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MICHAEL MOERMAN

The Use of Precedent in Natural Conversation: A Study in Practical Legal Reasoning¹

I. Students of legal reasoning commonly observe that its results and procedures are neither arbitrary nor accounted for by formal deductive logic. All students, whether they react with despair and " 'an inferiority complex' " (Blackstone, 1971: 233, quoting Gidon Gottlieb's *The Logic of Choice*) or by glorying in the life of experience, seem convinced that there is a gap, some 'other than' or 'more than' relationship between formal logic and legal reasoning. This gap has been given various names, like 'material logic' (Recaséns Siches, 1965, 1971), and some have tried to map all (Perelman and Olbrechts-Tyteca, 1958) or part (Sartorius, 1967) of it. But I doubt that any of the distinguished scholars who have worked in this field would claim that the gap has been closed, that we can explicate the workings of actual argument either as well as we can formal logic, or sufficiently to describe how judges reason.

The failure arises from a division of labor which, regardless of its historical necessity, now impoverishes the study of both formal and practical reasoning. Logic, once the study of actual argument, became the exclusive servant of mathematics and the physical sciences some 300 years ago. The result, as Bar-Hillel (1969: 1) observes, was that "argumentation in natural languages became a no-man's land between logic and linguistics ... with disastrous results". He gives the disaster trenchant anecdotal

¹ An earlier version of this paper was presented at the World Congress for Legal and Social Philosophy in Brussels, September 1971. I thank the organizing committee, and especially Prof. Perelman, for inviting me to that Congress, and the Committee on Research of the Academic Senate, UCLA for making it possible for me to accept the invitation.

illustration (1966). You come upon a man bent over near a lamppost and offer your help. "Yes, thank you", he says, "I'm looking for my cuff link." You search with him for a while, but the area is small and barren and you soon grow impatient at failure. "Are you sure you dropped it here?" you ask. He answers, "No, of course not. I lost it in the alley, but the light is better here." The 'splendid mutual isolation', to again use Bar-Hillel's phrase (1969: 1), between logic and the use of natural language keeps the lamppost stationary and the alley where the cuff link, and the rules of legal reasoning, will be found, dark.

Until now, we have not had effective ways of illuminating that alley. Less metaphorically, without being able to show speakers orienting to and consequentially using features of talk, without being able to point to the effects of one person's utterances on another, we have had no principled ways of demonstrating how context, strategy and situated interactive concerns affect actual argument. For those observations that have been made (e.g., Perelman and Olbrechts-Tyteca, 1958; Perelman, 1952, 1968), there has been no way of distinguishing between the observer's ingenuity and the rules of language use actively employed by men going about their practical concerns.

This paper² claims that the goals, procedures, and accomplishments of the formal analysis of natural conversation — largely the work of my senior colleague, Professor Harvey Sacks of the University of California at Irvine — permit us to do these things and thereby to close, or at least map, the gap between formal and practical reasoning. By pointing my discussion toward showing that and how precedent, a central and fairly technical legal notion, was used in an actual Thai conversation, I will illustrate my conviction that practical reasoning is substantially identical with legal reasoning.

The primary data consist of about eleven minutes of rather commonplace talk recorded in a village in Thailand and presented as Appendix I, supplemented by equally humble American talk.³ With one possible exception, none of the participants whose conversation I will analyze has had any legal training. None of the talk occurred in a recognizable court-

² I gratefully acknowledge National Science Foundation grant #GS-1003 for partial support of the research upon which this paper is based.

³ Field time and equipment for making the recordings were supported by grants from the Center for Southeast Asia Studies, U. Calif., Berkeley, and the Committee on Research, Academic Senate, UCLA; transcription, translation, and initial analysis by grants from the Division of Behavioral Sciences, ARPA/OSD (Order #836) monitored by the Directorate of Information Sciences, AFOSR Grants 66-1167 and 68-1428.

room. None was governed by technical rules of pleading, evidence, or procedure. What we have here, at least before analysis, is simply some people talking to one another and telling stories, by which I mean telling of an event in more than one utterance.

My using such materials is not without distinguished precedent. In order to show that the principles he pointed to were the very stuff of *The Common Law Tradition*, Karl Llewellyn dealt:

not with queer cases or important cases only, nor with peculiar judges, nor with atypical courts, but instead with what is happening daily, all over the country, with what is palpable in almost every other case (1960: 149).

A major feature of his book:

which is unique and which goes to the essence is that demonstrations are undertaken not on cases carefully selected to convenience, nor yet on cases of high importance, nor on cases of particular subject matter, but on mine-run stuff as it comes unselected from the mine: the cases in sequence as they stand in the reports Illustrations are indeed selected for discussion. ... But the *demonstrations* which clinch the vital points are done on stuff from the daily grist ... (1960: 6).

Llewellyn hoped to thereby show that what he found was characteristic of the entire common law. By using analogous data, I claim that what I point to is characteristic of natural conversation, and thus of practical reasoning.

Working on American conversational sequencing, Sacks has encountered and accounted for some of the uniform ways in which stories get told. Working on Thai materials, I have encountered the same uniformities. Some of these patterns strongly resemble sanctioned and productive features of the use of cases and precedents at law. The features I will discuss in this paper are that and how conversation participants:

- use stories to illustrate rules,
- keep stories to the details which their circumstances make material and relevant,
- make one story essentially similar to another,
- use stories adversatively,
- address or otherwise form their stories for their intended audience.

