process the individual experiences that enables her to sustain her passion in light of a more rationalist critique.

Singer finds the grounding (a term he would probably dispute) of such passion or morality within "the human assertion of responsibility."[100] Having (to my mind successfully) "demystified" foundationalist attempts to justify particular assertions of responsibility, Singer then closes with his own assertion of a progressive agenda.[101] In this sense, his article fits neatly within the pattern described here. For in the absence of the author's (Singer's) own progressive politics, it would be very difficult to link the antifoundationalist attack on legal reasoning (again, this attack employs many semiotic techniques) to any particular agenda. Indeed, one can easily imagine an equally forceful attack on foundationalism followed by a defense of greater societal rewards for individual merit, greater societal efforts to protect privacy, and hard-boiled recognition that cruelty and misery are often necessary to prevent chaos.

Now, of course, there is nothing wrong with a philosophically rigorous essay that makes valid methodological points without pointing in any particular political direction. Thus, I am not accusing Singer of committing any fundamental errors, nor do I wish to join those suggesting that some version of foundationalism may be necessary to sustain the possibil-

exposition. Thus, Kennedy can begin his story with the conflict between the judge and his initial impressions of the law. One wonders, however, if the most interesting action takes place before the beginning of Kennedy's first sentence.

98. Singer, *supra* note 4. By foundationalism, I mean the belief that certain objective principles or reasoning techniques ean be used to ground normative assertions.

99. *Id.* at 52-53.

100. "Virtue may not be knowledge, but it certainly is not callous indifference. Why? Because I assert it to be so. What we do and believe matters. It does *not* matter that I can not prove this to be so; what matters is the human assertion of responsibility." *Id.* at 53 (emphasis in original).

101. Like the brand of progressive politics identified at the outset, Singer is troubled by the extent to which our society too often grants some people the power to tell others what to do. *See id.* at 68-69. He also envisions a society working to "prevent cruelty," *id.* at 67, "alleviate misery," *id.* at 68, and "alter the social conditions that cause loneliness," *id.* at 69.

ity of normative thought.[102] Rather, my fear is that without an additional defense of antifoundationalism in terms of progressive politics, Singer's article risks begging the questions it sets out to address. Singer urges us to be suspicious of any philosophy not directed at discovering "[w]hat shall we do and how shall we live?"[103] But within his own framework, these very questions are matters of personal political morality that each individual can determine only through the process of extended conversation.[104] What I desperately want to know is what that conversation will look like.[105] For only a specification of its content will establish the true politics of demystification.

B. Artificiality

The problem of deferring to an indescribable, but purportedly preferable, form of moral discourse grows more severe within arguments that legal reasoning is an artificially structured and thus inauthentic form of debate. Nothing illustrates this more clearly than what might be called "proverb pairing."

In providing his students one of the most systematic published versions of legal semiotics, James Boyle tells them:

> [T]hese argumentative techniques are, *by themselves*, incapable of explaining the cases or the "rules," because for each argument or technique there is a counterargument. Without some political choice as to which side one is going to favor, the arguments are just like pairs of cliches, e.g., many hands make light work vs. too many cooks spoil the broth; a stitch in time saves nine v. cross your bridges when you come to them.[106]

But what basis is there to distinguish *political* choice, which presumably involves authentic considerations, from the supposedly inauthentic invo-

102. *See generally* Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1 (1986) (seeking a ground for law within the concept of public morality).

103. Singer, *supra* note 4, at 1. I have often wondered whether this phrasing of the question does not already presuppose some version of objectivism. After all, if at bottom morality involves the "human assertion of responsibility," why isn't the crucial question "what shall *I* do and how shall *I* live?" Like Singer, I prefer the more communal phraseology. Perhaps, however, this means both of us cannot quite shed our faith in moral principles that are objective in the sense that they apply to more than one person.

104. *Id.* at 51-56 (describing legal reasoning as a process of conversation).

105. In other words, just as Kennedy devotes little attention to what I see as the crucial point of the judge's moral character, so too Singer spends too little time on the nature of moral conversation to explain how the individual develops moral views that will free her to act forcefully once foundationalism has been "demystified." For Singer's more recent efforts to confront this problem, see Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989); Singer, *Should Lawyers Care About Philosophy?* (Book Review), 1989 DUKE L.J. 1752, 1752-55 (reviewing R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989) and E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988)) (discussing the relationship between philosophy and justice).

