ISSA Proceedings 1998 – Delivering The Goods In Critical Discussion

1.The pragma-dialectical theory of argumentation ***[i]***

In the 1970s, inspired by Karl Poppers critical rationalism, an approach to argumentation was developed at the University of Amsterdam that aimed for a sound combination of linguistic insight from the study of language use often called pragmatics and logical insight from the study of critical dialogue known as philosophical dialectics (van Eemeren and Grootendorst 1984). Therefore, its founders labelled this approach *pragma-dialectics.* In pragma-dialectics, argumentation is viewed as a phenomenon of verbal communication; it is studied as a mode of discourse characterized by the use of language for resolving a difference of opinion. Its quality and possible flaws are measured against criteria connected with this purpose.

In the 1980s, a comprehensive research programme was developed. This programme was, on the one hand, based on the assumption that a philosophical ideal of critical rationality must be developed, in which a theoretical model for argumentative discourse in critical discussion could be grounded. On the other hand, the programmes point of departure was that argumentative reality has to be investigated empirically to achieve an accurate description of actual discourse processes and the various factors influencing their outcome. In the analysis of argumentative discourse the normative and descriptive dimensions were to be linked together by a methodical reconstruction of the actual discourse from the perspective of the projected ideal of critical discussion. Only then, the practical problems of argumentative discourse as revealed in the reconstruction could be diagnosed and adequately tackled.**[ii]**

Crucial to grounding the pragma-dialectical theory in the philosophical ideal of critical rationality is a model of *critical discussion.* The model provides a procedure for establishing methodically whether or not a standpoint is defensible against doubt or criticism. It is, in fact, an analytic description of what argumentative discourse would be like if it were solely and optimally aimed at resolving a difference of opinion. The model specifies the various stages and rules

of the resolution process, and the types of speech act instrumental in each particular stage.

2.Current research projects in pragma-dialectics

Because the rules for critical discussion are a specification of the norms discussants need to observe in order to resolve a difference, it is to be expected that people who resolve their differences by means of argumentative discourse will maintain norms that are, at least in part, equivalent with the pragma-dialectical rules. To determine systematically to what extent the pragma-dialectical rules agree with the norms applied – or favoured – by ordinary language users, the pragma-dialecticians have embarked upon a research project aimed at testing the 'conventional' validity of these rules.**[iii]** In this project, as reported in this volume, experimental empirical investigations are carried out in which ordinary language users assess fragments of argumentative discourse that contain various kinds of fallacious discussion moves for their acceptability.**[iv]** The results provide general insight into ordinary language users' conceptions of reasonableness.

Another research project that has been started with the ideal of critical discussion as its point of departure, deals with the verbal means used in argumentative discourse to indicate the communicative and interactional functions of the various verbal moves. The aim of this project is to make an inventory of potential indicators of moves that are relevant for a critical discussion – and to identify the conditions for giving a certain expression a specific function in the resolution process. In her contribution to this volume, Francisca Snoeck Henkemans explains that the scope of the project is not restricted to well-known relational indicators such as 'therefore', and indicators of argumentation such as 'my reasons for this are', but extends to indicators of counterarguments and relations between arguments, and also to indicators of moves in other stages of the resolution process: expressing antagonism, granting concessions, adding a rebuttal, et cetera.**[v]**

In *Reconstructing Argumentative Discourse,* co-authored by Frans van Eemeren, Rob Grootendorst, Sally Jackson and Scott Jacobs, the ideal of critical discussion is used as a point of departure for the analysis of a variety of specimens of argumentative discourse. Such an analysis results in an analytic overview that can be the basis for a critical evaluation. It makes clear what the difference of opinion is that is developed in the confrontation stage, which positions are being

taken and which premisses serve as the starting point in the opening stage, which arguments and criticisms are – explicitly or implicitly – advanced and which argumentation structures and argument schemes are being used in the argumentation stage, and what conclusion is finally reached in the concluding stage. Because the speech acts – and combinations of speech acts – that play a part in the various stages of the resolution process are all specified in the model of critical discussion, the model is a heuristic tool for reconstructing implicit or otherwise opaque speech acts (van Eemeren, Grootendorst, Jackson, and Jacobs 1993). Until recently, pragma-dialectical analysis tended to concentrate on reconstructing primarily the dialectical aspects of argumentative discourse. It is clear, however, that the analysis and its justification can be considerably strengthened by a better understanding of the strategic rationale behind the moves that are made in the discourse. For this purpose, it is indispensable to incorporate a rhetorical dimension into the reconstruction of the discourse. The project we report about in this paper aims at integrating rhetorical insight methodically into the pragma-dialectical method of analysis.

3. Strategic manoeuvring in resolving a difference

Characteristically, people engaged in argumentative discourse share an orientation towards resolving some difference of opinion. They may be regarded as committed to the norms instrumental in achieving this purpose – maintaining certain standards of reasonableness and expecting others to comply with the same critical standards. This is, of course, not to say that they do not want to resolve the difference of opinion in *their own favour*. In practice, their argumentation and other speech acts may even be assumed to be designed to achieve precisely this effect.**[vi]** There is, in other words, always a *rhetorical* aspect to argumentative discourse.**[vii]**

The rhetorical pervasion of argumentative discourse does not mean that the parties involved are interested exclusively in getting things their way.**[viii]** Even when they try as hard as they can to get their point of view accepted, it is by no means necessarily so that they adopt an unreasonable attitude. They have, at any rate, to maintain the image of people who play the resolution game by the rules: they may be considered committed to what they have said, assumed or implicated. As a rule, they will at least pretend to be primarily interested in having the difference of opinion resolved. If a move is not appropriate, they cannot escape from their dialectical responsibility by simply saying 'I was only being rhetorical'.**[ix]**

The balancing of a resolution-minded dialectical objective with the rhetorical objective of having one's own position accepted is prone to give rise to strategic manoeuvring. Generally, the parties will seek to fulfill their dialectical obligations without sacrificing their rhetorical aims. In the process, they will attempt to make use of the opportunities available in the dialectical situation for steering the conclusion of the discourse rhetorically in the direction that serves their own interests best.**[x]** In our view, an adequate analysis of argumentative discourse should take account not only of its dialectical dimension but also of its rhetorical dimension. To enrich the pragma-dialectical method of analysis with rhetorical insight, we view rhetorical moves as operating within a dialectical framework. This means that insight into strategic manoeuvring in argumentative discourse as it occurs in practice is incorporated in a resolution-oriented reconstruction.**[xi]** New conceptual tools must be developed for carrying out and justifying such an integrated analysis.

4. Integrating rhetoric into pragma-dialectical analysis

Since antiquity, there has been a division between rhetoric and dialectic.**[xii]** According to Toulmin's (1997) Thomas Jefferson Lecture, this division became ideologized with the Peace of Westphalia (1648). It led to the separate existence of two mutually isolated paradigms, which are seen as incompatible and as conforming to entirely different conceptions of argumentation**[xiii]** – if not a total neglect of this subject.**[xiv]**

Within the humanities, rhetoric has become the field of scholars in communication, language and literature. After already having been incorporated into logic by Ramus, dialectic has – with the further formalization of logic – in fact almost disappeared from sight. Although recently the dialectical approach to argumentation has been taken up again, there still appears to be among argumentation theorists a yawning gap between those formally-oriented theorists who opt for a dialectical approach and the humanist protagonists of a rhetorical approach.**[xv]**

On closer inspection – we have elaborated on this elsewhere (van Eemeren and Houtlosser 1997) – there have always been authors who see a connection between rhetoric and dialectic. For Aristotle, rhetoric is the mirror image or counterpart (*antistrophos*) of dialectic.**[xvi]** In the *Rhetoric*, he assimilated the opposing views of Plato and the sophists (Murphy and Katula 1994: Ch. 2). According to Reboul, in the first chapter Aristotle wrote 'que la rhétorique est le "rejeton" de la dialectique, c'est à dire son application, un peu comme la médicine est une

application de la biologie. Mais ensuite, il la qualifie comme une "partie" de la dialectique' (1991: 46). In late antiquity, Boethius subsumes rhetoric in De *topicis differentiis* under dialectic (Kennedy 1994: 283). According to Mack, 'for Boethius dialectic is more important, providing rhetoric with its basis' (1993: 8, n. 19). Mack explains that the development of humanism 'provoked a reconsideration of the object of dialectic and a reform of the relationship between rhetoric and dialectic' (1993: 15).

In *De inventione dialectica libri tres* (1479/1991), a major contribution to humanist argumentation theory, Agricola builds on Cicero's view that dialectic and rhetoric cannot be separated and merges the two into one theory.**[xvii]** Unlike Perelman and Olbrechts-Tyteca, who bring elements from dialectic into rhetoric, Agricola incorporates elements from rhetoric into dialectic.**[xviii]** We opt for a similar approach.

To overcome the sharp and infertile ideological division between rhetoric and dialectic, we view dialectic as a theory of argumentation in natural discourse, fitting rhetorical insight into persuasion techniques into this theoretical framework.**[xix]** In the words of van Eemeren, Grootendorst, Jackson and Jacobs, dialectic is 'a method of regimented opposition [in verbal communication and interaction] that amounts to the pragmatic application of logic, a collaborative method of putting logic into use so as to move from conjecture and opinion to more secure belief' (1997: 214).**[xx]**

The Aristotelian rhetorical norm of successful persuasion is not necessarily in contradiction with the ideal of reasonableness that lies at the heart of this pragma-dialectical approach. Why would it be impossible to comply with critical standards for argumentative discourse when attempting to shape one's case to one's own advantage?**[xxi]** A critical audience will probably require rhetorically strong argumentation to be in agreement with the dialectical norms pertaining to the discussion stage concerned.**[xxii]** From this point of departure, we have started to integrate the rhetorical dimension into the pragma-dialectical method for analysis.**[xxiii]**

5. Levels of manoeuvring in different stages

An understanding of the role of strategic manoeuvring in resolving a difference of opinion will deepen and strengthen the pragma-dialectical reconstruction of argumentative discourse. It does so by revealing how the opportunities available in a certain dialectical situation are used to complete a particular discussion stage

most favourably for the speaker or writer. Each stage in the resolution process constitutes a dialectical situation that is characterized by a specific aim. As the parties involved want to achieve the definition of the dialectical situation most beneficial to their own purposes, they will attempt to make the strategic moves that serve this interest best. Therefore, the dialectical aim prevailing in a particular discussion stage always has a rhetorical analogon as its corollary. Because what kind of advantages can be gained depends on the dialectical stages, the presumed rhetorical aims of the participants must be specified according to stage.

Rhetorical manoeuvring can consist in making a choice from the options constituting the *topical potential* associated with a particular discussion stage, in deciding on a certain adaptation to *auditorial demand*, and in taking a policy in the exploitation of *presentational devices*. Given a certain difference of opinion, speakers or writers can choose the material they find easiest to handle; they can choose the perspective that is most agreeable to the audience; and they can sketch this perspective in their verbal presentation in the most flattering colours. On each of these three levels of manoeuvring, they have a chance to influence the result of the discourse strategically.

The topical potential associated with a particular dialectical stage can, in our view, be regarded as the collective of relevant alternatives available in that stage of the resolution process.**[xxiv]** As Simons (1990) observes, the ancient Greeks and Romans were already aware that on any issue there is a finite range of stratagems that can be called upon when discussing a case. Perelman and Olbrechts-Tyteca rightly emphasize that from the very fact that certain elements are selected, 'their importance and pertinence to the discussion are implied' (1969: 119). Apart from endowing elements with a 'presence' deliberate suppression of presence is, in their view, also a noteworthy phenomenon of choice (1969: 116).**[xxv]** Other modes of choice are defining a difference of opinion, or interpreting a starting point, in the way the speaker or writer finds easiest to cope with.

On the level of making a choice from the topical potential, strategic manoeuvring in the confrontation stage aims, for example, at making the most effective choice among the potential issues for discussion – restricting the 'disagreement space' in such a way that the confrontation is defined in accordance with the speaker or writer's preferences. In the opening stage, strategic manoeuvring attempts to create the most advantageous starting point for the speaker or writer, for

instance by calling to mind – or eliciting – helpful 'concessions' from the other party. In the argumentation stage, starting from the list of 'status topes' associated with the type of standpoint at issue, a strategic line of defence involves the selection from the available *loci* that best suits the speaker or writer. In the concluding stage, all efforts will be directed towards achieving the conclusion of the discourse desired by the speaker or writer, for instance by pointing out the consequences of accepting a certain complex of arguments.

In order to achieve the optimal rhetorical result, the moves that are made must in each stage of the discourse be adapted to auditorial demand in such a way that they comply with the audience or readership's good sense and preferences.**[xxvi]** Argumentative moves that are entirely appropriate to some may be inappropriate to others. In general, adaptation to auditorial demand will consist in an attempt to create 'communion'. This may manifest itself in the confrontation stage, for example, by the avoidance of unnecessary or unsolvable contradictions. According to Perelman and Olbrechts-Tyteca, disagreement with respect to values is sometimes communicated to the audience as disagreement over facts, because it is easier to accommodate. As a rule, a speaker's or writer's effort is directed to 'assigning […] the status enjoying the widest agreement to the elements on which he is basing his argument' (1969: 179). This explains why, in the opening stage, the status of a widely shared value judgement may be conferred on personal feelings and impressions, and the status of fact on subjective values. In the argumentation stage, strategic adaptation to auditorial demand may be achieved by quoting arguments the listeners or readers agree with or referring to argumentative principles they adhere to. In order to achieve the optimal rhetorical result, all available presentational devices must be strategically exploited in the discourse. This means that the moves should be systematically chosen for their discursive and stylistic effectiveness. In *De oratore*, Cicero observed an unbreakable unity between expression and content – verbum and *res*. Anscombre identifies expression with orientation: 'signifier pour un énoncé c'est orienter: non décrire ou informer, mais diriger le discours dans une certaine direction' (1994: 30). According to Perelman and Olbrechts-Tyteca, all argumentative discourse presupposes 'a choice consisting not only of the selection of elements to be used, but also of the technique for their presentation' (1969: 119).

