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I. INTRODUCTION

This Essay attempts to show some of the important connections between the Continental tradition of semiotics, American Legal Realism, and the Critical Legal Studies movement. Semiotics, the study of signs and systems of signification, was developed independently by two thinkers, the American philosopher Charles Sanders Peirce and the Swiss linguist Ferdinand de Saussure. Much of the literature in legal semiotics has followed the Peircian tradition, but ironically, its connections with progressive movements in American legal theory have not always been clear.[1] This Essay offers an alternative way of uniting legal semiotics with legal theory in America. It argues that the line of inquiry begun by Saussure, and continued by the French

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1. For a good introduction to Peirce's relevance to legal theory, see B. KEVELSON, THE LAW AS A SYSTEM OF SIGNS (1988). Peirce and his followers referred to the study of signs as "semiotics," *e.g.*, U. ECO, A THEORY OF SEMIOTICS (1976), while many (but by no means all) of the continental theorists followed Saussure in using the word "semiology," *e.g.*, R. BARTHES, ELEMENTS OF SEMIOLOGY (1967). Except when specifically referring to Saussure's theories of the sign, I use the term "semiotics" in this Essay.

structuralists and post-structuralists, is not only an especially fertile way of approaching the study of legal semiotics, but that this semiotics can be more readily adapted to understanding politics and ideology as they are expressed in and disguised in legal thought. For this reason, there is a very natural affinity between Saussure's semiology, on the one hand, and the work of the legal realists and the modern Critical Legal Studies movement on the other.

I begin my discussion with the ideas of the person who was, in my view, the first legal semiotician—Wesley Newcomb Hohfeld. Lawyers and legal historians are familiar with Hohfeld for other reasons. He was, after all, a very famous law professor who in his short life had a considerable impact on analytical jurisprudence, and his influence can be felt in a number of areas of legal thought today. In the law of standing, for example, it is commonplace to refer to certain types of plaintiffs as being either Hohfeldian or non-Hohfeldian depending upon what kind of interest they have in a particular legal action.[2]

Of course, calling Hohfeld the first legal semiotician is revisionist history, for Hohfeld would probably have been very surprised at the thought that he was practicing semiotics. He probably believed that he was studying analytical jurisprudence and the law of property. Nevertheless, Hohfeld deserves to be called the first legal semiotician because he was the first to systematically and self-consciously discuss legal concepts such as rights, duties, and privileges rhetorically and as a system of mutually self-defining relations. Hohfeld explained his theory of legal rights in a famous article called *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, published in 1913.[3]

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2. *E.g.*, Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). We have little information about Hohfeld's life. He left Stanford to join the Yale law faculty in 1914 and died in 1918 at the age of 38. Both Arthur Corbin and Walter Wheeler Cook greatly admired him, and in fact, Corbin helped secure his appointment on the Yale faculty. *See* W. TWINING, KARL LLEWELLYN AND THE LEGAL REALIST MOVEMENT 34-35 (1973). Hohfeld also made a lasting impression on one of his most famous students, Karl Llewellyn. *Id.* at 35. There is a brief biographical sketch in Corbin's introduction to W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING vii-xv (W. Cook ed. 1978), and a portrait of Hohfeld as a teacher in K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 491-94 (1962). For discussions of Hohfeld's system, see Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919); Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); and Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

3. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]. A continuation of the article appeared 4 years later in Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). Hohfeld actually stands at the end of a long line of scholars of analytical jurisprudence who were concerned with the relationships

The fact that this theory (which we may assume Hohfeld had been working on for some time) was first published in 1913 has always struck me as quite interesting. After all, this was only two years after Saussure gave his famous third set of lectures on the foundations of language, which marked the beginning of European semiology.[4] Indeed, one reason we can be quite sure that Hohfeld would not have considered himself a semiotician is that the word had just been invented.

Nevertheless, there is a remarkable similarity between what Saussure was doing in linguistics and what Hohfeld was doing in analytical jurisprudence. Saussure's semiology is based upon two important concepts. The first is the arbitrary relationship between the signifier and the thing signified, and the second is that signs take their meaning from their mutual relationships in a system of signification.[5] These two ideas are related to each other. If there is no natural connection between a signifier and its referent or usage, its meaning must come from the way it is contrasted to other signifiers. Thus, the relation between signifier and signified is mediated by the relationship of signifiers to each other in a general system of signification. Meaning in language, then, comes from the play of differences.[6] A system of signification is the essence of language. Indeed, we can go so far as to say that the proper object of linguistic study is not words themselves but the relationships of words to each other.

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between legal concepts. In particular, his work builds on the jurisprudence of John Austin and John Salmond. For useful discussions, see A. KOCOUREK, JURAL RELATIONS (1927); and Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

4. *See* F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (W. Baskin trans. 1959).

5. *Id.* at 67-70, 114-22. For example, the continuum of color is divided into several English words like "blue," "brown," "red," and so on. By the "arbitrary" connection between signifier and signified, Saussure meant two things. First, there is no necessary connection between a word and the shades of color it stands for. For example, what we call "blue" could as easily be called "blooff." Second, and more important, the particular grouping of shades of color among the various concepts denoted by English words is also a matter of linguistic convention. In English, light blue and dark blue are both "blue"; in Russian they have distinct names and are different colors. J. CULLER, FERDINAND DE SAUSSURE 31-36 (1986). In like fashion, the boundaries between what is "violet" and what is "blue" may vary from language to language. According to Saussure, then, language "carves up" the world into a conceptual scheme—it not only describes reality, but also produces it. The way in which the world is carved up is a matter of conventions, and different languages do this in different ways. For this reason, words do not simply describe pre-existing concepts—rather concepts are produced by the division and organization of reality by language. Hence, linguistic meaning is produced by the differences between the various concepts in a language. The meaning of "blue" is derived from its differences from other concepts—"blue" is that which is not brown, red, and so forth. *See* F. DE SAUSSURE, *supra* note 4, at 116-17.

6. And, here of course, one can see the influence of Saussure on deconstruction. *See* J. CULLER, *supra* note 5, at 127-30.