106. Boyle, *supra* note 2, at 1051-52 (emphasis in original).

cation of clichéd discourse that now encompasses not only law but familiar proverbs? In other words, do we wish to encourage students to draw a sharp contrast between "something *real*—some rules, some political analysis of the rule structure, some philosophy, economics, history" and something artificial—"thousands of pages of judicial rhetoric."[107]

In my classroom, I also highlight the similarity between the frequently opposing structure of legal argument and the equally frequent tendency of common proverbs to come in matched pairs. In addition to the proverbs Professor Boyle identifies, my favorites include: "absence makes the heart grow fonder" versus "out of sight, out of mind"; "look before you leap" versus "he who hesitates is lost"; "nothing ventured, nothing gained" versus "a bird in the hand is worth two in the bush"; and "opportunity knocks but once" versus "if at first you don't succeed, try, try again."[108] But the lesson I draw from the recurrent pattern of contradiction is precisely the opposite from the one suggested by Professor Boyle. Rather than teaching my students how legal rhetoric is as empty as mindless clichés, I emphasize how legal argument simply reflects the confused and contradictory character of similar efforts to make moral sense out of a confused and contradictory world.[109] In previous work, I have attempted to illustrate this lesson by demonstrating the similarity between legal arguments and a mundane dispute over a child's bedtime.[110]

107. *Id.* at 1008 (emphasis in original). For a concise summary of the political dangers inherent in stressing the supposed indeterminacy of artificial judicial rhetoric, see Winter, *Indeterminacy*, *supra* note 11, at 1466-69.

108. Efforts to square these apparently inconsistent maxims are beyond the scope of this Paper. I suspect, however, that much is to be learned from studying which linguistic metaphors are chosen to convey competing messages. Thus, the heart, symbolizing a person's deepest emotions, gains appreciation for an absent love. In contrast, the mind, which sometimes "changes" or "plays tricks," too easily forgets the absent friend.

109. Professor Balkin nicely describes the extent to which unresolved moral tensions and conflicts will always be with us, and he is wholly correct to suggest that pressure to resolve such conflicts won't necessarily point in a progressive direction. Balkin, *supra* note 9, at 1836-40. Indeed, I here stress the conflicts within everyday proverbs precisely to refute the argument that would find a necessarily progressive bite to the process of rooting out contradictions.

Again, however, the interesting question is not whether the legal semiotics project is intrinsically progressive but whether there are factors within our historical circumstances that align the substantive goals of progressives with the intellectual methods of semioticians. Balkin's argument forces us to recognize that when a semiotician highlights the similarity between the arguments for slavery and the arguments for wage labor, the reactionary could use this to support reinstituting slavery just as the progressive might use it to support adoption of a high minimum wage. But both advocates will have changed our thought process by contextualizing a social practice (wage labor) that we might otherwise have taken for granted. While Balkin is correct that the process of contextualization may or may not have progressive implications, those pushing the process have an obligation to inquire what political implications contextualization does have rather than to rest easily with the view that the political implications cannot be identified. Part IV represents my preliminary inquiry into these political implications.

110. *See* Paul, *supra* note 2.

Another way to make the point, however, would be to consider how obviously conflicting proverbs actually function in everyday decision making. To one school, proverbs too are artificial and merely provide a crutch for the more difficult contextual decision making we all confront. Nor can it be denied, for example, that a person deciding whether to spend a year apart from his fiancée will ultimately make "a personal choice" that cannot be determined by invocation of a maxim like "absence makes the heart grow fonder." But what does it mean to say that the decision maker is making a *personal* choice? Certainly we would not expect that person to place a label on himself and then decide according to the purported implications of the label. Imagine a person whose internal justification for a decision to take the far away job was only "I'm a risk taker so I'm going."

Instead, we might expect a more reflective person to choose by engaging in extended conversations with friends concerning the pros and cons of the year away. And, in my own experience, friends with a strong point of view would be extraordinarily likely to invoke maxims like "out of sight out of mind" to support their position on whether the relationship could stand the strain of a year apart.[111] Indeed, these maxims might ultimately prove useful to me (*i.e.*, the decision maker) both as heuristic, emotional devices to help me capture the essence of a particular argument and as evocative capsules to trigger memories of how I coped with similar decisions and experiences in the past. Nor can I easily envision an alternate vocabulary with which to describe the competing positions that would differ greatly from the familiar clichés, although I would be quick to recognize that the guts of the decision would depend more on the details than the proverbs. Moreover, once I had made a decision, I can easily imagine myself telling someone that "the absence made the heart grow fonder" argument seemed stronger than the "out of sight, out of mind" argument without much ability to describe why I did what I did beyond simply rehearsing the competing positions, both of which, when restated, will continue to appear strong. The last thing I would be able to do would be to defend the decision based on "something real" like "psychological analysis" concerning the person I am and want to become. My decision would be "a personal choice" but the play of

111. Of course, just as legal argument often points in different directions depending on whether the focus is on the plaintiff or the defendant, so too the proverb here could cut both ways. Thus, we can imagine the purported friend arguing against the year away by stressing that *the fiancée* may enter other relationships (out of sight, out of mind) or arguing in favor of the year away by emphasizing that *the decision maker* will be able to cope with the absence of his fiancée (out of sight, out of mind).

competing proverbs would help capture what went on in my head even as I was fully aware of the proverbs' contradictory character.