Rhetorical figures that can be used as presentational devices are specific modes of expression; they are ways of presenting which make things present to the

mind.**[xxvii]** Perelman and Olbrechts-Tyteca regard a figure as argumentative if it brings about a change of perspective (1969: 169).**[xxviii]** Among the many rhetorical figures that can serve argumentative purposes are – to name just a few classical examples – *praeteritio* and rhetorical questions. It depends on the stage of the discourse which figure may be helpful. According to Perelman and Olbrechts-Tyteca, figures such as *metalepsis* can, for instance, facilitate the transposition of values into facts, as in 'remember our agreement' for 'keep our agreement' (1969: 181).

Only if in a certain stage of the discourse the speaker or writer's strategic manoeuvrings on the levels of topical potential, auditorial demand, and presentational devices converge, shall we say that a 'rhetorical strategy' is being followed. Rhetorical strategies in our sense are methodical designs of moves manifesting themselves in argumentative discourse on all three levels in the systematic, co-ordinated and simultaneous use of the available opportunities for influencing the result of a specific dialectical stage to one's own advantage. There are confrontation strategies, such as evasion or 'humptydumptying' in defining the difference. There are also opening strategies, such as creating a broad zone of agreement or, the opposite, a 'smokescreen'. Included in such argumentation strategies are spelling out factual consequences and 'knocking down' the opponent. A notorious concluding strategy is forcing the audience to 'bite the bullet'. In our view, the various rhetorical styles used in conducting argumentative discourse are characterized by a particular combination of the use of such strategies.

6. Delivering the goods in William the Silent's Apologie

This proclamation is at the same time the conclusion of this paper. In a second paper, entitled *William the Silent's argumentative discourse* (this volume), we illustrate our method of analysis by providing a partial reconstruction of this 16th Century revolutionary's *Apologie*.

NOTES

i. We thank Dale Brashers, Eveline Feteris, Bart Garssen, Susanne Gerritsen, David Hitchcock, Scott Jacobs, Bert Meuffels, Agnès van Rees, Maarten van der Tol and John Woods for their useful comments on an earlier version of this paper.

ii. In the pragma-dialectical research programme, argumentative discourse is approached with four basic metatheoretical, or methodological, starting points: the subject matter under investigation is to be externalized, socialized,

functionalized, and dialectified.

iii. Each of the pragma-dialectical discussion rules constitutes a distinct standard for critical discussion. An infringement of any of the rules, whichever party commits it and at whatever stage in the discussion, is a possible threat to the resolution of a difference of opinion and must therefore be regarded as an incorrect discussion move or fallacy. It can be shown that the pragma-dialectical rules are problem valid in the sense that non-compliance with any of the rules is an impediment to the resolution of a difference of opinion. In order to be effective in resolving a difference, they must also be intersubjectively acceptable to people who wish to resolve their differences by means of argumentative discourse: they have to be tested for their conventional validity.

iv. See van Eemeren, Grootendorst, Meuffels, and Verburg (this volume). The results of these empirical investigations also provide an empirical basis for developing textbooks in which appropriate pedagogical attention is paid to specific argumentation rules.

v. Argumentative connectors, such as incidentally, in addition and since because provide information about the structure of the argumentation, even and let alone, about the relative weight of arguments, and nevertheless and still about their oppositional character.

vi. Simons (1990) observes that in this endeavour all issues must be named and framed, all facts interpreted, and the argumentative discourse must be adapted to an end, an audience, and the circumstances.

vii. In a general sense, all discourse is rhetorical since the participants are intent on making a certain impression on their audience, for instance by being polite. See Leech (1983) and Levinson (1983).

viii. Although in some cases rhetorical goals appear to be pursued that are entirely foreign to resolving a difference – e.g. being perceived as nice – argumentative discourse – purportedly – always aims at resolving a difference.

ix. According to the pragma-dialectical theory of argumentation, rhetorical moves that violate a dialectical norm are contra-dialectic, and are to be considered fallacious. See for this approach to fallacies van Eemeren and Grootendorst (1992).

x. In this, we disagree with Perelman and Olbrechts-Tyteca, who differentiate between rhetorical debate and dialectical discussion: ‘discussion came to be considered as a sincere quest for the truth, whereas the protagonists of a debate are chiefly concerned with the triumph of their own viewpoint’ (1969: 38).

xi. In doing so, the differences between the real and the ideal are appropriately

appreciated. See van Eemeren and Houtlosser (1997). Reality differs from the ideal in the sense that the ideal model of critical discussion not only includes only elements that are functional in resolving a difference, but also transcends the vices of argumentative practice.

xii. In Aristotle's view, these disciplines (and analytics) were 'supplementary' to disciplines that have their own substance. See Gaonkar (1990).

xiii. According to Govier, rhetoric and dialectic represent different perspectives on argumentation: 'argue to win our case' and 'argue in search of the truth' (1997: 73).

xiv. The geometrical world view, and the accompanying formal paradigm of the exact sciences, had become synonymous with rationality. For the humanists, argumentation had been part of an attempt to resolve a difference of opinion between people in a reasonable way, with rhetoric playing a legitimate role in the resolution process. In the exact sciences reasonable argumentation was equated with reasoning rationally by means of formal derivations – and rhetoric did not have a part.

xv. On one side there are the dialectical theories of argumentation with a formal – arhetorical – character, such as Hamblin's (1970) and Barth and Krabbe's (1982) 'formal dialectic' (based on the dialogue logic of the Erlangen School) and the formal approach to the fallacies by Woods and Walton (1989). On the other side are the rhetorical – anti-formal – functional and contextual approaches, such as Perelman and Olbrechts-Tyteca's (1969) 'new rhetoric' and the rhetorical tradition in American speech communication and among philosophers.

xvi. Reboul observes that for antistrophos the translators 'donnent […] tantôt "analogue", tantôt "contrepartie"'. He adds (1991: 46): 'Antistrophos: il est gênant qu'un livre commence avec un terme aussi obscur!'

xvii. For Cicero rhetoric is also disputatio in utramque partem, speaking on both sides of an issue.

xviii. According to Mack, Agricola's work is unlike any previous rhetoric or dialectic: '[He] has selected materials from the traditional contents of both subjects' (1993: 122). In Meerhoff's (1988: 273) view, 'pour Agricola, […] loin de réduire la dialectique à la seule recherche de la vérité rationelle, il entend parler de celle-ci en termes de communication.

xix. Kienpointner (1995: 453) points out that many scholars see rhetoric as 'a rather narrow subject dealing with the techniques of persuasion and/or stylistic devices', while others conceive of rhetoric as 'a general theory of argumentation and communication' (and still others deny that it is a discipline at all). According

to Simons (1990), most neutrally, rhetoric is the study and the practice of persuasion.

xx. In thus defining dialectic as discourse dialectic, our conception differs in various ways from Aristotelian, Hegelian and formal dialectic.

xxi. Since the recent revaluation of rhetoric, there is a general acknowledgement that the a-rational – and sometimes even anti-rational – image of rhetoric must be revised. According to Gaonkar (1990), this 'rhetorical turn' explicitly recognizes the relevance of rhetoric for criticism and as an interpretative method.

xxii. Some other theoreticians, such as Reboul, also recognize that rhetorically strong argumentation should comply with dialectical criteria: 'On doit tout faire pour gagner, mais non par n'importe quels moyens: il faut jouer [le jeu] respectant les règles' (1991: 42). See also Wenzel (1990).

xxiii. For other proposals to subordinate rhetoric to dialectic, see, for example, Natanson (1955). See also Weaver (1953).

xxiv. In the way we use the term topics, there are topical systems for all discussion stages, not just for the argumentation stage.

xxv. Edward Kennedy's 'Chappaquidick speech' illustrates how suppression of presence can be used strategically. See van Eemeren, Grootendorst, Jackson, and Jacobs (1993: vii-xi) and van Eemeren and Houtlosser (1997).

xxvi. In our approach, the audience is not just Perelman and Olbrechts-Tyteca's 'ensemble of those whom the speaker wishes to influence by his argumentation' (1969: 19), but coincides with the antagonist in a critical discussion.

xxvii. Perelman and Olbrechts-Tyteca regard a rhetorical figure as 'a discernible structure, independent of the content, […] a form (which may […] be syntactic, semantic or pragmatic) and a use that is different from the normal manner of expression, and, consequently, attracts attention' (1969: 168).

xxviii. In Perelman and Olbrechts-Tyteca's opinion, 'if the argumentative role of figures is disregarded, their study will soon seem to be a useless [or literary] pastime' (1969: 167).

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ISSA Proceedings 1998 – William The Silent's Argumentative Discourse

1.William the Silent and the Dutch Revolt

This paper **[i]** is the second part of a two-part paper; the first part is entitled *Delivering the goods in critical discussion* (this volume). The general outlines of the framework we are developing for analyzing argumentative discourse are explained in the first paper. As a brief illustration of the application of our method, we shall here reconstruct some important features of

an argumentative discourse produced by William the Silent, our 16th Century revolutionary.
As you may know, the years between 1555 and 1648 were a heroic period in Dutch history; they were decisive for the existence of the Netherlands as an independent state. These were the years of protest against the persecution of Lutheran, Calvinist and other Protestants, and resistance against the tyrannical Spanish Duke of Alva. Alva was governor of the Netherlands on behalf of King Philip II, who preferred to live permanently in Spain, which made that monarch more of a foreigner than his father, the Emperor Charles V, had been. The Revolt, as this period in Dutch history is generally called, led to the Abjuration of King Philip II and the founding of the Republic of the United Netherlands.
The political system Philip II inherited in the Netherlands can be described as a '*dominium politicum et regale*'. On the one hand, the sovereign governed according to laws and rules of his own design. On the other hand, he needed the people's consent to maintain these laws and rules (van Gelderen 1994). The political actions of Philip and his representatives were divisive in various respects; they led to an uproar that developed step by step into a real revolt. In this escalating development, various kinds of events and ideological considerations played a part. In the process, the Dutch Revolt became a fundamental source for the evolution of modern thinking about political power, the right of opposition, and national sovereignty.

The leader of the Dutch Revolt was William of Orange, better known as William the Silent – because of his gift of keeping his real purposes diplomatically hidden. Since William was not only in a political and practical sense the inspiration and guardian of the Revolt, but also the intellectual leader, he is honoured to this day as the Father of the Fatherland, *Pater Patrias*. Born in 1533 as son of the ruler of the German principality of Nassau, he achieved his prosperity and a prominent position at the court of Charles V by unexpectedly inheriting from his cousin René of Châlons the title 'Prince of Orange', with all its accompanying wealth. William then became one of the mightiest men in the Netherlands.

After Philip II had succeeded his father in 1555, gradually the whole power structure of the Netherlands began to collapse. Owing to various factors, one of them being the severe repression of the Reformation by the King and his collaborators, an anti-Hispanic movement started to grow. The basic principles of sovereignty and their practical consequences became a matter of debate. As the

revolution gained momentum, numerous texts – varying from public letters to extensive *apologias* – were published in an effort to legitimize the Revolt.
We are interested in examining the qualities of the argumentative discourse in which the motives for the Revolt are discussed – and usually defended. In particular, we would like to reconstruct the justification of William's actions offered by his famous Apologie. In reconstructing the historical meaning of the text, we follow Skinner (1978) and Pocock (1985: 1-34) in taking due notice of the political and, more particularly, intellectual and ideological context.

2. An integrated method of analysis
In *Delivering the goods in critical discussion* we explained that a pragma-dialectical analysis of argumentative discourse amounts to a methodical reconstruction from the perspective of the projected ideal of resolving a difference of opinion by critical discussion. In the 'confrontation' stage of the discussion the difference is defined; in the 'opening' stage the starting point is established; in the 'argumentation' stage arguments and critical reactions are exchanged; in the 'concluding' stage the result of the discussion is determined. The pragma-dialectical analysis results in an analytic overview that contains all moves that are made in the discourse which are relevant in the various discussion stages; it can serve as a basis for a critical evaluation (van Eemeren and Grootendorst 1992).
The project we are currently engaged in aims at enriching the pragma-dialectical method of analysis with rhetorical insight into the strategic manoeuvring taking place in argumentative discourse. How exactly are the opportunities offered by the dialectical situation in a discourse being exploited by the speaker or writer? Each stage in the resolution process has its own dialectical aim; it therefore depends on the stage the discourse has reached as to what kinds of advantage can be achieved rhetorically.
Strategic manoeuvring may, in our view, take place in choosing from the 'topical potential' available in a particular discussion stage, in adapting to 'auditorial demand', and in exploiting 'presentational devices'. The selection potential we view as a *topical system* associated with a particular stage in the resolution process. By selecting certain issues, defining and interpreting them, they are given 'presence' in the discourse, and by suppressing issues their importance and pertinence are denied. In adapting to auditorial demand, in each stage the moves that are made comply with the audience's good sense and preferences. The audience, which coincides with the antagonist in a critical discussion, may consist

of various parts, so that certain moves can be effective in creating communion with one part, but not with another. In exploiting presentational devices, rhetorical figures are used to make the various moves most effectively present to the mind. In the one case, this may, be achieved by means of praeteritio: drawing attention to something by saying that you will refrain from dealing with it. In other cases, a rhetorical question may be a more effective manoeuvre.

