APPENDIX

FIRST YEAR MYSTIFICATION AND LEGAL ARGUMENT: HOW TO AVOID THE FORMER AND MASTER THE LATTER

This handout\(^1\) describes one kind of mystification produced by first year law school and explains its moral and political consequences. It claims that part of this mystification stems from the fact that you don’t know what you are supposed to be learning. The rest of the handout is an extended description, with examples of the kinds of arguments that lawyers and judges make and the way that one needs to think in order to produce them. The idea is that “thinking like a lawyer” consists partly of understanding a set of easily mastered pro/con arguments about precedent and policy. You do not need to pick these arguments up by osmosis—you can learn them in thirty minutes. Learning them is important, not just educationally, but as a matter of moral and political choice.

First year is confusing because you do not know what you are supposed to be learning. All those vague statements about “thinking like a lawyer” should act as a signal to you that a lot of your time is to be devoted to learning a method of argument, rather than learning the content of the supposed rules on the subject. By now you should have realized that these rules are almost infinitely malleable, anyway. If the claim I am making is correct, then the “mystical first year transformation,” which second and third year students tell you about, will probably occur because, time and time again, you see people using this method of argument and eventually you pick it up by osmosis. But is that the only way to do it? My claim here is that you can learn this method of argument and become proficient at it quickly without confusion or mystification. In the rest of this handout I attempt to explain how you can do this, but first a warning: this set of arguments and techniques is not a substitute for a political, economic, or moral understanding of the law. My description should show you that these argumentative techniques are, by themselves, incapable of explaining the cases or the “rules,” because for

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1. This piece consists of examples of the types of legal argument described by Duncan Kennedy in Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976), and in his torts materials. I have tried to explain how one produces these arguments and in doing so I also relied on the work of Lon Fuller, Ludwig Wittgenstein, and Claude Levi-Strauss. E.g., Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 631, 661-69 (1958); L. Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans. 3d ed. 1980); C. Levi-Strauss, Structural Anthropology (C. Jacobson & B. Grundfest trans. 1983). Although I found these other influences important, any clarity or usefulness is entirely due to Duncan Kennedy.

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 vs. cross your bridges when you come to them.

Like cliches they appear convincing because the judge only uses one of them at a time ("no liability without fault"); but you have to learn that there is always another, opposite one ("between two innocents she who causes the harm must pay"). Until you learn to do this, you will be fooled by the shell game of judicial rhetoric, which appears to deduce solutions from "legal reasoning," when in fact those decisions rest on political, moral, or economic decisions.

I am going to describe two main kinds of arguments—precedential and nonprecedential. A skillful legal argument or judicial decision weaves the two techniques together so that the joints don't show; but in order to understand these techniques, you have to take them apart. Different decision makers react differently to these arguments; some will rely heavily on "precedent," some on "policy." You have to be able to understand the way that the particular judge believes herself to be bound by precedent or policy, at the same time as you understand that the precedents and the policy are actually completely manipulable.

I. Precedential, Rule-Based, and Interpretive Arguments

There are three main techniques which you need to learn if you want to argue about rules or past decisions. The first is the technique of making both purposive and formalist arguments about the meaning of words or rules. The second is the technique of generating both broad and narrow rules from the same case. The third is the general technique of factual and legal manipulation. All three techniques can be learned and, with a little practice, applied to almost any legal dispute. However, in this piece, I will use mainly tort examples, because that is the area with which I am most familiar.

A. Purposive Interpretation vs. Formalist Interpretation

I. Method

Formalist: To make a formalist argument, explain the meaning of the word by taking it out of context and without considering the purpose behind the rule. Having defined the word in question in the same way that a dictionary might, apply it to the fact situation.

Purposive: To make a purposive argument, "imagine" the purpose which lies behind the rule and define the word in the light of this
purpose. Notice that most rules can be explained by many conflicting purposes, so you have considerable flexibility.

2. **Examples**

   The rule says “no vehicles allowed in the park.” You have to decide whether to allow in an electric golf cart and a WWII truck which is to be placed on a pedestal in the park as a war memorial.

   **Formalist:** Neither can be allowed in. If anything is a vehicle a truck is one, and golf carts are defined as “vehicles” in a set of regulations issued by the Bureau of Motor Standards Licensing Division.

