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Actually Existing Rules for Closing Arguments

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Our interest in argumentation is provoked at least in part by the apparent paradox it presents. People are arguing because they disagree, sometimes deeply. But despite their disagreement, their transaction is orderly—at least, somewhat orderly. Furthermore, this orderliness apparently has a normative element; it establishes grounds for participants to critique each other's conduct as good and bad. How is this normative orderliness achieved, even in the face of disagreement?—That must be a central question for any theory, especially one that aims to deepen our understanding of the normative pragmatics of arguing (van Eemeren, 1994; Jacobs, 1999; Goodwin, 2002, 2007).

In this essay, I want to probe one rather abstract aspect of this question, about what I will call the general "shape" of the account we should be giving of argumentative orderliness. In attempting to understand or explain argumentative talk, how should we *represent* the activity? What basic *model* should we be using? In what *terms* should we explain the affairs? What *story* should we tell about them? Or, again, to put this generally, what *shape* should an account of arguing take?

One common approach to this question has been to say that we should account for arguing as a form of following rules. This has been the approach of many theorists proposing "dialectical" models for argument, including Rescher (1977), Walton and Krabbe (1995), and of course most prominently, the pragma-dialectical school (e.g., van Eemeren & Grootendorst, 1988, 1992). According to an account of this shape, although arguers disagree about many things, they agree about the rules of argument, which "provide established procedures for co-operation in order to reach solutions for disagreements" (van Eemeren & Grootendorst, 1988, p. 499). These rules of argument lend order to an argumentative transaction. They also express the

fundamental norms or ideals arguers should live up to. Talk which follows the rules is normatively good, while talk which breaks them is bad. A theory of argument is thus "a system of descriptive and/or normative rules for the performance of the communicative act complex of argumentation" (ibid., p. 506).

There are good reasons to find this shape of account attractive to explain argumentative orderliness, for it has proved attractive for other fields. Consider: A current in social science initiated by Peter Winch takes off from one interpretation of Wittgenstein and holds that we understand any form of life when we know the rules of that particular game. Again, a Searleian approach to speech acts represents them by the rules that constitute them. Again, Chomsky's model of syntax shows how what on the surface appears complex behavior can be the outcome of the recursive application of a limited set of simple rules. Again, contemporary cognitive science tells us that in acting humans are following "scripts" laying out the basic rules for an activity. And so on; other twentieth and twenty-first century tendencies could be cited, such as the axiom systems of formal logic and the instructions which constitute the activities of computers.

Working in parallel to these diverse projects, argumentation theorists may readily propose that arguing, too, is constituted through rules. The theory of argument should therefore proceed by articulating those rules.

But is this so? Is rule-following the general shape of account we should be giving about arguing? Most of the above rule-following accounts in other fields have been criticized, and undoubtedly some of the criticisms bear against an account of rule-following in arguing as well. In this paper, however, I want to explore the very abstract question about the ruliness and

possible unruliness of arguing by adopting a very concrete, empirical method, examining the shape of account arguers themselves give when they talk about their own activity.

Although arguers may be wrong, even fundamentally deluded or lying about what they are doing, there is nevertheless good reason to take what they say about their activities, in their activities, as presumptively correct. According to van Eemeren and Grootendorst (e.g., 1988), there are two ultimate desiderata that any shape account, any model, representational scheme or explanatory mode must meet: "problem solving validity" and "conventional validity." This means that any account of argumentative transactions must on one hand elucidate how arguing accomplishes something. And on the other hand, the account must also be acceptable to the (or a) community of arguers. Now, the accounts of argument actually put forward by arguers in their arguing—the "native" or "vernacular" theories of argument, of whatever shape—presumably are offered as attempts to get arguing to work better; they are furthermore already "intersubjectively" accepted by the arguers (or some of them). So "native" accounts of arguing meet the two desiderata, and are *one* good place to start building more sophisticated theories (an approach which has also been proposed by scholars working in the ethnography of communication, e.g., Craig, 1996, 1999; Philipsen, 1992).