Remarkably enough, Hohfeld was coming to similar conclusions about legal rights at about this same time, and his ideas would eventually be amplified by the legal realists that he influenced. If Saussure offers a theory of the arbitrary nature of the sign, Hohfeld offers us a theory of the arbitrary nature of a right, or more generally, of any legally protected interest. The nature and extent of a person's rights are dependent upon the correlative duties of others.[7] Just as a signifier does not take its meaning from the connection between itself and its signified, a right does not owe its existence to its connection to an individual, or a piece of property. Rather, a right is simply a legal guarantee that one has the privilege to engage in certain actions and invoke the power of the state to prevent other persons from engaging in certain other actions. Thus, my right of freedom of speech is defined by my right to inflict emotional injury on you when I say things that you do not like, as well as your nonright to prevent me from doing so and the government's duty to protect me in my infliction of injury on you.[8] Indeed, not only do rights become mutually self-defining, but so do legally cognizable injuries, for a legally cognizable injury is simply the flip side of a legally protected interest. A property right, then, is not an attribute or thing that inheres in the property itself, or in its owner. Rather, it is the state's legal sanction to perform or refrain from performing certain types of actions. I have a right to the use of my property to the extent that I cannot be punished or penalized for my use of it. Conversely, my property rights are unlawfully abridged to the extent that the state will penalize those persons who interfere with them.[9]

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7. Hohfeld, *Some Fundamental Legal Conceptions, supra* note 3, at 32. In Hohfeld's system, each type of legal interest is accompanied by a matching interest held by at least one other person. Hohfeld called this matching interest a jural correlative. *Id.* at 30. Thus, the correlative of a Hohfeldian right is a duty, the correlative of a privilege is a no-right, the correlative of a power is a liability, and the correlative of an immunity is a disability. *Id.* Moreover, each legal interest has not only a jural correlative but a jural "opposite." Whereas a jural correlative is what others *must* have if one has a legally protected interest, a jural opposite is what one *cannot* have if one has a legally protected interest with respect to a certain type of act. *Id.* at 32-33. Thus, if one has a right, one cannot simultaneously have a no-right, if one has a privilege, one cannot have a duty, having a power precludes having a disability, and having an immunity precludes having a liability. *Id.* at 30.

8. *See id.* at 37 ("To the extent that the defendants have privileges the plaintiffs have no rights; and conversely, to the extent that the plaintiffs have rights the defendants have no privileges.").

9. Hohfeld was careful to distinguish "claim" rights, which he called rights, from "liberty" rights, which are similar to what he called privileges. A claim right creates a correlative duty on the part of private parties not to interfere with the exercise of that right. A liberty right only guarantees that a person exercising the privilege will not be held liable for the exercise, and that others cannot invoke the power of the state to prevent the exercise. For example, my claim right (a Hohfeldian right) to the exclusive possession of my property carries

It follows from Hohfeld's work that what constitutes a legally protected interest is arbitrary, and is not defined by the nature of things. Rather, the "nature of things" in a legal sense is defined by the mutually self-defined relations of legal ideas. Just as reality is shaped and created by language, so too legal and political reality is shaped and created by mutually defined legal and political rights, powers, and duties. The state's allocation of legally sanctioned violence is established by mutually self-defining relations, and is not derivable from the concept of right itself, just as the concepts involved in our understanding of reality are mutually self-defining—their particular contours are not necessitated by things in themselves. Put another way, concepts like private property, consent, and liberty do not simply re-present previously existing things in the world. Rather, they result from the system of differences between legal and moral concepts, and in so doing constitute the political world that we live in.

As this last statement demonstrates, Hohfeld's insight had quite radical implications, although it was at first misunderstood as simply a retreat into conceptualism and formalism. In fact, however, it led to a devastating critique of these forms of legal thought, a critique from which we have never quite recovered.[10] Indeed, one can say without too much exaggeration that Hohfeld's analysis of rights discourse made much of the later work of the legal realists possible.

Having introduced the subject of legal realism, and the legal realist critique, I should perhaps interject a historiographical remark about them, or rather, the specific features of legal realism that I have in mind. When most people think of legal realism, they recall the aphorism that the law is what the judge had for breakfast, or, more seriously, the credo of legal realists that law should eschew unnecessary abstraction in favor of sound principles of social science. To be

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with it a duty on the part of others not to trespass. *See id.* at 32. However, my freedom or liberty (a Hohfeldian privilege) to use my property to generate income does not necessarily carry with it the right to prevent others from engaging in acts that might reduce my enjoyment of that freedom. For example, my freedom to open a fast food franchise does not necessarily involve the right to prevent a competitor from setting up a business across the street and cutting into my profit margins. Put another way, my freedom (privilege) to use my property is limited not only by state imposed restrictions on its use and disposition but also by my competitor's freedom to compete. Hohfeld's analysis of rights discourse emphasized that liberties or privileges do not necessarily entail rights to avoid all types of harms created by other private actors. *See id.* at 34-35.

10. For a good introduction to the legal realist critique of classical legal thought, see Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 RES. L. & SOC. 3 (1980); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); and Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465 (1988) (reviewing L. KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

sure, many of the people that we call legal realists believed something very much like this.[11] However, there is another sort of legal realism, more radical in its possibilities, that I am concerned with here. It is the strand of legal realist writing which focused on the political and ideological character of legal reasoning.[12] Quite apart from investigating the judge's diet, it was concerned with showing that seemingly neutral, natural, and apolitical concepts like the market, private property, or consent depended upon a set of political choices that were not necessary—choices that could be altered in the public interest once their contingent nature was made clear. It is this aspect of legal realism that depended so heavily on Hohfeld's theories.[13]

Thinkers like Felix and Morris Cohen and Robert Hale owed much to the analysis of rights latent in Hohfeld's work. For their argument was that when one asserted that *A* had the right to contract or not to contract with *B*, one was simultaneously making a statement about *B*'s rights. Moreover, the allocation of rights and duties between *A* and *B* was not derived from the inherent meaning of contract, consent, duress, or bargain, but was a demarcation of power created by the state's common law for which the state was ultimately responsible.[14] And indeed, emboldened by Hohfeld's critique, one

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11. On the social science strand of legal realism, see, e.g., Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927); Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923); Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—I. Legal Method: Banker's Set-off*, 40 YALE L.J. 381 (1931); and Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928). For an excellent study of the history of "scientific" realism, see Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); and Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980).