There is no need to belabor the relationships between such practical accomplishments and legal argument. It seems to be quite generally accepted, by Perelman (1963: 82), Llewellyn (1930: 249), Cross (1961: 4), and Ross (1959: 84) — to mention just a few — that precedent is used in every jurisdiction, presumably because it is required for applying the rule of formal justice to concrete disputes. Goodhart (1930) is not alone either

in observing that the selection of which facts are to be considered relevant and material is the judge's main device for finding or making law, or in observing that the test for knowing whether one case will be held binding precedent for another lies in seeing whether their material facts are similar⁴ (1930: 23). Sartorius (1967) observes that there are criteria of relevant and material similarity uniformly recognized and normatively used by litigants as well as lawmen, but which cannot be accounted for by formal deductive logic. To the extent that I can show conversation participants to be 'doing the same thing' as judges, I will be lending empirical support to such views of the relationships among legal rules, cases, material facts, precedent, and juridical logic. But insofar as the accomplishments are those of practical and commonplace affairs, I will be challenging the adequacy of accounting for them by purely legal reasons. So, for example, if I can show that storytellers regularly restrict themselves to material facts, and especially if I can account for their doing this by formal properties of conversation, I will have undercut the primacy of the rules of pleading and evidence that Vinogradoff (1913: 87) and Paton (1964: 540) credit for this accomplishment. Let me emphasize that my purpose is not to show ironically that the puzzles of scholars are triumphantly solved by peasants. Rather, I agree with Sartorius that there are normative rules of relevance or, rather, normative ways of making things relevant. These are shared by judges and laymen, by Thais and Americans. Being both universal and analyzable, they are part of "les principes ... de la métalogue" (Cosmovici, 1971: 468) but, unlike what is conventionally called formal or mathematical logic, their application and accomplishment is informed by the social contexts in which they are used. In showing some of the contextual features which their active use incorporates and requires, I hope to contribute to our understanding of their orderliness and, more generally, to our understanding of actual argument and public thought. As an ethnographer, it is my business to explicate the common sense of the people I study. Common sense

is not a matter of inexplicable or arbitrary assertions. ... [T] he ... notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest ... on stateable principles; though the ordinary man who uses them may not, without assistance, be able to make them explicit (Hart and Honoré, 1959: 24).

I will be making some of those principles explicit and showing some of the ways in which context is regularly attended to and used for ending stories

⁴ As discussed in Section III, Goodhart's word (1930: 23) is 'identical'.

(Section II) and for demonstrating that one has understood a story (Section III). Both of these tasks are conversationally problematic and interactively consequential. Both provide productive models for the legal use of precedent.

II. No one who cannot participate in conversation seems to his fellows a competent member of their society. In both Thailand and America, stories, especially of personal experience, are quite common in conversation, and we have found few settings that preclude them. The competent member of those societies must therefore be able to tell and listen to stories. But there are formal properties of conversation which make telling and listening to stories a task, and success an accomplishment. The means for the accomplishment are the basis, perhaps accidentally, for some of the resemblances between conversational stories, on the one side, and cases and precedents on the other.

In conversation, normatively one person talks at a time. Speaker change is instantaneous. It occurs at possible utterance endings. Utterance endings are possible at the end of completed sentences or phrases. Utterances can be constructed so as to select who should speak next and what type of utterance (e.g., an answer after a question) he should speak. If no next speaker has been so selected, any participant may start to talk and, insofar as conversation requires talk, someone should. A participant who wants to talk, or to avoid silence, must therefore listen to each utterance at least well enough to know when it might be over. Since failing to talk when one has been selected to, or speaking an utterance of inappropriate type, or violating rules of topical continuity are all noticeable and sanctioned, each participant must also listen to and analyze every utterance closely enough to know whom (perhaps him) it has selected as next speaker and what it has told that next speaker to do with his talk. So, in order to be considered competent, an individual must listen to the talk of others in the ways that permit him to talk appropriately.

These features imply some ways in which telling stories that require more than a single utterance presents participants with problems of which some relate directly to the issues of this paper. Once a multi-utterance sequence has begun, why should anyone listen to it, since the requirement that he might be made to talk next has been relaxed (see Moerman and Sacks, 1971)? How is such a sequence shown to be over so that the conversation can return to its one-utterance-at-a-time-and-each-speaker-can-select-the-next format? With the efficiency of design that is common in

natural conversation, the tasks of ensuring listenership and ending the multi-utterance format are accomplished by the same device.

Consider the materials presented as Exhibit 1. A story is ended by a hearer (M_s) commenting on it. The occurrence of the comment ends the multi-utterance format. The content of the comment shows that and how the commentator understood the point of the story. The storyteller (M_c) 'joins' in the comment. By repeating, paraphrasing, or completing it he confirms the understanding of his story which it showed. To make the comment which story endings require, and which, reflexively, thereby makes stories over, a hearer must have listened to the story over its course well enough not only to know when it might be over, but also well enough to know what it was about. To elicit the comment which shows how his story has been understood and that it is known to be over, the teller must design his story so that its point and its ending are clear. Let me observe informally what I shall later show in more detail. The storyteller accomplishes this by restricting his narrative to the facts that are material for the comment he intends to elicit.

EXHIBIT 1

VIII. 1 #236

M_c [The old woman] didn't say anything. [The girl] was unteachable. [She] just had no respect.

#237

M_s Sure, [she] didn't respect anything. Whatever anyone says (to) [her], [she] just stays as she is.

#237a

M_c (If) [she] acts like this when [she] is small, when she grows up, Buddha!

#238

M_s Buddha!

#s239-243

Child

W_1 Overlapping side-conversation.

 W_2

#241

M Yeah, they go so far as not doing that [i.e., not teaching [her] at all].

VIII.1

#182

M_c Just a bike, [they] still don't want, don't want to ride it, Isn't that so?

#182b

W What are they doing?

#182/4

M_c [They] want a Honda, a Honda, And once (they) have that, (they) even want a 50 c.c. Suzuki.

#185

M_s [They] only want to use fast things, right?

#186

M_c Yeah. [They] only use speed.

#187

M Yeah.

These devices, like all conversational devices and legal ones, are used by human beings, not automata. That is, their use is informed and constrained by the participants' situational context and interactive strategies. Let us now consider their use in the real and situated conversation which provides the principal data for this paper (see Appendix I). Let me assume here that it is clear upon inspection that M_1 told a story of what Nan Phian did to his fields and which he intended to be over at the end of his utterance #89.

For our present purposes it is enough to say about #89a, M_2 's *khap*, that it is insufficient as a comment to show that its maker knows either or both that a story has ended and what its point was. This accounts for M_1 repeating his story, as utterance #89b. He now obtains a comment from M_2 : #90, which shows M_2 to know both that the story was over and that if a tractor plows dikes they will, indeed, be destroyed. M_1 confirms this understanding (in #91) as (in #93) he also does M_1 's further comment (in #92) that the loss of the dikes is essentially a loss of the money spent to build and rebuild them. M_1 , in #97, then repeats his story.

