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Commentary on Plug

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                  Reconstructing the Intention of the Legislator"

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> Jurists, like other men, are in their attitude to the employment of logic either intellectualists or mystics. The intellectualist not only trusts implicitly all the results of reasoning but believes that no safe result can be obtained in any other way. Hence in law he emphasizes the rule rather than the decision. This, however, leads to an ignoring of the absurd consequences to which the logical application of the rules frequently leads. *Summa jus summa iniuria*. The mystics distrust reasoning. They have faith in intuition, sense, or feeling. "Men are wiser than they know," says Emerson, and the Autocrat of the Breakfast Table, who was not a stranger to the study of the law, adds, "You can hire logic, in the shape of a lawyer, to prove anything you want to prove." Morris Cohen, "The Place of Logic in the Law" (Harv. L. Rev. 1916, 29, 622.).
>   The criticism of formal logic is an attack upon a dummy overstuffed for the occasion. Mortimer Adler, "Law and the Modern Mind." (Columbia L. Rev. 1931, 31, 91.)

Professor Plug's paper is a very interesting one, the conclusions of which I find myself in substantial agreement. The relationship between legislative argument and judicial interpretation of statutes is greatly vexed and argument theorists should be well situated to clarify a matter fundamental to democratic practice. Professor Plug raises two large questions: put broadly, how do the separate argument fields of legislative politics and legal interpretation interact? and, what are the argumentative methods and schemata used by jurists when they interpret legislative documents? Professor Plug categorizes these argument schemes within the systems of symptomatic and pragmatic argument adumbrated by van Eemeren, Grootendorst, and Henkemans (2002). Once legal arguments are categorized in this fashion we can more easily see the critical questions pertinent to each sort of argument. As Plug states in concluding her remarks, "...insight into the argument scheme is particularly important in view of the evaluation of the argument, since for each type of argumentation different criteria of soundness are applicable." According to van Eemeren (2000, 97), for instance, arguments based on symptomatic relationships are best examined by the asking of several questions about them; are the factual claims embedded within the schema accurate?, are the posited symptomatic relationship as strong as the arguer would have us infer?, aren't there also other non-Ys that have characteristic Z?, and aren't there also other Ys that do not have characteristic Z? Similarly, Plug points out that pragmatic arguments can be tested not only by means of standard critical questions ("does Z always lead to Y?") but by more value oriented inquiries ("is Y a consequence worth arguing for?"). Plug also suggests that a number of strategic maneuvers are

available to an arguer, the choice of which is bound by essentially rhetorical considerations. Using the taxonomy supplied by van Eemeren she suggests three steps in the selection of these strategic maneuvers: 1) making an expedient choice from the options constituting the topical potential associated with the particular discussion stage, 2) selecting a response adapted to audience expectations, and 3) exploiting the appropriate 'presentational devices.'

Here Plug leaves the issue. What I will pursue here is more of an extension of Professor Plug's thesis than a criticism. The focus of my response will be to describe how contemporary jurists have considered the "topical potential" of statutory interpretation. Accordingly, the second section of this essay will discuss briefly four matters, the canons of argument judges use to interpret statutes, some of the current controversies in the United States over principles of statutory interpretation, recent legal scholarship prescribing topical modes of argument about statutory interpretation, and, finally, the relationship of this professional literature with the topical schemes of rhetorical invention known as the *stasis* system. In conclusion I will make some general theoretical remarks about the forms of argument used by judicial interpreters. These remarks will demonstrate the difficulty of the interface between informal logic and jurisprudence and may be profoundly discomforting to both pragma-dialectitians and informal logicians. Though I will rely on the tradition of legal argumentation with which I am most familiar, that of the United States, I believe that the underlying principals can be easily generalized.

II.

The problem that Professor Plug raises is, quite simply, the single most contentious issue in United States jurisprudence. The current controversy over the rules of argument pertinent to statutory interpretation is deeply divisive and reflective of profound disagreements over the role of a judiciary in a democracy.

