Dichotomies and Oppositions in Legal Argumentation

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Abstract. In this paper we use a series of examples to show how oppositions and dichotomies are fundamental in legal argumentation, and vitally important to be aware of, because of their twofold nature. On the one hand, they are argument structures underlying various kinds of rational argumentation commonly used in law as a means of getting to the truth in a conflict of opinion under critical discussion by two opposing sides before a trier of fact. On the other hand, they are argument structures underling moves made in strategic advocacy by both sides that function as platforms for different kinds of questionable argumentation tactics and moves that are in some instances tricky and deceptive.

In this paper we analyze examples of legal argumentation based on reasoning from dichotomies and oppositions. We show how this type of argumentation is especially visible in cross-examination and *voir dire*. It is shown in the paper how reasoning from oppositions is a powerful argumentative instrument in law that can be used both to support an assertion and back a decision.

Opposition and dichotomy are fundamental logical notions in logic, and in argumentation studies generally. In formal logic, there are two concepts of opposition. According to the strong sense of opposition expressed by classical negation, a pairs of propositions are contradictories if it is not possible for both to be true, and also not possible for both to be false. For example, the proposition 'This pen is black' and the proposition 'This pen is not black' are contradictories. The one proposition is true if and only if the other is false. According to the weak sense of 'opposition', one proposition can be the contrary of another if it is not possible for both to be true, even though it is possible that both are false. For example, the proposition 'This pen is black' (all over) and the proposition 'This pen is green' (all over) are contraries. In addition to this logical view of 'conflict of opinions', there is also a dialogical view (Walton, Reed and Macagno, 2008). Any critical discussion arises from an opposition of viewpoints between two parties to the discussion. A viewpoint contains a proposition, and an attitude, pro or contra. In the stronger kind of opposition, the one party has a pro attitude to a proposition and the other party has a contra attitude to that same proposition. In this strong kind of opposition, one party must refute the proposition held by the other party in order to win the dialog. In the weaker kind of opposition, the one party has a pro attitude to a proposition and the other party has neither a pro or contra attitude to that same proposition. He is simply unconvinced (sceptical about it being true). In the stronger kind of opposition, a party can refute the other and win merely by showing that her thesis is doubtful.

In this paper, we argue that the logical notion of opposition is useful for helping us to understand how dichotomies and oppositions work in legal argumentation, in the end it is of limited usefulness because we need to see how oppositions and dichotomies can intervene at different levels in the frame of a legal discussion. To do this we analyze this kind of argumentation within the framework of a dialog procedure with three stages: an opening stage, an argumentation stage and a closing stage. To show how this pragmatic approach applies to legal argumentation in a non-technical way that is still very useful, in section 3 we use the ancient stasis theory of Cicero. In this pragmatic model, reasoning is defined as a chaining together of inferences that can be used to try to settle some issue in a dialog that has two sides. A dialog is a sequence of moves in which two parties, a proponent and a respondent, take turns making moves – generally asking question, replying to question, and putting forward arguments. Such a dialog has a collective goal, and each participant has an individual goal. Rules determine which moves are legitimate as contributions to the dialog. Reasoning, as configured in this new pragmatic approach, is amenable to formalization

(Hamblin, 1970); Walton and Krabbe, 1995), but the formal structure required to analyze it is quite different from that of the traditional deductive logics.

Applying this pragmatic approach to legal argumentation, reasoning from oppositions is shown to be a strategy that works by altering a paradigm of possibilities in a dialog, through the use of which one party can deny a choice to support its opposite. The problem posed is that although the use of such a strategy is both necessary and reasonable in many instances, both in legal argumentation and everyday conversational argumentation, it is well known that in some instances it can be problematic and even fallacious. In such cases, it is used unfairly to try to get the best of a speech partner in a dialog.The distinction between reasonable and fallacious (or mistaken) strategies is not easy to draw on a case by case basis, because in many of these instances there are interpretative problems on how to understand the argumentation in the given text of discourse. However, the pragmatic approach to analyzing reasoning from oppositions is shown to throw much light on these problems and to provide a framework in which at least the question can be intelligently discussed.

1. Dichotomies and commitments

On the one hand, oppositions may be at the basis of the fallacies of false dilemma, or black and white fallacy. On the other hand, they can be considered the semantic aspect of the standpoint the ancient *loci extrinseci* are grounded on. For instance, the arguments “He is not dead, therefore he is alive” or “If war is the cause of our present troubles, peace is what we need to put things right again” are based on the semantic oppositions between “being dead” and “being alive” or between “war” and “troubles”, and “peace” and “right course of things”. A linguistic interpretation of the ancient extrinsic *topoi* and *loci* allows one to provide an argumentative approach to dichotomies and oppositions based on semantic categories.

Every question opens a paradigm of possible answers (see Gobber 1999). For instance, the question “What is your name?” opens the paradigm of names (John, Mark…). It would not be reasonable to answer that question “black” or “tomorrow”. Disjunctive questions are a particular form of question characterized by a binary paradigm. For instance a question like “Is the table red?” opens only two possibilities, namely yes or no (for yes-no questions, see also Hirschberg 1984). Obviously the interlocutor may refuse to answer the question (”I do not know”), but if he wants to accept the questioner’s communicative move, he has to choose between these possibilities. Similarly the interlocutor would have to choose between “dead” or “alive” if the question “Is this man dead or alive?” was asked. However, if the questioner asked “Is the wall black or white?”, the paradigm opened by the question does not correspond to the potential paradigm of the colours of a wall. In this case, a difference can be noticed between a pragmatic paradigm, namely the paradigm opened by the question, and a semantic paradigm, namely the paradigm of the possible qualities or ways of being that can characterize an entity. From a purely linguistic point of view, we notice how nouns designating entities can admit only of a particular type of predicate. For instance, the noun “wall” cannot be characterized by the predicates “hilarious” or “sensible” (see Rigotti – Greco 2006).

On our pragmatic perspective, paradigms are understood in terms of commitments. On this view, accepting a paradigm (accepting an implicit or explicit premise stating the possible allowed predications) means committing to a particular proposition. Reasoning from oppositions can therefore be evaluated using the pragmatic benchmark of commitments. Commitment is the key concept for analyzing and evaluating arguments on the pragmatic approach. This term refers to the acceptance of a proposition by a participant in a dialog (Hamblin, 1970). As each party makes a move, propositions are inserted into or deleted from his/her commitment set. Commitments do not have to be logically consistent with each other. But if a proponent’s set of commitments are shown by his opponent to be inconsistent, the opponent can challenge that inconsistency, and call for its resolution. In some types of dialog, the individual goals of the participants are opposed to each

other. Other types of dialog are not adversarial in this sense, and the participants are supposed to cooperate with each other and help each other to work towards achieving the common goal of the dialog by using rational argumentation together (Walton and Krabbe, 1995).

Some commitments are commonly accepted, as they are part of encyclopedic knowledge. From an argumentative perspective, we can read this difference as one between dialogical commitments (namely propositions the interlocutors commit to in a particular dialog), and *endoxa*, namely commonly shared propositions (see Walton and Macagno 2005; Tardini 2005). For instance, everyone in a community shares the meaning of the words used in that community. Similarly, everyone in a community shares some basic facts, some stereotypes and some habits. For example, everybody knows that New York is in the USA, that birds usually fly, and that if I take a taxi I usually have to pay. Other commitments commonly shared are the dialogical rules (if my assertion is challenged, I have to support it), and rules of inference (if there is a cause, there must be its effect). Encyclopedic information, dialogical rules and rules of inference represent the deepest level of shared knowledge, as represented in figure 1:

