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THE PROMISE OF LEGAL SEMIOTICS

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**\*1831** With a single rhetorical stroke, Professor Jeremy Paul has both identified and constituted a school of legal semiotics.<sup>1</sup> In reading his description one notes that, like other schools of legal thought, the school of legal semiotics has distinguished precursors (Wesley Hohfeld, Felix Cohen),<sup>2</sup> and, like the Legal Process School in particular, it even comes equipped with a fundamental text which is as yet unpublished.<sup>3</sup>

If there is now a school of legal semiotics, one might well ask what its political implications are. Professor Paul identifies me with three different positions on this subject. First, he ascribes to me the position that regardless of its political uses, "semiotic study is valuable for its own sake because it teaches us more about our legal culture."<sup>4</sup> Second, extrapolating from my work on

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<sup>1</sup> Paul, *The Politics of Legal Semiotics*, 69 TEXAS L. REV. 1779 (1991).

<sup>2</sup> See Paul, *supra* note 1, at 1789 n.22, 1792 n.30 (citing 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); Cohen, *Transcendental Non-sense and the Functional Approach*, 35 COLUM.L.REV. 809 (1935)).

<sup>3</sup> Compare H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958) (unpublished) with D. Kennedy, *Torts Teaching Materials* (1979) (unpublished) (copy on file with author and in many other places around the country).

<sup>4</sup> Paul, *supra* note 1, at 1784.

deconstructive theory, he suggests I hold that, like deconstruction, semiotics has no necessary politics, but only the politics of those who make use of it.<sup>5</sup> Third, he concludes from this that my position is that "there is little or no connection between semiotics and progressivism."<sup>6</sup> I agree with the first and second statements Professor Paul attributes to me, but not the third. There is a connection between semiotics and progressive politics, but the connection is a historically contingent one. Understanding why this is so, I argue, requires its own exercise of semiotic theory. In this Essay, then, I propose to apply legal semiotics to itself. I hope that this task will reveal something about the value of the semiotic enterprise, and the future promise of legal semiotics.

### \*1832 I. Legal Semiotics and Ideological Drift

It should be obvious to anyone who looks at the list of people that Professor Paul identifies as legal semioticians that they are all people whose political views are decidedly to the left. Nor is this an accident. As Paul points out, Professor Duncan Kennedy began analyzing legal argument forms to further goals associated with the Critical Legal Studies movement—to "demystify" legal argument and show its heavily political character.<sup>7</sup>

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<sup>5</sup> Id. at 1807 n.76.

<sup>6</sup> Id. at 1784 n.9.

<sup>7</sup> See id. at 1782; Tushnet, *Critical Legal Studies: A Political History*, 100 *YALE L.J.* 1515, 1524 (1991). The extent to which Kennedy was successful in achieving his goals will be discussed presently.

Professor Paul constructs his school of legal semiotics around the work of American legal academics, and CLS academics in particular. Nevertheless, as he points out, there is a rich literature of legal semiotics produced in this country outside of law schools. See Paul, *supra* note 1, at 1788 n.18. Professor Roberta Kvelson at Penn State has for some years now brought scholars from many different disciplines together at annual roundtable discussions on law and semiotics. The proceedings of these events are published in the yearbook *Law and Semiotics*. There is an equally broad development of legal semiotic literature in Europe. For recent examples, see P. GOODRICH, *LANGUAGES OF THE LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* (1990), and B. JACKSON, *SEMIOTICS AND LEGAL THEORY* (1985).

With respect to American legal academics, I note that the most interesting exclusion of legal semioticians from Paul's list is my colleague Philip Bobbitt, who has catalogued the various forms of argument used in American constitutional law. See P. BOBBITT, *CONSTITUTIONAL FATE* (1978). The fact that few people think of Bobbitt as a legal semiotician may be in part because his politics are quite different from those of the Critical Legal Studies movement. For example, Bobbitt wrote *Constitutional Fate* to legitimate the existing system

Although there are understandable reasons for the historical emergence of legal semiotics on the left, it is not necessarily progressive in all of its implications. Legal semiotics offers ways of looking at law and legal culture that can be of use to the left, right, and center alike.<sup>8</sup> There can be a right wing legal semiotics as well as a left wing version, just as there can be both right and left wing versions of law and economics. These statements should not be misinterpreted as a claim that legal semiotics is, or should be, a value-free social science. Nor is it a sentimental aspiration towards fair play and equal opportunities open to all. It is rather a sober assessment of the possible political valences of legal semiotics judged from the standpoint of semiotic theory itself.

\*1833 I have noted elsewhere that political and legal ideas can change their political valence over time from progressive to conservative and back again. I call this phenomenon "ideological drift."<sup>9</sup> Ideological drift occurs because political, moral, and legal ideas are and can only be made public through signs that must be capable of iteration and reiteration in a diverse set of new moral, legal, and political contexts. Thus, the first Justice Harlan's view that "our constitution is color-blind,"<sup>10</sup> had a progressive (and even radical) force in 1896 that becomes completely transformed by 1989, when it is offered by Justice Antonin Scalia as a justification for the unconstitutionality of affirmative action programs.<sup>11</sup> One might insist that Scalia's position is not really the same as

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of constitutional argument (and ethical argument in particular). Moreover, he has shown little patience for CLS attempts to demonstrate the political character of law. See Bobbitt, *Is Law Politics?* (Review Essay), 41 *STAN.L.REV.* 1233 (1989) (reviewing M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988)).

In addition to Bobbitt's work, one might add B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (describing law in terms of an ongoing dialectic between Scientific Policymaking and Ordinary Observation), and Hermann, *A Structuralist Approach to Legal Reasoning*, 48 *SO. CAL.L.REV.* 1131 (1975) (arguing that the deeper coherence of the legal system is revealed through structuralist analysis). Neither of these works meshes well with the early program of Critical Legal Studies.

<sup>8</sup> See, e.g., P. BOBBITT, *supra* note 7.

<sup>9</sup> See Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 383-84 [hereinafter *Realism About Pluralism*]; Balkin, *Ideological Drift*, in *ACTION & AGENCY* 13 (R. Kvelson ed. 1991).

<sup>10</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>11</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment); see also *Metro Broadcasting, Inc. v. FCC*,

Harlan's, or that it is a perversion of its spirit; but the question of what the "true" spirit of Harlan's earlier commitment to racial equality consists of is precisely what is at issue in the debates between Justice Scalia and his more liberal critics. It is at least as plausible for Justice Scalia to argue that modern proponents of affirmative action engage in a perversion of the ideal of racial equality in Justice Harlan's dissent and its eventual confirmation in *Brown v. Board of Education*.<sup>12</sup> Ideological drift is, in this sense, the phenomenon that allows this very sort of controversy to occur.