These observations require methodological and substantive comment. The best known previous attempt to describe the ways in which social context and speaker's strategy influence actual argument is Perelman's. Our data are not selected through pre-analytic conceptions of what kinds of cases, social situations, topics, or speakers are worth studying. His are restricted to "textes considérés comme étant traditionnellement des modèles d'argumentation" (1959: 9). Although Perelman recognizes the danger of analyzing an argument out of its context and independent of the situation in which it occurred (Perelman and Olbrechts-Tyteca, 1958: 251), he found it necessary to do so and made a virtue of this necessity by claiming that

since it is rarely the case that speaker or audience are influenced in one simple way by an argument, or know specifically how they are being influenced, literary examples are convenient and clear because they are simplified and stylized (1958: 252, my translation).

Our materials are interactive and detailed. They show at each point of talk how participants are influenced and what they are responding to. So, in the data examined thus far, we can point to the systematic relationships

between what M_1 said, how M_2 responded, and how M_1 responded to that. But the methodological constraint most relevant to the hope of adequately describing practical reasoning is the requirement — foreign to Perelman's work — that the devices, problems, features, etc., to which the analyst points be known, oriented to, used, and interpreted by actors; not just the products of our possibly extrinsic professional concerns. So, for these data, I must show that repetition is an active accomplishment of M_1 and not just an accidental feature of his talk convenient for my analysis of it. Since this is not the place for a technical demonstration, I hope that the following will suffice.

I observed that M_1 repeats: #89 in #89b, and #89 + #89b in #97. Table I summarizes those repetitions, using the convention of parenthesizing items unsaid in the Thai but added for intelligible English translation. Utterance #89b uses a pro-verb (*done*) for the activity described in #89 and a demonstrative (*there*) for the place (see line I, Table I); #89b deletes mention of the actor, while #97 uses a pronoun for the person described in #89 (see lines III and II, Table I). The conse-

TABLE I

	Utterance #89	Utterance #89b	Utterance #97
I	[1-6] I completed dikes all around (my fields)	[6-14] (it) was done there two years ago	[5-22] and planted boundary posts every 5 <i>wa</i> , sunk them all along. And then (I) made the dikes.
II	[7] now	[1-5; 15-17] (Although he) hadn't done it before, this year	[1] now
III	[9-18] our Nan Phian (the son of police) Col. Saen		[23] he
IV	[19-22] brought (his) tractor (&) just plowed, just plowed (up) the dikes.	[18-24] brought (his) tractor (&) plowed, plowed the dikes.	[2-4; 24-30] brought (his) tractor ... and pulled out those posts.

Numbers in brackets record serial order of the Thai words. The table accounts for all words in each utterance.

quential intelligibility of the repeating utterances relies upon the earlier utterances having been heard. From this it follows that:

- (i) The repeater knows that he is repeating.
- (ii) He assumes that his listeners heard him the first time.
- (iii) He thus assumes that his listeners know that he is repeating.

From these features, it follows that:

(a) Repetition is not an extrinsic observation imposed by the analyst, but a conversational device oriented to and accomplished by participants.

(b) In this instance, and so possibly in others, repetition does not indicate that a speaker took it that listeners did not hear the utterance he repeats. What, then, is the repetition designed to accomplish?

In conversation, as in legal writing,⁵ repetition can — as in this instance — accomplish emphasis. What is repeated from the initial utterance and what is added to that utterance are thereby emphasized. M_1 's first repetition explicates that the dikes had been there two years and that the reported event is a sudden and recent occurrence. This repetition goes largely to the issue, which I cannot examine here, of how stories warrantably begin. Consider instead, for our present purposes, #97's explication that the dikes Nan Phian destroyed were essentially part of a set of property markers (line IV, Table I). If repetition can accomplish emphasis or insistence, he is emphasizing that his story — for it is the same story repeated and not a new story — concerns not vandalism and the loss of an improvement, as M_2 's comment maintained, but trespass and land theft. Since the claim that the techniques of conversational analysis permit adequate description of practical reasoning is more interesting than the plight of an anonymous Thai farmer, I will make one more methodological observation. The instances just cited provide evidence that the comment-after-a-story-rule is used by participants, and is not just an analyst's artifact. Claiming that the lack of a comment at #89a accounts for the repetition at #89b amounts to a claim that participants orient to and expect such a comment, notice its absence, interpret that absence, and do something about it. Similarly, in arguing that #97's repetition is accounted for by the comments of #s 90 and 92 showing unsatisfactory understanding of the story, I am claiming that participants know and make active use of the way in which the comment shows understanding, and are therefore able to correct misunderstanding. At #89a, M_1 failed

⁵ "Lawyers are accustomed to relying upon repetition as a means of emphasis" (Wetter, 1960: 41 quoting George Rose Smith, "The Current Opinions of the Supreme Court of Arkansas", 1 *Arkansas Law Review* at 100-01).

to show that he knew a story had been told him; the story was repeated. At #90, M₂ failed to show that he knew the story concerned trespass and land theft; the story was again repeated, explicating just those features of it. But to show that this was the intended point of M₁'s story, I will turn to some observations which are more transparently connected to legal notions of precedent than is the issue of ending stories which I have so far examined.

III. "Toute argumentation", says Perelman (1968: 98), "vise à l'adhésion des esprits et, par le fait même, suppose l'existence d'un contact intellectuel." But what is the form of this *contact intellectuel*? How do conversation participants show that and how they understand one another? For one person to repeat what another has just told him is commonly interpreted as a sign that while he has indeed heard what was said, he has not understood it. To say something like "Yes, I understand", often makes it doubtful that one has. The surest and most efficient way to show that one has understood an utterance or sequence is to produce an utterance or sequence of one's own which requires, and so shows, an analysis of the earlier one. As a simple instance, one does not say: "Ah, that was a question", Rather, one answers it. The analyst can thus observe, as members know, not just that answers occur after questions with a frequency greater than chance. They are expected after answers, their absence is noted and interpreted by participants,⁶ and participants note and use relationships between specific questions and answers more detailed than co-occurrence to find competence, ignorance, evasiveness, etc.