3.William's Apologie as a specimen of argumentative discourse

Let us now return to William the Silent. Having led the revolt against Philip II, numerous attacks on William' s life were planned – one of them, indicentally, by a sea-captain called Hans Hanssen. At first Philip formally kept himself apart from such actions, but in 1580 a royal Proclamation and Edict was published against the Prince of Orange, which officially outlawed him. Apart from grossly misrepresenting the course of the Revolt and William's role in it, this document attributes the worst imaginable vices to the Prince, accusing him of being 'the public plague of Christendom' and 'the enemy of mankind'. It promises a large sum of money and a peerage to the person who will kill the Prince. William the Silent's *Apologie*, written by his court chaplain Villiers in close co-operation with the Prince, was his response: it is a defence against various accusations, and a justification of his behaviour.

In the first place, the *Apologie* is a political pamphlet, albeit it a very lengthy one (more than one hundred pages). To a large extent, it has shaped future positive views on the Prince of Orange, as well as future negative views on his adversary, King Philip II.**[ii]** The *Apologie*, submitted to the States General in December 1580, was published in 1581 in French, together with a Dutch translation.In the same year, five French, two Dutch, and several Latin, German and English editions appeared.**[iii]** It is clear that the *Apologie* appealed to a great many readers – not just to those to whom it was immediately directed (Wedgwood 1989: 222).

It is characteristic of William the Silent's writings that they are calculated to take carefully account of the ideas of the people to whom they are addressed (Swart 1978, 1994). The attitude assumed by the author seems to a large extent to depend on his addressee (Smit 1960: 7-10, de Vrankrijker 1979: 123). It is therefore important to realise that the *Apologie* is addressed simultaneously to a number of different readerships. In this text, William of Orange is the protagonist, but the antagonists vary: the formally addressed States General – the collective of the Provincial States of the Netherlands; the rulers of European principalities to

whom the Apologie was also sent; the formal protagonist of the counter standpoint, i.e., the avowed adversary Philip II; the successive governors and their counsellors – such as cardinal Granvelle – who shared Philip's standpoint; the malcontent Dutch Roman Catholic nobility that had turned against the Revolt; and individual traitors who implicitly defended
contrary positions.

Being an apologia, William the Silent's essay represents a specific text genre: a special type of argumentative discourse, aimed at justifying oneself against accusations by others. Viewed from a pragma-dialectical perspective, the *Apologie* involves a delicate balancing of – real or professed – dialectical resolution-mindedness with strategic manoeuvring, with a view to achieving the rhetorical objective of having William's position accepted by all. William the Silent's *Apologie* can be analyzed as an attempt to achieve certain rhetorical aims without sacrificing any dialectical ambitions. To show how the available opportunities are used to this end in the *Apologie*, we shall give an analysis that integrates the rhetorical dimension into the dialectical dimension. We do not pretend to provide a fully-fledged integrated dialectical and rhetorical analysis of the text: we merely intend to illustrate our view of the various levels of strategic manoeuvring in the consecutive stages of argumentative discourse.

4. Analysis of William's strategic manoeuvring

The *Apologie* gives the impression of being an angry outcry in which various perspectives and views are unsystematically combined and scattered bits of information are presented in arbitrary order. However, when viewed analytically, and particularly when seen against the background of King Philip's Proclamation, the *Apologie* proves to be an argumentative discourse in which the dialectical stages can be readily identified. We shall here concentrate on reconstructing the strategic manoeuvring in each of these stages.

Confrontation stage

Starting with the confrontation stage, which introduces the differences of opinion that occupy the author, it becomes clear that the Prince has selected an overwhelming number of issues, intending to cover virtually everything that relevantly can be said about the subject. These issues can be divided into several conglomerates. Most are a direct response to accusations made in the ban edict. They affect political, religious and personal aspects of the Prince's supposed rebellion. The political issues involve the juridical right of the Dutch – with the

Prince as their leader – to stand up against their Sovereign, and the Prince's view of who is, in the end, entitled to take over government: the States General. The most important religious issues are Philip's suppression of Protestants and the right of freedom of conscience. Personal issues concern the Prince's descent, his marriages, his actions against Philip, and his motives for leading the Revolt.
A second, and surprisingly large, number of issues echo themes that earlier had been sounded by the Prince's compatriots. A telling example of this manifestation of internal dissent is the accusation that the Prince had stolen public money. But, as he himself emphasizes, everybody knew that he had spent his whole income and capital on the war against the Spaniards.
Last but not least, are the issues not really dealt with, but at best hinted at, although they are mentioned in the ban edict or known to have been discussed at the time. Of particular importance, in this respect, is the accusation in the ban edict that the Prince, at the time that he was still a Privy Councillor, had already started his dealings with the government's enemies.**[iv]** The Prince clearly evades this issue.

William's adaptation to his readership consists primarily in securing that the various components of his audience are being targetted by addressing the kinds of issue they are particularly interested in. The States General are met by the treatment of political issues, particularly those where agreement with the Prince can be expected. Religious issues are of additional interest to the German rulers, who preach moderation, as well as to the Calvinists, who want to defend the Reformation, but probably also to the non-Calvinist Dutch nobility that wishes to protect Roman Catholics and other non-Calvinists. The Germans are approached by condemning the excesses of Calvinism, the Calvinists by an emphasis on their religious primacy, the non-Calvinist nobility by guarantees for the safety of the Roman-Catholics.
Among the presentational devices that the Prince uses most frequently in the confrontation stage are *praeteritio* and irony. *Praeteritio* is used to raise topics 'in passing', implying that they are not worth going into, while at the same time making the point. Important issues, such as the attitude of Philip and his governors towards William of Orange, are in this way effectively dealt with: 'I will not repeat the perjuries and deceits of the Duchess [of Parma], nor of the King on behalf of My Lords the Counts of Egmont and Horne [decapitated by Alva], nor the baits and allurements which they prepared for me' (*Apologie*, 94). Irony plays an important part in representing certain assertions made by the King in the ban

edict, as for instance his denial that he ordered the Duke of Alva to levy the notorious tenth and twentieth penny taxes: 'But that, my Lords, which is greatly to be esteemed in this Proscription, so true and well grounded, is this, that the King did not command the Duke of Alva to impose the tenth and twentieth penny without the consent of the people' (*Apologie,* 89).

Opening stage

In the opening stage of the discussion, the Prince's repeated attempts to evade the burden of proof by shifting the issue is a dominant technique. The technique is used when dealing with the issue of disloyalty. The Prince claims: 'We have not had, on our part, any infidelity or treason, or understanding with the Spaniards; as our enemies on their part have had. Have they not, against their faith and promise, with an armed power, begun a war?' (*Apologie*, 110).

The accusation of violating the provisional peace treaty known as the Ghent Pacification is resisted by turning the issue upside down: 'Often times in this execrable Proscription, and in their little foolish defamatory libels and secret letters, they object unto me that I have violated and broken the Pacification. Let us see how [the Spaniards] on their behalf have maintained and kept it' (*Apologie*, 102). The Prince's attempts at creating a favourable starting point further involve establishing his *ethos* by an artful narration of the 'factual' background of his predicament and the course of events. In his narrative, his account stands out of a conversation he had long before the beginning of the Revolt with the French King Henry II. Henry is said to have revealed to the Prince Catholic plans for exterminating the Dutch Protestants, which filled the Prince with a deeply-felt pity and presumably motivated him at this early stage to adopt the Protestants' cause.

Emphasizing common interests and shared goals, William adapts to the most important components of his audience by associating himself with the Dutch parties in the Revolt – the States General, the moderate nobility and the extreme Calvinists – and with the German Lutherans, while dissociating himself consistently from Philip II and the Spaniards by attributing despicable secret intentions to them. A striking example of the Prince's attempt to create a bond with the Dutch is his vehement reaction to Philip's contention that William is of foreign descent. Apart from dealing with this contention directly, the Prince also deals with it indirectly by spending a substantial part (about ten pages) of his *Apologie* on an elaboration on his ancestors' services to the Netherlands.**[v]** As regards his use of presentational resources, the most prominent devices William

exploits in the opening stage are those that implicate the States General, repeatedly using the introduction 'As you know, My Lords' – meanwhile ridiculing his opponents.

Argumentation stage
In the argumentation stage, the Prince favours three categories of arguments: arguments about whether he can be blamed for certain actions, religious arguments, and political arguments. The main thrust of his 'I am not to blame'-arguments is that the Spaniards and the malcontents themselves did much worse things. As far as religion is concerned, William silently exploits his account of how he had taken pity on the Protestants in order to guarantee his protection of the Reformation. His political arguments refer to the protective relation between a sovereign and his subjects, to Philip's violation of the oath of allegiance between lord and vassal, and to the disastrous consequences that the current course of events would have – the suppression of the Reformation would be only a first step towards suppression of the whole population and tyrannical terror.
In the 'I am not to blame'-arguments, adaptation to the audience involves reinforcing the idea that he who does worse things loses his right to speak up. The religious argument rests on ethos; it consists, in fact, in a pathetic arousal of emotion in the audience.

The warrant brought to bear in the first political argument is the appealing idea that a sovereign can be expected to protect his subjects rather than oppress them. The presentational device exploited in this argument is the use of folk wisdom: 'The people will more esteem him that maintains them, than him that would oppress them' (*Apologie*, 120-121). The second political argument is warranted by the principle that violating an oath eliminates an existing relation; the third by the rule that everything goes from bad to worse. In the oath argument, a counter-argument is turned into a pro-argument: 'If then I am not the King's natural subject – which he himself says –, I am by this unjust Proclamation and sentence absolved from my oath' (*Apologie*, 73). The argument that everything goes from bad to worse is in its presentation supported by a citation from the Bible, which was earlier used – but then meant as a threat – by the Duchess of Parma and Granvelle: 'The father has corrected you with rods, but the son will chastise you with scorpions' (*Apologie*, 66).

Concluding stage
In the concluding stage, the Prince's object is to have his views accepted. At a

further remove, the rhetorical aim, which can be described as a 'consecutive perlocutionary effect', is to win the political and financial support of the States General. The selection made in the *Apologie* involves an appeal for their solidarity and an urgent request for money: 'My Lords, […] keep your Union but do it […] not in words nor by writing only, but in effect also, so that you may execute that which your sheaf of arrows, tied with one band only, doth mean' (*Apologie*, 125). 'Employ all the means that you have, without sparing, I say, not the bottom of your purses, but that which abounds therein' (*Apologie,* 145). The adaptation which is to encourage the States General's acceptance of this request consists in emphasizing the Prince's disinterest and loyalty, and his willingness to obey them under any circumstances. Rhetorical questions are prominent among the presentational means used to achieve the target conclusion: 'Would to God, my Lords, either my perpetual banishment, or else my very death itself, bring onto you a sound and true deliverance from so many mischiefs as the Spaniards […] do devise against you […], how sweet should this banishment be onto me, how delightful should this death be onto me, for wherefore is it that I have given over, yea lost all my goods? Is it to enrich myself? Wherefore have I lost my own brothers, whom I loved more than my own life? […] Wherefore have I so long time left my son a prisoner, my son, I say, whom I ought so much to desire, if I be a father? Is it because you are able to give me another? Or because you are able to restore him to me again? Wherefore have I put my life so oftentimes in danger? What other recompense, what other reward, can I look for of my long travails, […] except to purchase and to procure your liberty, and, if need be, with the price of my blood?' (*Apologie,* 146).

5.Conclusion

On our definition, one can claim that a 'rhetorical strategy' is being followed in a certain stage of the discourse only if the strategic manoeuvrings in selecting from the available potential, adapting to the auditorial demand, and exploiting the presentational devices converge. In William the Silent's *Apologie* this is often the case. A major confrontation strategy is that of overburdening the difference of opinion by bringing up an exhaustive list of issues and at the same time concealing some important issues from the audience. The opening strategy is to create a broad zone of agreement by being at all parties' beck and call. The argumentation strategies are intended to overwhelm the opponents, and to foster unity among his compatriots by sketching a doomsday scenario. The main concluding strategy, as it relates to the States General, can be characterized as

making them bite the bullet.

NOTES

i. We thank Dale Brashers, Gerda Copier, Eveline Feteris, Bart Garssen, David Hitchcock, Bert Meuffels, Agnès van Rees, Maarten van der Tol and John Woods for their useful comments on an earlier version of this paper.

ii. The 'black legend' concerning the Spaniards finds its origin in William the Silent's Apologie.

iii. We shall refer to Wansink's (1969) edition of the English translation (1581).

iv. The Prince's letters to the Lutheran count Philip of Hessen – cited in Klink (1997: 120) – show that in this period the Prince was, in fact, guilty of high treason because he passed on state secrets to foreign rulers.

v. Pace Swart, who considers the Prince's elaboration on this point irrelevant (1994: 191).