The phenomenon of ideological drift suggests that legal, moral, and political ideas are not progressive or conservative in and of themselves, but are progressive or conservative in their instantiations within a particular contingent historical and political context. Because this context can always be reimaged or recharacterized, it is always possible to imagine at least some of the ways in which a progressive idea can be turned to reactionary purposes even at the very moment when it is universally accepted as deeply connected to progressive politics. Thus, in 1896, it was already possible to provide a critique of Harlan's theory of the color-blind constitution as providing aid and comfort to positions that would later be seen as racially conservative.

To be sure, recharacterizations of context that give ideas a very different political spin may be unlikely given existing circumstances and widely shared assumptions. This may have been the case with Harlan's theory of colorblindness in 1896. It might be that no one could easily \*1834 have imagined then how a formal principle of racial equality might perpetuate the substantive inequality of the races.<sup>13</sup> On the other hand, a recharacterization that would substantially alter the political valence of a particular idea may be quite plausible and possible at any point, but simply remain unnoticed and unused in current political discourse, lying dormant for years until some future thinker arises to assert it.

For various reasons, then, the conservative implications of a progressive idea may not be recognized at the time by the persons who espouse that idea. It then falls to history to demonstrate how its meaning will alter. Thus, I

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110 S.Ct. 2997, 3044 (1990) (Kennedy, J., dissenting, joined by Scalia, J.) (noting "disturbing parallels" between the Plessy decision and *Metro Broadcasting*, where the Court upheld an FCC affirmative action policy).

<sup>12</sup> 347 U.S. 483 (1954).

<sup>13</sup> Although I doubt it. It strikes me that the rhetoric of Reconstruction-era theorists, which was quite explicitly race conscious, understood the necessity for race-based remedial measures in order to raise the newly freed slaves to the condition of whites. See Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA.L.REV. 753 (1985).

like to say that "history deconstructs," because history provides the contextual changes that demonstrate that the intellectual frameworks of the past are ill-equipped to the progressive aspirations of the future, and that (from the standpoint of progressives) these frameworks will age, stagnate, and become obstructions to progressivism as it will later be defined.<sup>14</sup>

Historical deconstruction, and the associated phenomenon of ideological drift, shows the contextual nature of the political valences of legal, moral, and political ideas over time. Yet, as I have already pointed out, it is often possible to see how existing legal, moral, and political ideas can be "flipped" to serve radically different political ends at one and the same time. This deconstructive "flip" is a synchronic function of the sign, while historical deconstruction and ideological drift are diachronic functions of the sign. The recurring debate in the Critical Legal Studies movement over whether legal doctrines are always "flippable" (and thus never have a determinate political valence), or whether they have a particular "tilt" which is a function of their historical situation (and thus can meaningfully be said to be progressive or conservative at a particular time)<sup>15</sup> is a manifestation of these two different ways of **\*1835** looking at the signs that constitute legal doctrine. The former view is synchronic, the latter diachronic.<sup>16</sup>

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<sup>14</sup> See, e.g., Balkin, *The Footnote*, 83 *NW.U.L.REV.* 275, 305-13 (1989) (noting how the progressive vision underlying *United States v. Carolene Products Corp.*, 304 U.S. 144 (1938), stagnated and obstructed social reform and judicial protection of fundamental rights and oppressed groups); Balkin, *Realism About Pluralism*, supra note 9, at 391-94 (discussing how liberal first-amendment theory as developed in the 1930s, 40s, and 50s became a hindrance to progressive solutions to problems of our present era). Note that the process of historical deconstruction also works in the opposite direction—it can reveal the progressive or emancipatory character of ideas that were previously thought retrograde. An example would be the continual movement within the history of American feminist thought between emphasis on women's similarity to men and emphasis on their differences.

<sup>15</sup> See, e.g., Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 *W. VA.L.REV.* 173, 175-76 (1985); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV.L.REV.* 1685, 1731-37 (1976); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979). For a slightly different version of the controversy, see Gordon, *Critical Legal Histories*, 36 *STAN.L.REV.* 57 (1984), and Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 *J. LEGAL EDUC.* 505, 511-13 (1986).

<sup>16</sup> Cf. F. DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 81-100 (W. Baskin trans. 2d ed. 1966) (describing two different approaches to the study of language).

The seemingly paradoxical position that legal semiotics has no necessary politics but that it is clearly identified with the political left in our era now becomes more understandable. Whatever the progressive intentions or aspirations of existing legal semioticians, the semiotic phenomenon of ideological drift must apply to the signs that describe the theory and practice of legal semiotics as much as it applies to other theories and practices. My position is thus simply an application of semiotic methodology to legal semiotics itself. Legal semiotics may be progressive in our era for any number of perfectly sound reasons. But there is no reason to think that it must always continue to be so, or that over time it would not, like other legal ideas or legal movements (e.g., legal realism), manifest more conservative tendencies. Moreover, it must also be the case presently that one could, with sufficient ingenuity, "flip" the progressive reasons offered for engaging in legal semiotics to demonstrate their nonprogressive character. Even if conservative legal scholars currently lack interest in the methods of legal semiotics, it must already be the case that conservatives can use legal semiotic methods to criticize existing doctrines they see as too liberal or in tension with doctrines they prefer. Indeed, as I shall now discuss, they have done so already.

## II. Legal Semiotics and the Algebra of Legal Argumentation

As Professor Paul points out, one of the most common methods of legal semiotics is studying the recurring forms of legal argument. Legal semioticians have asserted that lawyers, judges, and legal commentators employ a relatively small handful of argument forms to justify rule choices in many different areas of doctrine. Thus, legal semioticians have discovered that the arguments used to justify rule A over rule B are also available in the choice between rules C and D. If rule A is in fact accepted in doctrine, this might suggest that rule C, supported by similar arguments in its opposition to rule D, might be chosen by the law as well. But in fact the opposite is very often the case. The arguments rejected in the choice between A and B become the arguments used to justify the choice of rule D over rule C.<sup>17</sup> I have called this phenomenon the "crystalline structure" of legal discourse—the basic structure of moral and **\*1836** political choice is reprised at each level of discourse, so that large scale structure resembles small scale structure, as is the case with some types of crystals.<sup>18</sup> In hindsight, it would probably have been better to call this phenomenon the "fractal structure" of legal

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<sup>17</sup> For example, the arguments used to justify negligence over strict liability turn out to be similar to the arguments that one would use to justify a subjective standard of negligence over an objective one. Yet the law chooses an objective standard instead. See Paul, *supra* note 1, at 1781 n.6.