The "natives" I will be studying here are participants in the closing arguments of trials in the United States. Although I do not follow authorities such as Toulmin and perhaps Perelman in taking legal argument as *the* paradigm for argument generally, there still can be little doubt (a) that trial "natives" are arguing, and (b) that they're arguing in a sophisticated fashion. As to (a), the practice I will focus on—the trial advocates' final address to the jury—is variously called "closing argument, final argument, jury argument" or even just "argument," and standard training manuals urge participants to "*argue!*" (Mauet, 1996, p. 367), leaving little doubt that much of

what is happening in this context is relevant to argumentation theory. As to (b), participants in closing arguments are trained and experienced professionals, inheriting a long tradition of practice, facing complex situations and with strong incentives to perform well; all of which assure us that what is happening in this context is worthy of attention.

Closing argument practice is also worthy of attention because its "natives" can be expected to be quite articulate about what they are doing. Legal arguers not only are likely to argue *well*, they are likely to argue quite *self-consciously*, thematizing matters that might in more relaxed contexts ordinarily remain implicit. This is in part because of the professionalism of the activity, which renders practitioners more self-aware, but even more because of its adversariality. Practitioners are likely to become very articulate when they have an opportunity to accuse their opponents of failing to perform correctly, and in such accusations they will be pushed to give an account of what went wrong (see also Philipsen, 1992). And finally, in legal contexts there are judges—indeed, an entire array of trial and appellate judges—who are empowered to announce what ought to be done. For all these reasons, we can expect participants in closing argument to give us relatively extensive accounts of what they are doing, and why it is or is not good—accounts whose shape we can examine.

Finally, closing arguments are worthy of attention here because participants in them are likely to be sympathetic to giving an account of their practice in terms of rules. Lawyers are used to thinking in terms of laws, that is, rules for all sorts of activities, including rules for arguments. Judges are empowered to announce (or interpret) the procedural laws governing their courtroom, that is, to set or enforce normative rules. If we find that even in closing arguments there are things going on that aren't conceived of as following (or breaking) rules, then it is likely that arguing in other, less overtly rule-oriented contexts is *at least* that "unruly," too.

So I am going to ask: is arguing well in closing arguments fundamentally a matter of following rules?—is rule-following the shape of account we should be giving? Or is closing argument unruly—and if so, how is its normative orderliness achieved, even in the face of disagreement? And I'm going to answer these questions in a preliminary fashion by examining the participants' own accounts of the ruliness and unruliness of closing arguments in U.S. trials.

Rules for Closing Arguments

Courts (and in some cases, legislatures) do promulgate rules governing various trial procedures. Notably, these rules give almost no coverage to advocates' closing arguments—in contrast, say, to their more detailed treatments of what can be said by witnesses during the trial proper. The U.S. Federal Rules of Criminal Procedure, for example, specify only that the prosecutor speaks first, the defense counsel second, and the prosecutor last; nothing else is said about the process or content of closing argument (Rule 29.1). This lack of promulgated rules is not a serious blow to an account of closing argument as rule-following, however, since in a common law system rules can emerge incrementally through decisions on individual cases, as opposed to being announced by a central authority. And indeed, there are many pronouncements about closing arguments made by judges considering appeals based on alleged irregularities of closing argument procedures. Legal scholars (senior practitioners, law professors and students, and judges) summarizing the case law regularly produce lists like the following:

(1) General Rules Governing Closing Arguments . . .

Several forms of conduct are prohibited in closing argument: . . .

Providing Improper Statements of the Law. . . .

Attacking the Law or the Court's Rulings. . . .

Misstating the Evidence. . . .

[Personally] Vouching for [the truthfulness of] Witnesses. . . .

Stating Personal Beliefs. . . .

Improperly Exciting Prejudice, Passion, or Sympathy. Inflammatory language is improper and may be grounds for mistrial. Avoid any derogatory remarks about opposing counsel or the opposing party, or improper stories or descriptions designed to provoke sympathy for the client or prejudice against the opponent.

Along the same lines, arguing an impermissible inference is improper by, for example, implying that the defendant is wealthy or has insurance coverage and so can afford the judgment. Also beware "conscience of the community" arguments, appealing to policy objectives divorced from the law or the facts of the case.

Advocating the Golden Rule. In closing argument, do not suggest that the jurors put themselves in the place of one of the parties. A Golden Rule argument is rarely expressed as "do unto others as you would have them do unto you." If it were that simple, no one would ever violate the rule against such arguments. You must avoid implying the Golden Rule, by asking the jury to put itself somehow in the shoes of a party. . . .