Anglo-American jurisprudence has been bound, throughout the modern era, by what is called the plain language rule of interpretation. Under this rule, in effect since at least the 18th century, a judge's responsibility is to apply the law 'as it is written' (Thorne 2001). Exception can only be made for laws that are deemed to be ambiguous. The rule in the United States is supplied by *Overseas Education Association v. Federal Labor Relations Authority* (876 F.2d 960 [D.C. Circuit 1989]) which holds that a statute must be shown to be ambiguous before any other canon of construction can be invoked. Ambiguity is defined for jurists in *State ex. rel. Neelsen v. Lucas* (24 Wisc. 2nd 262, 128 N.W. 2nd 425 [1964]) by means of a "reasonable person" rule, "a statute is ambiguous when two reasonably well informed persons could understand the language in two or more senses." The plain language rule is also required to be employed by jurists in most Uniform Code statutory systems, such as New York Consolidated Laws (sec. 71-92).

When statutes are found to be ambiguous -- and this happens quite often, after all courts rarely consider easy cases -- jurists have available to them a number of topical guides, called canons of construction, by which they can attempt to reduce the ambiguity of the text. A recent book by William Eskridge (2000) identifies more than twenty of these canons, most inherited from English common law. By way of illustration, two well-known canons focus on the reduction of ambiguity caused by lists within statutes, a very common problem of statutory interpretation. *Ejusdem generis* ('of the same class') holds that when general terms follow specific terms in a list, the general terms are to construed to embrace only things similar to those enumerated. So, if we have a law that gives an agency the right to sell off certain assets in its possession, say, "gravel, sand, and earth or other material." They may not construe the rule to

include such things as timber, oil rights, or computers, but may use it justify the sale of clean fill or field stones. A second, widely used canon that also governs enumerations in statutes is *expressio unius est exclusio alterius.* This holds, roughly, that 'whatever is omitted is understood to be excluded.' United States copyright law is almost supernaturally complex and the materials brought under its protection are enumerated in excruciating detail. That enumeration, however, does not end in a generally term such as 'and other similar material.' Because architectural blueprints are not enumerated in the statute *expressio unius* suggests that architectural blueprints are not protected by U.S. copyright law.

Canons of construction, then, are topical tools used by jurists to interpret statutes in relatively stable ways. Intrinsic canons, such as those described above, are considered superior to extrinsic canons that direct the jurist to examine legislative history as a means of arriving at a legislature's intent. And, it should be remembered that extrinsic canons can only be used after it has been determined that a statute is ambiguous.

These canons were the traditional backbone of judicial interpretation and stood without serious challenge until the middle of the 20th century, when they came under vigorous scholarly attack. The key blow against them was an article by Karl Llewellyn (1950) that demonstrated that for every canon, there was an equally compelling counter-canon. The law reviews were soon full of articles calling for judges to pay greater attention to legislative intent (Hart & Sacks 1958, Jones 1952, Hurst 1982). American courts leapt on board and the following period became known as the era of 'legal realism,' in which a judge's central task seemed to be the interpretation of ambiguous statutes in light of a legislature's intentions. Under this regime it was not at all unusual for judges to base interpretations on such things as statutory preambles, reports of legislative debates, and compendia of legislative histories.

Legal realism was a modern articulation of an old idea, that once the intrinsic canons of construction had been exhausted jurists could turn to legislative intent in order to clarify an ambiguous statute. In the past, jurists often attempted to define a statute's general legislative purpose, often by reference to their assumptions about the aim of legislation, or even social mores. The *locus classicus* of 'purposeivism' is the majority ruling in *Church of the Holy Trinity v. The United States* [143 U.S. 457,1892)] where it was held that a Federal immigration law that prohibited the importation of contracted workers into the United States could not possibly be applied to the hire of a British minister, because -- against all textual evidence -- it seemed inconceivable to the Court that the Congress of a "Christian nation" would intend such a thing. This sort of purposeivism seems to me what Plug refers to the "second form of the genetic argument" and which she places in a pragmatic argumentative scheme. Purposeivism is only very rarely invoked in the modern era, at least in the United States.

