ISSA Proceedings 2006 – Actually Existing Rules For Closing Argument

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, making room for them to critique each other's conduct as good and bad. So 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 2004).

In this paper, 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. According to an account of this shape, although arguers may disagree about many things, they agree on the rules of arguing. When followed, these rules lend order to a transaction; talk which follows them is good, while talk which breaks them is bad.

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 number 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 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 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 using a very concrete, empirical method, by 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 are nevertheless good reasons to take what they say about their activities, in their activities, as *presumptively* correct. The ultimate desiderata for an account of any shape, for any model, representational scheme or explanatory mode, are what have been termed "problem solving validity" and "conventional validity" (van Eemeren et al. 1993). That is, the account of argumentation must elucidate how arguing does some work, and further the account must be acceptable to the community of arguers. Now, the accounts of argument actually put forward by arguers in their arguing – the "native" theories of argument, of whatever shape – presumably are offered as attempts to get arguing to do its job, better; they are furthermore already "intersubjectively" accepted by them (or some of them). So "native" accounts of arguing meet the two desiderata, and are *one* good place to start building more sophisticated theoretical accounts (see also Craig, 1996, 1999).

The "natives" I will be studying here are participants in the closing arguments of trials in the United States. Although I do not follow authors such as Toulmin and perhaps Perelman in taking legal argument as the *paradigm* for argumentation generally, there still can be no doubt that (a) 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 may furthermore provide a good window onto the specific question I'm asking here, about participants' own accounts of their activities. Legal arguers not only are likely to argue *well,* they are likely to argue quite *self-consciously* – to be quite *articulate* about what they're doing, 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 can 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.

Finally, participants in closing arguments 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, viz., rules for all sorts of activities, including rules for arguments. 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 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 views of the ruliness and unruliness of closing arguments in U.S. trials.

1. *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, in considering (for example) how much money they themselves would want as compensation for an injury. In this 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 rule for argument.
Furthermore, it acts like a rule; when participants deploy it to solve closing argument problems, they make the intuitively familiar moves of rule-based reasoning. 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: "Does he make substantial income from this venture? When you left your house this morning, did you leave $ 23,000 on the bed? 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?" . . . Neither did the government 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.

2. *Unruly closing argument.*

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 constituting 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 capture it with the exactness that they can specify what is bad**[i]**.

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 the sprawl. In this item, participants seem to be articulating their sense that what argumentation theory calls fallacies – *all* the fallacies – should be avoided during closing arguments. That is pretty broad coverage for a single rule. But "native" attempts to define the contours of this "rule" more narrowly lead quickly 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 is often quoted in this context, making a similarly tautological pronouncement: the 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, p. 1-50, 51; Smith 1992, p. 2.12; Lagarias 1989, 1.12). If these are "legitimate," what then is "improper" and "impermissible"?

Given this sort of indeterminacy, it is not surprising to find that courts and commentators have themselves noticed the problems with the standard "rule" lists. 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 routinely to determine when some talk is an improper appeal to passion and prejudice. How 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*, p. 276-77).
Each of these examples starts 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 responsibility to reverse only if that discretion was abused.

Each of these proceeds by noting multiple and indeed competing principles regulating the trial judge's discretion. On one hand, advocates should have room

to argue vigorously—"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 participants 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 before 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. 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**[ii]**. 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, points the participant towards multiple and competing goals. This is true for closing arguments – with goals of both fairness and zeal – and I believe more generally. As Karen Tracy has put it, communication is *dilemmatic*, pulling participants in two (or more) directions (Tracy 1997). This means that generally there is not

going to be any one good way to argue, but rather multiple defensible choices which weigh the goals against each other.

Finally, a rule sets the aspects of the situation that are relevant to determining whether the rule is being followed. There is certainly 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).

3. *Conclusion.*

What can we learn from the "natives" of closing argument about the shape of the accounts we should be giving of argumentative orderliness 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 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, systematize, justify and critique them.

But, as I have tried to show, much of closing argument practice appears 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 because participants figure out their responsibilities, recognize dilemmatic goals, and sort though the factors they need to consider. The task for argumentation theorists is then to articulate more precisely the practical reasoning involved in these three tasks, systematizing, justifying and critiquing 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 make the judgments of good and bad that we want to make.

Appendix: Lists of "Rules" for Closing Argument

Some of the common items appearing on closing argument prohibition lists:
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.

NOTES
[i] Further evidence of how participants' understanding of good arguing is prior to their articulation of any rules for it is suggested by the way that new prohibitions can emerge and be justified. For example, some courts and commentators have debated a new rule against invoking religion in closing

arguments (Brooks 1999; Henson 2001; Miller & Bornstein 2005). Advocates, judges and commentators are able to justify and attack this proto-rule not on the basis of other rules, but on the grounds of some understanding of good closing argument that precedes all prohibitions. Indeed, in (2) there is a hint that even well-established rules still need justifying in terms of some prior understanding. What is the shape of that understanding?

[ii] 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.

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