   **Purposive:** Both should be allowed in. The purpose of the rule must be to avoid pollution, noise, and the danger of accidents. Neither of these modes of conveyance pose such risks. The classifications that the Motor Standards Bureau make for its purposes are completely irrelevant.²

   Can you bring an action under the intentional tort of false imprisonment when two policemen illegally block off one end of a public road and prevent you from passing?

   **Formalist:** No. One is hardly imprisoned simply because one cannot walk in one direction, but instead must circumvent an obstruction. A road is not a prison.

   **Purposive:** Yes. The purpose of the tort is to deter others from illegally interfering in my legally protected interest of free locomotion. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else?³

   **B. Broad Rule vs. Narrow Rule**

   This is the simplest but one of the most important techniques. You have to be able to take the same case and “deduce” from it different “rules” which it “stands for.”

   **1. Method**

   **Narrow rule:** Tie the rule to the facts of the particular case so that it would not be capable of deciding a case in which the facts were even marginally different.

   **Broad rule:** Take each of the phenomena in the case and make them as “abstract” as you can. To do this requires a knowledge of

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² For the origin of this example, see H.L.A. Hart, *The Concept of Law* 121-32 (1961); Fuller, *supra* note 1, at 661-69.

what kind of analogies the legal elite finds convincing in a particular historical period and a knowledge of the way in which lawyers classify phenomena. The example will demonstrate what I mean.

2. Example

In a case called Vosburg v. Putney, one child kicked another during a class in high school. The jury held that there was no intention to harm, nevertheless Putney was held liable for a considerable sum (the kick having aggravated a previous injury to Vosburg’s shin).

Broad rule: All people, including children, lunatics, people acting under duress, and other persons not normally thought of as fully responsible for their acts, are liable for all of the consequences that result from any set of physical movements which they engage in intentionally, regardless of what they thought the consequences would be.

Narrow rule: After a class is called to order, if a child commits an act which turns out to have harmful consequences, there is a greater degree of presumption that the act was done intentionally and is unlawful.

Notice that the broad rule uses “children” as analogous to other classes of people—the insane, those acting under duress, etc. To be able to make this kind of argument, you need to remember all the ways in which lawyers generalize; in this case the common feature is “diminished responsibility.” Remember that, particularly when making analogies across areas (e.g. torts to contract), you need to understand the current “legal consciousness” about what kinds of analogies are convincing. Remember there is no “inner logic” to these analogies; they rest on a political choice about what similarities we will recognize.

C. General Manipulation of Precedent

1. Method

Lawyers normally combine the methods I have already described with a factual and legal recategorization of what has happened in the case at hand, so as to make other cases seem more or less relevant.

2. Example

There has to be an act by the defendant for there to be an intentional tort. For example, in Hurley v. Eddingfield a doctor refused to treat a patient who was seriously ill and who had offered to pay for

4. 80 Wis. 523, 50 N.W. 403 (1891), reprinted in R. Epstein, supra note 3, at 4-6.
5. 156 Ind. 416, 59 N.E. 1058 (1901).
the doctor’s services. The person subsequently died as a result of the illness. The court held that the doctor was not liable because there was no “unlawful act,” merely a refusal to contract. Taking this case and Vosburg v. Putney as your precedent, make precedential arguments about the following situation. A small boy starts to move a chair under an old woman who, apparently relying on the chair, began the lengthy process of seating herself. The child fails to get the chair under her in time and the woman breaks her hip.6

_Hurley controls, Vosburg is irrelevant:_ Even if the woman relied on the little boy getting the chair under her, his failure to do so cannot make him liable. The sick person in _Hurley_ relied on the doctor. The doctor’s failure to act directly caused the patient’s death. Nevertheless, as here, there was no act and thus there can be no liability.

_Vosburg controls, Hurley is irrelevant:_ By grabbing the chair and seeming to move it under the woman, the child committed an act that started off a train of consequences which culminated in the woman’s broken hip. At the time he may not have realized what the consequences of his action could be—just as Putney did not intend to hurt Vosburg and could not have known that his kick would aggravate the previous injury—nevertheless he is liable. Notice that the argument revolves around two things: the characterization of moving the chair as “an act” or as “an omission,” and the way that the circumstances are “made” to resemble each other, _i.e._ “a reliance and failure to act,” or “an act and an unforseen consequence.”