The legislative intent sought after by legal realists is more akin to what Plug call the "first form of the genetic arguments," or "what the legislator directly intended." This sort of legislative intentionalism aims at the clarification of the statutory text. That is, it investigates extrinsic canons of construction as a means of gathering evidence as to why the legislature phrased a law in the manner that they did, and of better discerning meanings of the words of the statute.

The conceptual and theoretical problems of establishing legislative intent by means of extrinsic canons of construction are manifest and profound. The fundamental critique of intentionalism is that it relies on a radically idealized notion of legislative action. Intentionalists seem to believe that legislatures have a single, articulable, purpose for passing any given statute; that, in essence, all who voted for it did so for the same reason. This, of course, is nonsense as statutes are the results of compromises that are made at every level of the legislative process.

Accordingly, when jurists isolate some statement in a legislative history they cannot know if that statement says anything about the purposes of anyone else, or the legislature as a whole, or whether the purpose (if such a thing could be isolated) of the bill at any particular stage in the legislative process is the same as the purpose of the bill which was finally passed. Quite simply, many would argue that it is impossible to isolate the unitary intention of a collective body (Shepsle 1992), requiring jurists to, as has been famously suggested, "scan the crowd in front of them and wave to their friends." This problem is only multiplied in complexity when we discuss the purposes of bi-cameral legislatures. When intentionalists turn to legislative history other problems of method arise. There is, for instance no common law hierarchy of sources of legislative history, though legal scholars have suggested some (Erskine 2000, 307). On account of this structural tendency to arbitrary judgments intentionalist jurists are accused of undermining both the authority of law and the confidence of laypeople in the law, and more fundamentally, of being, in essence, anti-democratic.

In recent years there has been a virtual revolution against 'legal realism,' led by some of America's most prominent jurists and legal scholars. "New Textualists" have forcefully called for the return of the plain language rule to the heart of jurisprudence (Vermule 1999 2000, Sunstein 1999, Wald 1990, Bell 2000, Eskridge 1991 1994 1998, Marshall 1989, Posner 1986, Scalia 1997). New Textualists anchor their theory of interpretation in a series of assumptions: that the task of a jurist is to apply laws passed by a democratically elected legislature, that legislative intention is communicated directly through the text of a statute, that interpretation of statutes is a relatively simple matter of common sense reading, and that the tiny number of truly ambiguous statutes that do exist can be clarified by the application of the intrinsic canons of construction. The net effect is a radical reduction of a judge's ability to construe a statute beyond its linguistic surface.

New Textualist practice has been described as implying nothing less than a 'linguistic turn' in jurisprudence. Indeed, some have called for linguists to be qualified as experts so that they might assist in the proper interpretation of statutes (Cunningham 1994). New Textualism's rigorous parsimony has had such an effect on jurisprudence that legal scholarship has taken note of the frequency with which judges, especially those on the U.S. Supreme Court, use dictionaries as tools for the interpretation of statutes (Randolph 1994, *Harvard Law Review* 1994). Justice Antonin Scalia, in a recent speech, reported by the *Washington Post*, (4/12/03 p.5), discussed his use of an 18th century dictionary to "make sure he understands what the Constitution's words meant to the men who wrote them." Scalia's preferences in contemporary dictionaries are legendary. He disdains *Webster's 3rd*, for instance, as being merely descriptive, and will only accept definitions taken from the prescriptive 1st or 2nd editions.

The extremity of some of these New Textualist positions (and perhaps the political conservatism of many of its adherents, as well) has drawn a vigorous counter-offensive. Increasingly, legal scholars see New Textualism as wooden, reductionist, and based on cavalier dismissals of recurrent and difficult interpretive problems (Sinclair 1997 1999 2000 2002, Alienkoff 1988, Chomsky 2000). Linguists, in particular, have taken strong offense with what they see as New Textualism's primitive conceptions of both the field of linguistics and the problems of meaning (Sinclair 1985, Schroth 1998, Miller 1990, Golanski 2002, Brewer 1996). In Golanski's words New Textualism relies less on disciplinary linguistics than a "farrago of folk psychological truisms about linguistic meaning." Textualist judges also seem to have a radically idealized notion of legislative action, in which hyper-rational legislatures fully and consciously invest statutes with their intentions, and hyper-literate drafters craft statutes that perfectly

articulate those intentions. Critics of textualism point out that if discerning the plain language of statutes was as simple a matter as textualists suppose, then we should have many fewer wrangles among textualist judges about what statutes mean. Textualists have also come under fire for a text-fetishism which can lead to absurd results.