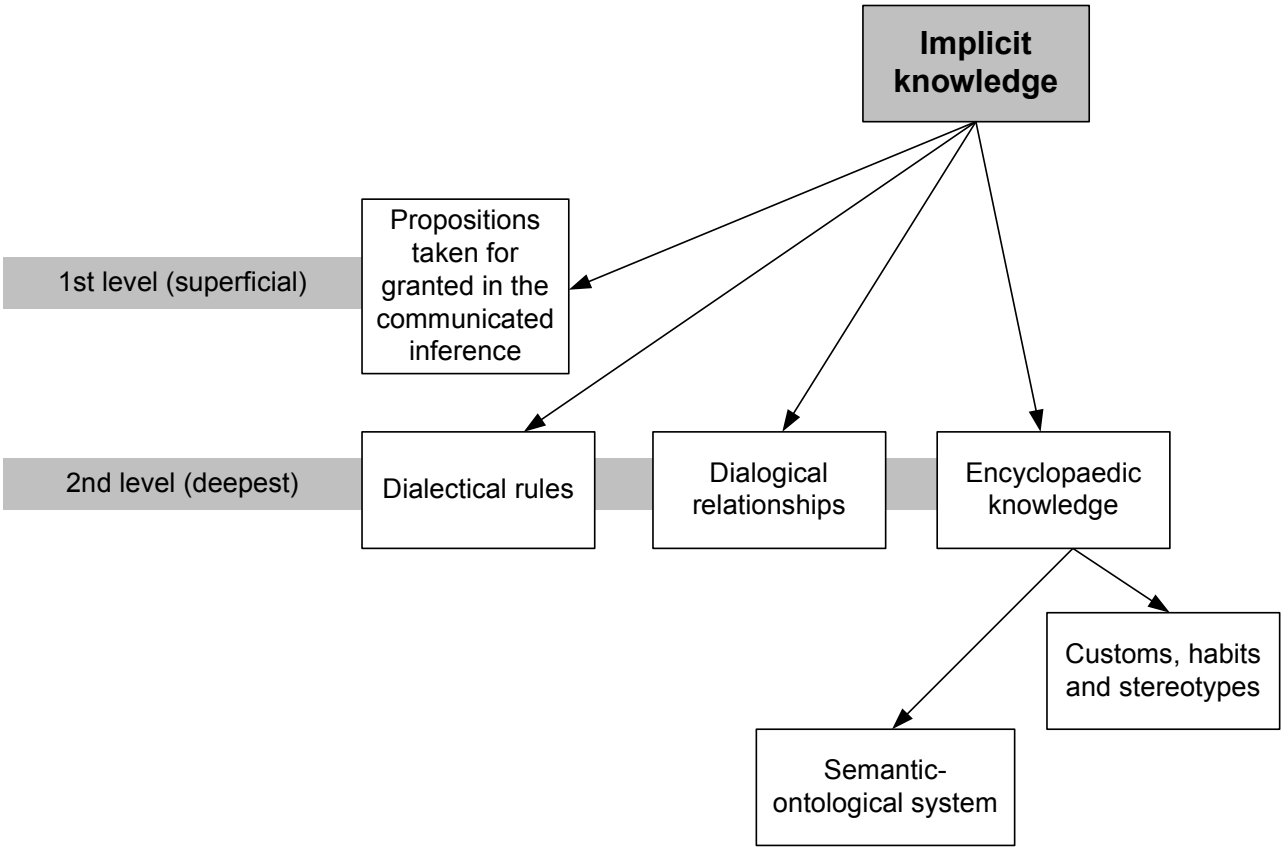

Figure 1: Levels of Common Knowledge

Other commitments are instead dialogical, namely they are not shared by everyone, but only between the interlocutors in a specific dialogue. For example, if I state that “Bob is a thief”, I am committed to that proposition. Similarly, if my interlocutor admits in a previous stage of the dialogue that he used to drink to much in the past, this proposition becomes part of his dialogical commitments, and allow a reasoning of the kind “You have not stopped drinking too much; therefore you are still drinking too much”. However, this commitment is not shared by a community.

The distinction we drew above between pragmatic and semantic paradigms can be analyzed in terms of deep *endoxa* and dialogic commitments. If a paradigm is grounded on semantics, namely the shared *endoxa* regarding the shared semantic-ontological structure, the reasoning will be

strong. If the paradigm is based on propositions already accepted in the dialogue, the force of the reasoning depends on the dialogical rules of the dialogue (for instance in some types of dialogue retraction is not possible, in others it is normal), and on the respondent's understanding of the proponent's commitments. Finally, if the paradigm is an alteration of the shared paradigm, or is contradictory to the propositions already accepted by the interlocutor in a dialogue, the reasoning will be result weak. For example pieces of reasoning like "This wall is not black. Therefore it is white" are contradictory to the semantic paradigm of colors admitted by the property "being a wall". In case of dialogical commitments, weak forms of reasoning comport a contradiction between the already accepted propositions and the paradigm advanced or presupposed. A reasoning like "You have not stopped drinking too much; therefore you are still drinking too much", asserted in a situation in which the interlocutor has never admitted having drunk in the past, would fall in this category.

Whereas *endoxa* represent propositions that are shared by a community, dialogical commitments are sometimes valid only in a particular dialogue. Pragmatic paradigms can be better understood taking into consideration the following question:

> Have you stopped drinking too much?

This type of question opens a binary paradigm: yes or no. However, the paradigm is not acceptable by someone who never drank too much. In this case, the pragmatic dichotomy is fallacious.
Using or manipulating pragmatic paradigms (namely altering the commonly shared paradigms) can be employed to force the interlocutor to commit to a particular proposition. In law this mechanism is particularly evident in cross-examination and in *voir dire*.

1.1. Dichotomies in examination

Cross-examination is an instrument for separating truth from falsehood, and assessing the trustworthiness of the witness (Wigmore, 1940, § 1368, at 38). In cross-examination, alternative questions can be used for two purposes (Wigmore, 1940, § 1368, at 37; *Whorton v. Bockting*, 549 U.S. 406 (2006). Supporting the questioner's case, by leading the witness to admitting favourable information, or discrediting the believability of the witness, showing that his statements are inconsistent or false (Rule 608). The use of alternative questions is used to lead the witness to a forced choice, and allow the questioner to control the possible answers (Luchjenbroers 1997: 482). The witness is left with little freedom of movement (Bülow-Møller 1991, p. 46), and can be led to contradict himself. However, as the cross-examination itself is a test for the ascertainment of truth, the witness should not be forced towards the wanted conclusion, but simply confronted with his own previous statements. Questions in cross-examination cannot presuppose facts the witness has not admitted, or present false dichotomies.

Dichotomies in cross-examination can be used to avoid allowing the witness to evade the question, forcing him to answer choosing between the possible alternatives. For instance, we can analyze the following cross-examination drawn from the OJ Simpson case (3/14/1995, at 0037). Mr. Bailey, representing the defence, is cross examining detective Fuhrman. The goal of the defence was to show that the piece of evidence found by the detective, a bloody glove apparently belonging to the killer, was actually planted by the detective himself. Bailey wanted to show how the detective persuaded the other colleagues, whereas Fuhrman wanted to avoid answering the questions regarding his behaviour after finding the evidence:

> Q. And the reason that you had three detectives in three separate trips trample back along that path was because you wanted to point out to them the fact that this glove looked like a match for the one they had seen over at the crime scene on Bundy; isn't that true?
> A. Not entirely. I just wanted to show them the evidence that I thought I found.
> Q. Didn't you say to them "In my view this looks similar" or words to that effect?

A. I believe I said that to detective Phillips, but I don't believe I went into that detail with the other two detectives, no.
Q. Did you say anything when you took Mr. Vannatter back there, anything at all?
A. I am not sure exactly what I would have said, I believe Detective Phillips talked to Vannatter and Lange, they joined me and I took them back to the path.
Q. **I did not ask you that. I asked whether or not during the trip you described, trip number two, actually number three if you counted your own, with Detective Philip Vannatter, the boss in this case, did you share with him your observations about the glove or did you just remain silent?**
A. I could have shared those observations, yes. I don't recall specifically.

Here the use of a disjunctive question forces the witness to choose between the two possible answers the original question allowed. The function of the alternative is to make explicit the paradigm of possible answers, in order to avoid the witness eluding the question.
Sometimes, however, false dichotomies are used to lead the witness to answers that can bring to a possible contradiction. In the same cross-examination, for instance, Mr. Bailey uses an undue alternative question to force the detective to answer a question already answered (lines 23- 24):

Q. Were you looking for possible sharp objects when you were on the Salinger property?
A. I was looking for **anything** that looked like it was unusual or something that was odd, yes.
Q. Was one of the unusual things you were looking for, Detective Fuhrman, a sharp object?
A. I didn't know at the time the cause of death at Bundy. I didn't know what I was looking for precisely.
Q. **Can you answer the question. Were you looking or not looking for a sharp object?**
A. I can't answer that as a yes or no, sir.
Q. You don't know if had you seen a knife whether you would have picked it up or photographed it or even noted it?
A. I wasn't specifically looking for a knife. If I would have found one I would have seized it or kept it there for a photographer or a criminalist to look at it.
Q. What else were you looking for? If it wasn't knives, what else were you hoping to find?
A. I don't know, sir. Anything that looked like it was out of place or possible evidence.