II. Nonprecedential Arguments

Nonprecedential arguments, or “policy arguments,” appear to be more “political” than precedential arguments. As you saw in the last section, there are political choices involved in the precedential arguments: in the selection of a purpose behind a rule, in the choice to rely on the supposed “plain meaning” of a word, and in the choice of one analogy or precedential argument over another. But these choices are concealed by the quick shuffle of semantics as the judge moves the categories. With “policy” arguments, however, one would expect the political choice to be on the surface. But, if your experience is anything like mine was, you have probably found these policy arguments to be both mystifying and strangely apolitical. My explanation for this phenomena is the same one that I gave earlier. The policy arguments and the pairs of cliches are merely _formal symbols_, like _+ _or _−_. They alone cannot tell us what is the

right decision, although they appear to if you are only given one side of the pairs. Part of the confusion of the first year class is that the teacher generally has both sides of these pairs of arguments. This can make you feel dumb in comparison, but you are not; you simply have not learned all the tricks yet.

Dividing these arguments into categories is a bad idea, but there doesn’t seem to be any better way to explain them. The categories are generally the ones developed by Duncan Kennedy and the idiosyncratic illustrations are mine. I propose to give a list of types of arguments, describe a method for producing them, and give brief examples. At the end of this handout, I will use them all at once, in the context of an actual case. You can use this case as an exercise to see if you are on the way to mastering these techniques.

A. Five Types of “Policy” Argument

1. Arguments about judicial administration

These arguments are sometimes called “formal realizability” arguments. One of the most common pairs goes like this:

We Need the Firm Rule
If the court adopts rule $x$, it will be laying down a firm standard which can be easily administered by judges and which will enable citizens to order their affairs in the sure knowledge of what the law is. Any other rule or standard would lead to confusion, open the floodgates of litigation, undermine the rule of law, and threaten western civilization.

vs.

We Need the Flexible Standard
Rule $x$ is a harsh, rigid standard which is unfair in this case and would force the courts to be unfair in many other cases. The rule cannot adapt to changing times and it will tie the court’s hands in the future. Instead the court should adopt flexible standard $y$ which will permit each case to be taken on its own facts, thus maintaining confidence in the court’s ability to mete out equitable justice on a case-by-case basis.

2. Arguments about institutional competence

These arguments appeal to the inherent “nature” of institutions (courts, the legislature, the executive, etc.) so as to be able to claim a particular decision is or is not suitable for them to take. This gives you a lot of leeway, because it is easy to claim that institutions are good at a wide range of different and even conflicting tasks (just as it was easy to argue for different “purposes” behind a rule). The following is a good example:
Courts are the Competent Institutions vs. Courts are not the Competent Institution

This issue is uniquely suitable for the courts to deal with. Courts are the bodies that society has set up to deal with complex factual issues, to be responsive to changing circumstances, and yet to be objective. An issue like this, which needs all of these qualities for its resolution, must be left to the courts. In addition, this issue needs to be resolved by an institution, which can take outside expert advice and has a firm understanding of the changing moral consensus of our society. Courts are the only bodies which combine all of these abilities.

Hint: this argument depends on “reification” or “essentialism,” the making of a concept into a thing. The same procedure is used by people who make sexist arguments e.g. “women are unsuited ‘by their nature’ to jobs like x.” As with the sexist argument, one useful counterattack is to give examples which prove the opposite. For example, if women are supposed to be “weak” and courts are supposed to be incapable of administration, point out that there are woman athletes and construction workers and that courts commonly administer schools, prisons, and mental health systems. Standard liberal constitutional thought and the theories about “judicial review” are supposed to make sense of institutional competence, but they don’t.

3. Moral arguments

These are harder to systematize or explain because they depend on the contradictory ideas of morals, which we all hold and which can be evoked in a particular set of circumstances. For example, there are conflicting strains in the vague background ideas of morals, on which we rely when we “intuit” a just result. The follow-
ing charts illustrate two obvious examples, form vs. substance and freedom vs. security.

Making moral decisions on the “formal” classification of the dispute (two “contracting parties”) vs. Making moral decisions on the “substantive” relative social power of the “people” involved (AT&T and an inner city slum dweller).

*Morality as Form*  
Why should a person of full age be able to get out of a valid contract that she had signed? A contract is a contract, people should keep their bargains.

*Morality as Substance*  
Why should this large corporation be able to enforce this document against a person who did not have equal bargaining power and who did not read the small print?

Making moral decisions on the basis of a right to freedom of action vs. Making moral decisions on the basis of a right to security.

*Morality as Freedom*  
A doctor ought to be free to refuse any patient, otherwise the state is putting her into a form of servitude. The state should only require us to refrain from certain actions; it should not require us to act.