Critics of New Textualism argue for a "principled eclecticism," what they call "dynamic" theories of statutory interpretation that would supplement the plain language rule with attention to the canons of construction and renewed attention to legislative intent, in effect a return to a chastened, but flexible, 'legal realism.'

It should be pointed out that though the battle has been joined anew among scholars rigid textualism is the order of the day in United States jurisprudence. So great has been the influence of New Textualism – and, on account of political reasons, this influence will continue far into the future – that lawyers, pragmatists as they are, have generated a number of ingenious strategies for working within the textualist regime. Gregory (2002), for instance, argues that in modern legal practice, the invocation of the plain language rule has become a powerful weapon. Accordingly, the advocate must arrive in court with arguments constructed to demonstrate how the plain meaning of a statute should be interpreted to his client's advantage. Gregory describes three strategies, what he calls "gambits," for getting around New Textualist judges. In the 'plain meaning gambit' one seeks to be the *first* advocate, regardless of whether the statute seems to favor one's client, to argue that the plain meaning of the statute points to the superiority of their client's position. This is intended to trick the opposing advocate into arguing that this interpretation would violate the intention of the legislature, a plea that is likely to fail with a textualist judge. The second strategy suggested by Gregory is the high-risk 'textual end-run' by which one argues that the statute is so poorly framed that it would lead to absurd or contrary results. Gregory's third strategy, 'using text to bypass text,' is employed to show how the language of a specific statutory passage should be interpreted in the context of similar passages in the statute as a whole.

To get a sense of the concrete (not to say wooden) quality of this sort of topical argumentative scheme, see Gregory here on the 'plain language gambit (2002, 466).'

> An additional reason for invoking the plain language rule, in seemingly inapposite circumstances, is organizational. The Supreme Court has stated that the interpretive inquiry begins with a statute's text. Although the Court has indicated that an unambiguous text generally ends that interpretive inquiry, a party rarely stops at the text. Typically, the party first advances a textual argument. Next the party marshals the relevant legislative history. Lastly, the party looks at the broader purpose of the statute. This linear form of argument tends to provoke plain language arguments. A party wants to construct and argument in which the text, history and purpose combine to create a clear picture of congressional intent. To strike the right note, at the textual stage, a party will want to argue that the text is plain. The party will construct the argument in this manner: the language of the statute is clear; any doubt on the point is put to rest by the legislative history; the reading of the statute supported by the text and history furthers the overall purpose of the statute.
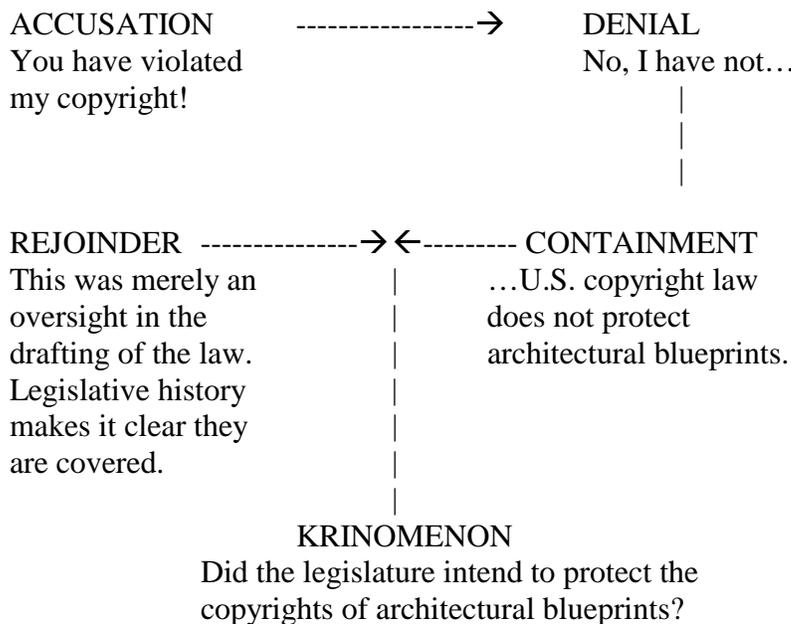
If the passage above smacks of casuistry it is also consistent with the spirit of much of the legal literature on strategies for dealing with the new jurisprudence. It should also ring bells for