Asking the Jury to "Send a Message" to the Defendant When Punitive Damages Are Not an Issue in the Case. . . .

Accusing Defendants of "Hiding the Ball" or Withholding Evidence. . . .

Contrasting the Wealth of the Defendant and the Poverty of the Plaintiff. . . .

Appealing to the "Conscience of the Community." . . .

Making the "Us Against Them" Argument. . . .

Injecting the Plaintiff's Attorney's Personal Experience. . . .

Encouraging "Comparative Awards." . . .

Justifying a Large Award With the Promise of Judicial Remittitur. . . . (Ronzetti & Humphries 2003; emphasis added).

These lists, often like this one explicitly identified as sets of "rules," vary in details, but have similar general outlines and share many specific items (see the Appendix for an overview of the material).

Now, at least some of the entries of list (1) appear without controversy to be rules for closing argument. Consider the prohibition against Golden Rule arguments, the seventh item above, and one that appears on most lists. Advocates may not ask jurors to put themselves into the position of one of the parties, when considering (for example) how much money they themselves would want as compensation for an injury. In this list item, a relatively well-defined sort of talk is being given a name by closing argument "natives" and is being acknowledged as something mutually known to be forbidden. In other words, this item looks like a normative rule governing the argumentative transaction.

Furthermore, the rule against the Golden Rule *acts* like a rule; when participants deploy it to solve closing argument problems, they make the familiar moves of rule-based reasoning (see e.g., van Eemeren & Grootendorst, 1992, p. 104). They begin by stating and perhaps briefly justifying the applicable rule as something already apparent to all, as for example:

(2) What every lawyer should know is that a plea to the jury that they "should put themselves in the shoes of the plaintiff and do unto him as they would have done unto them under similar circumstances ... (is) improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." The use of such a "Golden Rule"

argument so taints a verdict as to be grounds for a new trial (*Loose v. Offshore Navigation*, p. 496; citations omitted).

They may go on to interpret the rule, either to explicitize it further or to establish exceptions to it:

(3) McNely also contends that the district court permitted defense counsel to engage in an impermissible "golden rule" argument at trial. McNely charges that defense counsel engaged in a prohibited golden rule argument by inviting the jury to put itself in the defendants' position when considering McNely's alleged work place misconduct and evaluating whether he was terminated because of his disability. However, an impermissible golden rule argument is an argument "in which the jury is exhorted to place itself in a party's shoes with respect to damages." As in *Burrage*, "in this case the argument complained of was not in any way directed to the question of damages; rather it related only to the reasonableness of appellee's actions." Accordingly, the argument was not impermissible (*McNely v. Ocala Star-Banner*, p. 1071; citations omitted).

And finally, they must also interpret the situation presented by the trial, comparing the actual closing argument talk with the "Golden Rule" talk prohibited by the rule:

(4) Defendant objects to the following comments made during the prosecutor's closing argument: . . . "When you left your house this morning, did you leave \$23,000 on the bed [as the defendant did]? Did you leave \$2,500 in the headboard of your bed? Did you leave \$500 in the kitchen drawer? Did you leave \$26,000 in your apartment when you left this morning?" . . . [In these comments, the prosecutor did not] invoke the "golden rule" argument by encouraging the jury to depart from "neutrality and to decide the case on the basis of personal interest and

bias rather than on the evidence" and compare their behavior to that of the defendant. Instead, the prosecutor simply called on the jury to employ its "collective common sense" in evaluating the evidence and to draw reasonable inferences therefrom. *Id.* at 5. (*U.S. v. Abreu*, p. 1470; citations omitted).

The Rule against the Golden Rule looks like a rule, and acts like a rule; it is a rule. Good closing arguments are thus in part a matter of following rules.

Unruly Closing Arguments

Still, there are reasons to be suspicious whether *everything* in closing argument is governed by rules like the rule against the Golden Rule.

Notice, first, that the rule list in (1) is predominantly negative (see also Kirk & Sylvester, 1997 on this point). These are not rules defining what good closing argument is; these are rules carving out specific forms of badness. Participants and commentators apparently are able to practice and recognize good arguing, but are unable to specify it with the same exactness that they can identify the bad.