In this case, the questioner does not consider the interlocutor's admission. The witness states he was looking for "anything that looked unusual", not excluding sharp objects. He simply admitted to not knowing what he was looking for. The defence, asking him whether he was looking for sharp objects or not, implicitly refused the possibility of the interlocutor's indeterminacy, previously admitted. We can represent the relation between the questions and the possible answers admitted as shown in figure 2 (next page). The disjunctive question refuses the option of a third alternative to the question, forcing the witness to admit either to be looking for a sharp object (and therefore raising a suspicion of murder) or not to be looking for it (and therefore not raising a suspicion of murder). Both the answers could have been used to show the witness' inconsistency with his previous admissions.

The restrictive use of dichotomous questions is allowed in one particular circumstance in law, namely the assessment of the reliability of a witness. In case the witness is a child or a mentally challenged person, the first step is to assess whether his testimony could be reliable. One of the tests is to ask the witness a fallacious alternative question, in which the right answer is not contemplated in the paradigm. The witness should be able to recognize the absence of the third alternative, as in the case of the following question (Gudjonsson – Gund, 1982, p. 625):

> Alternative questions such as: "Were the blocks black or green?" when they were in actual fact white and red.

The witness should be able to recognize the misleading question, and show that he is not suggestible (see Endres 1997). The ability of not being subject to being misled allows the opponent in a process to actually test the witness' reliability and the truth of his statements.

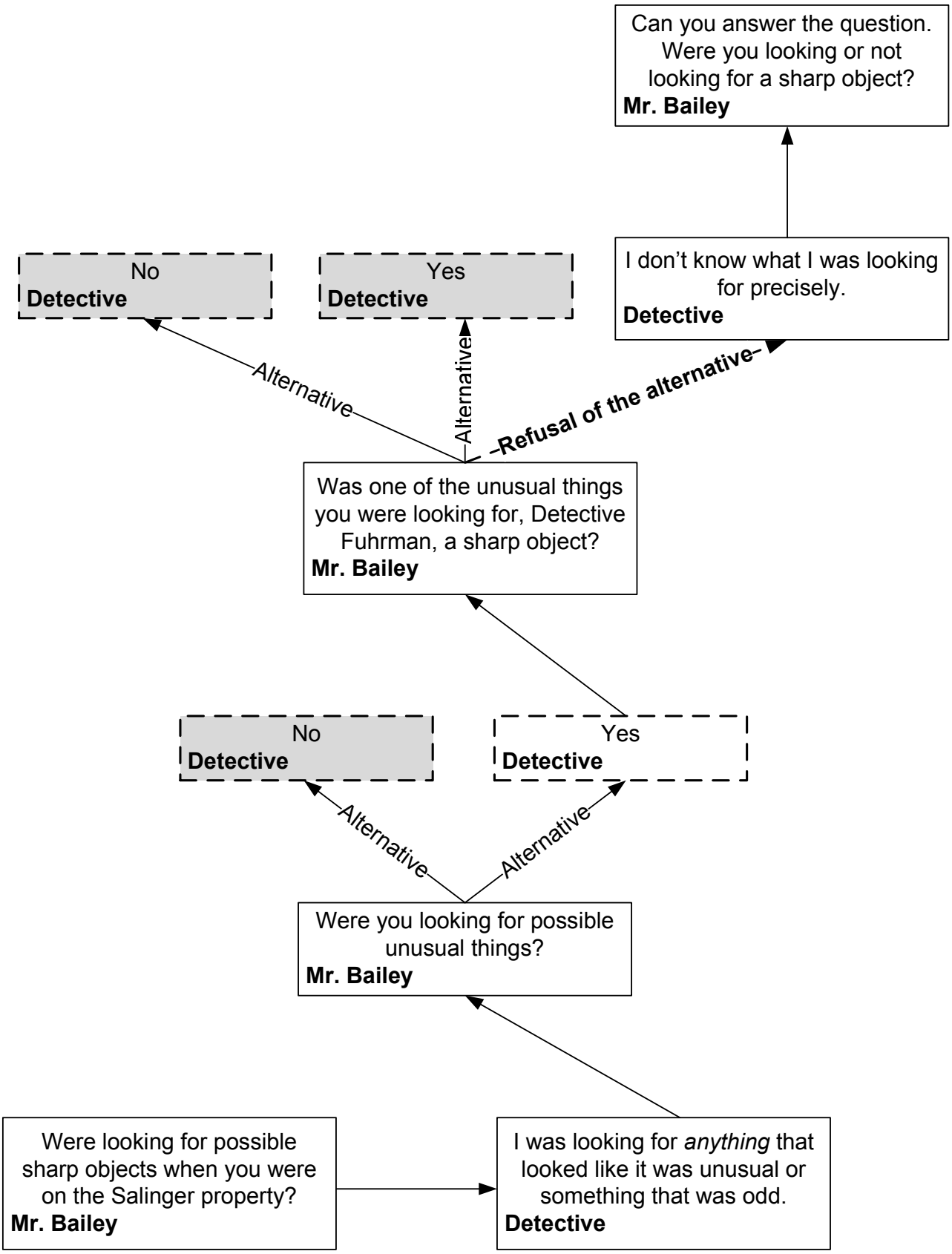

Figure 2: Argumentative Structure of Bailey's Cross-Examination

1.2. Dichotomies in voir dire

Voir dire is a preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury. In this phase, the jury members are examined, and a party may request that a prospective juror be dismissed because there is a specific and forceful reason to believe the person cannot be fair, unbiased or capable of serving as a juror. This process is called challenge for cause. In voir dire, jurors are asked questions about their view on specific issues. The challenge for cause provides that jurors may be asked to commit only to specific issues, whereas they may be asked to give their opinion on general issues following (*Standefer v. State*, 59 S.W.3d 177 at 181(Tex. Crim. App. 2001). For instance question of this type, called perspective question, may be the following (*Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001)):

> [I]f the victim is a nun, could [the prospective juror] be fair and impartial?

In those cases, the purpose of the question is to assess the jurors' view on a issue applicable to all cases, and it does not commit him to a particular verdict. A particular type of fallacious disjunctive question may be used in this phase. Jurors may be asked to answer to a dichotomic question, involving only two alternatives: yes or no. However, in both cases the juror is bound to a precise commitment, which is not requested by the challenge for cause. This type of question is called improper commitment question. An One example may be the following:

> Could you consider probation in a case where the victim is a nun?

The juror can answer this question only by committing himself to resolving, or refraining from resolving, an issue in the case based upon a fact in the case. The juror is not bound to commit himself by law, and therefore the paradigm of possible answers is fallacious.
By manipulating the pragmatic paradigm of the possible answers, the questioner can force the interlocutor to accept a presupposition, namely that he is committed to a particular decision.

2. Reasoning from oppositions: pragmatic functions in legal argumentation

Dichotomies in questioning highlight the particular relation between shared commitments and dialogical commitments. Fallacies in dichotomous questions can be detected by analyzing the relation between semantic paradigms, or endoxical paradigms, and the dialogical ones.
A more complex use of dichotomies in argumentation is the strategy of taking for granted a dichotomy and using it as a premise in an argument. For instance, we can examine the following reasoning:

> This man is not dead. Therefore he is alive.

In this case, the dichotomy between "dead" and "alive" is taken for granted. The negation of one of the two alternatives leads to the conclusion that the other alternative is the case (see Gatti 2000). However, in the following case an unacceptable dichotomy may lead to a manipulative strategy:

> This wall is not black. Therefore it is white.

As the paradigm of colours is not characterized by only two predicates, this type of reasoning is not reasonable. In argumentation theory, oppositions and negation are analyzed as source of fallacies and the ground of different types of argument schemes. Both the correct and fallacious patterns of

argument derive from the basic logical axioms, or syllogistic rules, of *modus tollens* and disjunctive syllogism. The two rules can be represented as follows:

Modus tollens	Disjunctive Syllogism
If A, then B. Not B. Therefore, not A.	Either A or B. A. Therefore not B.