anyone who has ever read classical rhetorical theory, as it has a close, arguably chromosomal, relationship with the topical inventional scheme known as the *stasis,* or *status* system.

Stasis schemes were inventional devices for accomplishing two things in ancient forensic rhetoric; determining the crucial issue to be determined in any case, and, once the issue had been determined, the suggestion of particular lines of argument (*topoi*) associated with the issue. All of these accounts divide cases into issues of 'action' (in most cases including the categories of fact, definition, quality, and jurisdiction) and issues of textual interpretation. These issues, the *controversia in scripto,* vary somewhat in the various accounts but more similarities exist than dissimilarities. A representative account is to be found in Cicero's *De Inventione* where, at I. 17 he distinguishes between five classes of dispute that can arise from the interpreration of a document or law; ambiguity (*ex ambiguo*), letter vs. intention of the law (*ex scripto et sententia*), contrary laws (*ex contrariies legibus*), correspondence or analogy (*ex ratiocinatione*), and definition (*ex definitione*).

Having identified the issues in Book I, Cicero turns in Book II to the matter of how to argue them. By far the longest treatment (in all accounts, by the way) is of how two parties should approach questions of spririt vs. intent (*DeInv.* II 121-143).

There we are to imagine that two parties have identified the *krinomenon* for the judge through the pragmatics of accusation, denial, containment and rejoinder.

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ACCUSATION          ---------------->      DENIAL
You have violated                          No, I have not…
my copyright!                                 |
                                              |
                                              |

REJOINDER  -------------->  <--------- CONTAINMENT
This was merely an         |        …U.S. copyright law
oversight in the           |        does not protect
drafting of the law.       |        architectural blueprints.
Legislative history        |
makes it clear they        |
are covered.               |
                           |
              KRINOMENON
        Did the legislature intend to protect the
        copyrights of architectural blueprints?
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Having been brought to this 'matter to be judged,' Cicero provides both parties with concrete and specific lines of argument, commonplaces or *loci.* So, for instance, if the accuser (as in our example) argues that the law has a purpose at odds with the text, Cicero recommends that the defendant amplify on two arguments: 1) it is not for the reader to argue the intention of the writer, that the legislator who wrote the text expressed his intentions with the text as written and following this, 2) that if judges interpret beyond the confines of the text there will be confusion in society as to what any legal document might mean (*DeInv. II* 128). Conversely, the

litigant attacking the letter of the law has the more complex, but equally concrete task of offering ten arguments in a series: 1) that equity is on the litigant's side, 2) that the authors of the law would have approved of this interpretation, 3) that judges are competent to judge the spirit of the law, 4) that if legislators had thought judges to be fools they could have covered every contingency in their statutes, 5) that any clerk can read the text of a law, that judges must interpret them, 6) after that (*postea*) the speaker should pose absurd hypotheticals which a strict textual reading would produce, 7) that people interpret intentions all of the time in everyday life, 8) next (*deinde*), amplify on the churlishness of literal interpretations of the law, 9) then (*deinde*), say that we value laws not on account of their texts but because of their purposes, and 10) after that (*postea*) set forth the true purpose of the law.

The most interesting feature of *status* based argumentation is its determined (perhaps over-determined) nature. The system does not merely suggest the topical potential of subject matters, it actually supplies what both sides are supposed to say when faced with a given situation. We even have many indicators that the treatment of these topics is supposed to be conducted in a particular order. What Cicero describes then, is less a general system of general argumentation than an efficient response system for advocates within an interpretive regime.

III.