12. Peller refers to this as the "deconstructive" strand of legal realism, Peller, *supra* note 10, at 1222, and although this might seem to be an anachronism, it is quite true we would recognize the methodology of many of these legal realists as a form of deconstruction.

13. *E.g.*, F. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L. J. 779 (1918); Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920). I would also include with this group of works M. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933), and M. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). Although his son Felix Cohen is usually considered a realist, Morris Cohen is best described as a sympathetic critic of realism. *See, e.g.*, M. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352 (1931) (raising objections to the extreme positivism and nominalism found in the work of Oliphant, Bingham, and Moore). Nevertheless, Cohen's analyses of the relation between public and private power are as trenchant as anything the realists produced. Thus, he has much in common with the "deconstructive" strand of realism.

14. M. Cohen, *The Basis of Contract*, *supra* note 13, at 586.

could go further and argue that the concept of property itself had no essential content, but was merely defined in opposition to other rights of contract, criminal law, and so on. Thus, the ultimate point of the Hohfeldian analytic was that contract and property rights did not refer to real entities, but to particular contingent allocations of power created and enforced by state actors, that divided up the permissible forms of private power. In this way, everything that seemed to be the product of private action between private individuals was in fact supported by a series of state decisions allocating people's rights and duties. For this reason, I believe that we should also count this more radical strain of legal realism as constituting a semiotic tradition, even though it was not self-consciously semiotic.

A second point about Hohfeld's work, which I think was not sufficiently emphasized by the legal realists, was that his theories about judicial language were not specific to any type of rights. Thus, although the legal realists were mainly concerned with contract and property rights, and the general subject of economic regulation, the Hohfeldian analytic applies equally well to rights of free expression, sexual autonomy, equal treatment, or any other particular interest that the law might seek to protect. This fact, I believe, has only recently begun to be understood. Indeed, I would argue that recent feminist critiques of pornography make use of several arguments that are derived from Hohfeld.

For example, one such argument is that protection of the private speech of pornographers establishes a system of private power that silences women and contributes to their subordination. In Hohfeldian terms, to the extent that the state protects the rights of pornographers, it allows women to be injured by the deleterious effects of pornography. Moreover, some feminists argue that protection of pornography actually reduces the real (as opposed to formal) freedom of women to speak. This is analogous to the realists' analysis of contract rights—the realists argued that one does not have freedom of contract if the economic system created by the state's laws puts one in a situation of vastly unequal bargaining power. Similarly, the feminist critique of traditional first amendment jurisprudence argues that one does not really have free speech if one is not taken seriously or is unable or even afraid to speak because of one's subordinated role in society. The state enforced freedom of the pornographer to speak results in the silencing of women harmed by pornography, even though the formal right to speak is guaranteed.[15] From the feminist critique we can see that "free speech," like contract or property, is an

15. *See* MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV.

arbitrary signifier whose meaning is constituted by the system of differences between it and other legal and political concepts, and simultaneously constitutes relations of power in our society.

II. AN EXAMPLE OF HOHFELDIAN SEMIOTICS

I would now like to offer an example of how the Hohfeldian analysis of legal concepts works in practice, and how this semiotic approach takes us directly from linguistic categorization into the study of political and ideological thought. The example given here is directly in the legal realist tradition; both in the form of analysis and in the subject matter, as it concerns economic regulation, private property and accident law. Suppose that the failure of General Motors (GM) to equip its vehicles with airbags costs the American public some $300 thousand a year in accident costs, including pain, suffering, and medical expenses. Suppose also that it would cost GM only $200 thousand a year to install airbags in its automobiles. Now assume that a series of lawsuits is brought against GM by plaintiffs who were driving GM cars and got into accidents; the plaintiffs sue GM for the additional injuries caused by GM's failure to install airbags in the cars they were driving. Should we make GM pay for their injuries? If we adopt a negligence standard for unintentionally caused injuries, we would conclude that yes, of course GM should pay, because $200 thousand a year is less than $300 thousand a year. That is to say, the burden of taking safety precautions is less than the expected loss from the failure to take those precautions. GM is therefore at fault and should have to pay.

Note that this is a fault based argument for a standard of negligence—if you cause injury by not taking precautions that are cost-benefit justified from the standpoint of society as a whole, you have done something morally wrong and therefore should pay damages. Moreover, this argument is based upon common sense notions of fault, causation, and harm. A person or corporation that fails to take such cost-benefit justified precautions is at fault, and because the failure to take those precautions causes harm to others, they should have to pay money damages. But each of these concepts—fault, causation, and harm—is a legal concept that does not simply stand for an independently existing entity in the real world. Rather, the concepts of fault, causation, and harm obtain their meaning from their relation to other legal concepts—for example, property and contract rights.

Thus, imagine that counsel for GM argues as follows: Why is it

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1 (1985); Olsen, *Feminist Theory in Grand Style* (Book Review), 89 COLUM. L. REV. 1147, 1162 (1988) (reviewing C. MACKINNON, FEMINISM UNMODIFIED (1987)).

just to make GM pay $200 thousand to save $300 thousand in accident costs to perfect strangers? Allowing a cause of action in negligence here will force GM either to install airbags in all of its cars at a cost of $200 thousand a year or continue to pay money damages at a rate of $300 thousand a year, as injured plaintiffs line up at the judicial trough to collect huge sums of income without a day's work. Thus, GM is being forced to divert at least $200 thousand of its hard earned profits for expenditures it had no desire to undertake. Put more bluntly, the use of a negligence standard in this case amounts to outright theft of GM's property and a redistribution to others, either in the form of direct subsidies, or in a forced investment of capital and labor in airbag technology.

Perhaps you will object to this argument on the grounds that GM's property rights are limited by its moral and legal responsibilities to others. Perhaps you will say that GM's property rights end where its responsibilities to others begin, so that GM may use its property in any way it wants as long as it does not injure the rights of others. Thus, because GM's wrongful use of its property caused injury to others, it has no right to prevent the government from taking its property.