Examination of stories told in American and in Thai conversation leads to the observation that stories come in what Sacks calls 'clumps'. Once a story has been told, others are expectable. The phenomenon of 'second' or *n*th story is not merely a matter of distributions greater than chance. Second stories are not just stories told after firsts which might just as well have been told at some other conversational time and place. Rather, in both Thai and American conversation, second stories show marked and interactively potent parallels to the stories that precede them. In even the most ordinary talk, these parallels are amazingly fine and specific.

It is helpful to begin with the American example presented as Exhibit 2. Whatever the events in the world that A perceived: a smashed car, an

⁶ Although trial lawyers are certainly not the only members to make systematic use of our expecting timely answers after questions, a particularly nice instance can be found in Wellman 1962 [1932]: 88.

EXHIBIT 2

- A: Say did you see anything in the paper last night or hear anything on the local radio, Ruth Henderson and I drove down to Ventura yesterday.
 B: Mh hm
 A: And on the way home we saw the: most gosh-awful wreck.
 B: Oh:::
 A: -we have ev- I've ever seen. I've never seen a car smashed into am- such a small space.
 B: Oh:::
 A: It was smashed from the front and the back both it must've been in- caught in between two cars.
 B: [Mh hm uh huh
 A: [Must've run into a car and then another car smashed into it and there were people laid out and covered over on the pavement.
 B: Mh
 A: We were s-parked there for quite a while but I was going to listen to the local r-news and haven't done it.
 B: No, I haven't had my radio on, either.
 A: Well I had my television on, but I was listening to uh the blastoff, you know.
 B: Mh hm.
 A: [The hh ah- // astronauts
 B: [Yeah
 B: Yeah
 A: And I-I didn't ever get any local news.
 B: Uh huh
 A: And I wondered.
 B: Uh huh.
 B: No, I haven't had it on, and I don't uh get the paper, and uhm
 A: It wasn't in the paper last night, I looked.
 B: Uh huh.
 B: Probably didn't make it.
 A: No, no you see this was about three o'clock in the afternoon.
 B: [Uh huh
 A: [Paper was already off the press.
 B: Uh huh
 A: Boy, it was a bad one, though.
 B: Well that's too bad.
 A: [Kinda // (freak) -
 B: [You know, I looked and looked in the paper- I think I told you f-for that uh f-fall over at the Bowl that night. And I never saw a thing about it, and I // looked in the next couple of evenings.
 A: [Mh hm
 (1.0)
 B: Never saw a th- a mention of it.
 A: I didn't see that, either.
 B: Uh huh.
 B: Maybe they kept it out.
 A: Mh hm, I expect.
 B: [Uh huh, deli // berately.
 A: [Well I'll see you at- at-
 B: [Tomorrow // night
 A: [-at six at- hehhehh

interrupted trip from Ventura, a delay on the highway which are raw material for her story, those events are formulated in just the way that B's story parallels. "I", whether A or B, "was witness [not participant, over-hearer, etc.] to an event [either a 'wreck' or a 'fall'] formulated as an accident of the sort which is expectably an item of news but which I did not find reported on the news media where anyone would expect to find such a thing reported."

B's brief story is stunningly parallel to the story A told her. By telling such a second, she shows that and how she understood the first. This holds for the Thai data as well. After M₁'s story, M₃ (at #167) tells a story of how his own land was stolen. M₃'s use of the second story phenomenon confirms the understanding of M₁'s story given us by the former's use of repetition. As a matter of conversational competence, M₃ must have listened to and analyzed the first story so as to yield the understanding that it concerned land theft, and demonstrated that understanding by himself telling a story about the 'same thing'. As a matter of legal competence, to put it informally for the moment, in both the Thai and the American data, the teller of the second story has used the first as a precedent.

In Goodhart's (1930: 23) language, he finds a second case with material facts identical to the first. The teller of a second story, to quote Rinaldi (1971: 368), uses

the process of case law, [which] is ... the application of the general principles enunciated in an earlier case (or constructed from the decision of that earlier case) to the fact situation presenting itself in a subsequent case.

But these descriptions are not fine enough to catch the phenomenon of second stories nor, perhaps, to catch precedent use either. Goodhart refers to 'identical' material facts, but the facts of the stories, like the facts of cases, are not identical. The teller's work, like the judge's and the lawyer's work — as Jenkins (1971: 290-91), Blackstone (1971: 240) and Rinaldi (1971: 366) have observed — is to find or create material, i.e., significant, similarities. And this can be done because it is not the case, as Rinaldi's phrase (1971: 368) would have it, that "the fact situation present[s] itself". Rather, it is presented by storytellers, orators, lawyers, or judges who cull and form it so as to make it materially similar.

Of all the many things which must have happened to M₃ during the four years since he claimed his land, he chooses to tell of this event. And through the facts he selects and the level of generality with which he presents them, M₃ forms up his story so that it is 'on all fours' with

M₁'s. He edits his facts so that we are not told how he felt about his land being taken, or what the bookkeeper wore, or the details of his falling out with his kinsmen, or the difficulties of planning one's farming without firm title. These would have been immaterial, not in some abstract sense, but in the immediate situation in which he told his story: as a second story about land theft. The differences between the events that befell him and those that M₁ told about are culled so as to leave the similarities. And those similar events are further formed into a story that parallels M₁'s in its status as an accusation of land theft. M₃ does not tell us that the man who took his land also had access to a tractor. He does not say, for example, "I, too, was once annoyed, or treated unjustly, or lost something, or had something stolen by a stranger, or by a non-villager, or by a person apparently trustworthy and respectable." Like B in the American instance and like the other tellers of second stories we have encountered in our data, he formulates his account at the level of specificity and detail required for making it similar to the preceding story. This is an accomplishment familiar to lawmen. Cross (1961: 38-43) observes that Lord Atkins forms the binding facts of *Doneghe v. Stevenson* (1932 A.C. 562) so as to govern "manufacturer[s] of products ...", not as *Grant v. Australian Knitting Mills* (1936 A.C. 85) tried to distinguish, "manufacturers of food and drink", and certainly not so as to govern solely instances of manufacturers of ginger beer that is sold in opaque stoppered bottles to Scots widows.