The passage from formal syllogistic rules to natural language arguments, however, is more complex. Not only must the conclusion follow logically from the premises, but also the link between premises and conclusion must be reasonable. In order to explain this aspect of natural language argumentation, we can analyze two similar types of reasoning validated by the same logical rule. We can give first an example of a reasonable disjunctive syllogism:

PM. Either it is hot or it is not hot
Pm. Today is hot
C. Therefore it is false that today it is not hot

In this case, the PM is commonly accepted as true and the reasoning is valid. In the following example the reasoning is logically valid, but the conclusion is not usually accepted as reasonably following from a shared premise:

PM. Either it is hot or it is cold
Pm. Today it is not hot
C. Therefore it is cold

Whereas "hot" and "not hot" are contradictory terms, and therefore mutually exclusive, "hot" and "cold" are commonly accepted as contraries but not as exclusive. They allow middle terms such as "mild", "warm", etc., and, for this reason, the aut – aut disjunction cannot be accepted as shared. According to some logic textbooks (see for instance Morris Engel, 1994, pp. 140-142), the fallacious character of types of reasoning of the kind "It is not hot; therefore it is cold" lies in a confusion between contradictory terms (hot-not hot) and contrary terms (hot-cold). While in the first case only one disjunct can be true, in the second case at most one can be true, since they can be both false. The reasoning from disjunction can be valid when it proceeds from contrary mutually exclusive terms, namely terms not allowing an intermediate. For instance we can consider the following argument:

This man is alive; he has been proved not to be dead (Men are either dead or alive)

In this case, "alive" is contrary to "death", and the conclusion proceeds reasonably from the explicit and unstated premise. Whereas in the reasonable reasoning from disjunctive syllogism the disjunction is generally accepted (death-alive), in the fallacious cases the implicit premise is not shared.

The force of reasoning from opposites derives from logical axioms. Reasoning from oppositions can be seen as an analytical tool (*Adams v. United States* 78 Fed. Cl. 556 (2007)); however, how highlighted above, the force and acceptability of the reasoning depends on the acceptability of the dichotomy itself. In order to show how reasoning from opposites is used in legal argumentation, we will analyze its possible functions in a dialogue. Reasoning from oppositions is used in law in two different stages: the argumentation stage and the process of decision-making

2.1. Dichotomies used to prove a point

The use of false alternatives to prove the lack of responsibility in a decision, showing how what appeared as a decision was in fact a forced choice. We can for instance analyze the following case (O.J. Simpson 3/14/95 AM., at 0089-0090):

Q. Well, you did not do anything to protect it, did you?
A. Yes.
Q. What?
A. I am capable of protecting myself, once I was committed **I really had no choice but to go forward**.
Q. **You did not have the option** having discovered what could well have been the deposit wittingly or otherwise of a dangerous killer to go back and get some help, that option wasn't there?
A. The option was there.
Q. **Why did you decide**, Detective Fuhrman, that there was no need to go get one of the gun that was in the house to accompany you?
A. I don't think it was a need, I think it was a judgment call at that time.
Q. It was a judgment call, Detective Fuhrman, based on the fact that you well knew there was no cause for concern, isn't that so?
A. No. That is not so.
Q. Do you ordinarily conduct investigations of what could be a dangerous nature in this fashion?

In this case, the questioner wanted to prove that the detective chose not to partake of the assistance of his colleagues, implying the possibility of a detective's secret reason for not doing it. The detective to prove that he did not decide acted upon the presuppositions of the predicate "to decide". Without freedom of choice there cannot be will, and therefore not decision. By using the false alternative between "to go forward" and "go back and retrieve his commitment" he wanted to show that he actually did not decide, but was forced not to get help.

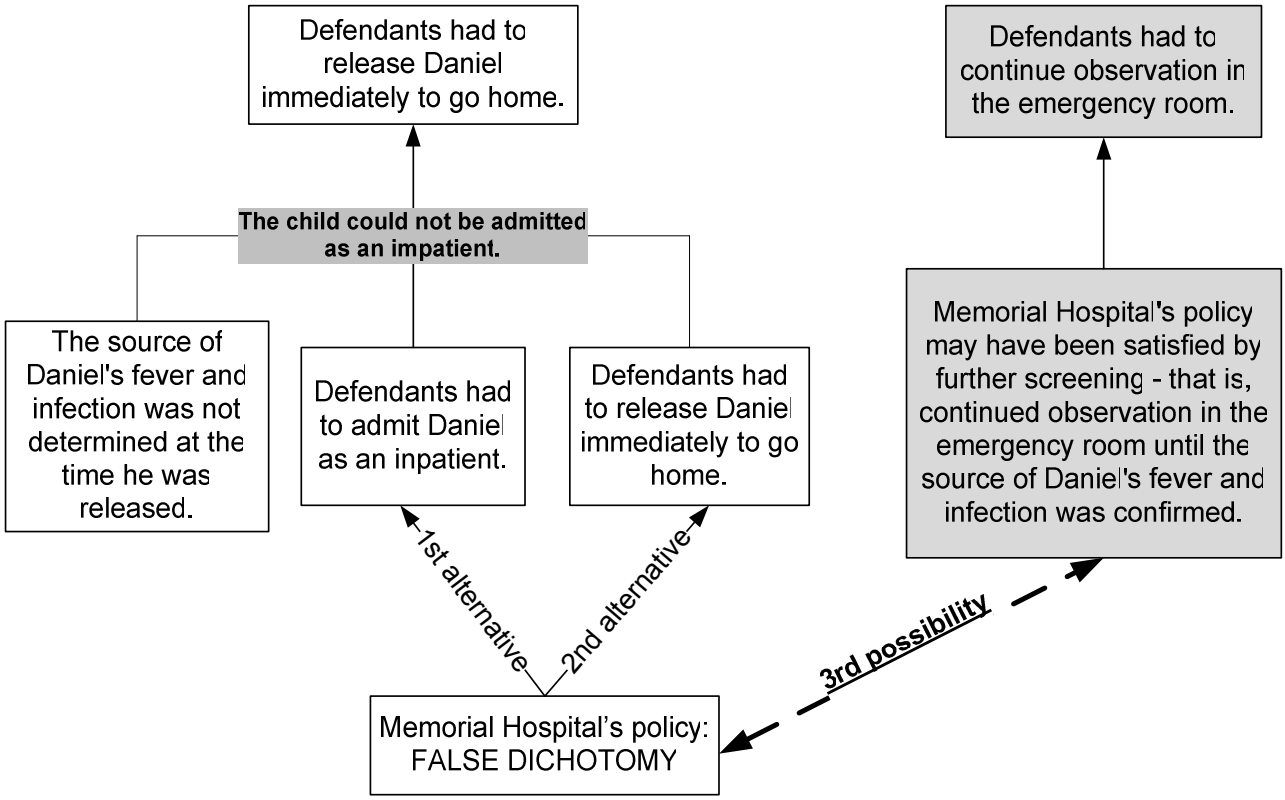

Figure 3: False dichotomy in the Daniel case

2.2. Undue use of dichotomy in decision making

The use of the false dilemma can be extremely useful in law for justifying an illegal action, showing that the defendant's deed was the only possible course of action possible at the moment. The possible choices are represented as alternative: on the one hand an unreasonable action, or an action impossible to bring about in the given circumstances, is presented; on the other hand, the state of affairs carried our by the agent is given as the only possible different decision.
In 228 F.3d 544 (5th Cir. 2000), a child, Daniel, was brought to the hospital because of fever and infection. After some analyses, the child was sent home, but after few days died because of brain infection. The evidence showed that the brain infection caused the symptoms the child presented at the moment he was dismissed from the hospital. The mother sued the hospital for misconduct in handling this case. The defendant, the Memorial Hospital, brought in its own defence the fact that the child was sent back home even if the cause of his health problems was not confirmed because this was the **only possible decision**. Defendants had to release Daniel immediately to go home or to admit him as an inpatient. Because at the moment of his dismissal the health condition of the child was positive, the child could not have been admitted as an inpatient. Therefore, the child had to be sent home. This dichotomy, however, conflicted with the commonly accepted and known hospital policy: the child, in fact, could have been admitted in the hospital for further screening. He could have been hospitalized and subject to further observation in the emergency room.
We can represent the difference between the use of fallacious and the nonfallacious (reasonable) reasoning from alternatives by the argumentation structure shown in figure 3.