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ISSA Proceedings 1998 – The (Un)Reasonableness Of Ad Hominem Fallacies

1. Introduction

It is unknown exactly what ordinary arguers think of the discussion moves deemed acceptable or unacceptable in argumentation theory. Little empirical research has been conducted concerning their standards for easonableness. Bowker & Trapp (1992) have made an attempt into this direction, but their research gives rise to a great many theoretical, methodological and statistical objections.**[i]** Because knowledge of ordinary arguers' standards for reasonableness is of theoretical as well as practical importance, we started a comprehensive research project at the University of Amsterdam systematically aimed at charting these standards.**[ii]** In the pragma-dialectical argumentation theory, which is the theoretical starting point of the project, unreasonable discussion moves are regarded as fallacious. The central question in the project is to determine to what extent such fallacious discussion moves are also considered unreasonable by ordinary arguers.

The term 'ordinary arguers' here refers to people who do not have any specific knowledge of argumentation theory and who have not received any specific education in this field. Do they regard all fallacies as absolutely unreasonable? Do they make any exceptions? Do they distinguish degrees of (un)reasonableness? Generally speaking, we are interested in investigating ordinary arguers' standards for reasonableness and in examining their consistency in applying

these standards. This article reports the findings of the first research conducted within this framework, focusing on *ad hominem* fallacies.

2. Conventional validity

In the pragma-dialectical argumentation theory, the various moves made in argumentative discourse are seen as part of a discussion procedure for resolving a difference of opinion concerning the acceptability of a standpoint (van Eemeren & Grootendorst, 1984 and 1992). The moves made by the protagonist and the antagonist are regarded as reasonable only if they contribute to the resolution of the difference of opinion. The pragma-dialectical discussion procedure is specified in a set of ten rules for *critical discussion* – thus constituting an ideal model of an exchange of views solely aimed at resolving a difference.

Any violation of the pragma-dialectical rules is an unreasonable discussion move, interfering with the aim of resolving the difference. Such violations reflect the type of errors commonly known as *fallacies*. From a pragma-dialectical point of view, fallacies are thus discussion moves that do not agree with the rules for critical discussion. The soundness of the critical discussion rules is first and foremost based on their "problem-validity": the fact that they are instrumental in resolving a difference of opinion.**[iii]**

In order to resolve a difference, however, the discussion rules do not only have to be effective but they should also be approved upon by the parties involved. As a consequence, they must not only be problem-valid but also "conventionally valid": they must be intersubjectively acceptable. The criterion of conventional validity is central to our research project. So far, the conventional validity of the pragma-dialectical discussion rules has only been subject of investigation in exemplary analyses, for example, by corpus research of text fragments taken from columns in newspapers, articles in magazines, and private and public discussions.**[iv]** From this material, due to lack of experimental control and various other factors, no conclusive evidence can be drawn. For example, no reliable conclusions can be achieved concerning the *extent* to which the discussion rules are conventionally valid. Speaking from an empirical point of view, it is still in the dark which variables determine the standards for reasonableness ordinary arguers apply in practice, either individually or in combination, in judging argumentative moves.

Systematic experimental research is required in order to to trace more accurately the factors that influence ordinary arguers' judgements concerning the permissibility or non-permissibility of certain discussion moves and to exclude

interfering variables. Such research would consist in asking ordinary arguers to assess the permissibility, acceptability or validity – in other words, the reasonableness – of various types of discussion moves in which a pragma-dialectical rule is violated. The research is to start from deliberately constructed discussion fragments. The experiment reported here is definitely not aimed at empirically testing the problemvalidity of the pragma-dialectical argumentation theory: the problem-validity of a normative theory cannot be falsified or corroborated on the basis of empirical data. The experiment concerns the conventional validity of the pragma-dialectical discussion rules; it concentrates on the first rule, the rule for the confrontation stage or *confrontation rule*.

3. Pragma-dialectical reasonableness judgements

In pragma-dialectics, the notion of "reasonableness" is related to the context of a critical discussion aimed at resolving a difference of opinion. It applies only to verbal exchanges which can be justifiably reconstructed as (part of) a critical discussion. From this perspective, all speech acts performed in a discourse that contribute to the aim of such a discussion are considered reasonable; all speech acts interfering with this aim are considered unreasonable. The pragma-dialectical rules specify which speech acts contribute to the resolution of a difference in each of the various stages of the resolution process.

In each discussion stage, certain moves can be made which interfere with the aim of resolving the difference; they may do so in a specific way and are then labelled accordingly as a fallacy. Examples of violations in the first stage of a critical discussion, the *confrontation stage*, in which the difference of opinion is externalized, include declaring a standpoint taboo ("I refuse to discuss such matters"), declaring a standpoint sacrosanct ("I regard his authority beyond discussion"), putting the other party under pressure by using an *argumentum ad misericordiam* ("You cannot do this to an unemployed like me") or an *argumentum ad baculum* ("Your action will badly affect our relationship"), and attacking the other party by using an *argumentum ad hominem* ("You're only saying this because you want to be elected"). All these fallacies involve a violation of the rule that neither party should prevent the other party from expressing their standpoints or expressing their doubts.**[v]** In the empirical research reported here, we restrict ourselves to a number of violations of the confrontation rule that are traditionally known as *ad hominem* fallacies.

An argumentum ad hominem is a speech act in which the rivalling party is

attacked with the aim of disqualifying them as a serious discussion partner. In doing so, no attention is paid to the acceptability of their standpoint. The other party is portrayed as ignorant, stupid, unreliable or inconsistent, so that they lose their credibility. Our reseach question is to what extent this type of fallacy is regarded reasonable or unreasonable by ordinary arguers.

4. Independent variables

Taking pragma-dialectics as the theoretical starting point for this research, it is – from a methodological point of view – superfluous to run a pilot study to make sure that the instrument developed for measuring (un)reasonableness is indeed measuring what it is designed to measure – that the fallacies are recognized as fallacies. In pragma-dialectics, fallacies are by definition conceived as violations of a rule of critical discussion, regardless how the speech acts in which they are committed are judged by particular subjects. In the empirical research reported here, a number of discussion fragments were constructed; they are short dialogues in which one of the discussion partners violates the rule for the confrontation stage. For base-line and comparison purposes, a number of fragments were included in which no violation of the confrontation rule was committed. The subjects were asked to judge the (un)reasonableness of particular contributions to the discussion (in which an ad hominem fallacy did or did not occur).**[vi]**

The speech acts with or without an ad hominem fallacy were not simply presented in isolation but in a well-chosen context: the dialogues in which they appeared were part of a discussion. Three types of discussion were represented: scientific, political, and domestic. A scientific discussion is the type of exchange of ideas that resembles most closely the ideal of critical discussion (some philosophers of science even regard a scientific discussion as the outstanding example of critical discussion).**[vii]** The other two discussion types are generally taken to be specimens of exchanges that are further removed from a critical discussion. The reason for presenting the fallacies in a specific discussion context is that judgements concerning the reasonableness of discussion moves are not formed *in abstracto.* The pragma-dialectical concept of reasonableness is linked to the notion of 'critical discussion' and the one type of discourse approaches the critical ideal more closely than the other. For investigating the conventional validity of the pragma-dialectical confrontation rule it is crucial to compare judgements about ad hominem violations of this rule in different discussion types.

It is to be expected (prediction 1) that the subjects will regard speech acts with an ad hominem fallacy in a scientific discussion less reasonable – in the pragma-dialectical sense – than those in a discussion which is not predominantly oriented towards truth-finding. It is also to be expected (prediction 2) that the subjects will not indicate any significant differences in the degree of reasonableness of contributions to each of the three discussion types in cases in which no violation of the confrontation rule is
committed.
These two basic predictions are of vital importance for establishing the conventional validity of the pragma-dialectical confrontation rule. Less straightforward are some predictions concerning differences in the degree of reasonableness of contributions to the two non-critical discussion types: a violation of the confrontation rule in the domestic domain will probably be regarded as less unreasonable than a violation in a political debate (prediction 3). In a domestic context, discussions take place between partners, close friends and relatives in an informal setting; a personal attack will then generally less often, or not at all, result in loss of face, unlike in discussions in a more formal setting. On the basis of insight from conversation analysis, it is further to be expected that ordinary arguers – irrespective of the type of discussion concerned – will regard speech acts involving an ad hominem violation of the confrontation rule as less reasonable than speech acts that do not involve such a fallacy (prediction 4). Committing an argumentum ad hominem is, after all, a flagrant violation of the politeness principle operative in ordinary conversation.**[viii]**

Still one further independent variable was manipulated in the experiment, i.e. the type of ad hominem at issue. All three variants that are traditionally distinguished are examined:
1. the 'abusive' variant (direct personal attack),
2. the 'circumstantial' variant (indirect personal attack), and
3. the *tu quoque* variant.

In a direct attack, the opponent's knowledgeability, intelligence, personality or good faith is questioned by portraying him or her as ignorant, stupid or unreliable. In an indirect attack, the opponent's motives are questioned: it is pointed out that he or she has a stake in the standpoint presented and is therefore biased. In a tu quoque attack, the opponent's credibility is questioned by pointing at a discrepancy between the expressed ideas and his or her other actions in the

present or the past.
This independent variable is embedded in an independent variable mentioned earlier, i.e. the presence of a speech act involving a fallacy. The predictions related to this variable are less stringent than the earlier predictions: if there is any difference at all, then the direct attack will be regarded as the most unreasonable, the indirect attack will take a middle position, and the tu quoque attack will be considered the least unreasonable (prediction 5). In some discussion contexts, tu quoque has at least the appearance of being reasonable: serious participants in a conversation may be expected to show a certain amount of consistency between their words and deeds. A direct attack, however, will generally be regarded as a grave insult, because in most cases it challenges the prevailing decency values, and leads to loss of face of the addressee.
Ordinary arguers' judgements of the (un)reasonableness of discussion moves will in practice not only depend on the presence or absence of a speech act violating the confrontation rule, or the type of discussion or the type of ad hominem involved, but also on other, partly socio-psychological, variables, such as the nature of the standpoint at issue ('neutral' vs 'loaded'), the verbal presentation (open and direct vs implicit and indirect), and the personality of the judging subject (young vs old, high vs low education). Examining all these variables in one single study is clearly unfeasible. In addition to the three independent variables mentioned above, one further independent variable was manipulated in the experiment: the order in which the discussion types were presented to the subjects. In constructing an instrument for measuring the (un)reasonableness of discussion contributions, all other potentially relevant variables were, as far as possible, kept constant.

5. Design
Each of the three categories of the independent variable 'discussion type' was combined with each of the three categories of the independent variable 'type of argumentum ad hominem'. This resulted in a fully crossed facet design with a total of nine possible combinations (see Table 1).

A total of 92 pupils (50 from HAVO-4, i.e. pupils with four years of higher secondary education, most of them 16 years old; 42 from VWO-5, i.e. pupils with 5 years of pre-university education, most of them 17 years old) took part in a pencil-and-paper test consisting of 48 short dialogues. The subjects' task was to indicate for each dialogue how reasonable they regarded the reaction of the antagonist;

they were to express their judgements on a seven-point scale (1 = very unreasonable; 7 = very reasonable). 36 of the 48 dialogues contained an ad hominem fallacy; in the remaining 12 dialogues there were no fallacies. One third of the dialogues occurred in a discussion which was explicitly announced as domestic to the subjects, one third in a political discussion, and one third in a scientific discussion. In order to make an estimate of the consistency of the subjects' judgements, each variant of ad hominem was represented in each type of discussion by four short dialogues.

For methodological reasons, the 48 discussion fragments were constructed in accordance with a fixed pattern. Each fragment consisted of two turns, one by speaker A and one by speaker B. In order to avoid any influence of the source on the judgements, the identity of both A and B was not specified. In each case, speaker A presented a standpoint followed by an argument in support of that standpoint. In order to control interfering variables, the standpoint was in all cases marked by a standpoint indicator ('I think', 'In my opinion', etc.). The argumentation was always presented in the same order: first the standpoint, then the argument.

Speaker B reacted to A's standpoint, either by means of one of the three types of ad hominem fallacies or by using sound argumentation. In fallacious reactions to A's standpoint, B's response was in each case marked by ad hominem indicators such as 'are you out of your mind?', 'the real reason you're saying this is …', and 'you don't act as you preach'. Every fragment the subjects was accompanied by the question: "How reasonable do you consider B's reaction?"

Here are some examples of dialogues from the domestic domain:

Combination (1)
A: I think a Ford simply drives better; it shoots across the road.
B: How would you know; you don't know the first thing about cars.

Combination (2)
A: Mum, I really think you should buy a new camera; the one you have is worthless.
B: Wouldn't you like that! I bet you have set your eye on my camera.

Combination (3)
A: I think you'd better not eat so much chocolate, dear; it's affects your weight.

B: Look who’s talking! Your own tummy is getting bigger and bigger.

Here are some examples of dialogues from the political domain:

Combination (4)
A: In my opinion, banning Sunday rest could have some annoying consequences for the employees’ social life; in that way they’ll never get any rest.
B: But you belong to a religious party; how could you ever assess the pros and cons of such a decision objectively?

Combination (5)
A: In my view, the best company for improving the dykes is Stelcom B.V.; they are the only contractor in the Netherlands that can handle such an enormous job.
B: Do you really think that we shall believe you? Surely, it is no coincidence that you recommend this company: it is owned by your father-in-law.