Compare this example to a judge deciding a tough statutory interpretation case involving an at-will employee who was fired for reporting his employer's unlawful conduct to the authorities.[112] If the relevant statute prohibits firing workers for refusing to engage in unlawful conduct, the judge must consider whether the statute should be extended to cover *reporting* unlawful activity. She will be no more able to rely solely on a maxim like "statutes in derogation of the common law should be strictly construed" than a lay person could solve a problem with a proverb. Indeed, as Boyle rightly tells us, the judge must make a "political choice" whether to invoke this maxim or the competing canon that "remedial statutes are to be liberally construed."[113] But again the question here is what is meant by "a *political* choice." Surely we doubt that the judge's internal thought process will be as crude as to permit her to say, "I'm a liberal so I'll vote with the worker." Instead, I would argue that her decision process will be much like that of the previously described individual facing a year apart from his fiancée. The judge will encounter the competing maxims of statutory construction within the briefs of the opposing sides. She may use these maxims as heuristic devices to remind her of the heart of each position. Ultimately one position will seem stronger. But the judge will be unlikely to know how to justify her final outcome with any vocabulary that is significantly less contradictory than the so-called legal clichés.[114]

Let me stress that my goal here is not to legitimate or justify the judicial reasoning process as so described. Nor do I wish to dispute the notion that the judge's politics will play a key role in helping her determine the result. I would argue that a great deal of what from the outside can readily be described as influenced by politics will, from the judge's

112. The statutory example is Fischl's. *See* Fischl, *supra* note 11, at 513-15.

113. *See* Boyle, *supra* note 2, at 1051-52 (warning that legal arguments always have an opposite and, therefore, cannot substitute for a political, economic, and moral understanding of the law); Fischl, *supra* note 11, at 514. For the classic description of competing canons of statutory construction, see K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960); *see also* Fischl, *supra* note 11, at 513-15 (pairing Llewellyn's insights with the at-will employment example); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451-54 (1989) (arguing that Llewellyn overstated his case and generally revisiting the question of statutory interpretation).

114. For evidence that scholarly inquiry produces no less-conflicting visions of the appropriate course of action open to the judge, consider the divergent viewpoints expressed toward employment-at-will within the sources collected in Fischl, *supra* note 11, at 514 n.37 (comparing Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984), with Finkin, *"In Defense of the Contract At Will"—Some Discussion Comments and Questions*, 50 J. AIR L. & COM. 727 (1985), and Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983)).

point of view, be unconscious and thus will not fit within her experience of choice. At the same time, what judges will often experience as choice will be difficult to describe in terms of conventional politics.[115] But these are points for another day. The point here is simply to deny any sharp differentiation between conflicting desires facing the lay decision maker and opposing arguments confronting lawyers and, most notably, judges. Accordingly, I wish also to challenge strategies that link semiotics to progressive politics through emphasis on the artificial character of legal argument.

Consider finally in this regard Duncan Kennedy's rather cryptic query "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."[116] Kennedy worries:

> 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 chainelled into bites could reflect the full complexity either of the fact situation or the decision-maker's ethical stance toward it.[117]

I worry that precisely the same can be said of everyday debate.

Imagine a discussion between three coworkers about whether one should ask the boss for a raise. The first worker urges the second to go for it. She argues that the second worker has just recently completed a successful project and that any delay will allow the glory to fade, permitting the boss to pretend as though no raise is deserved. Moreover, she stresses that the company's financial picture could always take a turn for the worse, thus making later requests futile. In contrast, the third worker urges the second to wait to learn more about the relatively new boss. He points out that some bosses don't take well to being asked for a raise and instead reward those who keep their mouths shut and perform. Moreover, he notes that asking for a raise without first trying to find out what other workers are making may make the second worker seem naive. A well-considered raise request, the third worker concludes, would de-

115. If, for example, the judge's own experience has led her to view non-compliant employees as "troublemakers," she may be more likely to hold that the statute should not protect the fired worker. It would be highly unlikely, however, for her to feel as though she were choosing to see the worker as a troublemaker. This would require an additional justification that would be difficult to provide. Rather, the political nature of her decision would come in at the unconscious level. Her decision would thus be political, and she would certainly see that she had a *choice* between competing versions of the statute. But it would remain difficult to persuade her of the connection between politics and choice.

116. Kennedy, *supra* note 5, at 168.

117. *Id.* at 192.

pend upon careful analysis of how the individual's salary fits within the overall structure.