<sup>18</sup> See Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986).

thought, since fractals, which also display self-resemblance at micro and macro levels, are more basic and pervasive than crystalline formations.<sup>19</sup>

The crystalline structure of legal thought suggests that one can go through the various compartments of the law and discover many doctrinal choices that are in tension with each other, because the policy justifications that support them (over alternative doctrines) are themselves in tension. An earlier generation of Critical Legal Studies scholars might have described this as "contradiction," but I prefer the word "tension" because we deal here not with a contradiction in the logical sense, but rather with a conflict of values that does not appear, at least on its face, to be resolved by existing legal materials or the justifications offered for them. Now tension, either in moral or legal thought, is not in itself a bad thing. It reflects the fact that we live in a complicated world in which values are often in conflict. Nevertheless, the discovery of moral tensions within the law—justifications which point in opposite directions in different areas of the law—suggests that we should rethink our policy choices in those different areas, or that we must redescribe them under an alternative or more general theory in which they can be understood as consistent.<sup>20</sup> Thus, Professor Paul rightly ascribes to me the position that legal semiotics is useful because it will allow us to clarify hidden tensions in the law and assist us in the continuing refinement of our moral and legal intuitions.<sup>21</sup>

This project of investigating and clarifying tensions within doctrine might be progressive if one believed that unresolved tensions were caused by unjust doctrines and policies with a nonprogressive spin that had not yet been successfully rooted out and banished from the law. But there is no reason to think that all such tensions are due to the forces of reaction, or result from older doctrines that have since become incompatible with newer and more salutary developments. One might believe (as I do) that \*1837 no amount of refinement of our moral and legal intuitions will fully eliminate moral tension from the system, because the basic structure of moral, legal, and political thought is irreducibly

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<sup>19</sup> See B. MANDELROT, *THE FRACTAL GEOMETRY OF NATURE* 8, 34 (1982).

<sup>20</sup> See Balkin, *The Hohfeldian Approach to Legal Semiotics*, 44 U. MIAMI L. REV. 1119, 1140 (1990) (explaining how prima facie tensions may lead to shifts in doctrinal rules); A. ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 126-30 (1990) (explaining how prima facie tensions may be eliminated through redescription or rational reconstruction of legal precedents); Kress, *Legal Indeterminacy*, 77 CALIF.L.REV. 283, 304-05 (1989) (same).

<sup>21</sup> See Paul, *supra* note 1, at 1807 & n.76.

antinominal.<sup>22</sup> This does not mean that all forms of moral tension are equally good, or that it would not be a valuable exercise to reduce particular conflicts and tensions as much as possible. It is simply that unresolved moral conflict will always be with us, whether it is noticed or not.<sup>23</sup> Part of the goal of legal semiotics is to demonstrate hidden conflicts that were not recognized before, so as to spur reassessment of existing moral, political, and legal intuitions. Because moral, political, and legal thought is antinominal, this process is ongoing and never-ending.

Even if moral tensions within the law can be reduced, it is by no means clear that the only way to reduce them is in the direction that people now label "progressive." There is no reason to think that progressive positions have a monopoly on the resolution of heretofore unacknowledged moral conflicts. From the standpoint of conservatives, so-called "progressive" positions may seem full of unresolved tensions and even outright contradictions. If the structure of moral and legal discourse is irreducibly antinominal, it will often be just as easy for a

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<sup>22</sup> See Balkin, *supra* note 18, at 75-77. The noted essayist Conor Cruise O'Brien argues that belief in irreducible moral conflict is connected to an anti-utopian view of politics. See O'Brien, *Paradise Lost* (Book Review), N.Y. Rev. of Books, Apr. 25, 1991, at 52, col. 1 (reviewing I. BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (1991)) (describing Isaiah Berlin's gradual recognition of competing moralities and his abandonment of utopianism). For a related view which discusses irreducible conflicts of value from the standpoint of resource allocation, see G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

<sup>23</sup> Although I do not have time to develop the matter at length here, my view is that while moral conflict is always with us, we have a natural tendency to reduce the cognitive dissonance that recognition of such tension would produce. In other words, our sense of moral coherence in a system of beliefs is due not only to its actual lack of moral tension, but to a process of forgetting in which we all engage. Thus, I believe one cannot determine the degree of moral tension in our thought by asking whether people usually feel that their beliefs conflict. Such cognitive dissonance would normally be reduced as much as possible in everyday life. Cf. G. CALABRESI & P. BOBBITT, *supra* note 22 (discussing various strategies for disguising irreconcilable conflicts of value); M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987) (describing legal strategies for suppression and denial of political conflict). Philosophical speculations (and even the standard socratic dialogue of the law school classroom) bring suppressed moral conflicts in our beliefs to light, and thus create the temporary unease and confusion that people forced to confront directly difficult moral issues often experience. This unease may be dissipated by changing the subject, or it may cause further reflection and an ultimate change in our beliefs, leading to a new equilibrium. This view is linked to a larger theory which asserts that moral tension is the norm, rather than the exception, in all human conceptions of moral value.

conservative to argue that tensions must be resolved in a more conservative direction as it will be for a progressive to argue that tensions must be resolved in a more progressive direction. It will be just as possible for imaginative conservatives to discover hitherto unrecognized tensions between progressive positions as it will be for progressives to uncover unrecognized \*1838 tensions in the status quo, or in even more conservative legal regimes.

Let me give just a few examples. Professor Michael McConnell has recently pointed out that there is at least a *prima facie* inconsistency between liberal arguments concerning the constitutionality of restrictions on abortion funding and arguments about the constitutionality of subsidies for parents who wish to send their children to parochial schools.<sup>24</sup> Liberal scholars who decry the government's selectively funding childbirth for welfare mothers but not abortion must explain why the same difficulties do not arise when the state subsidizes parents who choose secular education but not religious education.<sup>25</sup> To his credit, McConnell notes that the question is complicated and not susceptible of easy resolution, but his basic point should resonate with any student of legal semiotics. He has taken the basic forms of liberal arguments about abortion rights and substituted "religious education" for "abortion," producing plausible arguments with a very different political spin. Similarly, I have shown that many legal realist arguments concerning economic regulation can be applied to free speech issues by substituting the right of freedom of speech for that of freedom of contract.<sup>26</sup> I have also argued that the forms of factual characterization liberals use in economic rights cases differ markedly from the forms of factual characterization they use in cases involving free speech for reasons that are not entirely clear, other than the post-1937 decision that speech, and not contract, is considered a fundamental liberty.<sup>27</sup> Finally, the libertarian philosopher Robert Nozick has argued that if a person's right to choose to marry A instead of B cannot be said to be an infringement of B's rights, then the same argument should apply to the right to choose contractual partners.<sup>28</sup>

Each of these arguments operates by noting the basic form of traditional liberal arguments for protection of fundamental rights and substituting a right less

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<sup>24</sup> See McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV.L.REV. 989 (1991).