A clear example of false dichotomy in decision making can be found in law in the discussion about the parole ineligibility. In *Simmons v. South Carolina*, (512 U.S. 154 (1994)) for instance, the defendant was declared guilty of the murder of an elderly woman. The jury had to decide whether to sentence him to death or to life imprisonment. However, the court failed to give the jury the correct instructions about the interpretation of the concept "life imprisonment". In fact, under the state laws, imprisonment carries with it the possibility of parole; however, under another state law, ignored by most of the jury, a defendant sentenced to life imprisonment is ineligible for parole. This failure to instruct the jury about the parole ineligibility caused a false dichotomy, namely *either* death-sentence *or* life imprisonment with possibility of parole.

Reasoning from alternatives in decision making

ARGUMENT	REASONING
0. The defendant should be sentenced either to death or to life imprisonment.	**(0) Either death or life imprisonment (with parole).**
1. The defendant is very dangerous for society.	(1) Freedom of the defendant is not desirable.
2. If the defendant is eligible for parole, he can be very dangerous for society.	(2) If parole, then freedom of the defendant.
3. (implicit)	(3) Parole is not desirable. (from 1 and 2)
4. Life imprisonment carries the possibility of parole.	(4) If life imprisonment, then parole. **(from 0)**
5. Life imprisonment is not desirable.	(5) Life imprisonment is not desirable. (from 4 and 3)
6. Death sentence does not allow any possibility of parole.	(6) If death sentence, then no parole.
7. Therefore death sentence is a safer decision	(7) Therefore death sentence is more desirable than life imprisonment. (from 0, 5, 6 and 3)

This type of reasoning can be represented as shown in figure 4.

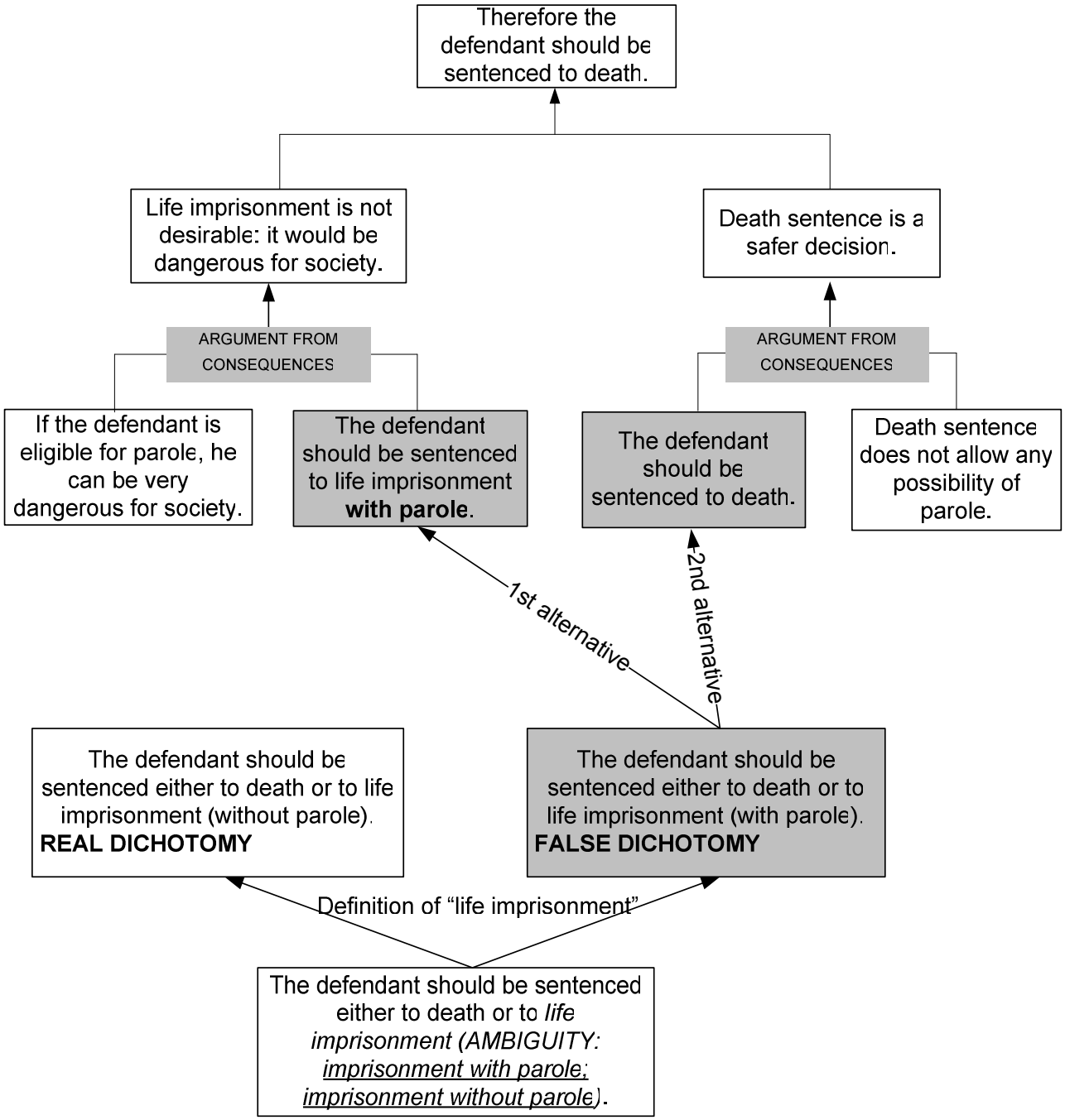

Figure 4: Arguing from oppositions in legal decision making

This type of false dichotomy, we should notice, is aimed at influencing the use of reasoning from consequences in the decision-making. Here "life imprisonment" is in a binary opposition to "death sentence", but the mistake, or the questionable strategy, lies in the nature of the members of the disjunction. In this case an omission caused an ambiguity in interpreting the concept of "life imprisonment"; the court and the jury did not share the same concept and for this reason the false dichotomy happened. The problem here is a contextual definition not shared, as appears from *Mollett vs. Mullin* (No. 016403 - 11/05/03; 10th circuit 2003)[i].

Already one can see from our analyses of the various examples so far that a dialog structure of argumentation where two parties take turns making moves, like asking and responding to questions, is a natural model of the procedure. Using structured dialectical models to analyze legal argumentation of this sort is not a novelty at this point. Well-developed models of this sort are already widely being applied (Walton, 2002). Instead, we use an older model that still have value.

3. Reasoning from oppositions: stages of a legal discussion

The use of dialog structures to model legal argumentation was known by legal writers in the ancient world, and there is one well known model of this sort that is still very useful today. In the ancient tradition, legal (and ordinary) controversies were analysed by means of a four-step process called stasis. Stasis represented the levels of inquiry and were four in number: *conjectura*, *finis*, *qualitatas*, and *translatio* (see Barwick, 1965, p. 96, Cicero, *De Inventione* 10-11), namely the stasis of fact, definition, quality and jurisdiction (for a detailed introduction to the stasis in the ancient tradition see Heath 1994; Braet; for its applications to communication, see Marsch 2005). Stasis thesis can be interpreted as four levels of shared knowledge. The first level is the fact itself, whether the defendant committed what is alleged or not, for instance, killing a man. If the facts are agreed, the next problem is to name them: for instance, was the killing murder or manslaughter? Only after establishing what a fact is, is qualification possible. For instance, once the name of the fact is agreed, the defendant may argue that the crime for which it is charged is lawful or that there are extenuating circumstances. For instance, the murder was committed for self-defence. Jurisdiction is a kind of meta-discursive level. At this level the facts themselves are not debated, but the procedure to assess them. The typical case is when a charge is debated in an improper venue, or when a judge is not competent for a judgment; however, it may be interpreted as the procedural level in general, for example mistakes in notification. Reasoning from oppositions can be used for different purposes at these four levels.

3.1. I step: facts

The classic example of reasoning from oppositions at factual stage in legal argumentation comes from Cicero's *De Inventione* (*De Inventione*, I, 63):

> Ea est huiusmodi: "Si, quo die ista caedes Romae facta est, ego Athenis eo die fui, in caede interesse non potui." Hoc quia perspicue verum est, nihil attinet approbari. Quare assumi statim oportet, hoc modo: "Fui autem Athenis eo die."