Notice, again, the rather mixed-up character of the list in (1), typical of such lists generally. It resembles Borges' "Chinese Encyclopedia" in jumbling highly specific prohibitions with more sprawling proscriptions. The sixth item on the list, what is often called the "rule" against inflaming passion and prejudice, is a good example of sprawl. Closing argument activities that have been thought to inflame passion or prejudice include personal attacks on parties or witnesses, appeals to the opinions of the community, appeals to pity and fear and attempts to arouse anger—that is, the *argumenta ad hominem*, *ad populum*, *ad misericordiam*, *ad baculum* and *ad indignationem*. At least five traditional fallacies are mixed together here: broad coverage indeed for a single rule.

Can it be narrowed? "Native" attempts to define the contours of this "rule" more exactly quickly lead to circularities or worse. In (1), for example, "improperly" exciting prejudice is forbidden. What is "improper"? "Improper stories" are improper, as are "impermissible inferences." A U.S. Supreme Court opinion is often quoted in this context, making a similarly tautological pronouncement: an advocate "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one" (*Berger*, p. 88). "Foul blows," of course, are by definition what one ought not to strike, while "legitimate means" of course may be pursued. And worse than circularities are contradictions. In another commonly quoted phrase, advocates are permitted at times to make arguments that are "illogical, unreasonable, or even absurd" (Stein, 2005, pp. 1-50, 51; Smith, 1992, p. 2.12; Lagarias, 1989, p. 1.12). If these are "legitimate," what then is "improper" and "impermissible"?

Courts and commentators have themselves noticed these problems with this common closing argument "rule." They acknowledge that determining impropriety is not an "exact science;" the doctrine is "extraordinarily complex," and courts are "perpetually divided" over it (Lessinger, 1997, p. 780; Spiegelman, 1999, p. 133; Montz, 2001, p. 69). "The law surrounding closing argument," one admits, "generally lacks specific rules and is not so technical as other bodies of law" (Stein, 2005, p. 1-5). Trying to put this situation in a cheerful light, some describe how in closing arguments advocates are "released" from the "highly regulated process" that confines them during the rest of the trial (Nidiry, 1996, p. 1306). Another quotes with approval from an opinion which is confident that "though there can be no detailed handbook rules, . . . everyone, including the trial judge, knows the limits beyond which a lawyer should not trespass"

(Lagarias, 1989, 36). In more negative terms, commentators complain that the "rules" of closing argument give advocates "no clear map," and that the "rule" against passion and prejudice in particular is a "broad catch-all without any true definition" (Kirk & Sylvester, 1997, p. 326; Headley, 2004, p. 806).

The prohibition against passion and prejudice thus appears to be one significant example of the way in which closing argument cannot be reduced to rules. But if we cannot talk about closing argument (only) as rule-following, how are we to talk about it? For I don't think we should rest with cheerful but empty assertions that good arguing is *just* a matter of contextual judgment or an exercise of some inarticulatable prudence (and so on). Every argumentative event may be unique, but there are presumably some reasons why most are orderly; indeed, some reason for identifying them as *argumentative* events at all. Trial "natives" appear able at least sometimes to determine when some talk is an improper appeal to passion and prejudice. How, if not by applying rules, do they manage to do this? What shape of account do they give of their practice?

Examining the opinions of judges struggling with this particular issue and the associated scholarly commentary, we can observe that though unruly, the participants' understanding of passion and prejudice is not disorderly. Analysis of whether some specific closing argument talk should be criticized as appealing to passion or prejudice regularly proceeds in three steps: (a) acknowledgment of the responsibility and power of a participant in the transaction to manage the arguing; (b) articulation of the overall goals that participant is responsible for achieving; and (c) partial articulation of some of the situational factors that participant should take into account in evaluating the propriety of the arguing.

Consider the following examples, drawn from a well-known legal encyclopedia and from an appellate opinion:

(5) Matters related to the closing argument of counsel, such as the extent of allowable comment thereto and the allowance of rebuttal arguments, rest largely in the discretion of the court. Generally speaking, counsel must restrict his or her argument to the issues of the case, the applicable law, pertinent evidence, and such reasonable inferences and deductions as may be drawn therefrom. The introduction of purely emotional elements into the jury's deliberations by closing arguments is prohibited conduct. . . . Within the foregoing limits, a district court is entitled to give attorneys wide latitude in formulating their arguments (*Corpus Juris Secundum*, Federal Civil Procedure §943).