Yet at this point it should become clear that the concepts of property and fault are mutually defined. One cannot know whether GM's property is really being taken unless one knows whether GM is at fault. Indeed, once we assume that GM is at fault, it is GM who is taking the property of others—in the form of lost wages, medical expenses, and pain and suffering—by its callous disregard of human safety and welfare. Allowing GM to save money by refusing to install airbags is effectively a wealth transfer from the victims of its negligence to GM. Put another way, not allowing plaintiffs to sue GM for negligence allows GM to fatten its profit margins through human carnage and the suffering of others.

This example should make clear that notions of property rights are parasitic upon notions of fault. But that is only half the story. Notions of fault are also parasitic on notions of property rights and contract rights. Let us return to the argument of the counsel for GM. Perhaps she might concede that if GM were at fault, that there would be no question of compensation. She might agree with our assessment that the person who is at fault should bear the risk of loss, and that one should never be allowed wrongfully to use one's property so as to injure the rights of others. However, why is it clear that GM is at fault for not installing airbags? GM has the right to make cars and place them before the public, and if the public wishes to purchase

those cars and drive them, that is their choice. There is absolutely no fault involved in GM's placing its product in the hands of a willing buyer. GM is merely exercising its rights to free contract.

Any plaintiffs injured in GM cars rode in them out of their own free will. If they had wanted airbags in their cars, they could have demanded that the airbags be installed and paid GM for the extra cost of this option. Alternatively, they could have installed the airbags themselves or hired a third party to do it, and absorbed the cost in that fashion. If anyone is at fault for the extra costs incurred by the plaintiffs, it is the plaintiffs themselves for failing to ask for safety equipment they now insist should have been in their cars all along. The person at fault should bear the risk of loss, and should not be able to shift the loss to persons who make an innocent and lawful use of their own property.

Indeed, what the plaintiffs really want is to have it both ways. They are at fault for not asking for airbags that they themselves admit were necessary, and then, when they get themselves involved in accidents that were not GM's fault, they want GM to subsidize the cost of the extra safety precautions that they were not willing to pay for in the first place. There is no problem with the general proposition that GM may use its property in any way it likes as long as it does not invade the rights of others. But in this case, GM did not harm the interests of the plaintiffs or invade the plaintiffs' rights. The plaintiffs caused their own injury by failing to spend a little extra money for safety precautions. If anything, holding GM liable allows the plaintiffs to use their contract and property rights to interfere with GM's property rights because they are now perfectly free to get into accidents and tax GM for their own failure to invest in safety precautions.

To know what the lawful property and contract rights of GM and the plaintiffs are, we need to know who is at fault for not having airbags installed in GM cars. However, in order to know who is at fault, it appears we must first determine what is a lawful use of one's property or a lawful exercise of the right to contract. With respect to GM, this involves the nature of products that it can sell to willing buyers without incurring liability for damages, and conversely, with respect to the plaintiffs, the boundaries of the concept of assumption of risk. The concepts of property, contract, and fault are thus mutually defined. Just as Saussure taught us that in linguistics there are no positive terms, legal terms also have a mutually self-defining quality. In the more modern language of deconstruction, we would say that property, contract, and fault exist in a relation of *différance*, of mutual dependence and differentiation, in which each concept bears

the traces of the others.[16]

Perhaps you may sense that there is something wrong with the arguments of GM's counsel. Although the concept of fault seems difficult to pin down at first, we can give it determinate content by invoking the concept of causation. We know that GM is at fault because it was GM's failure to install the airbags that caused the harm to the plaintiffs. Thus, the notion of fault depends on the more basic idea of causal responsibility. Yet the notion of causal responsibility is parasitic on other concepts, including fault. Is not the cause of the plaintiffs' harm (1) the plaintiffs' involvement in an accident, which is either the plaintiffs' fault or that of third parties, but certainly not GM's and (2) the plaintiffs' failure to demand that airbags be installed, coupled with (3) plaintiffs' voluntary action in driving or riding in a car without airbags? In order to know who really caused the accident and thus who is at fault, we must have more than a notion of but-for causation, for in this case both the plaintiffs' and GM's actions are but-for causes of the injury. Yet it will be difficult for us to arrive at such a notion without invoking other legal concepts, such as fault.

To understand this point better, suppose that a plaintiff drove a GM car while drunk and then sued GM for not installing a device that made it impossible for a person to start the ignition without passing a breathalyzer test. Would we say that GM caused this accident by failing to install such a device, even if the cost of this device were minimal in comparison to the number of lives that might be saved by it? Or would we say that the cause of the accident was the plaintiff's drunken driving? Perhaps we would distinguish the breathalyzer case on the grounds that a person who drives drunk causes the accident because he is at fault. Note, however, that at this point causation has become parasitic on notions of fault, instead of the other way around. Yet the same is true of the airbags case. In order to know whether GM or the plaintiffs caused the harm, we might have to decide whether GM was at fault for placing a product on the market that could have been safer, or whether the plaintiffs were at fault for choosing to purchase and misuse the product. Fault, causation, contract, and property rights have all become intertwined.

These conclusions are related to Hohfeld's basic idea that a legal right is a privilege to inflict harm that is either not legally cognizable or is otherwise without legal remedy. The concept of legal fault depends upon whether one is acting within one's rights, but of course

16. *See* Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 751-52, 761 (1987).

one's rights depend upon the corresponding rights of others to protection from harm, while those harms that the law will remedy depend upon what one's rights are, and so on. Thus, legal fault and legally remediable harm become two sides of the same coin, while legal rights and legally nonremediable harm are also two sides of the same coin. Indeed, we can understand all of our rights of contract and property, or our rights to freedom of action and protection of our security, as allocations of power by the state. Put another way, these are privileges granted by the state to private actors to inflict nonremediable harms upon each other. My right to freedom of contract involves my right to injure my competitors by underselling them, to injure my employees by fixing their wages and working conditions, or to injure my customers by refusing to deal with them or by raising my prices. My property rights involve my right to use my property in a way others do not like, as well as my right to invoke the aid of the state if someone attempts to take my property from me or put it to a contrary use. Private property is a state sanctioned monopoly in the use and disposition of things, enforced by the state's monopoly over the use and license of legally sanctioned violence.