Workers strike me as likely to engage in such a discussion in a highly "self-serious" mode. Nor do I suspect they would be troubled to learn that the first worker might very fairly be described as making a "he who hesitates is lost" argument just as the third worker could be said to be invoking the principle of "look before you leap." Sure, it will be the particulars of the situation that ultimately shape whether the worker will in fact ask for the raise. Nonetheless, the structured character of the debate merely reflects the fact that life over and over again presents situations in which the competing virtues of boldness and discretion are both desirable.[118] There is simply nothing artificial about it.[119]

What this means for legal semiotics is that we are kidding ourselves if we believe systematic demonstrations of the structured nature of legal discourse will free us to speak in a less structured or less oppositional mode. If we mean seriously to challenge a social system that sanctions massive inequities in wealth distribution and to challenge a method of production that requires most workers to take orders from hierarchically ranked superiors, we will have to look elsewhere.

IV. Legal Semiotics and Progressivism

A. Coping with Specialization

Here's where we should start. The beauty of legal semiotics lies first and foremost in its simplicity.[120] It doesn't take long to teach students the arguments described in the *Pierson v. Post* grid. Indeed, as I have illustrated elsewhere, virtually the entire structure of everyday legal argument can be encapsuled in a short tale involving a twelve-year-old as-

118. Kennedy's earlier suggestion that conflicts within legal argument reflect a "fundamental contradiction" between the individual's need for others and his fear of annihilation by others is more closely attuned to the position I take here. *See* Kennedy, *Blackstone's Commentaries*, *supra* note 2, at 209-13. My point, of course, is not that there is one fundamental contradiction, but rather that attempts to impose moral order on complicated facts may often appear fundamentally contradictory. I note further that Kennedy has since renounced "the fundamental contradiction." Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16, 36-37 (1984).

119. I do not mean to suggest here that there is nothing artificial about legal discourse or that law never forces people to alter the stories they wish to tell. *See generally* Alfieri, *Reconstructive Poverty Law: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (describing ways in which legal discourse differs from client narrative). Rather, the point is that there is nothing artificial about the structured or routinized pattern of conflict within legal discourse. That pattern also occurs within everyday debate.

120. *Cf.* R. UNGER, KNOWLEDGE & POLITICS 30 (1975) ("In our age, philosophy has won some triumphs because a few men have managed to think with unusual simplicity. If only one could think even more simply, it might be possible to move still further ahead.").

serting her desire to stay up late to watch T.V.[121] Students who have mastered the techniques, however, are better armed against one of the principal sources of hierarchy within any society—specialization.

It is no secret that the growing number of lawyers and the high cost of legal services are producing rapid changes within the American legal profession. As mega-firms grow and attorneys complain they spend more time running a business than practicing law, I hear my students talking more and more of what they can do to acquire marketable skills during their years in law school. Often what this means to them is picking a specific area of practice (these days bankruptcy is hot) so as to be able to sell themselves to increasingly selective employers.

I have no wish here to pass judgment on the desirability of such legal specialization to either the attorney or the society at large. Clearly, it may be argued that increased specialization serves clients well because they can be assured of the best possible technical knowledge. Alternatively, clients who are poor at managing the specialists or who do not have talented general counsel may suffer from narrow-minded advice. From the attorney's standpoint, specialization may bring increased feelings of competence and self-worth or a deepening sense of boredom or isolation or both. But these pros and cons aside, one risk of specialization deserves special mention. Lawyers who concentrate on different areas of practice may come to feel that they not only do different things but that they speak different languages.[122] It is here that legal semiotics offers a significant and progressive contribution.

The effort to develop familiar labels and patterns for legal argument cuts across a wide range of practice areas. If analogies can be drawn between typical legal arguments and the language of a twelve-year-old contesting bedtime with a baby sitter, surely semiotic study will produce similarities between controversies in different legal subject areas. For example, one familiar argument in landlord-tenant law is that courts and legislatures should be wary of imposing increased burdens on landlords (like maintaining the apartment) that may end up being passed on to consumers.[123] Duncan Kennedy colorfully calls this the "landlord will

121. *See* Paul, *supra* note 2.

122. The widespread use of acronyms as part of the specialized legal language only furthers the sense that lawyers will have difficulty communicating with each other. ERA to a civil rights lawyer customarily refers to the Equal Rights Amendment. To a real estate attorney, however, the letters commonly symbolize a nationwide franchisor of real estate agents.