How did M₃, how did B, how do tellers of second stories so artfully accomplish precedent? The hypotheticals which M₃ did not say, since they are logically consistent with M₂'s story, support the generally accepted contention — for which I here cite Cohen (1959: 35-37), Llewellyn, and Sartorius (1967: 340) — that formal logic is insufficient for this. But from this it does not follow that he could have said anything whatever.⁷

⁷ This is the suggestion of Sartorius' unfortunate wording: "Even where it would be correct to say that the facts of a given case stood 'on all fours' with the facts of a binding precedent, it will always be possible to construct a rule under which the prior decision is subsumable, and under which *any decision whatsoever* in the instant case is subsumable as well ... [I]t will always be possible to incorporate the description of these facts into a rule the application of which in the instant case would lead to a result the exact opposite of that which from a pre-analytic point of view it would be said should follow from an adherence to the relevant principles" (1967: 349).

The wording is unfortunate because it obscures what I take to be Sartorius' general thesis: formal logic permits more outcomes than are made acceptable by the other rule-governed procedures used in making precedent. The difficulty with 'relevance' as THE extra-logical rule is not only its insufficiency. More critically, Sartorius's substantive rules for relevance assume the results of research that is yet to be done. His C₂, for example, states that, "a description is legally relevant if it is one which

Speaking without benefit of the regulated pleading and evidence which Vinogradoff (1913: 87) credits for that accomplishment, tellers of second stories present "the mere skeleton of the events itself, from which all irrelevant circumstances have been removed". This should not surprise us, for such regulations typically concern who has the authority to decide whether an item is relevant and what they can do about it.⁸ The covert rules for substantive relevance, for what kinds of things should be considered relevant in what kinds of cases, are — as my vague phrasing suggests — a product of being socialized and practised at the conventions of the legal profession. Because lawyers are men first, because these conventions probably are little different from practical reasoning, and, most compellingly, because conversationalists like B and M₃ operating without them regularly succeed in using precedent, it is of legal interest to inquire into how they seem able to do so.

For M₃, as for others who converse, what makes some events skeleton and others useless flesh, what makes some irrelevant and others material, what makes some formulations of the facts cogent and others silly is using the second story phenomenon on an actual occasion of conversation in which a particular story has been told, here by M₁, to the very people, including M₃, here present. To put it most generally, stories, including second stories, are used interactively and in context.

By context, I mean, minimally, the preceding utterances. B tells her story after A's; M₃ tells his after M₁'s and some reactions to it. A's story was treated by B as having been about witnessing a newsworthy accident, etc. M₁'s story was treated by M₃ as having been about land theft. I am not suggesting that the tellers of the second stories were in any sense wrong. I am suggesting that the point of the first story is not objective and pre-existent: it is an interactive accomplishment in which the teller of the second lends a hand. We, the readers of the transcripts, come to know what the first story was about in part because of what the teller of the second successfully took it to be about. In the Thai data, for reasons

in fact is or at least would be generally accepted in the community as relevant" (1967: 362). Our research is intended to discover what, in fact, is considered relevant, even if defeasibly so. To say that, "the grounds for such acceptance might be considerations of morality or justice, conceptions of desirable social policy, or just plain 'common sense'" is, again, to suppose that we already know the results of research not yet started, and to substitute one set of terms which lack contextual definition for another. Without techniques, like those of conversational analysis, which permit describing the ways in which social context is actively employed by language users, students of practical reasoning cannot get beyond pointing to and providing opaque glosses for the gap between formal and practical logic.

⁸ See, for example, Thailand, *Civil Procedure Code*, Section 86, para. 2; Section 104.

which cannot be explored here,⁹ M₃ not only tells a similar story, he announces — with the phrase, "(It's) like (it was) with (the) bookkeeper" (#167) — that his story will be similar.

Unlike cases conveniently reported in digests, stories come without any headnote aside from the comment which ends them (and the utterances which aid hearers in making that comment).¹⁰ Their point is given, in part, by the context of stories in which they occur. As Perelman (Perelman and Olbrechts-Tyteca, 1958: 413) noted about more distinguished rhetoric, "when particular phenomena are evoked one after the other, and all are in some sense similar, one tends to see them as examples". B, to tell her American story, and M₃ to tell his Thai one must have heard the preceding stories as exemplifying some TYPE of situation which also covered the events of which they tell. This implies that there are ruled ways in which the tellers of a second story listen to and analyze the first, ruled ways which account for the parallels regularly found between them. These ruled ways have to do with the fact that stories do interactive work on the occasions of their telling. I have already pointed to one of the universally relevant features of the occasion: has a story been told just previously? If one has, tell or expect another materially similar to it. But what rule produces material similarity?

I give the rule with some misgiving, because to state it flatly, and credit Sacks with its discovery, is a clumsy caricature of the subtle, elegant, and reticulated research from which it comes. But even as presented here, the rule accounts for much of the material similarity between second and first stories, both Thai and American, and has clear interactive consequences and, perhaps, motives. The rule: Listen to the first story so as to know whether its teller is a character in it. If so, tell a story in which you appear as the same character. Such a rule provides automatically for the teller of the second story to stand in the same relation to the events and other characters of his story as the teller of the first did in his. I call it a rule not because it regularly happens, but because it must be made to happen and because the members of a society notice and interpret its violation. B would have been insulting, embarrassing or otherwise discomfiting A had she told of an accident in which she was not also a witness, but a

⁹ These have to do with the adversative use of the story, on which I will comment, and with the formal conversational device of 'topic-marking' employed to mark the use of an item — here, a second story — out of its appropriate place — here, immediately after the first story.

¹⁰ Sacks has shown for American stories that and why the 'preface' to them tells their audience what to listen for so as to know when they will be over, and thereby what their point will be. I do not know how well those findings hold for Thai conversation.

victim annoyed by witnesses gawking at her. M_3 would have been challenging, undercutting, ridiculing or otherwise discomfiting M_1 had he told of himself stealing or successfully resisting the theft of land. It seems to be the interactive consequence of taking sides with or against the teller of the first story which accounts for this major part of the parallelism shown by second stories. The rule requires the teller of a second story, and the audience that interprets it, to listen to the first story so as to analyze how its teller stands toward its events and, through those events, to its other characters. Such a listener is attending to who the parties are, what the issue is, and to how those parties and issue might be made to be essentially similar to some other story of his own. That is, he is well on the way to doing legally recognizable precedent. His basis for doing this is his orientation to the interactive consequences of stories on the occasions and to the audience of their telling.