III. SEMIOTIC STRUCTURE AND LEGAL ARGUMENT

The previous analysis has been derived from the particular semiotic structure of American law—the relationships of mutual definition that constitute legal concepts such as fault, causation, harm, and rights. But there is much more that follows from the analysis. These semiotic structures are just that—structures in which debates about fault, causation, harm, and rights are carried out, and which constitute these concepts. These structures do not change when the particular issues of liability are altered any more than the basic structures of a language change when a new sentence is spoken or written. These linguistic structures are what is common to the various spoken or written tokens of a language.

Many, if not most questions of law involve the issue we have been dealing with in the last few pages—whether to expand or contract the privilege to inflict nonremediable harm on others. Yet the semiotic structure of legal concepts guarantees that this question may also always be understood at the same time as the question whether there has been legal fault, legally compensable harm, or an invasion of legal rights. Thus, to argue for the expansion of the privilege to do harm is to argue that an actor was not legally at fault, did not cause harm compensable by the legal system, or did not violate the legal rights of another. Conversely, to argue for the contraction of the priv-

ilege to do harm is to argue that an actor was legally at fault, did cause harm that the legal system should compensate, or did violate the legal rights of another.

Thus, whenever we consider a legal issue that concerns whether the privilege to inflict nonremediable harm should be expanded or contracted, there is always a fault based argument for liability and a fault based argument against liability, a compensation based argument for liability, and a compensation based argument against liability, a rights based argument for liability and a rights based argument against liability, and so on for other legal concepts in the system. This is not to say that these arguments will all be equally convincing. In many cases they will not. Rather, the semiotic character of legal concepts guarantees the *formal possibility* of such arguments on each side of the legal issue presented.

From this insight we can connect the work of Hohfeld and the legal realists to more recent developments in legal theory, in particular work by members of the Critical Legal Studies movement. Our analysis of legal concepts has shown that because debates over many, if not most, legal rules share the same structure—that such debates all concern whether to expand or contract the privilege to inflict nonremediable harm—the arguments used in these legal debates will all have a common structure. This result is consistent with work done by Professor Duncan Kennedy, who has argued that whenever legal lawyers debate rule choices they tend to use a stereotypical set of pro and con arguments.[17] Kennedy also created a classification system for these various argument forms. I have extended and elaborated upon both this basic insight and Kennedy's classificatory scheme in my own writings.[18] The importance of the connection between Hohfeld's insight and Kennedy's is that the existence of these standard sorts of pro and con policy arguments is not simply accidental, or due to the fact that lawyers are unimaginative souls. Rather, it follows from the semiotic character of legal concepts.

What one discovers, then, when one studies the forms of legal discourse, is that the basic styles of argument do not vary as one moves from one set of rule choices to another. Thus, there is a

17. *E.g.*, Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, *Form and Substance*].

18. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986). Other scholars who have adopted Kennedy's classifications of legal argument in one form or another include James Boyle and Jeremy Paul. *See* Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003 (1985); Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988).

remarkable similarity between the arguments for a negligence standard in tort law as opposed to a rule of no duty, on the one hand, and the arguments for strict liability as opposed to negligence, on the other. Similarly, the debate between strict liability and negligence is recapitulated in subdoctrinal debates within negligence law—for example, whether to have an objective or a subjective standard of negligence, whether children engaging in adult activities should be held to the same standard of negligence as adults, and whether to have a doctrine of res ipsa loquitur. This feature of legal argument I call the crystalline structure of legal thought, because the structure of a crystal is always identical regardless of the portion of the crystal one is looking at, and moreover, because the structure of a crystal is identical whether viewed on a large scale or a small scale.[19] In the same way, macrolevel debates about legal rules are replicated in microlevel debates about subdoctrinal rule choices, and even in debates about particular applications of legal rules.

Furthermore, this crystalline structure is not merely confined to arguments about such concepts as legal rights, causation, fault, and property. To be sure, the examples given above involving GM and airbags concerned only two types of arguments, which we might label rights arguments and arguments of moral responsibility and desert. However, there are many other kinds of arguments as well. For example, we might try to solve the question of whether to adopt a rule of negligence or no duty by asking which rule would have the most desirable social consequences. However, even when we shift from a rights-based inquiry to consequentialism, we discover that there are stereotypical pro and con arguments that have the following general form: The plaintiffs argue that the rule requiring greater liability leads to better consequences because it will give defendants incentives to engage in socially desirable behavior, while the defendants argue that the opposite rule is necessary to give the plaintiffs incentives to engage in socially desireable behavior. The plaintiffs will respond that giving plaintiffs additional incentives by denying them recovery will not work and will only punish the plaintiff class for things it has no control over, thus leaving society worse off in the long run. The defendants will respond that the rule of greater liability will not work and will only punish the defendant class for things it has no control over, and this will only make society worse off in the long run.[20]

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19. Balkin, *supra* note 18, at 2-3, 36-41.

20. *Id.* at 32-33, 89-93. Like arguments concerning rights and moral responsibility, these social utility arguments also have a semiotic character. The notions of "best consequences" or "excess of social cost over social benefit" or even "cheapest cost avoider" which generate these

Nor is the list of pro and con arguments exhausted by arguments of social utility. There are also arguments concerning which rule is easier to administer judicially, arguments about whether a particular decision maker has the authority or competence to decide the issue, and so on.[21] However, each of these argument forms has its own crystalline structure—each recurs both in macro and micro level debates about legal rules.

The connection between the recurrent forms of legal argument and the Hohfeldian approach to legal semiotics is important for two reasons. First, it provides a satisfying link between semiotics, legal realism, and Critical Legal Studies. It demonstrates that the recurrent forms of legal argument and the manipulability of legal concepts such as causation, fault, and duress are all manifestations of the same characteristics of legal language and legal thought. Second, this semiotic analysis avoids a number of methodological problems that have plagued the Critical Legal Studies movement almost from its inception.

