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In Response to: H. José Plug's *Reconstructing the weight of legal arguments*

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We are pleased to be responding to this essay by José Plug. Her handling of a complex question about the weight and force of second, or secondary, arguments is skillful and measured. It is a pleasure to be participating in a serious dialogue about the essay and the problem it engages.

We would like to begin by noting a move Plug makes that may seem peripheral, but in fact strikes us as central to the themes of her larger argument. That move is Plug's decision to emphasize the broader context of legal argument. She writes in particular of the putative jurisdiction of judges' argumentation. Where a judge makes judgments, and what or and wherein her legal authority lies, bear directly on her work on the bench. As Robert Hariman (1990, p. 19-21) has observed, social knowledge in and of the law has telling consequences for community, for polis, and for courts of law. A judge's standpoint, as both an adjudicator of the law and a recipient of opposing arguments, may be strengthened or vitiated, but will always be positively or negatively complicated, by contextual considerations influencing argumentative processes.

A subset of "context" (writ large) is *institutional* context. In addition to rightly noting inherent differences between legal and critical-theoretical argument, Plug suggests the need for critical appraisals of how "institutional context" in its various forms and guises may speak to legal argumentation.

"Jurisdiction," after all, is a fiercely contested concept, as evidenced—to name only the most prominent example in American constitutional law—by the longstanding debate over judicial restraint and judicial activism. To what extent may, or should, a judge reach beyond the letter of the law so as to influence, directly and palpably, social questions, public policy, or ethical outcomes? Is a judge dependent upon the words of the law alone, without resort to contemporary viewpoints or interpretations? In short, what binds a judge? What *frames* his methods and modes of operation?

Such questions are by now standard, and are therefore not especially interesting of themselves. But their implications for how one *perceives* arguments are compelling, as evidenced by the confusions borne of those trends or movements which demand of arguers an adjustment of perspective and, at times, a concomitant renewal of evidence, claims, or strategy. The rightward ideological shift of the U.S. Supreme Court, beginning fifteen or so years ago and accelerating in the last several years, has necessitated a near reversal of convenient labels, and has engendered a hatful of ironies not lost on legal scholars or cultural critics. That is, a "conservative" court is lately accused of "acting" to scale back, strip down, or simply destroy the painstaking additions and renovations wrought upon the Constitution's sturdy frame during the Warren-Brennan years. What was once an "activism" that violated norms of "restraint" and a properly "strict construction" is now refashioned as a series of efforts by the court's liberal minority to "restrain" the activist machinations of the Rehnquist triad and its sometime compatriots, Justices O'Connor and Kennedy. Politically, perspectives have shifted; and the vocabularies, forms, and topoi of specific types of legal argumentation must shift along with those perspectives or risk semantic obsolescence. Framed in this manner, Plug's precise analysis

of judicial argument, and the context in which what kinds of argument may prevail or prove necessary, takes on added importance, if not urgency.

The heart of the essay is Plug's careful and balanced response to van den Hoven's objection to the introduction of secondary arguments in coordinative compounds. Plug argues that "it should not be the perspective of the evaluation that determines the reconstruction of the argumentation, but rather the perspective of the protagonist's presentation of his argumentation" (Plug 2001, p. 7). Here it is not so much the differences between multiple and compound argumentation that intrigue Plug, but the effects on standpoint of asymmetrical approaches to coordinative compounds. Following Snoeck Henkemans (1992), Plug detects, in asymmetry, fruitful possibilities for establishing a dialogic frame of argumentation, one that, by permitting the arguer to make "more than one attempt to defend his standpoint," may lead to the construction of a more *suasive* case (Plug 2001, p. 3).

Perhaps the most crucial piece of support Plug offers for asymmetry (and its featured element, the secondary argument) is her assertion that a judge may anticipate contestation of counsel's first argument. Given the desire of any good attorney to (at the very least) call into question, if not politely undermine, the legitimacy of objections or counterarguments from the bench, it is both argumentatively reasonable and rhetorically prudent for judges to anticipate and parry, *a priori*, counterarguments from counsel.

The proverbial best offense is, still a good defense. Plug claims that insofar as secondary arguments anticipate, and thereby counter, or even merely acknowledge, probable objections, they are valid and useful; and insofar as they in fact do just that, we concur. While it is certainly reasonable to hold that coordinative compound arguments may grow messy or unwieldy, or may confuse the arguer's interlocutors, it would be difficult to substantiate the claim that all second or secondary arguments are superfluous. It is easier to support the claim that in many instances, as Plug amply demonstrates, a second argument adds a second perspective, another vantage point or lens through which an arguer's recipient may entertain and appraise the merits of the argument. And if, as Plug suggests, a judge (or opposing counsel) has anticipated objections to a first argument, the use of a second argument is then not only merely creative, dialogically or otherwise; it is also highly pragmatic. Do you know, or suspect, that you may not succeed at first? Then be prepared *in advance* to try again.

We would go even further than Plug in responding to the possibility of being caught in Gricean gridlock. Privileging Grice as an approach to argumentative encounters reveals the inadequacy of applying formal "ordinary language" rules to everyday discourse. Argument is not neat and tidy; it is messy and fuzzy, ambiguous and even necessarily inefficient at times. To assume that the opposite pole is always preferable is to miss the point: language's inherent ambiguity has value above and beyond the straitjacket brought on by adherence to Grice's maxims. So what if one of the interlocutors violates a "cooperative principle" in a dialogue. This does not mean, *contra* Grice, that the discourse is lessened in value, or that any singular claim (as in the case of secondary argument) is therefore "superfluous." It simply does not follow, by any stretch of logic's rules, that if a secondary argument is superfluous in one case (and it may be) that it is superfluous in all cases, as that ignores the content of cases other than the one under consideration. In fact, one may be "clear, honest, efficient" only by arguing from an anticipatory posture toward the other. To delete or suppress a secondary argument because it might appear superfluous in advance is to yield ground to a second round of argument that forces the secondary position to a level of expression. Such a sequence would hardly qualify as the more

“cooperative.” Thus, argument may be more efficient through the employment of secondary arguments than would appear to be the case from a strict application of Gricean logic.

In conclusion: José Plug offers her readers a balanced and insightful evaluation of various ways of framing questions about the strength of legal arguments. She parses, with care, a difficult set of concerns about coordinative compound argumentation, and argues for the acceptance of another class of such compounds—namely, asymmetrical coordinative compounds. Viewed both for the specific contributions asymmetrical coordinatives may make to the study of coordinative compound argumentation, and for the essay’s broader connections to theoretical inquiry in legal argumentation, we must thank Professor Plug for her original and thought-provoking work.

References

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