<sup>25</sup> See *id.* at 990-91.

<sup>26</sup> See Balkin, *Realism About Pluralism*, *supra* note 9, at 397-425.

<sup>27</sup> See Balkin, *The Rhetoric of Responsibility*, 76 VA.L.REV. 199, 255-61 (1990).

<sup>28</sup> See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 237, 263-64 (1974).

beloved by traditional liberals, or by taking liberal arguments for regulation of economic liberty and substituting rights that liberals view as more deserving of protection. One can also use semiotic analysis to bolster traditional conservative positions within a particular area of legal regulation. Thus, consider conservative objections to the standard liberal justifications for strict products liability. A conservative might well ask why products cases should be treated differently from **\*1839** ordinary accident cases, or owner-occupier cases. She might ask why Coca-Cola is a better loss spreader when a coke bottle explodes in the plaintiff's face than when the plaintiff is hit by a Coca-Cola truck, or when the plaintiff slips and falls in Coca-Cola's headquarters.<sup>29</sup> To be sure, more liberal advocates might argue that these points are well taken and that there is an inconsistency that should be resolved, albeit in the direction of a general system of strict liability (or social insurance). My point, however, is that inconsistencies or tensions within a system of law can be resolved in more than one direction, each of which will be preferred by persons of different political persuasions.

At this point, some readers will surely exclaim that what I have been describing as "legal semiotics" is no more than the process of good old-fashioned legal analysis. I think this is partly true, but only partly. The imaginative recognition of similarity and difference in seemingly disparate areas of law has always been the mark of the skilled lawyer. But legal semiotics goes beyond the ordinary lawyer's tools. It systematizes and organizes the process of discovery in legal analysis. The algebraist and the schoolchild can both do sums, but the former can explicate the more general principles which ensure the correctness of the latter's work, and may permit much more powerful insights.<sup>30</sup> The legal

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<sup>29</sup> See *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 309, 405 P.2d 624, 628 (1965).

<sup>30</sup> Thus, I think that Professor McConnell's article on abortion funding is wonderfully creative and insightful. It also strikes me that its basic point is quite obvious once one grasps the general form of subsidy/penalty arguments and recognizes that one can insert any number of different "fundamental interests" in place of the word "abortion" or "religious education." For example, Professor Richard Epstein has done related work using state sovereignty as the fundamental interest in his analysis of *South Dakota v. Dole*, 483 U.S. 203 (1987), and other federalism cases. See Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV.L.REV. 4, 44-47 (1988). Conversely, as Epstein's article demonstrates, one can transfer his very interesting game-theoretic analysis to any other fundamental right (for example free speech or abortion rights) in a relatively formulaic manner. This suggests that one could write Epstein's and McConnell's articles over and over again, substituting different fundamental interests each time, and comparing the results. There is, indeed, something very much like algebra in these argumentative manipulations. Thus one could write that, as a general matter, if X is any fundamental interest threatened by a selective refusal to subsidize which is claimed to act as a penalty, the following general forms of pro

semiotician studies specific doctrines and arguments to capture the recurring forms of legal argument and factual characterization. Once these are understood and codified, an immense world of contrast and comparison opens up that the ordinary lawyer may grasp only in a haphazard and piecemeal fashion. The work of the legal semiotician is indeed the work of the \*1840 lawyer, but raised to a higher power of abstraction. And just as the algebraist can produce more powerful results, so too can the legal semiotician assist the doctrinal work of the lawyer or the legal scholar.<sup>31</sup> The political implications of this power, however, are unclear. As the above examples demonstrate, there is no reason that this increased understanding must necessarily result in arguments that will delight progressives.

Yet the work of the legal semiotician differs from that of the skilled lawyer in ways other than its level of abstraction. The legal semiotician asks questions about the materials of doctrinal argument and factual characterization that the practicing lawyer is not likely to ask or even need to ask. These questions concern why the choices of argument and characterization occur in the way that they do with respect to different rights and different factual situations. The legal semiotician is interested in legal ideology, and she sees the way that people argue for moral and legal positions as central to this study. Rather than viewing ideology as a smokescreen for illicit motivation, the legal semiotician takes the language of the law very seriously indeed. For her, ideology is constituted in part by the very patterns of argument and factual characterization that persons within the legal culture adopt.

This goal may or may not have progressive political implications. We may indeed discover that liberals and conservatives have very different ways of characterizing events and very different ways of classifying situations. But this does not demonstrate that conservatives, and not liberals, have blind spots or suffer from some form of "false consciousness." We may well discover that the ideology of the political left is full of its own blind spots or irrational prejudices which bear an uncanny and symmetrical relation to the blind spots and prejudices we identify in the ideology of its political opponents. Thus, once again, the work of the legal semiotician may forward a progressive agenda, or it may not. Perhaps one can hope that it will assist progressives in rethinking their own positions as much as it assists them in convincing others to agree with them.

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and con arguments can be offered with respect to X. Such a list would not resolve any particular subsidy/penalty problem. See McConnell, *supra* note 24, at 1047-48. It would, however, give persons writing in this area a virtually limitless supply of rhetorical analogies upon which to draw. The very interesting question whether this recognition spoils the work of legal analysis in some way, by robbing it of creativity or authenticity, is discussed in the next section of this Paper.

<sup>31</sup> Cf. Paul, *supra* note 1, at 1825-26, 1828-29 (explaining benefits of the power of abstraction in legal semiotic analysis).