When Professor Kennedy first stated his hypothesis about recurring argument forms in his famous article *Form and Substance in Private Law Adjudication*, he gave a structuralist justification for the phenomenon.[22] He argued that the forms of argument involved in each rule choice recapitulated a fundamental opposition between self and other, or as he called it, between individualism and altruism.[23] In *The Crystalline Structure of Legal Thought*,[24] I also used an essentially structuralist analysis, showing that the argument forms represented two orientations—one denying responsibility for the effects of one's behavior on other persons in society (individualism) and the other emphasizing the responsibility for those effects (communalism).[25] In the earlier discussion of airbags, for example, the plaintiffs' arguments would be classified as altruist or communalist, while GM's arguments would be classified as individualist. In either case, the "cause" of the recurring forms of argument, the reason they existed, was a "fundamental contradiction" in social life that was both real

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forms of argument are also constituted by a play of differences between concepts, but the relationships are considerably more complicated and beyond the scope of this Essay.

21. Balkin, *supra* note 18, at 42-44, 106-10; Kennedy, *Form and Substance*, *supra* note 17, at 1694-701, 1751-53.

22. Kennedy, *Form and Substance*, *supra* note 17, at 1712-13. For an introduction to structuralism, see T. HAWKES, STRUCTURALISM AND SEMIOTICS (1977).

23. Kennedy, *Form and Substance*, *supra* note 17, at 1713-24.

24. Balkin, *supra* note 18.

25. *Id.* at 13-19.

and permanent.[26]

However, structuralism as a methodology has its problems, as the many post structuralist critiques have shown. Structuralist analyses, like other products of culture, do not describe things actually existing in the world—they are themselves interpretations which impose and constitute intellectual order upon the world; moreover, they tend to be ahistorical interpretations. These features of structuralism do not rob structuralist analyses of their utility, but do require us to subsume such analyses under a more generalized semiotic and historical understanding.

For example, the fundamental contradiction between individualism and altruism is just another concept defined by the play of differences; this split is no less an interpretation of social life dependent upon the values assigned to other concepts than is the notion of fault or causation in our airbags example. Indeed, one could explain the existence of the recurring forms of legal argument in other ways. Instead of grounding the analysis of argument forms on the distinction between self-regarding and other-regarding behavior, as Kennedy did, one could have used notions of greater or lesser responsibility owed to others, as I did in The *Crystalline Structure of Legal Thought*.[27] Or one could view legal arguments as generated by a deep division between classical liberalism and a philosophy of social engineering, or even the masculine and the feminine principles of social order.[28] Furthermore, the ability to generate various argument forms from one of these sets of oppositions does not give that set of oppositions a privileged status over all others. For example, the opposition between greater or lesser responsibility would not make "responsibility" the master concept that would replace Kennedy's fundamental contradiction between individualism and altruism.

Our ability to derive the existence of recurring argument forms about legal responsibility from the Hohfeldian or Saussurian analysis of legal concepts obviates the need to adopt a thoroughgoing structuralism in the face of the many important post-structuralist critiques. Once we understand that legal concepts are constituted by a play of differences, or to use deconstructive language, by relations of *différance*,[29] we do not need to postulate the actual existence of a "fundamental contradiction" in social life as the *cause* of the recurring forms

26. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 211-13 (1979).

27. Balkin, *supra* note 18.

28. *See* West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1987).

29. *See supra* note 16.

of legal argument. Rather, the "fundamental contradiction" is a symptom of a culturally created and historically contingent system of differences that also produces the crystalline structure of legal arguments concerning responsibility. The organization of rule choices around the decision whether to expand or contract the legal privilege to inflict nonremediable injury, coupled with the semiotic character of legal concepts, is sufficient to generate sets of pro and con arguments that might be termed individualist or communalist.

Under this interpretation, ideas such as individualism and communalism (or altruism) remain useful heuristic categories for organizing legal ideologies, but they are only that—interpretations good enough for the purposes at hand. In this way we can preserve the insights gained from the study of argument forms without committing ourselves to an untenable metaphysics. Moreover, such a stance is more consistent with a vigorous commitment to transforming our political and legal institutions, for it avoids the natural temptation of a structuralist determinism—that we must reconcile ourselves to living in a world of fundamental contradiction from which we can never escape and which can never be improved.

IV. THE SEMIOTIC APPROACH TO THE STUDY OF LEGAL IDEOLOGY

The Saussurian or Hohfeldian approach to legal semiotics, I have argued, is based upon two related ideas. First, legal concepts, no less than other linguistic concepts, result from a system of differences. Second, because of the semiotic characteristics of legal thought, the basic structure of legal arguments about rules and about the application of rules does not change, but repeats across various areas of doctrine. Where is this type of semiotic analysis likely to lead us? Why should we be interested either in the mutual self-definition of legal concepts or in discovering the basic structures of legal argument? The answers can be summed up in one word: ideology. The Saussurian approach to legal thought leads us directly into the sort of ideological analysis that has been a major focus of semiotics since Barthes' pioneering work.[30]

We should begin by noting that the semiotics of law, conceived in the way I have described it, is radically anti-essentialist. This should come as no surprise. Because Saussure's linguistics is anti-essentialist, it stands to reason that a Saussurian or Hohfeldian theory of legal concepts would also be skeptical about essences.

30. *See, e.g.*, R. BARTHES, MYTHOLOGIES (1972).

However, the rejection of essentialism in law has important political and philosophical consequences that become increasingly apparent as one moves from the realm of linguistics to that of social theory. Although people may accept as an abstract matter that linguistic meaning is conventional, it is more controversial to assert that all products of culture, and especially legal and political concepts, are equally conventional in Saussure's sense of that term. People are quite willing to acknowledge that what we mean by the term "dog," for example, is a matter of convention. However, they are considerably more resistant to the notion that consent is also a completely conventional concept, that property has no essential attributes, or that democracy is a notion defined only by the play of differences. Nevertheless, conclusions of this sort follow from the acceptance of the Saussurian principle of the arbitrary nature of the signifier and the fact that legal concepts are signifiers or texts. To use a well-worn phrase, semiotic inquiry is designed to "demystify" the products of culture, and show their conventional and ideological nature. This is no less true of semiotic analyses of legal concepts than it is of semiotic analyses of magazine advertisements.