(6) The denial of a new trial on the issue of damages is reviewed for abuse of discretion. . . . No doubt, final arguments must be forceful. And, generally, counsel are allowed a "reasonable latitude" in making them. "When a closing argument is challenged for impropriety or error, the entire argument should be reviewed within the context of the court's rulings on objection, the jury charge, and any corrective measures applied by the trial court." . . . [But] consistent with plain error review, we must reverse when necessary to preserve "substantial justice". In sum, in order to serve "the interests of justice", we must abandon our deference for the district court's decision.

Obviously, awards influenced by passion and prejudice are the antithesis of a fair trial. This case was fertile ground for such bias. By its very nature, it was extremely emotional. Indeed, part of the damages involved "emotional distress".

But, this did not permit appeals to emotion—quite the contrary. In cases of this type, counsel must be unusually vigilant and take the greatest care to avoid and prevent such appeals, in order to keep the verdict from being infected by passion and prejudice. Unfortunately, the Whiteheads' counsel did just the opposite. Our close and repeated review of the Whiteheads' closing argument convinces us that it caused the verdict to be so influenced.

First, the Whiteheads' counsel made statements that appealed to local bias. On numerous occasions. . . . This repeated emphasis on Kmart being a national, not local, corporation was exacerbated by counsel's shameless refusal to abide by the district court's sustaining Kmart's objections to counsel's comments concerning [these arguments]. . . . Counsel made other highly prejudicial statements during closing argument. . . . Of course, we need not find that each statement, taken individually, was so improper as to warrant a new trial. Rather, taken as a whole, these comments prejudiced the jury's findings with respect to damages. . . .

(Whitehead v. Food Max, pp. 276-77).

Both of these examples start by assigning to the trial judge primary responsibility for determining whether or not some talk constituted an impermissible appeal to passion or prejudice; even the appellate court which is about to overturn the judge's decision acknowledges his discretion, assigning itself the power to reverse only if that discretion was abused.

Both of them proceed by noting multiple and indeed competing principles regulating the trial judge's discretion. On one hand, advocates should have room to argue vigorously—to have "wide latitude" to make "forceful" arguments. On the other hand, the trial must be "fair," and the arguments "restricted" to the issues and evidence. The fact that the two examples order these

principles oppositely suggests that neither trumps the other; it's equally valid to say that "closing argument should be vigorous, but fair," as it is to say that "the argument should be restrained, yet forceful."

Each of these, finally, notes some of the aspects of the situation that need to be considered by the judge in determining the appropriate balance between fairness and zeal for a particular case. Degree of emotionality versus reliance on issues, evidence and inferences is mentioned in (5), while (6) notes the number of passionate statements, their variety, and the way they continued despite warnings. Even together, these factors don't constitute a complete list; other commentators note the importance of the advocate's intent, which party (prosecution or defense) is making the appeal, whether the appeal was neutralized by a reply in kind, the relationship of the appeal to the evidence, and the strength of the rest of the case, among other things.

Overall, if I were to give this shape of account a name, I would call it "good arguing as practical reasoning." Contrast it with the idea that normative orderliness in arguing is achieved through following rules:

First, a rule is established prior to the transactions in which it will be applied. And anyone, inside or outside of a transaction, is equally well positioned to say whether a rule is being followed. Rule-based argumentative orderliness is thus independent of any specific argumentative transaction. By contrast, practical reasoning occurs only from a position within a transaction (including of course the position of a critic of the transaction). Indeed, the first step in practical reasoning as sketched above is to determine "who I am"—what responsibilities and powers this "I" has in this transaction. Of course, all responsibilities for managing argumentative talk need not fall on a single participant. In the trial setting, for example, the judge has discretion

to oversee the entire transaction, but the appellate court can overturn decisions that are an "abuse of discretion," advocates are responsible for their own activities to their clients and to the court system, and legal commentators take the license to pass judgment on all. Still, in this approach orderliness in argument is achieved only *within* a transaction, through the activities of the participants themselves.