Combination (6)
A: I believe that a Minister should not withhold any information from Parliament; this would mean the end of democracy.
B: Of all people it is you who are saying this, who once had for months been trying to keep secret a case of subsidy fraud.
Here are some examples of dialogues from the scientific domain:

Combination (7)
A: In my opinion you have been acting unethically; you have failed to inform your patients of what they would be exposed to.
B: What do you know about medical ethics? You are not a medical scientist yourself.

Combination (8)
A: In my view, it is highly questionable whether smoking really causes cancer; there are studies which deny it.
B: Do you want me to accept that opinion from you? Everyone knows your research is sponsored by the tobacco industry.

Combination (9)
A: I believe the way in which you processed your data statistically is not entirely correct; you should have expressed the figures in percentages.
B: You’re not being serious! Your own statistics are not up to scratch either.

Finally, here are three examples of sound argumentation in each of the three discussion types:

A: I think you can safely trust me with that car; my driving is fine.
B: I don't believe a word you're saying; you've borrowed my car twice and each time you've damaged it.

A: In my view, we have never used empty election slogans; we have always kept our promises.
B: No-one will believe you; although you promised to lower taxes in the last election campaign, people have to pay considerably more taxes since you have come to power.

A: I believe my scientific integrity to be impeccable; my research has always been honest and sound.
B: Do you really want us to believe you? You have already been caught twice tampering with your research results.

TABLE 1 – Fully crossed facet design with 'discussion type' and 'type of ad hominem' as independent variable

The written instruction given to the subjects stated that people can have various opinions on the question what is or what is not allowed or reasonable in a discussion; the notion of 'reasonableness' was not specified any further. It was mentioned explicitly that the dialogues that the subjects had to evaluate came from three different discussion domains. The example given of a domestic setting was that of conversation at breakfast, which was in the instruction characterized as an 'informal situation'. The political debate was characterized as a more formal situation in which the participants attempt to persuade others. In the description of the scientific discussion it was emphasized that persuading others is not the main point, but resolving a difference of opinion and coming closer to the truth.

A definition of the notion 'critical discussion' could not be provided to the subjects. The test is, after all, not designed to prove that the subjects were able to

learn something from the instruction and could apply this newly-acquired knowledge in practice. In order to avoid answers that are only socially preferred, the instruction emphasized that there were no right or wrong answers: the subject's opinion was all that counted. To ensure that all subjects would as much as possible react to the fragments in the same way, the instruction emphasized that in their judgements of the (un)reasonableness of B's reaction, they were to assume that A and B were both speaking the truth.**[ix]** To ensure that the subjects would place the 16 discussion fragments in the right domain, the fragments belonging to one particular discussion type were presented together; with each fragment the type of discussion situation was explicitly mentioned, for example: Domestic situation 1, Domestic situation 2, etc.

The test was offered in all six possible orders. In order to avoid class effects, one of the six orders was presented at random to each pupil of the four classes of pupils who participated in the experiment. In order to find out whether the independent (control) variable consisting of the order in which the fragments were presented can be of influence, a check was conducted afterwards. It is important to mention that the 92 pupils had not received any specific schooling in argumentation; a check afterwards made clear that they had never before heard of an argumentum ad hominem.

Assuming that differences in reasonableness judgements will occur between pupils from HAVO-4 groups and VWO-5 groups; the elder pupils with a higher level of education, the VWO pupils, were expected to react more critically, i.e. to judge the fallacious dialogues more severely than the HAVO-4 pupils, irrespective of the discussion type (prediction 6).**[x]**

6. Results

The reliability of the test as a whole (i.e. the internal consistency alpha) amounts to .75; the reliability of the tests concerning the three ad hominem variants fluctuated between .51 and .69 (due to the smaller number of items, these values are, of course, lower than those for the test as a whole). These reliability measures are fully acceptable; they show that the subjects, even though they did not know the term 'fallacy', reacted consistently in their judgements concerning the (un)reasonableness of fallacies. To some extent, their reasonableness judgements appear to be systematic and well-structured: for example, if the subjects judge a *tu quoque* contribution to be unreasonable, they judge similar text fragments involving the same type of fallacy equally unreasonable. Likewise,

if they judge a contribution as reasonable, they judge similar contributions reasonable too.

Table 2 Reasonableness scores for discussion moves involving or not involving a violation of the confrontation rule, for each of the three discussion types

	violation of the confrontation rule	no violation of the confrontation rule
domestic	4.10	5.07
political	3.94	5.41
scientific	3.22	5.39

TABLE 2 – Reasonableness scores for discussion moves involving or not involving a violation of the confrontation rule, for each of the three discussion types

The main question is now whether the pupils – as expected in prediction 1– make a distinction between discusion moves involving a fallacy and moves not involving a fallacy, and whether the pupils – as expected in prediction 2 – are consistent in their judgements of the reasonableness of discussion moves in which no rule is violated. The empirical data were analyzed by means of a multivariate analysis of variance (mixed model approach for repeated measurements, with subjects as a random factor and the other variables as fixed).

As was expected in prediction 2, there are no clear differences in the scores of the degree of reasonableness of contributions to each of the three discussion types in cases where no rule violation is committed ($F=2.07$; $df1=2$ and $df2=182$; n.s.; the disordinal interaction between the two independent variables proves to be significant ($F=94.95$; $df1=2$ and $df2=182$; $p<.00$); consequently, the attention was focused on statistical tests of the simple main effects). Speech acts involving a violation of the confrontation rule are not only considered less reasonable in a relative sense, but even in the absolute sense: on average, the subjects judged such speech acts as ‘fairly unreasonable’ and speech acts involving no violation as ‘fairly reasonable’.

In accordance with prediction 1, the fallacies were judged most strictly in a scientific discussion (test of simple main effect for the domestic domain: $F=72.03$; $df1=1$ and $df2=91$; $p<.00$; for the political domain: $F=165.21$; $df1=1$ and $df2=91$;

p<.00; for the scientific domain: F=357.51; df1=1 and df2=91; p<.00). In a scientific discussion, which is closest to the ideal of a critical discussion, the difference in reasonableness scores concerning fallacious and non-fallacious moves proved to be much bigger than the corresponding (mean) differences in the other two discussion types (F=172.61; df1=1 and df2=91; p<.00).

Table 3 Reasonableness scores for discussion moves involving the three types of ad hominem for the three discussion types

	direct	indirect	tu quoque
domestic	3.29	4.08	4.92
political	2.89	4.19	4.77
scientific	2.57	3.43	3.66

TABLE 3 – Reasonableness scores for discussion moves involving the three types of ad hominem for the three discussion types

In accordance with prediction 3, the same kind of difference (between judgements concerning moves involving a rule violation or not involving such a violation) was bigger for the political domain than for the domestic domain (F=30.28; df1=1 and df2=91; p<.00). Combined with the empirical findings of prediction 2, these results provide strong support for the conventional validity of the pragmadialectical confrontation rule.

In accordance with prediction 4, ordinary arguers consider discussion moves involving an ad hominem fallacy as less reasonable than discussion moves that do not involve such a fallacy, irrespective of the discussion type and the type of ad hominem concerned (F=539.31; df1=1 and df2=91; p<.00). The average reasonableness score of the discussion moves involving such a violation of the confrontation rule across the three discussion types is 3.75; the average reasonableness score of the moves not involving such a violation is 5.29 – an enormous difference, considering the range of a 7-point scale.

Do the subjects – as expected in prediction 5 – distinguish between the three types of argumentum ad hominem? Table 3 shows the statistics.

As predicted, the tu quoque variant is regarded as the most reasonable (mean

reasonableness score: 4.45), followed by the indirect attack (3.9) and the direct attack (2.91). This pattern can, as a matter of fact, be discerned within each of the individual discussion types; without exception, the difference between the direct attack and the indirect attack or tu quoque is considerably bigger ($F=352.75$; $df1=1$ and $df2=91$; $p<0.00$) than the difference between tu quoque and the indirect attack ($F=77.82$; $df1=1$ and $df2=91$; $p<0.00$). It is striking that a direct attack is never accepted as a reasonable move. The indirect attack and tu quoque are judged as unreasonable only in a scientific (critical) discussion.

Table 4 shows, as expected in prediction 6, that the elder, better educated VWO-5 pupils are slightly more critical in their judgements of fallacies than HAVO-4 pupils ($t=2.4$; $df=90$; $p<.02$).

With regard to the non-fallacious moves, no differences in judgement occur. This leads to the conclusion that the differences in judgement cannot be ascribed to answering tendencies. It is, for example, not the case that VWO-5 pupils are always stricter in their answers, irrespective of the discussion move that is judged. In other words, the difference found is clearly related to the presence of a fallacy.**[xi]**

Table 4 Reasonableness scores according to school type for discussion moves involving or not involving a fallacy

	fallacy	non-fallacy
HAVO-4	3.9	5.3
VWO-5	3.6	5.3

TABLE 4 – Reasonableness scores according to school type for discussion moves involving or not involving a fallacy

7. Conclusion

Taking into account the restrictions of the experimental set-up, our findings confirm the hypothesis that the pragma-dialectical discussion rule for the confrontation stage is largely in agreement with the standards ordinary arguers use or claim to use when judging the reasonableness of discussion moves.**[xii]** This result provides positive evidence for the conventional validity of the confrontation rule.**[xiii]**

The experiment that we have carried out indicates that ordinary arguers' judgements concerning the reasonableness of discussion moves are by no means chaotic or whimsical. On the contrary, their judgements appear to be well-structured and systematic in a way that is – to a certain extent -predictable. Of course, the research reported here does not answer questions concerning the conventional validity of the remaining nine discussion rules and ordinary arguers' judgements concerning violations of these rules. Nevertheless, on the basis of the results gained from our experiment, we venture to recommend the following general hypotheses as a starting point for further empirical research:

1. In their judgements concerning the reasonableness of discussion moves, ordinary arguers distinguish between moves involving a fallacy and moves not involving a fallacy, and they do so consistently. *Ceteris paribus*, discussion moves involving a fallacy are judged less reasonable than moves not involving a fallacy.

2. Ordinary arguers consider as more unreasonable violations of discussion rules occurring in an exchange of opinions which – in our terms – closely approaches the ideal of critical discussion than similar violations occurring in types of exchanges that are further removed from the critical ideal.

NOTES

i. Bowker and Trapp's empirical research is not based on a theoretical notion of reasonableness. They eventually arrive at an empirical concept of validity which is generated by observing a more or less coincidental collection of subjects. In fact, the precise content of their validity concept remains to a large extent unclear. Therefore, it cannot be the basis for making any concrete predictions as to how the validity of specific argumentative moves in actual situations will be judged. Bowker and Trapp's approach can, at best, be characterized as 'exploratory'.

ii. This project is part of the research programme for argumentation theory and discourse analysis of the Institute for Functional Research of Language and Language Use (IFOTT). The main participants are F.H. van Eemeren, R. Grootendorst and B. Meuffels.

iii. See van Eemeren & Grootendorst (1994).

iv. See, for example, van Eemeren & Grootendorst (1992).

v. A personal attack can, of course, also occur in the argumentation stage; then, another type of rule has been violated, and the consequences for the course of the discussion are different.

vi. The term reasonableness is here used in its ordinary everyday meaning.

vii. See de Groot (1984).
viii. See van Rees (1992).
ix. This was explicitly added to the instruction after it transpired in a pre-test that it was confusing to the subjects that they did not know whether the discussion partners were speaking the truth.
x. Bowker & Trapp (1992) identified differences in the reasonableness judgements of subjects from different sexes. Unfortunately, a theoretical rationale for the differences was not provided.
xi. As explained before, we abstracted from the control variable 'order of presentation'. No subtle differences related to the order of presentation were found. Also, no differences occurred between the reasonableness judgements of boys and girls.
xii. An entirely different question is whether the judging subjects actually bring their avowed reasonableness criteria to bear in their own argumentative practices.
xiii. It is still to be investigated to what extent the results of the present research may be generalized to extra-experimental, real-life discussion situations.

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ISSA Proceedings 1998 – Ubuntu Or Acknowledgment: An Analysis Of The Argument Practices Of The South African Truth And Reconciliation Commission

Winnie Madikizela-Mandela looked uncomfortable as she faced the third day of public hearings by South Africa's Truth and Reconciliation Commission examining her role in more than a dozen murders, many assaults, and her attempt to ruin the reputation of white, anti-apartheid Methodist bishop Paul Verryn.With Archbishop Desmond M. Tutu, the head of the Commission intervening from time to time, witnesses testified that Madikizela-Mandela was either actively engaged in the murderous assaults of her bodyguards or gave her approval of their criminal activities during the late 1980's.

If this were the Nuremberg trials, the panel of distinguished judges would be deciding the length of Madikizela-Mandela's prison term. But South Africa's novel version of the truth commission, a quasi judicial way of coming to terms with past human rights violations in countries emerging from the shadow of oppressive regimes, seeks "truth telling", acknowledgment and reconciliation – the public accounting of the country's difficult past as a step to building a new South Africa.

The Commission's mandated conclusion for its stories, acknowledged truth for amnesty, has met with much public critique. Many people find it difficult to believe that multiple murderers should walk free. Yet many in Nelson Mandela's government are supportive of coming to terms with South Africa's past through the commission rather than the courts. Richard Goldstone, a Constitutional Court judge, says: "Making public the truth is itself a form of justice." But is the Commission's construction of Justice spelled with a small j? Is the great emphasis placed on forgiveness, particularly by Archbishop Tutu, possible to justify in a

discourse of “truth telling” about the cruelest of human torture by both white Afrikaners and the black ANC?