An example may help clarify this point. The American system of government is premised upon the idea that democracy is the most legitimate form of government, and that the will of the majority should decide what regulations are imposed on individuals in society. It is also an article of faith that judicial review is essentially anti-democratic, and is only justified to the extent necessary to enforce constitutional norms, one of those norms being, of course, to protect democratic government. All this would seem to indicate that judges should strive to avoid overturning legislative action or overseeing executive decision making unless it is clearly contrary to the Constitution. Thus, judicial review is an exception to the basic structure of American democracy that should be eliminated as much as possible if our government is to retain legitimacy.

This privileging of democracy over judicial review, however, relies upon a set of ideological presuppositions that ascribe what appears to be a real property, "democracy," to existing political institutions, simultaneously evoking notions of respect and authority associated with our collective commitments to democracy. Yet "democracy" is a concept constituted by its relationships to other concepts. How do we know that existing political institutions are democratic? Are institutions democratic merely if they result from elections by a majority of those voters made eligible by law who actually vote? Suppose the right to vote is limited to white male property

owners, and that legislatures are largely composed of persons elected from gerrymandered districts. In what sense are the laws produced by this legislature "democratic" and hence worthy of judicial deference? Do we have "democracy" if access to the political process is skewed by maldistributions of economic power, so that the poorer a candidate, the less likely it is that she will have enough money to afford television and radio advertising and otherwise survive the rigors of modern political campaigning? Is judicial deference to legislatures appropriate in a state with a legacy of racism and sexism, in which existing power structures result from past denials of equality and civil rights?

Judicial deference to government officials in the name of "democracy" thus depends upon a panoply of unspoken assumptions about fair play, equal opportunity, procedural justice, and so on. The concept we call "democratic self-government," normally accorded iconic significance, is no more and no less parasitic upon other concepts than were fault, consent, or property, in our earlier examples. Once we bring these connections to the surface, we can use the concept of democracy to critique what are purportedly democratic institutions. Indeed, once we acknowledge that a legislature of white male property owners elected from "rotten boroughs" bears only a superficial resemblance to democracy, we might discover that judicial review of legislative action is absolutely essential to the preservation of democratic self-government, because one cannot truly have a democracy unless one has guarantees of equal opportunity, or protection of individual rights that are enforceable against what purports to be majority rule but is actually a perversion of it.

Thus, a semiotics of legal concepts becomes essential to performing the type of cultural criticism of law that we have become accustomed to in other areas of semiotic inquiry. The legal semiotician must ask how the terms of legal discourse, like "democracy," "equality," "fault," or "consent," are systematically related to other concepts in legal doctrine and legal argument. By carefully analyzing these connections, we can understand both the clash of ideologies within liberal legal culture, and the underlying ideology of liberal legal culture itself.

V. SEMIOTICS AND THE STUDY OF LEGAL ARGUMENT

The study of the recurrent forms of legal argument is a special case of this general semiotic approach. Interestingly, it has a number of useful functions in addition to assisting us in the study of ideology. For example, once lawyers and law students master a set of argument

forms they can become relatively fluent in legal discourse, and indeed, they can generate arguments and counterarguments for virtually any legal position almost at will. Here the analogy between law and language becomes quite close. One can learn the forms of legal argument in the same way that one can learn how to decline Latin nouns or conjugate French verbs. To use a Saussurian phrase, the study of legal argument becomes the study of the *langue* of legal concepts and their associated argument forms.[31]

Besides its more pedagogical and practical uses, however, the study of the *langue* of legal argument is intimately related to the semiotic project of understanding the ideology of legal culture. Categorizing the different forms of legal argument helps us to understand and classify legal ideologies in terms of their associated argument forms. I have found that a helpful way of organizing American political ideologies is by asking what kinds of arguments they are more likely to accept or reject with respect to particular rights.

For example, traditional liberals tend to make relatively individualist arguments in certain areas such as freedom of speech and reproduction, while taking relatively communalist positions where economic liberties are concerned. Interestingly, traditional conservatives have taken precisely the opposite views. These systematic relationships lead to interesting symmetries in liberal and conservative arguments, and allow for more powerful analyses of political ideology in America. Liberals have pressed for increasingly strict rules of responsibility in tort law except in the areas of defamation and privacy law, while conservatives have resisted these efforts and attempted to move in precisely the opposite direction. Conservatives have pressed for deregulation of business interests while simultaneously advocating regulation of reproductive interests. The systematic difference in conservative arguments regarding the sanctity of freedoms in the boardroom and the bedroom is a helpful insight into the sources of traditional conservative ideology, just as the opposing orientations in liberal thought allow us to understand its characteristic ideological features.

Moreover, as time passes, these traditional forms of liberalism and conservatism will change and fragment. As we witness the emergence of libertarian conservatives who differ with traditional conservatives on free speech and privacy issues, and leftists who have

31. By "*langue*," Saussure meant the underlying rules and forms of a language (for example, its rules of grammar, syntax, and phonology), as opposed to particular written or spoken examples of a language, which he called "*parole*." F. DE SAUSSURE, *supra* note 4, at 9-15.

embraced regulation of free speech in the name of sexual and racial equality, we can use the study of legal argument to understand the nature of ideological change in America.

Still another use of the study of argument forms is internal critique of legal doctrine—that is, locating areas of doctrine that are in tension or contradiction.[32] Because the basic forms of argument do not change when one moves from rule choice to rule choice, it soon becomes apparent that the law is replete with tensions and conflicts that can be used to offer useful critiques of legal doctrine and legal reasoning.

Let me give just a few examples. It is generally agreed in American criminal law that persons should not be subject to imprisonment unless their actions were accompanied by an appropriate degree of mens rea, which normally means at least reckless behavior, and often requires knowledge or purpose to commit a particular act.[33] Thus, ordinary (as opposed to gross) negligence is usually not sufficient to convict the defendant for a crime punishable by imprisonment,[34] and strict liability offenses normally allow only punishment by fines. Nevertheless, in many states a criminal defendant can be convicted of first degree murder under the felony murder rule if she participated in the commission of a felony in which a person was killed, even if the death was entirely accidental.[35] This is, in effect, a strict liability standard for murder.