*Morality as Security*  
A seriously ill person ought to be able to be secure in the knowledge that a doctor will treat her. Otherwise people can take the benefits of society without fulfilling its concomitant obligations.

Hint: There are many other types of moral argument. The basic trick consists of *shifting the context*. If the first argument relies on *form*, you rely on *substance* and so on. Other common sets of “switchable contexts” are individual *vs.* community, content *vs.* process, individualist *vs.* altruist, single encounter *vs.* continuing series, market theory of value *vs.* labor theory of value. All of these dichotomies belong to the contradictory political world views with which we have been bombarded. For example, how about Taxation is theft *vs.* Property is theft?

4. *Deterrence or social utility arguments*

These tend to intersect with moral and economic arguments. The basic form is simple. One side argues that the proposed action will deter good conduct and encourage bad conduct, while the other side argues the opposite. But behind this apparent simplicity there are a couple of twists which you should know about.
Flexibility vs. Stability
The proposed standard will allow business to respond to changing conditions, to act freely and thus it will encourage competition. Any other rule would act as a straitjacket, confining business ingenuity and forcing everyone to use a rigid framework which will merely get in their way.

The proposed standard will destroy certainty, upset legitimate expectations, and discourage competition because it will make people unsure that they will receive the fruits of their labor. Instead, we need a stable framework which will allow people to arrange their affairs in full knowledge of what the law is.

Hint: notice the similarity in form to the judicial administration/formal realizability arguments in A.1..

"Formal" Deterrence vs. Substantive Deterrence

Normally, deterrence arguments are made as though everyone knew the rules and adjusted their behavior accordingly. Consequently, one can make a fairly powerful argument by pointing out that this is not actually true; it is merely a formal assumption. This is most useful when you can point out that one of the parties is considerably more likely to know the rules and adjust its behaviour. For example, a large corporation that has a legal department may change its standard operating procedures for liability or insurance reasons, in the way that an individual might not have done. Hint: note that the argument depends on a switch of context from formal assumptions (all parties are rational atomistic monads) to the substantive realities of the situation.

5. Economic arguments

Although these arguments are being used more and more frequently, some people don’t teach them. If the explanation below is too complicated just ignore it and go on to the practice example. The thing that lawyers like about economic arguments is that they give the appearance of scientific rigor and neutrality to the political choices which judges make. The more complicated the economic analysis becomes, the harder it is to understand how to flip the arguments. Here are some general hints.

Use the same trick as I discussed in the deterrence arguments; move from the formal assumptions of macroeconomics (perfect information, “rational” economic actors) to the reality of imperfect information and economically inexplicable decisions. For example, make the argument that Shylock should have taken the pound of
flesh because severe penalties for delinquent debtors will ensure greater liquidity in loan markets. Then make a counterargument, relying on the “market need” for economically quantifiable penalties which require no physical force.

When you are looking at a “cost-benefit” analysis, remember that the post-Cosian revolution proved that anything can be factored in as a cost, including psychic upset or the wishes of future generations, and that all distributions of entitlements can generate efficient solutions, assuming the absence of transaction costs. Once the analyst starts juggling the figures, these facts will be obscured; but the basic point remains. The analyst is not taking the existing entitlements as fixed and trying to replicate the operation of a perfectly efficient market, because given transaction costs, the replication of an efficient market often involves changing entitlements. Nor is the analyst putting all entitlements “up for grabs,” factoring in social alienation, the “hidden injuries of class,” and the kitchen sink. Instead, the analysis takes a middle ground which conceals its choice of which entitlements to change. This strategy confers the legitimacy of science onto a technique, which actually operates in exactly the same way as the (more vulnerable) post-realist judicial opinion. Both techniques use the same metaphors and the same rhetorical structure. Both abstract certain reified entities from social life, be they “interests” or “externalities,” and having arbitrarily created these entities they pretend to neutrality by subsequently “balancing” them. But whereas the value choice in a balancing test is fairly obvious, cost-benefit analysts can smuggle in their preferences and thus give their tinkering with the existing distribution of wealth the sham rigour of scientific rationality.7

III. Practice Example

A banker in a small town is accused by the local barber of a campaign to ruin the barber’s business. The banker was “in nowise interested in the occupation of barber” but nevertheless he started up a barbershop “with the sole purpose of injuring the barber.” Failing to attract any barbers to the shop, he employed two at a salary and allowed them to occupy the shop rent free. The court is faced with the question of whether or not there is a legally protected interest in business good will or in freedom from malicious and unfair compe-

Make an argument for and against the creation of such a legally protected interest on the grounds of (i) judicial administration/formal realizability, (ii) institutional competence, (iii) morality, (iv) deterrence, (v) economics. A sample set of answers is on the next page.