### III. Legal Semiotics and the Problem of Legal Authenticity

As Professor Paul discusses, legal semiotics, at least in Professor Kennedy's original formulation, was tied to the agenda of the Critical Legal Studies movement. That agenda involved attempts to "demystify" legal reasoning by showing its indeterminacy and its essentially political character. This demystification, it was hoped, would rob legal reasoning \*1841 of its apparent naturalness, legitimacy, and claims to authority and obedience. The critical legal scholar could then move to a discussion of what really mattered, that is, political debate over the central issues of economic, gender, and racial justice. Legal semiotics had a role to play in this project. Legal semiotics demonstrated that the same forms of legal argument came up over and over again. This fact seemed to have several important implications. First, it seemed to suggest that legal discourse was formulaic and hence did not really determine the outcomes of legal cases, or at the very least it suggested that there was nothing inevitable about the results of cases.<sup>32</sup> To be sure, lawyers and judges wrote as if their conclusions followed logically and ineluctably from existing doctrine and uncontroversial social policies. However, this was because the legal rhetoric of opinions showed only one side of the available legal arguments. Once one understood the formulaic character of legal rhetoric, and the natural rejoinders to every standard legal argument, one could easily construct legal arguments and judicial opinions that sounded just as logical, which seemed to follow just as ineluctably from their premises, and yet reached diametrically opposed results. The implication was that if legal reasoning was not doing the work of deciding cases, then something else—politics or ideology—was doing this work.<sup>33</sup>

Second, demonstrating the formulaic character of legal reasoning was thought to undermine its claims to authority and respect. Thus, legal semiotics was thought to facilitate the demystification or debunking of legal reasoning.<sup>34</sup> One showed that law was merely a game with routinized moves that anybody could play, and which never determined the outcome by themselves. Legal argument was like a puppet show; it resembled the magical tricks of the Wizard of Oz which were actually performed by a little man behind the curtain.<sup>35</sup> Worse still, legal argument had the effect of creating an inappropriate sense of legitimacy

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<sup>32</sup> See, e.g., Boyle, *The Anatomy of a Torts Class*, 34 *AM.U.L.REV.* 1003, 1051-52 app. (1985).

<sup>33</sup> See D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 20-21 (1983); Boyle, *supra* note 32, at 1052 app.

<sup>34</sup> Boyle, *supra* note 32, at 1015, 1051-52 app.

<sup>35</sup> I have great fondness for this metaphor, having spent a considerable portion of my childhood in Kansas.

in existing legal doctrines because these did appear to the uninitiated to be the product of rational argument and logical necessity. Again, the clear implication of the demystification argument was that something else was going on behind this puppet show that really counted, and that something was ideological or political commitment. The puppet show should be exposed for what it was, the Wizard of Oz should be brought out in front of \*1842 the curtain, so that real debate could ensue at the appropriate level—that is, the level of overt political discourse. Paul suggests that this assertion could be joined with a further claim—that existing legal discourse somehow falsified existing reality, or made it more difficult for oppressed groups to articulate their real needs and interests. By exposing the puppet show of legal argument, one could move to a form of discourse that addressed these needs and interests more clearly and directly.<sup>36</sup>

Third, showing the formulaic character of legal reasoning suggested that there was, in fact, an incredible similarity between legal argument and political argument. The basic forms of legal argument turned out to be amazingly similar to the basic forms of everyday moral and political discourse. As Paul points out, this argument makes the connection between law and politics in a different way than the other two arguments. Instead of claiming that beneath legal argument there is political argument, or that legal argument acts as a smokescreen for ideological contention, it asserted instead that legal argument and political argument were inextricably tied together as parts of the same general discourse.<sup>37</sup> To use a somewhat different metaphor, legal discourse was permeable to political discourse and vice versa. The two were so similar, and so deeply intertwined in their common forms of expression, that it was no accident that legal argument and political argument moved in lock step. Thus, lawyers and judges were not making legal arguments in order to cover up political arguments that they dared not openly express. Rather, they were always making political arguments because the basic forms of legal and political discourse were identical, or at the very least shared large elements in common.<sup>38</sup>

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<sup>36</sup> See Paul, *supra* note 1, at 1784-85, 1814-15.

<sup>37</sup> See *id.* at 1811.

<sup>38</sup> I believe that what most differentiates Philip Bobbitt's work from that of most CLS-influenced legal semioticians, and thus leads to his lack of recognition as an important figure in the semiotics of law, is precisely his appreciation of legal discourse as an independent form of discourse worthy in its own right. See Bobbitt, *supra* note 7, at 1235. In Bobbitt's view, law is as much a distinct "form of life" in a Wittgensteinian sense as is politics, and thus it is quite possible to talk sensibly and solve problems solely within this definitively legal form of discourse. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 8, 11 (G. Anscombe trans. 3d ed. 1968); P. BOBBITT, *CONSTITUTIONAL INTERPRETATION* (forthcoming 1991); Bobbitt, *supra* note 7, at 1302-12. That is why Bobbitt would also be loath to describe himself as a semiotician, even though I believe that he clearly qualifies as one. For Bobbitt, a

Of these three possible claims of legal semiotics, only the third—the \*1843 interpermeability of legal and political discourse—strikes me as having lasting value. Thus, I agree with Professor Paul that there are serious problems with the use of legal semiotics to demonstrate legal indeterminacy or for the purposes of demystification, at least as these projects were originally conceived.<sup>39</sup> Ironically, Professor Paul incorrectly conflates my work with the project of demystification he criticizes.<sup>40</sup> In fact I believe that my own theories of legal semiotics provide a more solid foundation for Professor Paul's critique than he himself makes.

Professor Paul argues that the indeterminacy and demystification arguments fail because they assume that once we clear away the artificial and inauthentic discourse of legal argument, it can be replaced by a more authentic discourse that will address progressive concerns more directly. But, argues Paul, there is no reason to think that this more authentic political discourse will not possess "precisely the same mind-numbing set of contradictory arguments" that legal semiotics discovered in legal discourse.<sup>41</sup> This argument needs some refinement, but Paul's basic point is correct. It is surely not the case that "precisely the same" arguments will arise when we move from legal discourse to any other form of moral or political discussion. Nevertheless, we will encounter the same phenomenon of repeatable forms of arguments in any other normative discourse with which we replace legal discourse. For convenience, I shall call the process of analyzing a discourse in terms of recurring tropes or moves "rhetorization." To "rhetorize" a discourse is to see its arguments and moves as repeatable rhetorical forms. Paul's argument can thus be restated quite simply: If the problem with legal

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person who studies the forms of legal discourse and practice is not a legal semiotician but a lawyer par excellence. I do not disagree with Bobbitt's view that legal discourse exists as a distinct form of life. I would differ with him rather in his relative neglect of the interpermeability of the different normative discourses of law, politics, and morality. Moreover, I would emphasize that these forms of life are always in the process of change, and therefore may increasingly borrow from each other or even converge towards each other over time. Thus even if the forms of legal discourse seemed to have little in common with political discourse in 1890 (a fact which I dispute), they have clearly become more intertwined with politics today; it will do no good to complain that we should return to forms of life that have already been reconstituted and no longer exist in the form one desires.

<sup>39</sup> See Paul, *supra* note 1, at 1811-15.

<sup>40</sup> See *id.* at 1807 & n.76.