Storytellers, both first and second, can be shown to monitor more about their audience than just that one of its members was the teller of a previous story. Stories, generally, and talk, still more generally, are formed up for just the audience and just the occasion of their occurrence. Sacks points to a striking, even amusing, instance of a story being formed up for the occasion of its telling. A man joins a group he meets with regularly and begins a story with, "Almost didn't get here today." The story, it turns out, concerns his nearly being killed on the highway a few days previously. For any purpose other than forming the story for its occasion of telling, surely, "Almost didn't get here ..." is a puzzling feature of such a dramatic tale. Features of the Thai stories of our data also show their tellers' cognizance of the occasion of the telling. I need point only to such superficial instances of this as M_1 using M_3 's presence as a resource in dating his land claim (at utterance #119) by "ever since this man here was headman" or M_3 (at #171 and 173) citing "Acan, here" as witness to his. I call these instances superficial because in these stories, in all stories, and in all talk the audience is used in far more pervasive, creative, and interactively potent ways than these.

It seems impossible to 'just talk', in any analytic sense, without thereby also doing such things as: claiming fellowship, showing superiority, enacting roles, insulting, forming alliances, etc. Participants' orientation to the social actions done by the utterances they speak and listen to is, along with rules of language and formal logic, the main determinate of what they say, the main determinate of actual argument and practical reasoning. The social action done by an utterance is informed by who speaks it, and by whom it is spoken to: by who is relevantly present.

All acts of speech, not only argumentation, are, in Perelman's phrase (1963: 155), "function[s] of the audience to which [they are] addressed" (see also Perelman, 1952: 18, 19; 1968: 97, 98, 101; and Perelman and Olbrechts-Tyteca, 1958: 650). With regard to stories, I am sure that each of us can recall some occasion in which we changed, or wished we had, the form of a story about Jews or Germans or judges for an audience that included one. "Don't jest of ropes in a house where there's been a hanging", is a proverb useful everywhere. The difficulty of following it is that the house where there's been a hanging is also poor, or slate-roofed, or rural, or childless. It is only by mentioning ropes that we learn there's been a hanging. That is, by talking of rope we have made hanging relevant, and our listeners will sort themselves around the category we have invoked and so find us having done things to them. In this case, having insulted or pained them.

In data analyzed elsewhere (Moerman, 1968), a story — not of personal experience — begins by saying that an old man scolded a young girl. It develops that she took longer on a shopping trip than she should have. An old woman in the audience proposes, "She must have gone traipsing about the market", thereby providing an account which shows not only that the old woman has analyzed the story over its course, but one which aligns her with the old man as against both the young girl and an old woman who then appears as a character in the story and permissively fails to scold or punish the girl. Had the old woman in the audience proposed an excuse for the girl's delay, "Her bicycle must have had a flat tire", for example, she would have been challenging the justice of the scolding. Had she proposed some major delict, "She must have gone whoring", for example, she would have been challenging its sufficiency as a punishment. Had she sided with the character of like sex, rather than the character of like age, the old woman would thereby have also been siding against the story's teller, himself an old man.

The characters and events of a story invoke features of their teller and audience who are thereby socially affected by the story, specifically through co- and cross-categorization with its characters. There are thus interactive reasons for which teller and audience monitor the relationships between the story and the participants at its telling. But one's social fellows, those to whom one talks and listens, and those one talks about, are not featherless bipeds, heat radiating bodies, interchangeable informants, etc. They are socially categorized and typified persons. There are, of course, a very large number of culturally correct ways of categorizing any individual. A necessary requirement, accomplishment, and

resource for any interaction is categorizing its participants in a motivated and relevant way. Since this is done in the interaction, and with consequences for it, all-purpose categories extrinsic to that interaction may be distorting. This is why I have rather consistently referred to the conversation participants in my data by neutral letters and tried not to characterize them by sex, age, profession, race, class, etc. But interactively, M_1 's story is what it is, or tries to be, by virtue of whom it is told to. This is specifically noted and used by M_3 not only to align himself with M_1 , but to do so adversatively.

The issue of M_1 's story had been disputed. By telling a second which is clearly about trespass and land theft, and which omits any features concerning vandalism and loss of an improvement, M_3 joins M_1 's interpretation as against M_2 's. And by virtue of how their audience has been categorized, neither story is a casual anecdote about land loss. They are accusations and/or complaints.

An 'accusation',¹¹ according to the *Criminal Procedure Code* of Thailand (hereafter, CPC) is:

an allegation made by an injured person, GIVEN TO THE AUTHORITIES ACCORDING TO THE PROVISIONS OF THIS CODE, that an offence has been committed, whether by a known or unknown person, to the detriment of the injured person, and such allegation is made with the intention to have the offender punished (CPC, Sect. 2 (7); emphasis added).

M_1 presents himself as an injured person, specifies the offence, and injury, and together with M_3 , identifies the accused Nan Phian. For a tale of being wronged to have the status of an accusation, and to thereby initiate an "investigation" (CPC 2:10), it must be presented to a "superior administrative official", of whom a district officer is one (CPC 2:17:(13)). By his use of the title 'District Officer' (*câw thâw*) for the person to whom he tells his tale and the person to whom he went for land registration, M_1 categorizes M_2 , his audience, so that the story can be an accusation of trespass, or a petition for authoritative redress.

Whatever the tale might amount to told by kinsman to kinsman, villager to villager, informant to anthropologist, 'to tell the district officer' is to invoke his official powers. And it is just these which the official refuses to activate. At #90 he shows himself to have heard a complaint about loss of an improvement, a cheap loss (at #96), and one, as he says at #92, for the parties to settle themselves. M_1 's repetitions notice and dispute this interpretation, but the official revives it at #141

¹¹ For ease of exposition, I translate *Khamrô:ŋ* as 'accusation' and not, more standardly, 'complaint'.

and, despite M_1 's insistence (at #s 97, 109, 154, 156) that theft is the issue and (at #s 148, 162, and 164) private compromise impossible, offers (at #s 157 and 165) no redress other than private conciliation. Only insofar as he is talking to the district officer, is M_1 demanding he take jurisdiction, and thereby making an accusation or complaint. Only in that the demand is made can it be refused, and M_1 's repetitions notice and protest that refusal.