123. *See, e.g.*, Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1186-87 (1971) (arguing that, under many market conditions, comprehensive housing code enforcement will redistribute income from landlords to tenants even where partial enforcement will be ineffective or counterproductive).

raise the rent and evict the grandmother" argument.[124] It should be clear, however, that the same argument (and the corresponding counter-arguments) will apply in virtually any circumstance where the state is considering a modification of existing economic arrangements that does not disrupt the basic entitlement structure giving economic power to one party (*i.e.* the landlord) over another.[125] Accordingly, we might expect an environmental lawyer to have something to learn from the landlord-tenant expert despite the seeming dissimilarity of their practices.[126]

Encouraging communication between attorneys with different specialties is, of course, likely to have only a marginal impact on society. But its progressive direction is clear. A lawyer who fears that a foreign practice topic is simply beyond her ability to comprehend is well-trained to fit within a world where people give and take orders. If the tax specialist recommends a course of action, and I feel powerless even to talk to her concerning her reasons, it is unlikely I will be prepared to challenge her conclusions. In this sense, specialization rapidly becomes a source of power. Of course, legal semiotics will never be an adequate substitute for the years of training necessary to become a tax expert. Nor do I mean to assert that law school training can overcome institutional pressures that may create different legal cultures, for example, separating partnership tax lawyers from corporate tax lawyers. But the direction of semiotic study is toward development of a common language, much like the everyday proverbs, that will make it more difficult to shield any legal decision from collective scrutiny on the grounds that it is too obscure or specialized.[127] Certainly progressives can be proud of that.

B. The Paradox of Abstraction

Virtually the same point can be made in a different way that focuses even more directly on the content of legal education. Consider the read-

124. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 604 (1982).

125. *See generally id.* (providing a detailed illustration of how arguments involving state regulation of private economic activity cut across familiar doctrinal categories of contract and tort law).

126. By now, I imagine many readers will stress that a good legal education has always encouraged attorneys to be creative in analogizing across different practice areas. I couldn't agree more. What legal semiotics adds is a method for labeling and learning analogies that are likely to appear over and over again. There will, of course, always be room for new and ever more creative analogies. But why should each generation of law students and lawyers also be forced to reinvent the wheel?

127. My concern with the creation of a common language for lawyers echoes Rosemary Coombe's desires, expressed in this Symposium, that large corporations not be permitted to use intellectual property laws to strip us all of the common language afforded in TV symbols like Mickey Mouse or Mister Ed. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853, 1854 (1991).

ily identifiable knowledge that contemporary law students all possess following graduation. Gather together a group of young lawyers at a cocktail party, and it's a fair bet they all remember studying the rule against perpetuities.[128] They probably all know a little bit about the Constitution, and with hope most of them will know some rudimentary tenets of statutory interpretation. But what fundamental principles can we really say constitute the hallmark of a first class legal education? What precisely are the communal intellectual bonds that hold today's bar together?

Imagine, for example, that someone stopped you on the street and asked you to provide a definition of property or contract. Although these are titles of core courses in virtually every curriculum, a brief, clear definition would prove highly elusive. Indeed, these grand concepts of classical legal education have come under withering scholarly attack in works with names like *The Death of Contract*[129] and *The Disintegration of Property*.[130] At its deepest level, legal semiotics is a principal contender in the battle to succeed these concepts with a different brand of abstraction that unites otherwise divergent subjects.

Of course, legal semiotics differs significantly from the more classical notion of abstraction. Thus, earlier scholars might have sought to develop contract *principles* general enough to provide solutions to a wide variety of concrete disputes. Consider, for example, judicial efforts to enforce the "expressed will of the parties" as applied to a labor-management dispute as well as to a dispute between individual buyers and sellers. In contrast, legal semioticians seek to describe the rhetorical similarity between *arguments* employed in a wide variety of contexts. Remember how both the prosecutor arguing for a good faith exception to the exclusionary rule and the pregnant teenager challenging a requirement that she tell a parent of her intended abortion might both be described as emphasizing the tendency of bright line rules to deter or prohibit too much conduct. Thus, rather than searching for abstractions useful to judges in resolving cases, legal semioticians identify abstractions useful to advocates in formulating cases. But the fundamental technique of abstraction remains the same. Legal semioticians hope to characterize legal argument at a higher level of generality to reveal similarities that might otherwise be missed and to invite counterarguments that might otherwise be overlooked.

Legal semioticians' reliance on abstraction however creates a para-

128. It's an even safer bet that few of them will be able accurately to describe the rule.
129. G. GILMORE, THE DEATH OF CONTRACT (1974).
130. Grey, *supra* note 82.

dox for progressive scholars. Recent progressive scholarship has included a significant amount of criticism of abstraction and its role in legal and political argument. James Boyle's own contribution to legal semiotics, for example, contains direct criticisms of classical legal thought's efforts to obscure political bias in a cloud of generalities.[131] Mari Matsuda's feminist critique of John Rawls's political theory explicitly challenges Rawls's efforts to derive normative conclusions from abstract assumptions concerning human nature.[132] And, Peter Shane has recently argued that law teachers' tendency to think in abstractions helps block efforts to achieve faculty diversity.[133]

These critiques of abstraction, and others too numerous to mention, find deep roots in the progressive concerns I detailed at the outset. People with power over wealth and resources are also likely to have control over inventing abstractions that serve to justify existing power relationships. Accordingly, when influential philosophers like John Rawls devise theories of justice based on an abstract (and thus hopefully universal) view of human nature, feminists like Mari Matsuda are justifiably suspicious that Rawls's portrayal will ignore traditionally feminine virtues or indeed any virtues Rawls does not himself possess.[134] When

131.