In this case, a man is accused by prosecutors of having committed a murder known to have taken place in Rome on a certain day. To rebut the charge, the defendant showed that he was in Athens on the same day the murder was committed in Rome. The reasoning can be represented as follows:

I was in Athens on the same day the murder was committed in Rome
Either a person is in Athens or in Rome on the same day
Therefore I could not be in Rome

This type of opposition is grounded on an endoxon, namely "It is impossible to be both in Athens and Rome on the same day". This type of premise grounded the disjunctive premise. In the ancient world, Rome was incompatible with Athens under the aspect 'physical presence in the same day'. By showing the impossibility of the defendant's presence on the scene of the crime, the charge could have been dismissed as grounded on inexistent facts.

A similar piece of reasoning in legal argumentation can be found in O.J.Simpson's cross examination. In this case, the questioner wanted to show how the questioned, detective Fuhrman, planned to go alone to look for evidence in the garden of the house where the murder was committed. In this fashion, the questioner wanted to suggest that he might have planted the evidence himself (O.J. Simpson 3/14/95 AM at 0070 – 0071):

> Q. Did you instruct Vannatter to go and talk to Kaelin, that ties up two of the four people that were with you in the house of the five, doesn't it? Having a conversation.

MS. CLARK: Calls for speculation.
THE COURT: Overruled.
Q. Do you understand my question?
A. No.
Q. Would you agree with me, Detective Fuhrman, that everybody has to be someplace?
A. I agree.
Q. **And that one person can't be in two places**.
A. Agreed.
Q. So that if you caused two people to join together in a conversation, at a specific place, it is unlikely**, it is unlikely that they will be at any other places until the conversation is over**?
A. I would agree with that.
Q. Okay. Now, I will ask you one more time. Did you use words of instructions to Phil Vannatter telling him without suggesting any subject matter to go talk to Kaelin?
A. Not in that manner but yes I did.
Q. **You had already formulated a plan that you were going to look out beyond the building in the darkness for something**, correct?

In order for the questioner for the defendant to rebut a charge grounded on some evidence, he decides to show that the facts are substantially different. The reasoning from oppositions is similar in some extent to Cicero's dichotomic argument, and can be represented as follows:

One person can't be in two places
If two people are joined together in a conversation in a house, they cannot be in the garden until the conversation is over
Detective Fuhrman caused the only colleague available to join a person that could not leave the house in a conversation
Therefore the colleague could not go with detective Fuhrman to go to look out in the house garden
Therefore detective Fuhrman wanted the colleague not to go with him to look out in the house garden

Using this type of reasoning from oppositions, the facts are shown to be noticeably different. The detective is suggested planning to go on his own to look for incriminating evidence, which sounded highly suspect.

3.2. II step: definition

The level of definition is aimed at naming agreed facts. We can explain this process as follows (Cicero, *De Inventione* I, 11)[ii]:

> The controversy about a definition arises when there is agreement as to the fact and the question is by what word that which has been done is to be described. In this case there must be a dispute about the definition, because there is no agreement about the essential point, not because the fact is not certain, but because the deed appears differently to different people, and for that reason different people describe it in different terms. Therefore in cases of this kind the matter must be defined in words and briefly described. For example: if a sacred article is purloined from a private house, is the act to be adjudged "theft" or "sacrilege"? For when this question is asked, it will be necessary to define both theft and sacrilege and to show by one's own description that the act in dispute should be called by a different name from that used by the opponents.

In the ancient theory of stasis, the ascertained fact was that a man stole some goods from a temple. Was it a theft or a sacrilege? It depended on the definition of "sacrilege", whether it was considered to mean "stealing goods from a sacred place" or "stealing sacred goods from a place". Naming a fact or a deed is therefore a type of reasoning, based on the definition of the name itself, which can be represented as follows:

Reasoning from definition	
RULE OF INFERENCE	**ENDOXON**
What the definition is predicated of, also the definiendum is predicated of.	
	Sacrilege is stealing goods from a sacred place.
Preliminary conclusion What "stealing goods from a sacred place" is predicated of, also "sacrilege" is predicated of.	
The definition is predicated of X.	Bob stole goods from a sacred place.
Therefore the *definiendum* is predicated of X.	
CONCLUSION Bob committed sacrilege.	

In this structure of reasoning the definition is represented as a commonly accepted proposition and not as an universal premise like in a syllogism. In argumentation theory the type of reasoning grounded on definitions has been analyzed under the label of "argument from verbal classification" (Walton, Reed and Macagno, 2008, ch. 9) and (Walton 2008). This type of pattern of reasoning leads from data to a verbal classification by means of a shared definition:

DEFINITION PREMISE:	*a* fits definition *D*
CLASSIFICATION PREMISE:	For all *x*, if *x* fits definition *D*, and D is the definition of G, then *x* can be classified as *G*.
CONCLUSION:	*a* has property *G*.

However, the definitional reasoning is in this case joined to a pattern of reasoning from oppositions. Showing that the defendant committed theft, the charge of sacrilege is logically dismissed. "Sacrilege" and "theft" are, in the genus of "felony", two different species, and the same fact cannot be classified under both these two categories.

The use of reasoning from oppositions can intervene in the definitional stasis in two different fashions. On the one hand, the very definition of the charge can be used (or manipulated) in order to show that the facts (or data) do not meet the requirements for such a classification. On the other hand, reasoning from alternatives may intervene at a deeper level of reasoning from classification, namely the interpretation of the meaning of the single words of a definition. For instance, in the case above, at a first level of the definitional stasis the defendant might have been shown not to have stolen anything from a sacred place; otherwise, by adopting a different definition of "sacrilege" as "stealing sacred goods" he might have been proved to have stolen goods from a sacred place, but the stolen goods were not sacred. At a second level, the defendant, agreeing on the definition of "sacrilege", may contend that he did not "steal" the goods, but just "borrowed" them, as "borrowing" can be defined as "taking something with the *intention* of giving it back".

False dichotomies can be used in the second level of classification. For instance, we can analyze the case *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), in which Milkovich, a high school wrestling coach, sued Lorain Journal Company's newspaper for publishing a column stating that column stated that "Anyone who attended the meet . . . knows in his heart that Milkovich. . . lied at the hearing. . . ." (Milkovich, 497 U.S. at 5, 110 S. Ct. at 2698, 111 L. Ed. 2d at 9). The statement was classified as "defamatory", as it damaged the petitioner's reputation. The respondent attacked the whole reasoning from definition, not attacking the definition of "defamatory" itself, but

denying the possibility of this predicate to be attributed to the statements itself. The shared definition of "defamatory" presupposes the existence of a false statement, stated with malice, damaging someone's reputation. False statements of fact may be punished at least when said with knowledge that they're false or with reckless disregard of falsehood (*Gertz v. Welch*, 418 U.S. 323 (1974)). The respondent did not choose to prove that the assertion was in fact true (harder to prove), but that the assertion could not be verified, as it reported an opinion and not a fact. Under the First Amendment "there is no such thing as a false idea" (*Gertz v. Welch*, 418 U.S. 323 (1974)) .The respondent's reasoning can be explained as follows: "As a fact is opposed to opinion, and a fact is verifiable, opinion is not verifiable". From the point of view of the characteristic "to be verifiable", the responded created a dichotomy and used a reasoning from opposites, that can be made explicit as follows:

Oppositions and redefinition	
Definition of "defamatory"	A statement is defamatory if and only if it is false.
Dichotomy	Opinions are contrary to facts.
	The statement reported an opinion
	The statement did not report a fact
Reasoning from opposites	Facts are objective; opinions are not objective, opinions cannot be false
	The statement is not verifiable
	The statement is not defamatory

The whole reasoning was aimed at proving that as the column stated an opinion, and not a fact, it cannot be verifiable, and therefore cannot be false. As a consequence, it cannot be defamatory. However, the dichotomy between fact and opinion cannot hold from the legal point of view (see *Milkovich v. Lorain Journal Co*, at 19-20, 110 S. Ct. at 2705-06, 111 L. Ed. 2d at 18). The word "factual statement" is polisemic, and in law has the particular meaning of statement "that relates to an event [**18] or state of affairs that existed in the past or exists at present and is capable of being known" (*Ollman v. Evans*, 750 F.2d at 981 n.22). Facts are in this perspective not contrary to generic opinions, as opinions may report events that can be verified, but to subjective assertions, namely opinions grounded on personal evaluations (see *Scott v News-Herald*, 25 Ohio St 3d 243 (1986) for the distinction between the two types of opinion). Opinions can be evaluated according to their grounds: if the grounds of the judgment expressed are factual (*Scott v News-Herald*, 25 Ohio St 3d 243 (1986)), they are subjected to verification, whereas if they are values, they are not. The principle of verification is the semantic characteristic relevant to the interpretation of "fact" and "opinion" (*Janklow v. Newsweek, Inc*., 759 F.2d 644 (8th Cir. 1985). The fallacious move here consists in manipulating the genus of the two opposites, namely the semantic feature that divides them. In spite of "verifiability" the genus becomes "viewpoint of the speaker". In this fashion, even if an opinion expresses a verifiable event, it is still expresses a viewpoint and therefore is contrary to "facts". By manipulating the definition, the speaker fallaciously classifies an assertion as an "opinion", fulfilling the burden of proof.