Again, a rule points activity in one direction. Although rules may conflict, and have exceptions, any given rule must be relatively univocal—otherwise it wouldn't qualify as a rule. Ideally, therefore, application of a rule to a situation will produce a single clear answer. Practical reasoning, by contrast, even under ideal conditions points the participant towards multiple and competing normatively valued goals. This is true for closing arguments—with goals of both fairness and zeal—and I believe more generally. Karen Tracy has argued that all communication is *dilemmatic*, pulling participants in two (or more) directions (Tracy, 1997). This means that in general there is not going to be any one normatively good way to argue, but rather multiple defensible choices reaching different balances between the various goals.

Finally, a rule sets the aspects of the situation that are relevant to determining whether the rule is being followed. As noted above, there is room for free play in interpreting the arguing in order to compare it with what the rule allows or prohibits, but the play is constrained by the rule. By contrast, practical reasoning is relatively unconstrained. The factors articulated by a practical reasoning account of arguing direct the reasoner's attention to certain aspects of the situation, but the factor list never pretends to be complete and can expand to attend to novel or previously invisible aspects of the situation, as they appear. As Cass Sunstein has put it, factor lists are "specific but nonexhaustive," allowing the users to be attentive "to (much) of the whole situation," however it happens to turn out (1996, pp. 143-44; see also 1995).

Conclusions

What can we learn from the "natives" of closing argument about the shape of the accounts we should be giving of argumentative orderliness more generally?

Participants in closing arguments do treat some aspects of their activity as a matter of following rules. If we were to adopt this shape of account to construct a more general theory of argumentation, we would explain that argumentative transactions are orderly, and activities in them good or bad, because participants know the rules, interpret the rules, and interpret the situations to see if they meet the rules. The task for argumentation theorists would then be to articulate more precisely the rules, to systematize, justify and critique them.

But, as I have tried to show, some aspects of closing argument practice appear to be irreducible to rules. Instead, participants in closing arguments treat their activity as a matter for practical reasoning. If we adopt this shape of account to construct a more general theory of argumentation, we would explain that argumentative transactions are orderly, and activities in them good or bad, because participants figure out their responsibilities, recognize dilemmatic goals, and sort through the factors they need to consider in deciding what to do. The task for argumentation theorists is then to articulate more precisely the practical reasoning involved in these three tasks, and to systematize, justify and critique this reasoning.

If we do adopt accounts of the second shape, admittedly we will be taking argument as unruly. Still, we will be able to see how arguers achieve some order in their disagreements, and in particular, how they and we can justify the judgments of good and bad that we want to make.

Appendix: Lists of "Rules" for Closing Argument

Items commonly appearing on lists of closing argument prohibitions:

- A. Don't misstate the law.
- B. Don't misstate the evidence.
- C. Don't mention facts not in evidence.
- D. Don't comment on privileged matters (e.g., on a criminal defendant's failure to testify).
- E. Don't vouch for the credibility of witnesses.
- F. Don't state personal beliefs about the case.
- G. Don't appeal to passion and prejudice.
- H. Don't make personal attacks.
- I. Don't make "Golden Rule" arguments.
- J. Don't mention insurance (when arguing about damages in a civil case).
- K. Don't mention the wealth or poverty of the parties (when arguing about damages in a civil case).

Commentators and the items they discuss;

Ahlens (1994): A, B, D, F, G, H.

Benner & Carlson (2001): A, B, C, D, E, F, G, H, I, J.

Cargill (1991): C, D, F, G, I.

Carney (1997): A, B, C, E, F, G, H, I, J, K.

Headley (2004): C, G, I, J.

Kirk & Sylvester (1997): C, G, H, I, J.

Lagarias (1989): A, B, C, F, G, I, J, K.

Montz (2001): A, E, F, H, I.

Ronzetti & Humphreys (2003): A, B, E, F, G, I, K.

Smith (1992): B, C, E, F, I, J, K.

Stein (2005): A, B, C, E, F, G, H, I, J.

Sullivan (1998): C, D, E, F, G, H, I.

Tierney (2003): C, F, G, H, I, K.

Tobin (1995): D, F, G, H.

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