Significant theoretical problems become apparent if we approach current practices of statutory interpretation through the lenses of either informal logic or pragma-dialectics. Argument theorists will readily recognize that topical forms of argument, such as those of the *stasis* system or the intrinsic canons of construction, do not rest on creative inventional structures or schemata. Neither do they lend themselves easily to critical analysis. Nor do they seek to aid critical discussion.

To begin with, commonplace systems are purely prescriptive. By 'prescriptive' I do not mean that they recommend sound, or even criteria based argumentative practices, as we often use the term. The 'prescriptiveness' of commonplace systems refers to the fact that they suggest specific and concrete things for advocates to say whenever they encounter particular situations. The general formula for topical systems is, "If you find yourself in situation X, say Y. If your opponent says Y, say Z.." The commonplaces, in this sense are not creative but reiterative systems of argument. Professor Plug notes, for instance, that by assigning methods of statutory interpretation to various argumentative schemata we gain insight into how that argument might be criticized. Commonplace schemes, however, are neither generated by nor criticized as argument types, but are merely off the rack strategies to be employed when prudence indicates they might obtain. If we imagine commonplaces being played as a series of predictable gambits by three players (opposing counsel and a judge) who are well educated in the rules, much of the creative power of critical discussion is drained away.

In addition, commonplace systems neither theoretically nor logically exhaust the topical potential available in any situation, but merely suggest a (relatively short) list of familiar things to say when one encounters such situations. Commonplace systems are produced by induction and based on the 'best practices' of professional advocates. Quite simply, they are gathered or collected, rather than theorized. Informal logicians and pragma-dialecticians might both be discomforted by such radically over-determined systems.

Finally, commonplace systems, if the terms amoral or apolitical seem pejorative, are surely and entirely pragmatic. They are idealized in neither argumentative nor ethical terms. Gregory (and Cicero, for that matter) is not concerned with the question of whether his gambits

will create sound arguments, nor is he interested in the abstract quality of the outcome. He is concerned with giving good value to his client. He makes no judgment of the validity of the textualist regime, he is solely concerned with maneuvering within it. If 'legal realism' returned, I think it fair to imagine he would be happy to produce strategies for working around that regime. The same can, of course be said of the *stasis* system. Pragma-dialecticians might well quail at the thought of a system of argumentation which commits interlocutors to adversarial and contradictory lines of argument the point of which is not to produce critical discussion but victory (Kagan 2001).

In sum then, I would suggest that argument theorists should follow up on Plug's essay in three ways.

First of all, we need a comprehensive and realistic account of the argumentative practices of legislatures and jurists. I think that the assumptions and practices of these two groups differ so greatly that they can and should be considered different argumentative fields; indeed they seem to be paradigms cases of greatly separated argument fields. Plug very correctly identifies the essential task of statutory interpretation as being the reconstruction of legislative intent. I hope that my response at least suggests that the assumptions of jurists and legal scholars about legislative intent are often improperly idealized or based on overly simplistic accounts of the problem of textual meaning. Scholars of argumentation should not make the same mistakes. In particular, our accounts of statutory interpretation should be informed by a sophisticated account of legislative practices (debates, committee work, compromise) and legislative documents (drafting conventions, canons of construction). We should also be particularly well placed to examine the fundamental problem of identifying unitary intentions in the complex, collective, activity of legislation.

Secondly, I believe we need to examine more carefully the "topical gambiting" that marks legal advocacy. In most of the West, legal systems are adversarial. Advocates aim to get maximally advantageous results for their clients (corporate, political, or individual) with little regard for abstract notions of justice, much less sound argument. Our appraisals of legal argumentation should take these values into account. Jurisprudence is more of a decision system than a system of critical discussion and our analyses should recognize this.

Lastly, and most generally, I think we need to re-examine the processes of topical argument. Topical systems, such as the *status* system and the canons of interpretation, are often thought to be a lesser, primitive, form of argument. This is most unfortunate. Ignoring them, or merely criticizing them for being what they are, simply abandons the field. Argumentation scholars might well consider the degree to which topical systems can function as inventional devices.

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