3.3. Step III: Qualification

The third step in stasis is the process of qualification, namely the step in which the facts and the definition of the facts are taken for granted. In this phase the qualification of the action is taken into consideration. For instance, an action can be judged as lawful or unlawful (see Cicero, *De Inventione* I, 12), more or less serious, excusable or not. The classical example is the case of man that killed an adulterer. The prosecution and the defendant agreed that the man was killed and that

the man was an adulterer. The controversy, after the conjectural and definitional stage, came to qualification: was the action lawful or unlawful? (Quintilian, *Institutio Oratoria* VII, 1, 7-8)[iii]:

> "You killed a man"
> "Yes, I did. It is lawful to kill an adulterer with his paramour."
> "But you had no right to kill them, for you had forfeited your civil rights"

Sometimes in the qualification stasis definitions are controversial. For instance we can analyze the following case (Heath 1994, p. 114):

> Consider the case of the adulterous eunuch. A husband may kill an adulterer in the act; a man finds a eunuch in bed with his wife and kills him; he is charged with homicide. […] Whatever the eunuch was up to, it was clearly not a fully-fledged instance of adultery; it (and indeed he) lacked something arguably essential to that crime. Is this 'incomplete' adultery nevertheless to be classed as adultery? If so, then the killing is covered by the law on adultery; if not, the killing is unlawful.

In this case, the problem is how to classify the killing, and how to classify it when only two categories are possible, namely "adultery" and a class of behaviours not including the sexual intercourse. The reasoning is focussed on the relation between the fact and its legal qualification: from the point of view of the justification of the crime, killing and adulterer is lawful; however, the law does not establish what happens in case of incomplete adultery. The reasoning proceeds from a reasoning from oppositions, which we represent as follows:

Reasoning from oppositions

STATED PROPOSITIONS	IMPLICIT PREMISES
Killing an adulterer is excusable.	
Killing a non adulterer is not excusable.	
An eunuch is an incomplete adulterer.	
	Either a person is an adulterer or he is having a relationship not interfering with marriage relations.
An incomplete adulterer cannot be considered fully an adulterer.	
	Therefore an incomplete adulterer is not an adulterer.
Preliminary conclusion Therefore the eunuch is having a relationship not interfering with marriage relations.	
CONCLUSION Therefore killing the eunuch is not excusable.	

In this table we represented a particular interpretation of the law. We considered the relevant character of the concept of "adultery" the feature "interfering with marriage". On this perspective, the prosecution's reasoning is based on a reasoning from opposition. Instead of proving that the relationship was one of the possible not interfering with marriage, simply denied the possibility of classifying the act as adultery. The negation opened a paradigm of possibilities, ranging from allowed extra-marital relations to a friendship. The problem is not in the reasoning from oppositions, but the reasoning from a classification failure (an eunuch cannot be classified as an adulterer) to a classification (an eunuch is not an adulterer).

Reasoning from oppositions can be extremely helpful in qualification stasis, especially when the reasoning from verbal classification is controversial. Taking into consideration the modern jurisprudence, we can analyze *Adams v. United States*. In this case, the U.S. Department of Health and Human Services (HHS), denied overtime pay for the investigators under the Fair Labor Standards Act. The plaintiffs claimed that this denial was unlawful, whereas the defendant maintained that administrative exemption to the overtime requirement of the FLSA applied to the investigators their duty was an administrative function. The defendant's argument, however, was not aimed at proving that the plaintiff's work was administrative, using an argument from classification. Instead, the defendant used a different line of reasoning, applying the dichotomy between administration/production work. The defendant used the definition of production as characteristic of "employees whose primary duty is to produce the commodity that the enterprise exists to produce or market are engaged in `production' activity" (29 C.F.R. § 541.205(b)). The defendant defined the production work of HHS as "the sponsoring of federally-funded health care and benefit programs". In this fashion, as the plaintiffs' work regarded criminal investigations, and as criminal investigations are different from the production work of HHS, the defendant was shown to be engaged in an administrative work. The reasoning can be represented as follows:

Reasoning from oppositions in classification

SHARED PREMISES	POTENTIALLY CONTROVERSIAL PREMISES
0. Either a work is administrative or it is production.	
	1. Production work is the sponsoring of federally-funded health care and benefit programs.
2. The plaintiffs' duty was criminal investigations.	
	3. Criminal investigations does not fall within "sponsoring of federally-funded health care and benefit programs".
Preliminary conclusion Therefore plaintiffs' work was not production. (from 1 and 3)	
CONCLUSION Therefore plaintiffs' work was administrative. (from prel. concl. and 0)	

This type of reasoning is grounded on two premises that are highly controversial. In particular, the defendant defined "production work" by simply using examples. The court rejected both of them, applying the same reasoning from oppositions starting from the definition of "administrative employee's duty" as duties among those which "primarily involve or affect significant management responsibilities", including "specialized management consultation, overall management functions, contract negotiation and administration, and the like" (Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq). As the reasoning from oppositions did not show that the plaintiffs' work affected management responsibilities, the court found that defendant has not shown that plaintiffs' primary duty qualified for the administrative exemption (*Adams v. United States* 78 Fed. Cl. 556 (2007)).

3.4. Step IV: Procedures

The last step in stasis is jurisdiction, that we interpreted as "procedural stasis". On Cicero's view, jurisdiction or translatio (Cicero, *De Inventione*, I, 10)[iv]:

> But when the cause depends on this circumstance, either that that man does not seem to plead who ought to plead, or that he does not plead with that man with whom he ought to plead, or that he does

> not plead before the proper people, at the proper time, in accordance with the proper law, urging the proper charge, and demanding the infliction of the proper penalty, then it is called a statement by way of demurrer

Reasoning from oppositions can intervene at this stage of the legal procedure. A clear case of this type of reasoning comes from *Large v. State*, 2008 WY 22, P 23, 177 P.3d 807, 814 (Wyo. 2008):

> Defendant contended that a counseling psychologist impermissibly provided opinion testimony of her guilt and vouched for the credibility of the victim. The court found that the psychologist's testimony regarding the victim's statements that she was abused by defendant was admissible because the psychologist was called in to treat the victim, and the victim's identification of the perpetrators of her abuse was a necessary part of the psychologist's diagnosis and treatment. While the psychologist's identification of defendant as one of the perpetrators of the abuse constituted an improper opinion of defendant's guilt, **there was no plain error because defendant had not established that the testimony was prejudicial**

Reasoning from oppositions is applied here to a procedural case. As a general principle, there are two possible procedural types of errors: the plain (or structural) error, and the *per se* (or trial) error. In the first case the error mandates reversal of the court's decision, whereas in the second case the error is not reversible. The prosecution, instead of proving that the error was a simply *per se* error, showed that the conditions for the categorization of an error as a plain error are not met. The reasoning can be represented as follows:

Reasoning from oppositions in procedures

STATED PREMISES	IMPLICIT PREMISES
1. The plain error standard requires the alleged error (1) be clearly reflected in the record, (2) be a violation of a clear and unequivocal, not merely arguable, rule of law, and (3) deny an appellant a substantial right resulting in material prejudice.	
2. Defendant had not established that the testimony was prejudicial.	
	3. Defendant could not prove that the error was plain. (from 1 and 2)
	4. Either an error is a plain error or it is not a plain error.
Preliminary conclusion Therefore it is not a plain error. (*from 4 and 3)	
	5. Either an error is a plain error or it is a *per se* error.
CONCLUSION Therefore it is a per se error. (from prel. concl. and 5)	

This type of reasoning proceeds from two steps of reasoning from oppositions. As the defendant could not prove that the error was plain, the court found that the error was not plain. And as an error can be either procedural or structural, and as it could not be structural (for this dichotomy see McCord 1996), the court concluded that it was procedural (or *per se*).