<sup>41</sup> *Id.* at 1811.

discourse is that it is rhetorizable, a retreat to political discourse will not solve our problems because political discourse may also prove to be rhetorizable.<sup>42</sup>

\*1844 Paul believes that this analysis, which I wholeheartedly endorse, creates a terrible dilemma for the legal semiotician who seeks to pursue a progressive political agenda. On the one hand, the progressive legal semiotician seeks to move us to a more authentic discourse in which legal issues can be discussed on overtly political terms. On the other hand, to move the debate to the level of politics solves nothing, because political discourse itself may turn out to be rhetorizable, and hence inauthentic and artificial. "[W]hat basis" argues Paul, "is there to distinguish political choice, which presumably involves authentic considerations, from supposedly inauthentic invocation of cliched discourse that now encompasses not only law but familiar proverbs?"<sup>43</sup> Hence, Paul suggests that once we recognize that our personal politics are also based on rhetorizable discourse, we will become cynical because we can no longer really believe in the force of our own arguments. Worse yet, "o ur fear of becoming cynical . . . 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."<sup>44</sup> As a result, Professor Paul finds "superficial" my contention that legal semiotics will not and should not promote cynicism.<sup>45</sup>

The entire argument, however, rests upon the assumption that once any normative discourse is shown to be rhetorizable, it becomes inauthentic and

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<sup>42</sup> This does not mean that people cannot come up with new arguments and new ways of characterizing facts. The language of legal, moral, and political argument is always changing, just as language itself is always in the process of change. Yet as soon as these new forms of rhetoric emerge, they emerge as repeatable forms of rhetoric, and thus become rhetorizable in the same way that previous forms are. The possibility of rhetorization is present in every form of repeatable discourse, simply because it is always repeatable discourse. It is simply a question of patiently analyzing the discursive patterns and identifying the recurring tropes. To be sure, there is no reason to think that there is one and only one way of dividing up a discourse into recurring tropes. See Balkin, *supra* note 20, at 1134. There are many possible levels of analysis, and many different perspectives at each level. No one set of tropes will capture the full subtlety or the full possibilities of a genre of discourse. This point is one of the pillars of the post-structuralist critique of structuralism. See R. BARTHES, *S/Z* (R. Miller trans. 1974). But this does not mean that discourse is not rhetorizable; it simply means that it is rhetorizable in an indefinite number of ways.

<sup>43</sup> Paul, *supra* note 1, at 1815-16.

<sup>44</sup> *Id.* at 1812 n.89.

<sup>45</sup> *Id.* at 1811 n.89.

artificial. However, this assumption is precisely what I deny in my own writings.<sup>46</sup> I note that Professor Paul also concludes that "there is nothing artificial about the structured or routinized pattern of conflict within legal discourse."<sup>47</sup> However, the reasons that he gives for this conclusion—that "life over and over again" presents us with situations in which competing considerations apply,<sup>48</sup> and that patterned discourse "also occurs within everyday debate,"<sup>49</sup> do not establish the authenticity of legal discourse as much as they put the authenticity of everyday discourse into question. Thus, although Paul sees clearly that legal discourse cannot be artificial because this would threaten the authenticity of everyday discourse,<sup>50</sup> he fails to do much more than insist that the latter danger cannot arise. Yet there are good reasons to reject the argument that a rhetorizable discourse is necessarily inauthentic and **\*1845** artificial. They flow directly from the semiotic analogy between law and language I have tried to draw in my own work. It is therefore important to describe the theoretical basis of legal semiotics in more detail.

The purpose of semiotic study is to understand the system of signs which creates meaning within a culture. It is to understand the underlying structures that make meaning possible. The legal semiotician seeks to identify what might be called the "grammar" of legal discourse—the acceptable moves available in the language game of legal discourse.<sup>51</sup> These may occur at the level of permissible argument forms, modes of factual characterization, categories of social perception, or in many other ways. The semiotician traces the way that the system produces meaning, and if she has fully assimilated the post-structuralist critique, she tries to see the gaps or uncertainties within the structure, the many different levels at which rhetorical tropes can occur, and the many possible ways of redescribing them.

Yet the fact that legal discourse is rhetorizable says nothing about its lack of authenticity. To the contrary, I would insist that the only type of discourse that is truly authentic is that which is permissible within our existing language games, and is thus always rhetorizable. Authenticity is not freedom from the linguistic or cultural sources of meaning. Rather, it is precisely the opposite phenomenon—it comes from living within and through the structures of meaning

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<sup>46</sup> See Balkin, *supra* note 18, at 75-77; Balkin, *supra* note 27, at 199.

<sup>47</sup> Paul, *supra*, note 1, at 1820 n.119.

<sup>48</sup> *Id.* at 1820.

<sup>49</sup> *Id.* at 1820 n.119.

<sup>50</sup> See *id.* at 1820.

<sup>51</sup> Balkin, *supra* note 27, at 199-201.

that constitute a culture. At the same time, those structures of meaning can be understood as structures, and hence we can see to some degree how we live and think through them. Thus, semiotics does not show that the forms of discourse we live within and through are inauthentic. Rather, the study of semiotics makes us somewhat more self-conscious of the rules of our own language games of moral, legal, and political discourse, even as it shows the interpermeability of these discourses with each other.

This, however, does not end the matter. I have just asserted that legal semiotics makes us more self-conscious about our participation in legal culture. But self-consciousness can also be the enemy of authenticity. David Lodge's academic novel *Small World*<sup>52</sup> describes a novelist who gave up writing fiction after he learned that an admiring computer programmer had placed all of his works into a machine and produced a computer generated analysis of his style, showing how long his sentences were likely to be, when he would be likely to use a particular word, and so on. After reading this analysis, the novelist subsequently discovered \*1846 that whenever he used a particular word or phrase the computer had identified as characteristically his, it now felt artificial and false. Since it really was his style to use these expressions more than others, it became more and more difficult for him to write, until eventually he stopped writing fiction altogether.

Duncan Kennedy's original semiotic project hoped to have much the same effect for traditional legal reasoning. He believed that legal semiotics would make lawyers self-conscious about using standard forms of legal argument. Once people discovered that for every pro argument there was a con twin that popped into their heads the moment that they made the argument, they would lose faith in legal argument as a form of proof that could conclusively decide cases. This experience would rob legal reasoning of its authority and naturalness.<sup>53</sup> Eventually, lawyers and law students would begin to lose respect for standard legal discourse, and turn to other ways of conceptualizing legal problems. Thus, Kennedy's attack was two-pronged. First, he wished to make standard legal discourse seem artificial and cliched in order to undermine its authority and legitimacy. Second, he sought to encourage a movement to overtly political discourse by demonstrating its inescapable similarity to legal discourse. Thus he

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<sup>52</sup> D. LODGE, *SMALL WORLD* 182-85 (1984).