M_3 , in his use of the second story phenomenon, and by his categorization of the audience and characters of his own story, joins M_1 . To tell a noticeably second story is not only to acknowledge that there has been a first, and that even this (at utterance #89a) had been in doubt. It is to endorse in the strongest way possible, by doing the same thing oneself, that the first was socially proper. One central component of the propriety of a story is that it is proper for its audience. By affirming this story as proper to be told a 'district officer', M_3 affirms its status as an accusation or complaint. Moreover, he specifically addresses his own story about land theft to the 'district officer'. Still more explicitly, he so forms up his story as to state (at #167 and #177:22-end) that had there been quarreling and 'trouble' in his case, as M_1 had said (#s 148; 150; 162; 164; 113; 109; 111; 99), and the official acknowledged (at #108) there was in his, he, too, "would have gone to the 'district officer'" to tell him, just as M_1 has in fact just done in the very story for which M_3 is telling a second, and just as M_3 is in fact now himself doing.

In this, M_3 notices and challenges the private conciliation part of the official's 'authoritative decision'. And, of course, he forms his story so that, WHEN COUPLED WITH THE FIRST STORY, it challenges the other part of the authoritative decision as well. The very device which the official repeatedly proposes (at #s 114, 118, 125, 131, and 137) as the first villager's solution is exactly the source (at #s 179 and 181) of the second villager's trouble. For interactive reasons, he analyzed the first story for its point when told to its categorized audience; used that audience's comments and categorial status to, in Rinaldi's phrase (1971: 368), construct a decision of the earlier case; and so presented his own story adversatively, as a challenge to that decision.

IV. There are other ways in which this sequence of stories touches upon issues of legal reasoning and procedure. M_1 's story is quite cunningly designed as a cumulative accusation. Evidence is cited at points and in ways of interest to the legal scholar. These observations cannot be elaborated here, but they add weight to the main claim of this paper.

There are now techniques for analyzing, and findings that describe, the logic of conversational interaction. This logic is that of practical reasoning. It is also that of legal reasoning. Its main component is member knowledge of the social actions accomplished by situated talk among relevantly categorized conversation participants. We can show that and how persons actively and interactively use that logic to orient to and create their social situations. We can describe the ruled ways in which the members of society take account of the context in which their talk occurs. We can, in other words, begin to describe, analyze, and account for the practical or legal reasoning of which formal logic is but one component. The lamppost with which Bar-Hillel symbolizes formal logic cannot be moved into the alley of practical reasoning, but we now have a torch.

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APPENDIX I

These data are used illustratively, and are thus edited and translated. All excisions are marked "..." when part of an utterance has been removed;

"

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when intervening utterances have been removed. Material added to the literal Thai gloss for translation into intelligible English is in parentheses.

For actual formal conversational analysis, all successive utterances are presented in the order in which they were spoken; data are provided in Thai, a word-for-word gloss, and a translation which distinguishes between material added

by rules of Thai syntax, and that provided by conversational rules and cultural understandings. (See Moerman, 1968).

The data used here are from tape I. 1, recorded August 1965. For assistance in transcribing and translating them I am pleased to be able to thank Mr. Dherawattana Wongyai.

Spkr.	Utterance #	
M ₁	82	I plowed from over there, (from) the tail (of the fields) and right along, just as (you, the) District Officer [<i>câw thâw</i>], said to.
M ₂	82a	Uh huh.
M ₁	83	[I] plowed (the) tail there.
.		
.		
M ₁	87/9	Now, at the head (of the fields), at the head there, I made a dike completely around (my fields) and now our Nan Phian, Nan Phian (the son of police) Colonel Saen brought in his tractor and just plowed, plowed at the dike.
M ₂	89a	Uh huh. [<i>khap</i>]
M ₁	89b	Every year (he) didn't do it. It's been two years that (I've) had the dike there, you see. Now this year (he) brings his tractor along to plow, to plow the dike.
M ₂	90	Then your dike will be destroyed.
M ₁	91	Yes, completely destroyed.
M ₂	92	Well, in that case (you) must discuss (it) together. Building dikes costs a lot of money.
M ₁	93	That's right. I hired people.
M ₂	94	Hired them.
M ₁	95	For a <i>salyng</i> per <i>wa</i> .
M ₂	96	A <i>salyng</i> per <i>wa</i> is a good price.
M ₁	97	And now (he's) brought (his) tractor. (I had) sunk wooden posts and markers every five <i>wa</i> . (I) had buried them in the ground all along the boundary, and had set up a dike as well. Then he came and pulled up the stakes and destroyed the other things.
M ₃	98	Oh, he likes trouble like that.
M ₁	99	Yeah, (he) really likes trouble like that.
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M ₃	104/6	I hadn't yet gone to look for the <i>câw thâw</i> (about it), but (we) discussed (it) on (our) own.