This essay analyzes the argument strategies used in the Commission’s construction of the story of South Africa’s human rights atrocities between 1960 and 1993. Through an analysis of portions of the proceedings, I will attempt to understand how that story interweaves as complete a picture as possible of the atrocities, the public shaming of those who admit committing the atrocities, and the Commission’s prescriptions for reconciliation.

A close examination of particular hearings is critical to understanding if the argument forms employed in the quasi-judicial proceedings of the Commission can produce reconciliation. For instead of a general amnesty and corresponding reparations for all perpetrators and their victims, there is only individual amnesty and recommended reparations. Much like a criminal court of law, individuals are charged, the “truth” of each incident is exposed, and authorities pass judgment on the basis of the evidence heard during the Commission’s proceedings. But unlike the criminal court, the end result is acknowledgment not responsibility, victims’ catharsis and not justification, and amnesty not punishment. I will argue that the Commission’s construction of the story of South Africa’s violent past produces arguments for public acknowledgment of the “truth” of human rights atrocities, but cannot deliver reconciliation.

1. Constructing a New National Unity Through the New Constitution

South Africa is not the first nation in the late twentieth century to use the “truth commission” to confront a painful past in order to construct a national unity. From Argentina to Zimbabwe, governments have struggled to account for massive human rights atrocities without creating new violent fissures between the accused and their victims. All of these truth commissions have been born out of the compromise and political negotiation of new nation-state building. South Africa’s Commission is no different. In particular, the Commission grew out of the compromise between Afrikaner security police, the military, and the National Party as the price for allowing the country to proceed to free elections with a completely enfranchised population.

The price was amnesty. The negotiation could have called for a general amnesty law produced by the Parliament, but this would have been to ignore the victims of past atrocities entirely. Those negotiating with the old regime recognized that the country could not forgive the perpetrators unless the honor and dignity of the

victims was restored and reparations were made. And so a final clause was attached to the 1993 Interim Constitution the discursive evidence of South Africa's negotiated revolution which reads in part: "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."
These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimization. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament under this constitution shall adopt a law determining a firm cut-off date …, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
With this Constitutions and these commitments we, the people of South Africa, open a new chapter in the history of our country".**[i]**

When the new government of Nelson Mandela came to power through free elections in 1994; it was bound to this method of building national unity by sacred constitutional commitment. The goal of that commitment and the commission it created was not to conduct a witch hunt or to drag violators of human rights before court to face charges, but to enable South Africans to come to terms with their past and to advance the cause of reconciliation. How the Commission would do its work would determine if a real break from the past could be achieved.

After much discussion and debate, inside the new Parliament and out in the public, the scene was finally set for the appointment of the Truth and Reconciliation Commission, the setting of its objectives, and the development of its quasi-judicial procedures to achieve them. The charge to the Commission was daunting:
1. to conduct inquiries into gross violations of human rights , including violations which were part of a systematic pattern of abuse;
2. the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or representatives of such victims, which establishes their identity and the nature and extent of the

harm suffered by such victims;
3. facilitate and promote the granting of amnesty in respect to acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty;
4. prepare a comprehensive report which sets out its findings based on factual and objective evidence;
5. make recommendations to the President with regard to granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; and finally
6. make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society.**[ii]**

The Commission's charge came after an exhaustive inquiry into the ways other countries had gone about dealing with the past. Some members of the African National Congress originally wanted "Nuremberg trials". Anti-apartheid activist and international lawyer Kader Asmel, now a member of the Mandela government, argued that apartheid was like the Holocaust. Perpetrators of such massive scale genocide needed to be tried and punished.**[iii]** But two reasons prevented the "truth commission" from taking the Nuremberg form. First, after the peaceful transition to a democratic state, there was an overwhelming emphasis on national unity and reconciliation, personified by President Mandela. Second, guilty parties in both the security police and ANC camps would be protected. As Mandela and others reasoned, the amnesty provision in the Constitution should lead to reparation not retaliation, and reconciliation not revenge. Archbishop Desmond Tutu's influence framed the language of the Constitution in this rhetoric, invoking the African communal concept of "ubuntu", with its implications of "recognizing the humanity of the other" and "compassion." "Truth-telling" and amnesty was combined into one process with a hopeful outcome of "restorative justice".

Individual amnesty took the place of the general amnesty the security and military personnel originally demanded. It would be granted only to those who personally applied for it, disclosed full details of past misdeeds where they could demonstrate a "political objective", and expressed sincere remorse in front of the victims who had suffered because of their actions. Now a quasi-judicial set of procedures would have to be developed to hear the arguments and evidence that

could result in amnesty, reparations, and reconciliation. The Commission with its three main committees would have to work through more than six thousand applications and decide what should be done. Its judicial-like rules for argument would have to produce reconciliation and a new South African unity.

2. Judicial Argument Forms and Audience Expectations

That judicial forums serve as one of society's most important story tellers is not new. Oliver Wendell Holmes, Jr., likened the legal forum to the writing of a narrative of the moral history of a society,**[iv]** and Ronald Dworkin has likened this process to a group-written moral "chain-novel."**[v]** It remains important, however, to note that those presiding over judicial forums, in this case the Commissioners, are creating, as Robert Cover observed, a "normative universe"**[vi]** maintained through debate about, decision on, and enforcement of what is determined to be proper or "lawful" in our interactions with one another.

Writing the moral history of South Africa's past was essential in the building of a new nation after the first non-racial election and the installation of Nelson Mandela's government. The country was still haunted by the legacy of its past as an apartheid state and by the atrocities caused by apartheid policy. From the beginning, apartheid policy was constituted as a legal problem. Apartheid policy had been described in international law as a crime against humanity, yet persons who had implemented and supported the apartheid policy were still active in important public positions. Some of those who had resisted apartheid policies by committing violent acts occupied influential positions in the new South Africa.

Moral history would be written by the Truth and Reconciliation Commission through a long and public performance of offenders telling the factual and legal stories of their crimes against humanity, victims telling of their suffering, and the community at large gathered to hear the truth. The granting of an amnesty would only happen after its Amnesty Committee would have a hearing that would include a full disclosure of all relevant facts about human rights violations, an acknowledgment by those who committed those violations, and the testimony of the victims or survivors of victims of what they have suffered. Identification and public disclosure of political offenses was essential to the Committee functioning as the South Africa's highest moral story teller. As Mr. Kader Asmel, Cabinet member in Mandela's new government said: "… while we can legally forgive past transgressions, we cannot ever forget them… History must not, ever, be allowed to repeat itself… acknowledgment is part of the process of grappling with the

past, of purging ourselves of the pathology that afflicted our country."**[vii]**

These performances have all of the trappings of courts of law – barristers, rules of discovery, cross-examination and official opinions issued by Committee members. But could they not just grant legal amnesty but deal with the following: How could the granting of amnesty be performed by a judicial forum to serve the purpose of promoting reconciliation in the South African state and in South African society without impairing the sense of justice or the force of law?

In considering the task, the Commission entered a minefield of sensitive issues. If apartheid was a crime against humanity, shouldn't the people who supported it or carried out its policies be treated like criminals? Could human rights offenses that were committed in the struggle against apartheid as a crime against humanity be judged by the same criteria with offenses committed by persons controlling a security force in defense of that system? Could an amnesty inflict new wounds on the victims of both sides who might consider that their suffering and the human dignity of those who had been killed are being disregarded? Could the great emphasis placed on forgiveness, particularly by Archbishop Tutu really produce reconciliation?

The answer to these questions cannot be given in the abstract. But a close examination of particular hearings and the arguments performed by victims, offenders and Commission officials can provide us with a glimpse of spectrum of the answers constructed by South Africans from both sides of the apartheid legacy. I will devote the rest of my paper to two very visible examples of those hearings – those of ex-President D.W. de Klerk and Winnie Madikizela-Mandela.

3. The hearings of D.W. de Klerk and Winnie Madikizela-Mandela

On June 6, 1997, De Klerk began his testimony with an eloquent apology for apartheid. He apologized to "the millions of South Africans… who over the decades – and indeed, centuries – suffered the indignities and humiliation of racial discrimination." The apology, he offered, was given in the spirit of true repentance.

But after a poignant beginning, de Klerk was questioned and cross-examined at length by a lawyer about a series of bombings, tortures and killings in the 1980s, for which the commission found evidence of knowledge at the highest levels. Specific victims' stories were told in great detail: the murder of Ruth First, the wife of the communist leader Joe Slovo; and the activities of the notorious killing center run by police officers under de Klerk's direct demand.

Did de Klerk know about these atrocities? Did he consider them the necessary actions of a police state determined to wipe out "terrorists"? Did he condone them? De Klerk argued, in response, that the ANC challenged the state by advocating a revolutionary race onslaught. He admitted that terrible things were done, but claimed that the ANC did terrible things as well. But again and again he denied that he personally authorized or knew about these specific acts. To support his position he pointed out that he established a commission to investigate these claims. He repeatedly stated that no one in his government had been outside the law. Most of those present seemed not to believe de Klerk's denials of responsibility. Commissioners, journalists, victims and the media were indignant. "He's lying," said one commissioner bluntly. At a press conference after the hearing Tutu lamented the negation of de Klerk's apology. How could he apologize and yet claim that he didn't know.

Winnie Madikizela-Mandela's marathon session in December 1997 was even more painful. Her opening statement was a series of denials about her responsibility for the actions of the United Football Club, charged with kidnapping, assault, torture and murder. Led by her lawyer through lists of allegations against her, she denied each in turn, often describing them as "ridiculous". She denied taking part in assaults on teenage boys although there were numerous witnesses who testified that she directly participated in them. She vehemently denied the most serious charge against her that she helped beat and stab14-year-old Seipei Moekesti to death and then disposed of his body. She argued that she had been a victim of a campaign to discredit her by journalists who were paid informers of the security police.
Madikizela Mandela's main claim was that she was either un-aware or "not accountable" for the violent activities of the Club, which lived in her back yard. Commissioner Yasmin Sooka made the observation that : "If you are telling the truth today, then everyone else is lying." She said to Madikizela-Mandela: "Do you not accept that you have to take on some responsibility?" Madikizela Mandela responded: "Yes, most of the witnesses here are lying… The youths who claim I gave them money to kill are lying… As far as I am concerned these ludicrous assertions are a pack of lies."

At every turn in the case being presented against her, she denied all responsibility and expressed disdain for the Commission's proceedings. When TRC lawyer, Hanif Vally, began his cross- examination Midikizela Mandala took on

an aggrieved tone and said loudly: “I will not tolerate you speaking to me like that”. When Tutu begged her to acknowledgement her wrong doing and express remorse, she refused. Madikizela-Mandela used her final moments in the hearing to deliver a prepared speech. She concluded: “I have come to a public hearing… so we can put to bed all the speculation, so my accusers can come into the open, so that everybody can judge whether the accusations were based on fact or fiction… Beyond today I hope that those who seek to vilify me cannot claim ignorance. Unfortunately I have a history no different from that of each one of us.” Here she deviated onto a tangent about her role as “Mother of the Nation” which Tutu soon stopped, saying: “It sounds like a campaign speech and does not answer any questions of my colleagues.” Madikizela-Mandela replied: “My political detractors have used means both fair and foul to undermine my stature. It would not be proper for me to deal with such issues in a forum like this one.”**[viii]**

4. Conclusions

Both the de Klerk and Madikizela-Mandela hearings clearly demonstrate how the amnesty procedure fails to resolve South Africa’s painful past. In a court of law, after the terrible facts of murder are laid bare, the psychological need for the law to exert its power and punish the offender is overwhelming. There has been tremendous criticism directed at the great emphasis placed on forgiveness, particularly represented by the Christian presence of Archibishop Tutu. One victim’s husband who came home to find the body of his wife spread all over the yard objected bitterly to the imposition of the “morality of forgiveness.”

One black African woman after learning at a Commission hearing how her husband had been abducted and killed was asked if she could forgive the men who did it. Her answer came back through the interpreters: “No government can forgive.” Pause. “No commission can forgive.” Pause. “Only I can forgive.” Pause. “And I am not ready to forgive.”**[ix]**

It remains to be seen whether the Commission can produce anything like reconciliation as a result of these individual amnesty hearings. As one victim, Amos Dyanti, who testified to the Commission admitted, it helped him to have his suffering acknowledged. But his trauma remained. The police captain who supervised his torture has continued to work at the local police station after amnesty was granted, and Dyanti encounters him every day.

And then there is the problem of reparations. The reparations committee of the Commission will begin its work early in 1999. Who will pay? And how much?

Although substantial financial compensation is being recommended, the beneficiaries of apartheid continue to control the economic machinery of the country. The victims of apartheid, for the most part, remain poor and outside the power structure. The long-term goals of national unity and healing depend on the righting of those long-term human abuses.

What conclusions can be drawn from an examination of the Commission's judicial proceedings? When the traditional arguments of a legal courtroom long used to discover the facts of a crime and the particular motives of those who committed it, there is a strong societal expectation that the law will deliver a penalty.