A particular case of dichotomic reasoning in the procedural stasis is represented by teh creation of an artificial dichotomy in order to classify a particular fact. An example comes from *United Steelworkers of America, AFL-CIO-CLC v. Saint Gobain Ceramics* (467 F.3d 540, Oct. 30, 2006). In this case, the controversy is related to the procedural distinction between substantive

arbitrability and procedural arbitrability. In the first case is the court to decide a case, whereas in the second case the decision is up to the arbitrator:

> On March 2, 2004, the company fired two union members for insubordination. On the same day, the union filed grievances challenging the propriety of both discharges. The collective bargaining agreement contained a four-step process for resolving grievances. The union's grievances proceeded without complications through steps one, two and three. On March 29, 2004, the company issued a written denial of both step-3 grievances, which the union received on April 8, 2004. The agreement gave the union 30 days, excluding weekends and holidays, to appeal the company's decision to step 4—arbitration. If the union failed to appeal within the time limit, the agreement provided that the union forfeited its right to arbitrate the grievance. The union appealed the denials by letter dated May 19, 2004, and the company received the appeals on May 24, 2004. The company informed the union that the appeals could not proceed to arbitration because it had received them after the 30-day deadline.

At stake is whether the clock started running on March 29 (when the company issued the decisions) or on April 8. Being this controversy about timelessness, the problem regards the classification of timelessness as a problem of procedural or structural arbitrability. Normally, time limits fall within procedural problems (*Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)); however, the court of first instance interpreted *General Drivers, Warehousemen and Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988), and introduced a dichotomy between express and not express time limits. On this view, time limits provisions were divided into two categories: either the time bars clearly and expressly say that if a party does not satisfy the time deadline, the party is barred from filing the action, or they don't. In the first case the timeliness question is for the court to decide; in the second case it is for the arbitrator to decide. However, the clarity of the document at stake did not regard the consequences, but it related to determining when the clock starts running and when it stops. The dichotomic reasoning can be represented as follows:

Reasoning from oppositions in procedures	
A controversy is either of *procedural* (to be decided be decided by the arbitrator) or *structural* arbitrability (to be decided by the Court).	
Timeliness questions are of procedural arbitrability in absence of an agreement to the contrary.	
The agreement provided an unclear time limit, but did not specify the jurisdiction.	
REAL DICHOTOMY	FALSE DICHOTOMY
Either time-bars provisions are express or they are non-express (they express that "failure to comply with time requirements shall be considered a problem of *structural* arbitrability").	Either time-bars provisions are express or they are non-express. (Express = clear about consequences of failure to comply with time limitations).
In the agreement the time bar was unclear (when the clock starts running), and jurisdiction was not expressed.	In the agreement the time bar was clear (the consequences were clear), even though the application was ambiguous.
Therefore it is a problem of procedural arbitrability.	Therefore it is a problem of structural arbitrability.

The court created a false dichotomy between express and non-express time bars. On their view, if the consequences are expressed all the timelessness problems (including ambiguity of the application of time bars) falls within the structural problems (see *General Drivers, Warehousemen and Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988)).

5. Conclusions

On our pragmatic analysis, paradigms are defined in terms of commitments. On our analysis, accepting a paradigm (accepting an implicit or explicit premise stating the possible allowed predications) means committing to a particular proposition. Reasoning from oppositions can therefore, on our analysis, be evaluated using the pragmatic benchmark of commitments. We draw four general conclusions from this analysis, as applied to the examples analyzed.

1. Dichotomies and reasoning from oppositions based on commitments are extremely useful strategies in legal argumentation.
2. Dichotomous questions can be used to bind the interlocutor to a particular commitment, whereas reasoning from oppositions is grounded on an implicit premise that has to be shared in order for the reasoning to be acceptable.
3. Both dichotomous questions and reasoning from oppositions can be analyzed using the linguistic notion of semantic paradigm, and the argumentation-theoretic concept of common knowledge.
4. The reasonableness or fallaciousness of this pattern of reasoning, traditionally analyzed from a purely logical point of view, can better be analyzed by commitment and shared knowledge.

Using the two examples of the use of dichotomies in examination dialogs in the Simpson trial in section 1.1, we showed how the use of a disjunctive question can force a witness to choose between two possible answers the original question allowed. The function of the alternative is to make explicit the paradigm of possible answers, in order to prevent the witness from eluding the question. This process is much like filling out a form on a web page in the Internet, where the webmaster who makes up the form structures the options that are allowed to the respondent. Sometimes, however, as indicated, false dichotomies are used to lead the witness to answers that can bring him to a possible contradiction. A more detailed analysis of the argumentative structure of Bailey's cross examination was shown in figure 2. Another examination dialog from the Simpson case, presented in section 2.1, showed how what appeared as a decision was in fact a forced choice. This use of the false dilemma tactic illustrates how such sequences of questioning and replying in a dialogue can be deceptive and tricky. Two analyses illustrated different ways in which this strategy is used in legal argumentation: the analysis of the false dichotomy in the Daniel case, and the analysis of the example of false dichotomy in the case of Simmons v. South Carolina.

It wasn't until section 3, where we used examples of reasoning from oppositions at the factual stage of legal argumentation in a trial, where our analysis of the dialog structure this kind of argumentation was more fully articulated. By showing how Cicero breaks the procedure down using stasis theory into several stages, it is shown how argumentation in a typical legal case goes through three stages, an opening stage, an argumentation stage, and a closing stage. By applying Cicero's version of stasis theory to another example of examination in the Simpson case and two other examples, we showed how argumentation from oppositions and dichotomies is an essential mechanism for driving the dialog forward to its closing stage. By applying reasoning from opposition to such examples, using the stasis model of Cicero, we showed that there are two procedural types of errors to be concerned about. However, we were also able to show how oppositions and dichotomies can drive a dialog forward towards a successful closing stage where a reasonable decision can be arrived at by the trier despite the limitations of time, economic resources, and incomplete knowledge of the facts, that are inevitable in many cases.

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Footnotes

[i] "[…] juries in general are likely to misunderstand the meaning of the term 'life imprisonment' in a given context," and that therefore "the judge must tell the jury what the term means, when the defendant so requests". (*Mollett vs. Mullin* (No. 016403 - 11/05/03; 10th circuit 2003).

[ii] "Nominis est controversia, cum de facto convenit et quaeritur, id quod factum est quo nomine appelletur. Quo in genere necesse est ideo nominis esse controversiam, quod de re ipsa non conveniat; non quod de facto non constet, sed quod id, quod factum sit, aliud alii videatur esse et idcirco alius alio nomine id appellet. Quare in eiusmodi generibus definienda res erit verbis et breviter describenda, ut, si quis sacrum ex privato subripuerit, utrum fur an sacrilegus sit iudicandus; nam id cum quaeritur, necesse erit definire utrumque, quid sit fur, quid sacrilegus, et sua descriptione ostendere alio nomine illam rem, de qua agitur, appellare oportere atque adversarii dicunt". (Ciceronis *De Inventione* I, 11)

[iii] Id tale est: "occidisti hominem", "occidi". Convenit, transeo. Rationem reddere debet reus quare occiderit. "Adulterum" inquit "cum adultera occidere licet". Legem esse certum est. Tertium iam aliquid videndum est in quo pugna consistat. "Non fuerunt adulteri": "fuerunt"; quaestio: de facto ambigitur, coniectura est. Interim et hoc tertium confessum est, adulteros fuisse: "sed tibi" inquit accusator "illos non licuit occidere: exul enim eras" aut "ignominiosus".

[iv] At cum causa ex eo pendet quia non aut is agere videtur, quem oportet, aut non cum eo, quicum oportet, aut non apud quos, quo tempore, qua lege, quo crimine, qua poena oportet, translativa dicitur constitutio, quia actio translationis et commutationis indigere videtur

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