Spkr.	Utterance #	
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M ₁	109	His fields are over a hundred <i>rai</i> , you know. I have only 20 <i>rai</i> , yet he still wants to take them, still wants to swipe them from the tail of my fields. Kae Son brought his people there and said (to me), "Where it's not completely plowed, where the trees aren't cut down yet, don't cut down any more trees, for (we) are going to take away (your uncleared land)."
M ₂	110	Like that, huh?
M ₁	111	But I wouldn't give (them) to (him).
M ₂	112	What happened?
M ₁	113	That day we fought together in the forest, both using knives.
M ₂	114	Do you have papers of land claim yet? A certificate of provisional title?
M ₁	115	Yes I have. I have a claim paper.
M ₃	116	(He) has a claim paper.
M ₁	117	(I) have one. I have a claim paper.
M ₂	118	(You) have it already?
M ₁	119	That claim paper, (I) renew it every year. (I) have done it without missing a year, ever since this man here was headman, which is when I claimed it.
.		
.		
M ₂	125	Oh, that's a long time. This dry season don't just go and report (the claim. Instead) get a provisional title certificate and then everything will be alright.
M ₁	126	But I went to the <i>câw thâw</i> in order to do that and (you said) it wasn't necessary. (That I should) first clear the fields completely.
M ₂	127	(I) wanted you to get a lot (of land first. That was my) opinion.
M ₁	128	Yes, a lot. But now (I've) reached the borders already.
M ₂	129	Reached the borders already?
M ₁	130	Yes.
M ₂	131	If (you've) reached the borders already, then just go get a provisional title certificate.
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.		
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Spkr.	Utterance #	
M ₂	135	(Get it) this year. Before this (I) thought you said you hadn't finished yet.
M ₁	136	That's right. <i>Câw thâw</i> [i.e., you] told (me) that ...
M ₂	137	Finish it, then a provisional title certificate will be issued.
.	.	.
M ₂	139	Finish the entire area and then just get a provisional title certificate.
M ₁	140	Then I made dikes and put up posts so they wouldn't trespass on my land.
M ₂	141	Yes, yes. Make dikes and so invest a little money.
.	.	.
M ₁	148	... I spoke to Nan Phian angrily and said there will be trouble, there will be fighting between us.
M ₂	149	Oh so. There was violence.
.	.	.
M ₂	153	Stealing land.
M ₁	154	Those with lots and lots of land, they are the kind who want to steal still more.
M ₂	155	Crooks (like that) are no good.
M ₁	156	Crooks.
M ₂	157	This requires lots of discussion (among you). There's no need to be afraid (of him).
.	.	.
M ₁	162	They steal from people like (me), so no one can live in peace. I can't do anything about it. (I) can't quarrel with him, (I) can't say anything to him.
M ₂	163	Sure (you) can.
M ₁	164	But when he talks about it, he threatens by talking about his gun. He talks like that.
M ₂	165	I have a gun too. There's no need to be afraid. (After all, you're not afraid of mine.)
M ₁	166	Uh huh
M ₃	167	It's like (it was with) the bookkeeper (of the district office) that time. Had (we) really

Spkr.	Utterance #	
.	.	quarrelled, I would have gone to the <i>câw thâw</i> . At first I divided my fields with him. He asked me, so I gave him 100, and another 50 to Ma Na, the helper there.
.	.	.
M ₃	171	And the amount over that was mine, 150 rai. Then I divided it again. You can ask Acan here.
M ₁	172	But Acan had already left by then.
M ₂	173	Mr. Acan wrote down everything about my fields. My fields were 100, 150 here. I had many juniors and registered the land in their names. But those juniors, that group of juniors didn't understand what was happening and thought that I was really giving the land to them. So they protested to me and I gave each of them 10 rai. But then the bookkeeper sold the land to the Lao. (He) sold what wasn't his. (He) sold 200 rai, and I said, "(You) can't do it. I won't let you."
M ₂	174	Uh huh.
M ₃	175/7	I gave him 100 rai and gave Ma Na 50. That's 150. My side had 150, too, but we were many people. About seven or eight in my group. Mr. Acan here made a complete record of it. When I went to plow that year, Mr. Acan went along with me. But then (the Bookkeeper) sold them to the Lao and made trouble for me. I said ("You) can't, (you) can't, (you) certainly can't. If you make trouble (for me), I will go to Mr. District Officer and let the chips fall where they may."
M ₂	178	Uh huh.
M ₃	179	As for the land claim paper, I said (I) wouldn't accept it, the claim paper that the bookkeeper had prepared. It had only the names of my juniors on it. So he said. "Here's what I say about the claim paper. Just leave it with me. I will re-register it as a certificate of provisional title. Just leave it with me." So I believed him, because I had shared land with him. He took the claim paper and I agreed to it.
M ₂	180	Uh huh.
M ₃	181	I agreed. He said, "I will re-register it as a certificate of provisional title for you, Uncle

—	—	Mai. You don't have to worry about it at all any more." "That's good, sir", I said.
M ₃	182	But then he went ahead and used the claim paper to sell the land, like I said. He sold 200 rai to the Lao, but I wouldn't agree to it....
M ₂	183	Go get a provisional title certificate this year.
M ₃	184	Yes, sir.
M ₂	185	Level everything completely, build dikes properly. Finish it up properly.

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JUDITH MILNER

Analyse de la relation question-réponse en allemand

Le domaine des faits étudiés était — avec la perspective générale d'une analyse de l'interrogation en allemand, et en particulier de la correspondance des questions Q et réponses R — un corpus d'interrogatives à interrogatif, et leur réponse.¹ Une analyse un peu détaillée m'a plutôt dirigée vers la mise en évidence d'une régularité qui justifierait que l'on parle de 'stratégie de l'argumentation'² pour désigner le rapport Q-R, mais pour une raison peu étudiée jusqu'à présent: à savoir, on pourrait mettre en évidence une (ou un ensemble de) régularité(s) c'est-à-dire un ensemble de différences significatives et régulières³ dans la manière de formuler les questions.

¹ *Wie* 'comment', *warum/weshalb* 'pourquoi', *welcher* ou *was für ein* 'quel', etc. L'hypothèse extrapole donc un premier bilan, qu'une analyse des faits plus poussée doit confirmer ou infirmer. Le fait que cette recherche en soit à son début explique que je n'aie pas voulu reprendre un terme aussi précisément défini que celui de 'présupposé' ou 'présupposition'; pour ne citer qu'un exemple, il y a bien des points dans les faits exposés qui recourent ceux qu'aborde O. Ducrot dans "Les présupposés, conditions d'emploi ou éléments de contenu?", Congrès de sémiotique, Varsovie 1968. L'objet à long terme de la recherche étant de situer une telle notion (est-elle nécessaire? et surtout, est-elle suffisante?), il ne convenait pas de reprendre un terme chargé de définitions existantes, ni un terme en désaccord avec le point de vue pris ici: d'où le recours au terme d'énoncé implicite. (Cf. pour l'usage du terme de 'présupposé' à propos des interrogatives, mais dans une optique formelle que je ne prends pas: Ch. Rohrer: "Zur Theorie der Fragesätze", *Probleme und Fortschritte der Transformationsgrammatik* [= *Linguistische Reihe* 8] [Hueber: Wunderlich, 1971].)

² Cf. plus bas, et aussi: la logique du dialogue de P. Lorenzen (*Metamathematik* [Mannheim, 1962]).

³ S'il faut poser 'plusieurs' régularités, elles ne seront vraisemblablement que des formes différentes de la régularité par laquelle il faudrait caractériser l'échange Q-R qu'est l'interrogation, et dont il faudrait trouver une formulation homogène.