> We don't have a separate set of rules for innkeepers and their guests, landlords and their tenants, merchants and their customers; instead we have CONTRACT—an abstract *legal* relationship that we can "find" in each of these circumstances. By dealing with these purely *legal* categories, we immunize ourselves from claims of bias, or political "tilt" that might otherwise be levelled at the legal system. It may seem ridiculous to think that a powerful corporation and a group of nonunionized workers can bargain with each other as "free contracting parties," but this is only until we realize that the legal abstraction of "free contract" has nothing to do with any ideas we might have about equality of bargaining power. These legal abstractions were supposed to be logical deductions from the most basic features of the free market system. So if the classical notion of what will count as legal "duress" includes a gun to the head, but excludes the power to starve someone around to your way of thinking, then there is nothing *political* about this; it is a necessary logical abstraction. Or so say the classicists.

Boyle, *supra* note 2, at 1038 (emphasis in original).

132. *See* Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N. MEX. L. REV. 613, 613-14 (1986).

133. Shane argues astutely that when apparently identical abusive conduct is directed at both black and white students it may still be fair to find elements of racism within the abuse of blacks particularly. Because each student will have entirely different life experiences, none will perceive the teacher's abuse in precisely the same way. Moreover, it would be wrong to consider this abuse outside the historical context that creates each student's different life experiences. Shane attributes our tendency to make this mistake to our desire to think in abstractions that label all conduct either racist or nonracist. *See* Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033, 1038-39 (1990).

134. Matsuda's "objection is that unavoidably the person behind the veil [of ignorance that Rawls invents to hide knowledge of one's own circumstances] is John Rawls." Matsuda, *supra* note 132, at 617. His abstraction, she argues, "is necessarily weighted to derive a theory consistent with the liberal tradition," and "alternative conceptions of the nature of humankind are ignored." *Id.* For Rawls's description of the veil of ignorance, see J. RAWLS, A THEORY OF JUSTICE 136-42 (1971).

judges pretend that abstract concepts like property can resolve controversial disputes without discussion of competing values, contemporary scholars should expose whatever biases they can find.[135] And, champions of faculty diversity should vigorously question the extent to which law teachers use an abstractly defined category of racism to limit efforts to more broadly link race and victimization.

The question here, however, is whether the problem lies with the particular use of abstraction under scrutiny or whether the entire technique of abstraction is so fraught with danger that it must be avoided by progressive scholars. My answer is that progressives cannot afford to abandon abstraction simply because it risks depersonalizing and denying context.[136] The point can be made most clearly when considering an example outside the law.

In his recent book *Surplus Powerlessness*, Michael Lerner describes his experiences talking with and counseling a number of workers in the San Francisco Bay area.[137] His conclusion, as evidenced by the title, is that many workers compound the unhappiness they experience by blaming themselves for the lack of control they have over their work and their lives and by underestimating the control they actually do have.[138] Lerner's book gives name to this phenomenon and describes how it may affect not only workers but others living in contemporary America.

Now, of course, it would be easy to deconstruct a category like "surplus powerlessness." No two people will experience precisely the same feelings of despair. My claim, however, is that by abstracting from diverse personal narrative, Lerner has performed an invaluable, unifying function. A person who has actually felt she was to blame for things that are not her fault may take enormous comfort in reading of others who felt the same way. Indeed, it is gratifying and self-validating to learn that someone has studied feelings like yours and found them sufficiently widespread to warrant a name all their own. Only if the category's inventor later denies some feeling you have because it doesn't square with his concept, will the process of abstraction shift from being a friend to an en-

135. For my own effort at this brand of scholarship, see Paul, *supra* note 54 (arguing that competing abstract models of property law both engender confusion and permit judicial manipulation within the context of takings cases).

136. I do not mean to suggest that Boyle, Matsuda, or Shane would deny the usefulness of abstraction in advancing shared understandings. Indeed, Matsuda, who comes closest to this view, does not wish "to suggest that theory and abstraction are without value." Matsuda, *supra* note 132, at 629.

137. M. LERNER, SURPLUS POWERLESSNESS (1986).

138. The point is not that workers actually have a great deal of control. Rather, Lerner wishes to emphasize the extent to which workers wrongly blame themselves for their lack of control and the important ways in which limited control differs from none. *Id.* at 2-17.

emy.[139] More broadly, only when abstraction is used by those in power to deny experience should it become the object of progressive scorn. To forget that abstraction can also be used to vindicate and validate experience is to make a fatal error.