This expectation gains added poignancy when the perpetrators of "crimes against humanity" refuse to accept responbility for their actions in the face of overwhelming evidence and show no remorse. Perhaps the greatest contribution of the Commission to achieve some measure of reconciliation for this anguished country will be its final report to the nation The current plan calls for four volumes of a historical account of human rights violations. Can the TRC paint as complete a picture of the horrors of apartheid over the last three decades? Will ordinary South Africans, the only ones who can rebuild their nation, be satisfied? Can Tutu lead them through a public performance of Christian forgiveness? I am not hopeful. The Commission's construction of the stories of atrocities, public shaming and public suffering may produce public acknowledgement of South Africa's past, but cannot deliver reconciliation.

NOTES

i. Constitution of the Republic of South Africa, 1993.

ii. Dullah Omar, Minister of Justice, Government Gazette, January 1995.

iii. See Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance (Cape Town: David Philip, 1996).

iv. Holmes, "The Path of the Law," Harv. L. Rev. 10 (1897): 457, 459.

v. R. Dworkin, Law's Empire (1986): 28-250, 313.

vi. Cover, "Forward: Nomos and Narrative," Harv. L. Rev. 97 (1983): 4.

vii. Esther Waugh, "Disclosure Vital for Amnesty," The Star, May 26, 1994.

viii. Transcript of the Winnie Madikizela-Mandela hearing before the South African Truth and Reconciliation Commission, Electronic Mail & GHuardian/ZA*NOW, December 4, 1997.

ix. Timothy Garton Ash, 'True Confessions', The New York Review, July 17, 1997: 37.

ISSA Proceedings 1998 – Magnitude Beyond Measure: Judgment And Justice In The Late Twentieth Century

If classical tragedy has any residual wisdom for our age, it may lie in the possibility that the imperatives of forensic judgment prefigure a renewed sense of genuine civic life. Argumentation becomes rhetorical whenever it engages the priority, urgency, or importance of public matters. In the present century, the once-reliable borders, taboos, and hierarchies for grounding and guiding such argumentation have eroded, while the calamities and exigencies of our time have expanded in scale and enormity. Thus an ongoing dialectic of *magnitude* takes on the momentum of an irreversible process yielding a foreclosure of human agency, and virtuous reconciliation to catastrophe as *fait accomplis*. With this essay, I explore three twentieth century concepts designed to stabilize rhetorical argument over "magnitude' in civic and social life; these are the concepts of the *public*, the *spectacle*, and the *rhetorical forum*. In the West, these concepts are the ironic legacy of three unlikely Nineteenth century rhetorical figures (Henry Thoreau, P.T. Barnum, and Ida Wells). In an institutional sense, these same three concepts are the residue of the three foundational genres of rhetorical argumentation; the deliberative, the ceremonial, and the forensic. Most important, these concepts depict inventional moods of civic argument; the utopian, the tragic/farcical, and the retributive/conciliatory moods of judgment and forgiveness. The body of my presentation will stress the allegorical voices of this latter forensic mood: in the Nuremburg trials, as well as in the International Truth and Reconciliation Commission. Such cases as these, exceptional as they are, help to capture the unfinished inventional possibilities of argumentation and civic culture.

The figures of Nineteenth century America – Thoreau, Barnum, Wells – loom over

our still unfinished epoch with an expansiveness that seems larger than life. In mirroring back to us a cultural history more grand, and grandiose, than our own, they introduce nagging questions about what has become of magnitude as solitude, magnitude as magnificence, magnitude as the soul's tumult: the implacability of rage within. Whether we might actually find or construct a map for the typical nineteenth century consciousness, it is clear that the vast panorama of that vision has receded.

The confident progressive histories, so prominent at a new century's first moments, have also lost their traction. The not-always-felicitous union of concept and event, a residue of other discredited systems, continues to hover over the damage. It was Marx who once prophesied that philosophy would replace religion, only to be replaced by history and then politics. But the once-vibrant trajectory of modernity resists any easy assimilation. I do want to suggest, however, that even in an era of "dark times," the work of rhetorical reflection, and all its attendant weights and measures, persists. Specifically, I want to show by way of some culturally specific evidence that magnitude, however momentous its eventful compass, may nonetheless be judged. Such judgment is not only possible. It is absolutely necessary if rhetoric itself has any lingering hope of surviving the crimes of the century.

1. Retracing Modernity: Some Preliminary Codicils

"The category of greatness is in a peculiar situation these says… One has become accustomed to the fact that philosophy no longer represents the knowledge of the time, as the ancients still would have had it. Philosophy has acclimated itself, as it were, to less lofty altitudes" (Habermas 1971).

Of course, knowledge of any culturally-specific time, lofty or not, is elusive. There are as many dialectical oppositions in thematized history as there are dialectical opponents, and no single opposite or contradiction rules by necessity. What we do know is that, if philosophy has opted out of any representational mission for the knowledge of its time, it is the pliably resilient and creative practice of rhetoric that remains wedded to time's residue: the still unfinished magnitude of eventfulness in history.

Retrieving as much as we can from Aristotle's treatment, we might conclude that a strict identity logic will quickly exhaust itself, where the relationships of magnitude are concerned. An important correlary follows from this realization. To the extent that magnitude is always glimpsed in relation to some external aspect,

we will either need to find some fixed archemedian point to gain *the full measure* of things, or we will need to gain access to a rich lifeworld of events, projects and actions, so that our measures acquire relational meaning in practice. This is what I mean by *the eventfulness* of rhetoric. And it brings us as close to a dialectical relation as I am able to offer in these pages. In the world of modernity, as before, rhetoric's language of magnitude has attempted to give order, priority, perspective, and depth of recognition to a myriad of simultaneous and successively jarring events. But not only does rhetorical magnitude offer weight and measure to what it encounters. Increasingly, its own destiny is weighed and measured by these events as well.

In the pages that follow, we consider a succession of rhetorical concepts designed to stabilize and assimilate what "matters most" in the twentieth century. The three concepts are those of the public, the spectacle, and the rhetorical forum. In a sense, these concepts are the ironic legacy of our three Nineteenth century figures. Public life was that great oppressive dialectical *other* that Thoreau tried so desparately to escape. But to no avail. In railing against its venality and short-sightedness, in decrying its lack of true "measure," Thoreau was actually recreating this same public as audience. He became, despite himself, what Hegel noticed as a "character in the middle" of public life. Barnum, of course, was not nearly so complicated.

As the primary inventor of spectacle, Phineas T. Barnum deserves at least an asterisk next to every forgettable superbowl half-time show, celebrity trial, and Olympic ceremony. For well or ill. And as for Ida Wells, whose rage could neither be silenced nor censored, there was literally no choice but to go *outside*, elsewhere for a fair hearing, a witnessing, and a venue where wrongs could be documented, and judgments rendered. To the rhetorical practice of Ida Wells, then, I trace an invention of considerable importance: the rhetorical forum.

2. The public

From its auspicious beginnings to its oft-rumored decline, the idea of the "public" has been one of Modernity's most notorious seductions. The prospect that there are others *like us* who share our priorities, engage us in free discussion, document our collective annoyances, validate our outrage has been the mainspring for the mechanism of liberal politics. Born amid the leisure of Enlightenment cafe society, where idle chatter somehow transformed itself into communicative action critique, the *public* was seen by its apologists as escaping the irony of its bourgeois origins to become a figurative measure of magnitude

and historic progress.
Looking backwards, probably the least outwardly apologetic treatment of this "zone" of civic life comes from Jurgen Habermas.In his first book, *The Structural Transformation of the Public Sphere*, as well as the much more widely distributed encyclopedia excerpt ("the Public Sphere"), Habermas noticed in the public a zone of emergence that seemed to defy its bourgeois enlightenment origins. As he wrote in this early work:
"The bourgeois public sphere arose historically in conjunction with a society separated from the state. The "social" could be constituted as itsown sphere to the degree that on the one hand the reproduction of life took on private forms, while on the other hand the private realm as a whole assumed public relevance. The general rules that governed interaction among privatepeople now became a public concern. In the conflict over this concern, in which the private people soon enough became engaged with the public authority, the bourgeois public sphere attained its political function" (Habermas 1962:127).

This is a vintage Habermas account, fraught with the same dialectical tensions that seem to haunt its subject. Habermas seems to treat the eventful "founding" of the public sphere as a potential emancipatory moment in Western political history. But with characteristic understatement, he reports that "the dialectic of the bourgeois public sphere was not completed as anticipated in the early socialist expectations." Expansions of political rights, broadened inclusion of participatory franchise all promised to imbue the public sphere with a reflexivity of reasoned suspicion, a recourse of advocacy against the unwarranted assertion of state power. But for a variety of complex reasons, the chief engine of potential resistance, "public opinion," became instead simply one more intangible link in a cage of rational domination. Apparently lost in the succession of Habermas's ironic reversals is what "might have been" an emancipatory potential in the rhetorical appeal to public thought as *an agency of moral resistance*. The abandoned tacit question that addresses itself to any secular form of institutional domination remains that of *legitimation*.

As in many a concept in rhetoric, the idea of the public is itself a rhetorical invention. Social facts do not necessarily require empirical residences, however. And this is not to discredit their historical force. A key chapter in the story of the "public" idea took place at considerable geographic remove from Habermas's *ancien regime* of European culture: in the so-called new world to be known, by

itself at least, as “the American century.” This chapter is initially authored by John Dewey and the liberal-progressive pragmatists; and its call to activism is echoed by an entire modern school of thought in rhetorical theory.

Unencumbered by what it considered the baggage of Nineteenth century Idealism, and freed as well from any overarching theory of history, Dewey’s concept of the public is that of a purposive agency and regulator of change. In an oft-quoted passage from his seminal study, *The Public and Its Problems*, Dewey wrote:

“We take then our point of departure from the objective fact that human acts have consequences upon others, that some of these consequences are perceived, and that their perception leads to subsequent effort to control action action so as to secure some consequences and avoid others. Following this clew, we are led to remark that the consequences are of two kinds, those which affect the persons directly engaged in a transaction, and those which affect others beyond those immediately concerned. In this distinction we find the germ of the distinction between the private and the public. When indirect consequences are recognized and there is effort to regulate them, something having the traits of a state comes into existence. When the consequences of an action are confined, or are thought to be confined, mainly to the persons directly engaged in it, the transaction is a private one.”

Reading these words, over Seventy years later, one is struck by residual curiosities in this straightforward pragmatic account. For instance, while the “germ” of Dewey’s distinction still seems intuitively plausible, its presentational “voice” suggests a mechanism of determination that all but evaporates the force of human agency. Others are “affected.” indirect consequences “are recognized.” There “is effort” to regulate them (i.e. consequences). All of these things seem to be going on at a remote and inaccessible distance. One of Dewey’s most articulate and sympathetic commentators, Lloyd Bitzer, correctly positions this account as a “genesis” theory, beginning with the deceptively simple fact that (as he puts it), “public acts occur.” He also offers us a very emphatic answer to a question where Dewey himself seems ambiguous: “Note that the public is *called into being* by the consequences: persons affected by such consequences comprise a public, whether or not they are aware of their identity as a public.” Bitzer follows this statement with a quote from Dewey where he appears less than exact on the same question: “The public,” he writes, “consists of all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to

have those consequences systematically cared for." Deemed necessary, one wonders, by *whom*?

Bitzer is able to write, with nary a trace of irony: "The machinery of a state – offices, officials, laws, tribunals, and the like – are invented to assure the well-being of the public."

Thus, it has been argued (by Fraser, as well as McGee and Martin) that what critical theory regarded as "the public sphere" mutated from a burden of proof of legitimation *for* the state into a sort of presumptive entitlement *on behalf of its* secular representatives. To be fair to Bitzer, it could be retorted that this was surely not his original intent. Still less so in an era where one party's hegemonic intrusion may be another's site of resistance.

Isn't this all simply a matter of "point of view"? The uncomfortable acknowledgement must be that one hopes (I hope) that this is not so. Clinging steadfast to this hope, I must concede that something happened to the "public sphere" (in both thought and history) when universal pragmatics was succeeded by its more mechanistic new world relations.

I have not the space here to do full justice to the complex difficulties of the pragmatically theorized 'public' and its own indirectly thematized consequences. For instance, the paradox of inhabiting a "public" that one does not know one is in only intensifies with Dewey's tortured diagnosis of the public's disappearance. If a public does exist, Dewey writes, "it must certainly be as uncertain about its own whereabouts as philosophers since Hume have been about the whereabouts of the self." Whatever one makes of such a passage, it implies that recognition of public identity must have at least something to do with the full realization of that identity. Between such recognition and the mute acceptance of official attribution lies the shadow of majoritarian silence.

Yet there is a less-noticed aspect to the pragmatic conception of the public that needs to be underscored, especially if we are to fully appreciate the dialectical reversals of public agency in modern times. I say this is a less-noticed aspect because I myself did not notice it until quite recently. Note in Dewey's original formulation, and again in the section quoted by Bitzer, what it is that calls the public into being or existence: "Human acts have consequences upon others," and again, "those who are affected by the indirect consequences of *transactions* [my underlining], and again (from Bitzer) "public acts occur." It is not so much that this formulation is question-begging. The more serious problem is that Dewey apparently limits the genesis of the public to the consequences of already-situated

human action. Now this makes sense in a loose metaphorical way if we remind ourselves that the philosophy of pragmatism originally situated the mind in the midst of experiential interaction throughout the unfinished process of nature. However, even if we extend this interpretative generosity to Dewey,we are still forced to dilute the meaning of "action" to the point that issues of power and control are flattened beyond recognition.