Moreover, when one considers doctrines of justification or excuse like necessity, self-defense, or duress, a similar problem arises. A defense is available only if the defendant reasonably believed in the existence of an emergency (in the case of necessity),[36] if she reasonably believed that her life was in imminent danger (in the case of self-defense)[37] or if the will of a person of reasonable firmness would have been overborne (in the case of duress).[38] But the requirement that the defendant conform to the conduct of a hypothetical reasonable person

32. By "contradiction," I do not mean merely logical contradictions. These rarely occur in legal doctrine. Rather, I mean antinomal conflicts of value that are not convincingly resolved by existing legal materials. *See* Balkin, *supra* note 18, at 70 n.137.

33. *See, e.g.*, MODEL PENAL CODE § 2.02(3) (presumption that mens rea for an offense must be at least recklessness unless there is explicit statement to the contrary).

34. *See, e.g., id.* § 2.02(2)(d) (Criminal negligence involves gross deviation from reasonable care.).

35. *See, e.g.*, State v. Goodseal, 220 Kan. 487, 553 P.2d 279 (1976) (upholding conviction for first-degree murder involving illegally possessed firearm which discharged accidentally when defendant slipped in snow).

36. *See, e.g.*, United States v. Bailey, 444 U.S. 394 (1980).

37. *See, e.g.*, State v. Bess, 53 N.J. 10, 247 A.2d 669 (1968).

38. *See, e.g.*, State v. Tuscano, 74 N.J. 421, 378 A.2d 755 (1977).

reinstitutes a negligence standard with respect to justification and excuse, even when purpose, knowledge, or recklessness must be proved for the material elements of the crime.[39] The debate over whether to require a degree of mens rea greater than ordinary negligence for conviction is recapitulated at the next level of doctrine (the standard of care required for justification or excuse), and interestingly, the arguments that were rejected at the first level are accepted at the second.

Now, in some sense, conflicts of this sort in the law are unavoidable. We have strict liability for injuries caused by defective products, but not strict liability for injuries caused by false speech because the governing ideology of the day reflects a higher regard for freedom of speech of newspapers than for the economic freedom of manufacturers.[40] In fact, I have argued in *The Crystalline Structure of Legal Thought* that it is a vain hope to believe that we could eliminate all such tensions and conflicts, and that legal thought is irreducibly antinomal.[41] However, the fact that some tensions and conflicts are inevitable does not mean that all are, or that our recognition of particular tensions and conflicts within legal doctrine might not convince us to change the law.

For example, once we recognize the obvious tension between the felony murder rule and our abhorrence of imprisonment for strict liability offenses, we might be persuaded to change our minds about the justice of the rule. Moreover, once we realize that a reasonable person test in self-defense doctrine reinstitutes a negligence standard that is at odds with the requirements of mens rea, we might want to alter the self defense doctrine in some respects. For example, we might be more sympathetic to the claims of battered wives who shoot their spouses in a sincere but unreasonable belief that there was nothing they could have done to protect themselves from serious bodily injury or death.

VI. CONCLUSION

Hohfeld's basic approach to the analysis of legal rights has proven amazingly fertile, and I would argue that its fertility stems

39. Professor Gary Peller offered this example. Conversation with Gary Peller, Professor of Law at Georgetown University Law Center, in Austin, Texas (Fall 1988).

40. Interestingly enough, however, 100 years ago the situation was precisely reversed—libel was a strict liability tort, while products liability was governed by a much lesser standard of care. In fact, where there was no privity of contract or express warranty, virtually no duty of care was owed at all. The presence of these symmetrical changes in legal doctrine, however, is just another example of how semiotic analysis helps us to understand legal ideology.

41. Balkin, *supra* note 18, at 67-77.

from its striking resemblance to Saussure's ideas concerning the arbitrary nature of the signifier. Indeed, Hohfeld's analysis might best be viewed as a special case of Saussure's work applied to the discourse of legal rights. Understood in this light, Hohfeld's analysis applies not only to arguments about rights but to all legal concepts. This general form of analysis has been continued in the work of the legal realists and the Critical Legal Studies movement. We can thus reinterpret the work of Hohfeld, the legal realists, and various members of the Critical Legal Studies movement as part of a tradition of legal semiotics that has combined analytic depth with political commitment.

The value of this approach to legal semiotics is threefold. First, it has analytic significance. Understanding legal concepts as systems of differences reveals important relationships between legal concepts, as for example, the connections between fault and property, or between contract and causation. This analysis also makes manifest the contingency and manipulability of legal concepts, knowledge that will prove useful to anyone who works with the materials of the law. The study of legal argument forms allows us to classify and generate arguments for virtually any legal rule choice. It also allows us to spot tensions and conflicts within and across different areas of legal doctrine.

Second, this approach to legal semiotics allows us to understand legal ideology. The study of legal ideology is in large part the study of the system of differences that constitutes legal thought. The Hohfeldian approach allows us to bring ideological presuppositions to the surface by exposing the connections between legal ideas. The structure of legal ideology is also reflected in the forms of legal argument that people use, and the ways in which their use of legal argument changes over time.

Third, the Hohfeldian tradition, especially as it has been practiced by the legal realists and the Critical Legal Studies movement, serves as an instrument for progressive change. The demonstration of tensions and conflicts within bodies of legal doctrine may serve as a spur to reconstruction and reform. More generally, the recovery of the ideological presuppositions reflected in doctrine may have a therapeutic effect that will assist us to remake our laws and our society.

Clearly, there are many ways of applying semiotics to law that lawyers and scholars could fruitfully undertake. Yet what better promise could a theory of legal semiotics hold for us than to provide at one and the same time an interpretive science of legal thought, a methodology for the sociology of legal knowledge, and an instrument for social change? It is my belief that the Hohfeldian approach to

legal semiotics has the potential to fulfill that promise in all three respects, and that is why we should diligently pursue it.