Legal semiotics avoids this mistake. By relying on systematic abstraction of the tools of legal argument, legal semioticians are attempting to do for American law students what Lerner is trying to accomplish for other segments of society. In short, we seek to provide an intellectually unifying discourse that enables law students to describe what they are learning while they are learning it. We give names to a panoply of rhetorical traps that students will encounter across a wide range of contexts both during and after law school. Indeed, ironically enough, legal semiotics offers perhaps the best way of recapturing the idea that there is something special about being a lawyer.[140] As noted above, a unifying discourse may help lawyers resist domination that might otherwise accompany specialization.[141] Moreover, it may reduce student feelings of isolation and powerlessness that contribute to student hesitancy to question society's hierarchical structure. Although it would be naive to believe legal semiotics will significantly move students toward a particular life plan, a discourse that works to bring them together deserves to be counted as a progressive approach.

C. The Critique of Meritocracy

My last argument concerning the connections between legal semiotics and progressivism is by far the most speculative. It may also, however, prove the most fruitful for future work.

In my experience, a faith in meritocracy is the most sincerely felt and most powerful ideological rival to the brand of progressivism de-

139. To take another nonlegal example of the wonderful power of abstraction, consider Linda Budd's recent book that names a category of children falling between hyperactive and normal. (Budd eschews the word normal, preferring the more descriptive "sure and steady.") L. BUDD, LIVING WITH THE ACTIVE ALERT CHILD (1990). Budd's theory is that there are many children (up to 15%) who share certain characteristics that suggest different parenting techniques from those often employed. By creating a name for these children, "active alert children," Budd performs an enormously unifying function for parents hoping to exchange ideas and validates experiences that might otherwise have made parents feel wholly isolated, not to mention inadequate. But, of course, the risks of abstraction are present here, too, as everyone knows how fast a name can become a label employed by powerholders to assert predictions of what children can and cannot do.

140. I say ironically because my earlier work is explicitly dedicated to illustrating the similarity between legal discourse and everyday debate. *See* Paul, *supra* note 2. But, of course, what law students gain, which nonlawyers may often lack, is the ability to be self-conscious about the kind of rhetoric one is using and how it fits with other competing rhetoric.

141. Of course, as long as legal semiotics is taught only to lawyers the risk remains and even increases that law will be a specialized language inaccessible to nonlawyers. I have little doubt, however, that we will someday be ready to teach legal semiotics to high school students.

scribed above.[142] To the extent that the social, economic, and political systems actually reward merit, many would contend that inequalities of wealth and income are justified, and that hierarchical organization is acceptable to accomplish efficiency goals.[143] Any well-worked concept of progressivism would have to contend with (if not prominently include) the intuitive strength of merit-based decision making. Obviously that task is well beyond the scope of this Paper.

What is worth noting, however, is that there are at least two alternate strategies for responding to meritocratic ideology. One approach with deep roots in our political heritage gains prominent academic support within the writings of John Rawls.[144] His principal argument is that people's natural assets, talents and abilities that we often associate with merit are to a considerable extent a function of a random genetic-selection process that is arbitrary from a moral point of view. Moreover, if people cannot be said to deserve their natural talents, there is no moral justification for devising a political system that provides substantial economic rewards for those talents.[145] Instead, these incentives must consistently be evaluated to determine whether they are in fact necessary to encourage people to make use of their superior talents. Under the Rawlsian view, meritocracy becomes an almost necessary evil rather than a moral imperative.

An entirely different strategy for challenging meritocracy would begin with the idea that judging merit is often simply too haphazard and narrow-minded to warrant the enormous significance such judgments receive in our society.[146] The principal insight here is that meritocratic

142. During the 1988-89 year, I worked as an appellate attorney alongside talented colleagues at the Department of Justice. Many of the people with whom I regularly ate lunch would be proud to call themselves conservative in the best sense of that tradition. This meant that I often found myself supporting different political candidates and favoring different policies than many of the people whose abilities I most respected. During all but one of my informal discussions, however, I experienced a strong feeling of shared values and a general sense that a mutual commitment to a better world dwarfed narrow differences of perspective. The exception came when I one day suggested that public schools might consider alternatives to ability grouping. Only then did I feel treated like an outsider who just really didn't get how the world works.

143. *See generally* R. NOZICK, *supra* note 55, at 149-232 (arguing that historical claims of entitlement sometimes based on liberty and moral desert de-legitimate state efforts to establish an appropriate distribution of wealth).

144. *See, e.g.*, J. RAWLS, *supra* note 134.