<sup>53</sup> This aspect of Kennedy's project is quite clear in James Boyle's work. See Boyle, *supra* note 32. Boyle has written that his goal is to show that legal argument is just like trading cliches or proverbs, such as "a stitch in time saves nine" versus "cross your bridges when you come to them." *Id.* at 1052. Implicit in this description is the idea that cliches or proverbs do not really justify our decisions, but merely act as excuses or justifications after the fact. See *id.* To understand what is really going on in legal argument, Boyle argued, one needed to look past the cliches of legal argument and turn to politics. *Id.*

could both demystify the authority of the law and undermine its autonomy from politics in a single stroke.<sup>54</sup>

This approach to legal semiotics is modernist both in its aspirations and in the effects it seeks to produce. Modernism is both a child of Enlightenment values and a reaction to them. It uses the tools of reason to undermine the claims of reason itself.<sup>55</sup> Examples of modernist projects are Jerome Frank's attempt to explain what judges do in terms of their psychological needs<sup>56</sup> or a Marxist's explanation of their work in terms of their class status. Another characteristic of modernist culture is the increasing sense that one has become detached from the past and from the traditions that constitute it.<sup>57</sup> Thus a characteristic experience in modernist culture is inauthenticity—the modernist feels inauthentic because she has become self-conscious about her place in society and this self-consciousness signals a loss of organic connection to past culture.<sup>58</sup> This experience of inauthenticity and loss of organic connection to tradition produce the experience of "modernist anxiety."<sup>59</sup> Kennedy used legal semiotics to create a type of modernist anxiety within legal discourse. He sought to disturb legal actors' sense of the authenticity of legal discourse and hence their comfort with the system of legal discourse by making them self-conscious about their participation in it.

Kennedy's modernist project often does have its desired effect of causing anxiety and unease. After teaching legal semiotics in my torts classes for years, I have encountered two opposite reactions that are really the same reaction in different forms. Some students become like the hapless author in Lodge's *Small World*. They wonder if they will ever be able to make legal arguments with a straight face again. Of course, they can, and they do, in subsequent courses and

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<sup>54</sup> It should by now be clear that the first goal conflicts with the second, in precisely the way that Professor Paul describes. See *supra* text accompanying notes 39-50.

<sup>55</sup> See Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 *TEXAS L. REV.* 1195, 1213 (1989).

<sup>56</sup> See J. FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>57</sup> For a general discussion comparing the experience of modernity in musical and legal culture, see Levinson & Balkin, *Law, Music, and Other Performing Arts*, 139 *U.P.A.L.REV.* (forthcoming 1991).

<sup>58</sup> See *id.*

<sup>59</sup> *Id.*

later on in private practice.<sup>60</sup> Other students offer considerable resistance to the idea that normative discourse is rhetorizable. Somehow they believe that the notion of rhetorizability robs them of a particular power—the power to say exactly what they mean in normative argument. They feel that if they are doomed to say things in preexisting forms of normative argument, they have lost the power of individual expression. Both of these reactions express different senses of anxiety and disempowerment. The second rejects the possibility of rhetorization because it would deny the subject's ability to say what she really meant, while the first accepts that rhetorization is possible and feels a consequent loss of control over the content of normative discourse.

We now see a quite different and more profound reason why rhetorizing discourse is thought to rob it (and the speaker) of authenticity. The problem is not that a rhetorizable normative discourse is indeterminate, or that it serves as a smokescreen for actual normative decision making. A rhetorizable discourse is threatening because it seems to threaten the self's own control over the normative positions that she espouses. This concern leads to attempts to discard this discourse and substitute another that is not rhetorizable, and would therefore express the subject's real thoughts, unencumbered by the straitjacket \*1848 of recurrent and stylized normative argument forms. The fear of a rhetorizable discourse creates the desire to flee a realm where "language speaks people" into one where people speak their thoughts in language. But there is no such realm. The dichotomy between a realm of rhetorizable discourse and a realm of authentic individual expression is a false one. They are, and always must be, the same realm.<sup>61</sup>

Thus, Kennedy's modernist use of semiotics is open to a postmodern rejoinder. First, like other modernist projects, it refuses to investigate the application of its attack on reason to its own methods. As Paul points out, Kennedy's view of rhetorization, if accurate, would eventually undermine the authenticity of his own political discourse.<sup>62</sup> But there is a deeper problem with the modernist project. This problem is the modernist assumption that self-consciousness destroys authenticity, and in this case, the assumption that rhetorizing normative discourse necessarily destroys its authenticity. I claim that this false assumption rests on an equally false picture of subjectivity. The

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<sup>60</sup> Whether this rediscovered ability is due to a process of forgetting what they have learned (i.e., a reduction of cognitive dissonance) or due to a consciously postmodern perspective has not been tested empirically, although I strongly suspect that it is the former rather than the latter.

<sup>61</sup> See S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 552-53 (1989).

<sup>62</sup> See Paul, *supra* note 1, at 1812-13.

modernist project does not fully come to terms with the social construction of the self. It still clings to the notion of a relatively autonomous subject who in some way stands apart from culture and the forces of social construction.<sup>63</sup>

If individuals are socially constructed, then their freedom will not consist in thoughts and actions which exist separate and apart from culture. Rather, their freedom always consists in their thoughts and actions as socially constructed individuals. Our discovery of the terms of our social construction, then, does not entail a loss of freedom or authenticity but rather involves coming to understand what freedom and authenticity really mean.<sup>64</sup> Moreover, if language is always social, and if freedom consists in activity as socially constructed individual, then socially constructed and channelled forms of discourse should be seen as empowering rather than merely confining. To be free is to be able to participate in a number of existing language games of normative discourse, and by participating in them to transform them as well.

I do not deny that the anxiety legal semiotics produces is genuine. I \*1849 do contend that it is unnecessary—unnecessary because it rests upon the false assumption that to be a free and authentic self is to be free of the forces that make us ourselves. The only truly "authentic" discourse is the discourse of a situated subject in some form of language game. To demand more than this is to demand the impossible. Imagine the following dialogue between two lawyers who have studied legal semiotics and are debating whether drug manufacturers should be held only to a negligence standard rather than a standard of strict liability:<sup>65</sup>

Lawyer A: It's unfair to hold drug manufacturers liable for dangers they could not have known about at the time they manufactured their drug. Moreover, you will keep valuable drugs off of the market.

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<sup>63</sup> See Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987); Schlag, *The Problem of the Subject*, 69 TEXAS L. REV. 1627 (1991); Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF.L.REV. 1441 (1990).