The court should not create or recognize a legally protected interest in "business goodwill" or "freedom from unfair competition," because:

(i) Judicial administration: The creation or recognition of any such standard would be impossible, requiring the court to dig into a mass of vague subjective factors such as malice. The rule that all competition is good competition is simple and easy to enforce, whereas this proposed standard would be a judicial nightmare.

(ii) Institutional competence: The vague state of the law on this issue and the very fact that the court is being asked to create a legally protected interest show that this is a matter for the legislature. Courts should apply the law, not make it. To believe otherwise is to threaten the separation of powers itself. Besides, the resolution of such an issue demands an investigation of complicated economic issues which courts are ill-equipped to undertake.

(iii) Morality: In any event, the banker here has done nothing wrong. Even if he was motivated by malice, an evil intent cannot transform a morally neutral act (business competition) into a morally culpable one. If I think of stabbing my torts teacher while I am chopping garlic, am I committing a wrongful act?

(iv) Deterrence: Any such standard would deter socially beneficial activity, restrict commercial inventiveness and sap the entrepreneurial drive that has made America great. People are willing to go into business and face the hurly-burly of the marketplace, but if you add in the extra risk that they will be sued by economic losers claiming malice, then they will be deterred from this socially beneficial activity.

(v) Economics: Whatever the motive behind competition, it is still good. The consumers in the town benefitted by getting cheaper haircuts; and if the blind hands of the market place are guided by malice rather than lust for profit, the results are the same. By dividing competition into "good" and the "bad" types, the court would be setting itself on the slippery slope to socialism and economic ruination.

The court should create or recognize a legally protected interest in "business goodwill" or "freedom from unfair competition," because:

(i) Judicial administration: The proposed standard would allow the court to judge, in the light of the particular case, the advantages and disadvantages of supposedly malicious activity. This ability to give case-by-case justice is what distinguishes the courts of a free society and economic system from dogmatic totalitarianism. A rigid rule which blindly accepted all competition as good competition would shackle the courts and diminish respect for the rule of law.

(ii) Institutional competence: Courts are the only bodies which are competent to deal with an issue such as this. Courts are objective bodies, familiar with the working of the economic system and imbued with the situation sense which comes from exposure to all the peculiar fact situations thrown up by the vagaries of litigation. They are skilled in the type of "balancing of social interests" which this issue demands and they routinely handle the questions of malice and intention on which this case turns. Nothing in the doctrine of separation of powers prevents the courts from changing the law to adapt to changing circumstances.

(iii) Morality: One should not act maliciously intending to harm another person. Claiming that the act is moral because it is carried out through the neutral medium of the economic system is like claiming that sending a letter bomb is moral because it is carried through the ethically neutral framework of the postal system.

(iv) Deterrence: The recognition of this legally protected interest would deter socially harmful acts of malice. By reaffirming that the normal rules of morality and fairness apply to economic life, it would stop people from wasting their energies being nasty to others through the medium of the market.

(v) Economics: This standard will prevent economically inefficient activity at below cost. One cannot use microeconomic theory to justify an act based on malice since microeconomic theory assumes that everyone is acting rationally. In fact, economic science demands that we exclude from the market place all motives other than the desire for profit.

**Summary**

There are three main types of precedential arguments: formalist and purposive interpretation, generating broad and narrow holdings for cases, and manipulating legal and factual categories so as to make a case seem in point. There are five main types of non-
precedential arguments: arguments about judicial administration, institutional competence, morality, deterrence, and economics. Neither the precedential nor the “policy” arguments are capable of providing a neutral, “correct” answer. You must learn to use these arguments, if you wish to convince decision makers. You cannot rely on them, or the system they justify, to provide you with moral or political guidance. In fact, the most dangerous thing about these arguments is that they tend to discourage committed moral or political thought about the legal system by making you feel insecure or powerless (until you learn them) and at the same time by offering tools to knock down any suggestion for change. But this cuts both ways. Remember that it also means that the arguments which people give you about why the status quo is “simultaneously natural, inevitable and just”—that these arguments are also vulnerable to deconstruction. The choice is yours.