145. Rawls quite carefully distinguishes arguments that involve rewarding merit within an already established political system that contains rules that promise advantages to meritorious actors. In this situation, the naturally talented may rely on expectations engendered by an already existing rule system. *Id.* at 103, 310-15. Rawls's concern, however, is with what rules to establish. And, here he argues that rules should reward merit only to the extent necessary to induce the talented to take actions that will benefit those less fortunate. *Id.* at 61.

146. *See generally* Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 707-12, 748-52 (sketching the case against blind meritocratic judgments and emphasizing the role of cultural context to any meritocratic evaluation of legal scholarship).

judgments are by definition *context-dependent*. In some circumstances, the context will be highly uncontroversial. Thus, most of us would be highly comfortable with a meritocratic system that judged surgeons based on the return to health of their patients.[147] In other circumstances, however, the established context will controversially predetermine the content of a so-called meritorious performance. I am reminded here of a large daily newspaper in the American South that conducts personality tests upon incoming employees. Management suitability is reportedly judged by comparing the scores of incoming staff with those of the already existing top brass.[148] Any well-reasoned progressive critique of meritocracy would highlight the extent to which background contexts like this often merely reproduce an existing system without providing the opportunity for self-conscious criticism of so-called merit standards.[149]

In my judgment, legal semiotics bears a close rhetorical affinity to this approach to challenging meritocracy.[150] Like all good teaching, the legal semiotics classroom highlights the multiplicity of available arguments and thus discourages the idea that there is one right answer to legal problems. But legal semiotics goes further in demonstrating the systemic way in which legal problems will always generate diverse approaches. The student is thus forced to think very carefully about the criteria employed for determining which arguments to advance in a given situation.

And, legal semiotics has a strong message here, too. For above all, legal semiotics teaches that the meaning (and thus the merit) of any legal argument cannot be determined without understanding the context in which the argument is made. Indeed, legal semiotics demonstrates the extent to which the identified alternatives are in fact often necessary to

147. Even here, of course, crucial value judgements come into play. Is a surgeon who performs frequent, medically successful but sometimes unnecessary surgery better or worse than one who cuts less often to preserve quality of life but occasionally waits too long resulting in perhaps avoidable casualties?

148. I heard this story from a former reporter at the paper and, although I cannot prove its accuracy, its inherent plausibility is all that is really needed to make the point.

149. Within legal education, this critique is now in full bloom in the context of a spirited debate over the appropriateness of the goals and methods involved in diversifying faculties on the basis of race, class, gender, national origin, sexual preference, and intellectual points of view. *See generally* R. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (challenging the idea that minority scholars bring a unique, distinctive voice to legal scholarship that deserves a place at the table independent of more traditional notions of merit). Responses to Randall Kennedy's piece have been quick in coming. *See Colloquy*, Responses to Randall Kennedy's Racial Critiques of Legal Academia, 103 HARV. L. REV. 1844 (1990); Johnson, Racial Critiques of Legal Academia: *A Reply in Favor of Context*, 43 STAN. L. REV. 137 (1990); D. Kennedy, *supra* note 146; *see also* Shane, *supra* note 133, at 1036-54 (exploring thought patterns that might block the path toward diversity).

150. At the most rhetorical level, I note the familiar legal phrase that characterizes an argument that goes to the substance of the matter as one "on the merits."

give content to our most familiar argumentative moves. Legal semiotics shows that the strength of an argument depends as much on the consciousness of the listener as it does on the skill of the advocate. Accordingly, the student who grasps the structure of arguments encapsuled in the *Pierson v. Post* grid will come to appreciate that choosing which arguments to advance in a given situation involves tactical judgments and questions regarding the values of the decision maker much more than a quest for a so-called "best" argument.

But how then is this precocious student to be evaluated by her teacher? If the merit of a student's arguments is not judged on her intrinsic understanding of the legal problem, but instead is based on her ability to perceive how teachers and judges will in turn perceive the problem, then legal education risks rewarding conventional thinkers in precisely the self-justificatory way that the Southern newspaper ascertains management material. Of course, this is not to say that teachers are without justification in separating good arguments from bad ones. But what legal semiotics training affords students is the chance to engage their teachers much more directly in a discussion of the standards by which meritorious arguments are chosen and rewarded. More important, students will be encouraged to see the extent to which society always struggles to separate judgment on the merits from judgments that simply reinforce conventional understanding.

Ultimately, legal semiotics seeks more to describe how this system of judging and rewarding legal argument operates than to challenge it directly. But by sensitizing our students to the context-dependent nature of evaluations performed with their own educational system, we challenge their perhaps otherwise untested faith in the ability of all aspects of society to provide incentives based on merit. It is here that I conclude legal semiotics offers the most potential for vindicating progressive politics. This relationship between semiotic method and the critique of meritocracy may be neither airtight nor conclusive. But perhaps rhetorical affinity is the best we can hope for in our efforts to link semiotic form to progressive substance.