<sup>64</sup> My own view of freedom has been influenced by D. HUME, *A TREATISE OF HUMAN NATURE* 400-12 (L. Selby-Bigge 2d ed. 1978); G.W.F. HEGEL, *HEGEL'S PHILOSOPHY OF MIND* ' 514, at 254 (W. Wallace & A. Miller trans. 1971); and the writings of the later Wittgenstein, L. WITTGENSTEIN, *supra* note 38. Obviously this view requires a much fuller discussion and defense, which I leave to another day.

<sup>65</sup> See *BROWN v. Abbott Laboratories*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988) (holding that prescription drugs are unavoidably dangerous products within the meaning of the RESTATEMENT (SECOND) OF TORTS ' 402A comment k (1965), and therefore will be judged according to a negligence standard).

Lawyer B: I just knew you'd say something like that. How dare you make such a hackneyed "No Liability Without Fault" argument coupled with an equally predictable individualist social utility argument? What do you take me for? Don't you know that the obvious responses are "As Between Two Innocents Let the Person Who Caused the Damage Pay," and a communalist social utility argument that the defendant is a better loss spreader?

Lawyer A: Excuse me. I understand what the counterarguments are. But I really do believe that drug manufacturers aren't at fault in these cases and that truly bad consequences will flow from a contrary rule. What else can I do to convince you that I really mean what I say?

B's complaint strikes me as a category mistake. It is as if she were to say "I just knew that you would answer my argument with a well-formed grammatical sentence." It seems rather odd to say that A's use of individualist arguments to justify her position is a fault or deficiency of some kind. It seems odd because, as any student of legal semiotics will tell you, individualist arguments are the arguments one uses whenever one is embracing the relatively more individualist of two positions.<sup>66</sup> To object to an opponent's arguments because she is playing by the rules of \*1850 an existing language game seems very strange indeed.<sup>67</sup>

A postmodernist, therefore, would reject the modernist project if it sought to demolish faith in legal discourse merely by showing its semiotic character. There are many ways that Lawyer B could complain about Lawyer A's arguments in the above example, but none of them turn on the rhetorizability *vel non* of A's discourse. For example, B might argue within the existing language game of legal argument that A's arguments are not very plausible. She might argue that A was not paying attention to matters of context. She might insist that A was arguing without any knowledge of the economic situation in the drug industry. She might complain that A always makes pro-business arguments, no matter how implausible they seem, and that this undermines the plausibility of the arguments A has made in this case.<sup>68</sup>

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<sup>66</sup> See Balkin, *supra* note 18, at 32, 35-36, 59-60. Thus, if Lawyer A used communalist arguments to defend her position—if she said "I think that drug manufacturers should not have to pay because companies who cause harm should be held liable, or because we need to give drug companies incentives to make safer products"—we would think that she did not understand what a good argument for her position was.

<sup>67</sup> See S. FISH, *supra* note 61, at 245-46.

<sup>68</sup> This last argument is less an attack on the rhetorizability of legal discourse than a personal attack on A's credibility. Lawyer B is telling A that A is being an ideologue and that she should pay attention to the facts of this particular case. Although this would be unlikely to convince A, and although it would

As Professor Paul recognizes, there is a further alternative: B might insist that legal discourse as presently constituted does not allow a sufficiently nuanced description of the problems of consumers and drug manufacturers, and she might ask A to move to a different type of normative discourse.<sup>69</sup> In other words, it is perfectly plausible to argue that the language game we call legal discourse is insufficiently rich to convey some types of claims we think it important for people to be able to argue about, and that legal argument should be supplemented or reconstituted to take these kinds of claims into account. For example, before Catharine MacKinnon's pioneering work, the law did not have very good ways of discussing or describing claims of sexual harassment.<sup>70</sup> And despite its many detractors on the left, law and economics has enriched our legal language and our ways of expressing policy judgments.<sup>71</sup> In short, law could be supplemented by other normative discourses, of which there are many, and in fact it is always being supplemented by them. That is one consequence of the interpermeability of legal and political discourse. Of course, this process can work in the other direction as well. The language of the law can supplement gaps in other normative discourses just **\*1851** as these discourses can supplement it. Legal discourse can clarify and enrich our thought even if it sometimes obfuscates or hinders it.

Note, however, that such arguments do not rest on a perceived difficulty with the rhetorizability of legal or any other normative discourse. If legal language is impoverished, it is not due to its rhetorizable character. It is rather due to the particular rhetorical structures that legal language presently uses. Moreover, we can only understand this impoverishment from the standpoint of other rhetorizable forms of normative discourse in which we are already situated. It is precisely our situatedness in these discourses that empowers us and allows us to see the faults in legal discourse as currently constituted.

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involve a shift to a different game (i.e., personal abuse), it is certainly an available strategy.

<sup>69</sup> See Paul, *supra* note 1, at 1807-09, 1820 n.119.

<sup>70</sup> See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

<sup>71</sup> I view this as a major claim of B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984). See also B. ACKERMAN, *supra* note 7 (arguing that the language of Scientific Policymaking has enriched legal discourse).

If legal semiotics has a politics, it will be the politics of postmodernity.<sup>72</sup> By this I mean that it rests on the social construction of subjectivity and insists that older ways of looking at the subject must be revised. To the extent that existing normative discourses depend on older views of the subject, legal semiotics will suggest that they too must be revised. However, it is unclear whether the postmodern view of the subject will work in a progressive or a reactionary direction, and whether postmodern politics is itself progressive or retrograde. This follows from the principle of ideological drift. Indeed, I claim that it is already possible for us to see how postmodern conceptions of the self can be used against the agenda of progressivism. If the self is socially constructed, and if the self's freedom is its freedom as a socially constructed individual, one might easily defend existing social customs and practices because they are the basis of our individual authenticity and freedom. One might justify existing language games, and existing legal discourse precisely because they are our language games and our legal discourse, because we do live within them and are and always have been constituted by them.<sup>73</sup> Like pragmatism before it, postmodernism perverted may result in a glorified apology for what is rather than an imaginative aspiration toward what might be. It can, in the appropriate hands, prove as conservative as any conventionalist philosophy. I offer these remarks as a cautionary tale to anyone who thinks that embracing postmodernity will necessarily further progressive goals. The principle of ideological drift warns us that we must be ever vigilant in the new frameworks we \*1852 bring with us to meet the problems of today, for they have already inscribed within them the theoretical difficulties of tomorrow.

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<sup>72</sup> See Schlag, "Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction, 11 *CARDOZO L. REV.* 1631 (1990).

<sup>73</sup> Thus a conservative postmodernism would have much in common with Burkeanism. See E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790); cf. Kronman, Precedent and Tradition, 99 *YALE L.J.* 1029 (1990) (defending the normative force of tradition as constitutive not only of our culture but of our very selves).