A less generous reading would be forced to inquire what has been purchased by this rather odd view of origins. Why odd? Does any late-twentieth century denizen of modernity think that only human actions occasion matters of public concern? Let me go further and suggest that it is not just modern brushes with epidemics like AIDs, famines, natural disasters that broaden our sphere of public "acquaintance." In Aristotle's famous discussions of "phobos," and pity (from the *Rhetoric*), there is a rather striking list of what occasions these emotions: "all things that are destructive, consisting of griefs and pains, and things that are ruinous, and whatever evils, having magnitude, are caused by chance. Deaths and torments and diseases of the body and old age and sicknesses and lack of food are painful and destructive." With fear, it is the large destructive forces that we are unable to control. Fear nonetheless, we are told, inclines us toward deliberation. Aristotle concludes an earlier section by saying: "fearful things, then, and what people fear are pretty much the greatest things." Perhaps one of the few things Aristotle had in common with modernity was the realization that not everything that impacts public interest and awareness is already an outcome of human action.

So let us pose the question again. What has Dewey been able to purchase with this: unusual framing of public origins? While we can not know with any certainty, I strongly suspect that it is a certain balanced ratio of defeasability for action itself. Put another way, if consequences that impact and constitute a public's existence are already human in origins, then they must in some manner be capable of being 'cared for," "tended," (the nurturing version) regulated, controlled (the hard-boiled version). Hindsight is twenty-twenty, of course. But there is still irony aplenty with Dewey's own modernist confidence in the science of social control and expert valuation, given the timing of his remarks after "the Great War." How many more events would be open to the framing of "action," and therefore public regulation? The depression? The machine age, the war culture, the bomb, genocide, the paving of America and then the world? The great

modernist dream of progressivism turned upon the dubious enthymeme that, if only human nature could be perfected, so could everything else. It took the jaundiced comic spirit of Kenneth Burke to realize a Faustian truth that perfection is a term of entelechy, *not* of ethics. Abigail Rosenthal makes the point I have been circling around:

"Well, let us say briefly this: in the late-nineteenth and early-twentieth century, Western people believed in themselves. They believed, that is, that they were members of the most enlightened and progressive association of related cultures in the history of the world, and that they had both a right and a duty to bring their cultural light into the remotest corners of the inhabited world. Since that belief's heyday, members of Western culture have seen World war I, the Armenian massacre, the great depression, the failure of the versailles treaty, the Hitler and Stalin eras, the nuclear arms race, the ecological threats to the habitability of the planet, and other catastrophes, almost all of them issuing out of or related to factors in Western culture" (Rosenthal, 1987).

Rosenthal is looking for an explanation for the upsurge in what she considers, "moral relativism." But I think her recitation of "big events" illustrates a related theme as well. John Dewey, like many progressive optimists of his era, simply assumed that the avenues of activism and socio-political progress were necessarily public mechanisms, and accordingly that the great events, with their enduring consequences, would be able to generate great and enduring publics, with great leaders, and great symbols accessible to all. But the events which unfolded, while arguably human in constitution, were immeasurably larger in compass than any actional perspective might grasp. Lacking an archimedian point,a lever, a mechanism of agency, each moment of phobic recognition became its own dialectical ground of inertia. And so a rhetoric of compensatory resignation set in. A culture of delusion was succeeded by a culture of disillusion.

Lloyd Bitzer's valliant attempt to revive Dewey's public idea has been castigated too many times, from quarters too intellectually impoverished to deserve charitable reconstruction here. Rereading his concluding words, in the midst of yet another post-war disillusionment, I find it difficult not to experience – in almost equal portions – inspiration and a poignant sadness. Words such as these:

"We seem unable or unwilling to acknowledge that some truths are not to be found in these kinds of time frames, but rather *become,* over time, and perhaps pass in and out of existence. Why should we not acknowledge that some truths exist as faint rays of light, perceived perhaps dimly in a near-forgotten past, but

which light up again and again in the experience of generations?… The great task of rhetorical theory and criticism, then, is to uncover and make available the public knowledge needed in our time and to give body and voice to the universal public."

In these eloquent words, the logic of defeasability still rules: "The exigencies are global, and no less than a universal public is sufficient to authorize their modification." But if the clarion call lacks traction in these times, our times are the poorer for this fact. Bitzer's vision perhaps hovers now as an horizon beyond the public eclipse, a progressive-humanist article of faith asking for belief not despite implausability, but *because* of it.

3.The spectacle

"The diversionists have arrived. Some toy with "desire," the "libido," etc.; denounce responsibility as a "cop's word"; set traps for others and trap themselves in the blind alley of schizophrenization. Their strict complement, Foucault ("This century will be deleuzian or will not be," he says; we can rest assured that it is not) presents all society as caught up entirely in the nets of power, thereby erasing the struggles and the internal contestation that put power in check half the time" Cornelias Castoriadis (1976).

The legacy of the "public" dream (or ideology, if one prefers) has been, in the short run at least, a dispiriting one. And into the vortex of vacated universalism, has come that nightmarish deformation of modernist dreams: the spectacle. The triumph of signification without referents, as well as the eternal youth of Barthe's dead authors (He must have had Barnum in mind) spectacle is the celebration of the bad infinite as the only infinite in town. Spectacle is too many things to adequately encapsulate here. That is because it is too many things, period. It is, in the old critical theory jargon, the choreography of appearances as commodity for visual consumption: the mass ornament. It is the sublime left out in the sun too long, and turned rotten with neon.

To say that spectacle is a rhetorical formation that situates argument will seem strange to those who identify argumentation with critical reflection. For it seems the overarching function of spectacle to erase such reflection in the self-consuming pleasure of the gaze. What I will content myself with in this short excursus is the two-fold observation that yes, an attenuated demonstrative argument of hyperbole is usually going on with spectacle. The redoubtable Guy DeBord has written of spectacle: "The spectacle presents itself as something

enormously positive, indisputable, and inaccessible. It says nothing more than 'that which appears is good, that which is good appears.' The attitude which it demands in principle is passive acceptance which in fact it already obtained by its manner of appearing without reply, by its monopoly of appearance." So there is, in Debord's terms, a sort of arguing going on with spectacle.
It is a kind of panorama of assertion, with no apparent space for mental reservation or resistance. This is not a bad vernacular rendering of the baffling Marxist concept of reification. But it doesn't quite say all that needs to be said. This is because spectacle doesn't ever say it all either. It only purports to. It seeks to dazzle us, to bowl us over with the breathless fulfillment of false totality. As Debord himself inadvertently demonstrates, spectacle always needs to have some sort of subtitle, or decoding caption. Put another way, its imposing choreography of imagistic appearances is always self-congratulatory, but never self-explanatory. This is why we get such euphoric and meaningless consumer captions as , "It doesn't get any better than this," or "When you've said Bud, you've said it all." That is part one of the observation. Part two is sub-titled, "Yes, but…"

Over and against all logic and common sense, I want to suggest there is a sort of hidden normative trajectory within spectacle. Part of this derives from spectacle's warped teleology of desire. As my little graphic makes clear, we are absorbed in spectacle through a kind of delirium-fascination. At its worst, this gaze can resemble the sort of faddish voyeurism that stops to gawk at roadside carnage. But even at its worst, it is not a morally neutral activity. The same *schadenfreude* that brought Barnum's vast heterogeneity of gapers to 19th century sideshows beckons us for largely similar reasons. How could such a deformation of normal order happen? It is so unfortunate, and aren't we fortunate that it didn't happen to us? And worse yet, it is so sad that there is absolutely nothing we can do. If you place these questions end-to-end, they emerge as the fatalistic dialectical other of the four traditional deliberative questions. This is an ethic for visual consumption in a sedentary age. I don't mean to suggest that it is on a par with the categorical imperative. But it is probably better than nothing. Especially if "it doesn't get any better than this." It is probably easier to grasp this normative dimension, if we think about the deformation in a more affirmative way. As Julia Krysteva explains cultural delirium, it tends to inflate a sentimental spectacular object, say, the love objects in *Titanic*, or some sports celebrity into a shape that is both transcendental and accessible. The flaws in these figures simply disappear, so important is it that they become an abstract signifier of our own longing. For

what? Well, I am mixing mythologies here, but I suspect the sirens song of fascination is not so incompatible with Krysteva's sense of longing after an endlessly deferred human capacity. Here is the way she puts it:
"… delirium masks reality or spares itself from a reality while at the same time saying a truth about it. More true? less true? Does delirium know a truth which is true in a different way than objective reality because it speaks a certain subjective truth, instead of a presumed objective truth? because it presents the state of the subject's desire? This 'mad truth' of delirium is not evoked here to introduce some kind of relativism or epistemological skepticism. I am insisting on the part played by truth in delirium to indicate, rather, that since the displacement and deformation to delirium are moved by desire, they are not foreign to the passion for knowledge, that is, the subject's subjugation to the desire to know."
So these present themselves as the negative and affirmative aspects of a certain elusive normative content, in the grand Fuji blimp of world wide spectacle.

The much more obvious zone of reflection in the pageantry of spectacle occurs in those occasional indigenous participatory moments that seem to fly in the face of all the choreography. We cannot fail to notice them, for they startle us all when they occur – almost as if we were being awakened from a dreamlike daze.

Moments like Tieneman square. Or, an occasionally rude interruption by what, for want of a better term, can only be regarded as "reality." To mention only a few Olympic moments, the Black September massacre of Israeli athletes in Munich 1972, the genuinely heartfelt remembrance of Sarajevo in Lillyhammer in 1992, and the Atlanta bombing just two years ago. These rude interruptions are rarely pleasant. But in their very unpleasantness they shred the veil of false amusement. In a minor version, one must be a bit startled by the still confounding revolt of People magazine readers that forced the Queen to say, in best Clintonesque style, that "yes, I feel your pain." Where false tranquility is the norm, rude interreuptions may also be rude awakenings.
What may be said at this point is that, like its generic antecedent of epideictic discourse, spectacle has at best an accidental relationship to reflection about magnitude. It demonstrates, it choreographs, it magnifies, it embellishes. The only times we are able to reflect about what genuinely matters is either: a) when we are able to decode the choreography allegorically, or b), when some unpleasant aspect of "real life' rudely interrupts the procedings. But spectacle, for all this, is extremely important to the state of reflective argumentation about

magnitude for historical reasons that have their own ironic mimetic claim. There are times when spectacle appears to be the only game in town.

4. The Rhetorical Forum

The final rhetorical formation for addressing the legacy of magnitude beyond measure is that of the rhetorical forum. The public, the spectacle and the forum are, as we have seen, the exotic legacy of the deliberative, ceremonial and forensic genres. If I may quote myself, a rhetorical forum creates " a symbolic environment within which issues, interests, positions, constituencies and messages are advanced, shaped, and provisionally judged" (Farrell 1993: 282). Less jargonistically put, a rhetorical forum is an encounter-setting where discourse may be gathered, situated, thematized, stabilized. Students of argumentation, I suspect, are sufficiently familiar with the concept of "forum" to require no more than an attenuated description of it here.

What I would like to do, however, is to amend my category schema somewhat, by allowing two qualifications. First, it will not do to separate forum off entirely from the previously discussed types of public and spectacle. The most enduring cases of rhetorical forum have always had some public aspect to them. They are known, talked about, often controversial. And then there is the fact that their own operations typically engender discussion, colloquy, a process that seems to me not all that different from Habermas' idealization of discursive will formation. So far as spectacle, there are clearly family resemblances here as well.

Consider the extended example I use to illustrate rhetorical forum: the famous Nuremberg trials. The city of Nuremberg was itself symbolically chosen as scene. It was virtually rubble, but for an area on the fringe where stood the ironically named, "Palace of Justice." This latter locale was where the all-important initial trials were held. Widely circulated photos at the time heightened the profound contrast. To the press and, I suspect, any moderately inquisitive observor, this semiotics of display said something like, "in the midst of barbarism, a search for the restoration of civility." Perhaps an attempt to find real justice in this Palace of name only? The inside of the Palace is arranged so as to stress of course the moral seriousness, the formality of these proceedings. This is why you see the flags, the hangings, the elevated sight-lines for justices as jury. All this is spectacle, or at least theater. We can be grateful that they did not bear more modern traces of commodification: spin doctors, play-by-play announcers, commercial interruptions, and of course endorsements; perhaps the Nike

"swoosh" on the judicial robes. My second qualification is that there is no *a priori* reason why the forum should be limited to judicial examples, and forensic proceedings, with a mode of judgment the preferred mood. All I would say at this point is that the most conspicuous and successful prototypes of the rhetorical forum, at this juncture of history, have typically been forensic in character. Perhaps temporal distance remains the best arbiter of perspective where rhetorical magnitude is concerned.

For my own purposes, the case of the judicial forum, or encounter-setting, or tribunal is particularly important, because it helps to illustrate special problems of invention, authority and legitimation that are perhaps unique to our age. It has been observed, with undue frequency, that idealized postulated settings for speech often come to regard rhetoric as an unwelcome, insincere intruder. But this somewhat smug observation ignores the logical question of how *any* reasonably impartial setting is created in the first place. Far from being obliterated by the fierce lens of ideality, rhetoric is what makes the flickering glimmers of ideality possible; at least that is the view sponsored by the body of this essay.

If the forum is regarded as one of those "social emergents," very little serious intellectual labor has been devoted to the question of just how such "emergents" emerge. Institutions do not drop, fully formed, out of the ether like some Rawlsian a priori. Just as surely as "de jure" authority is made up from "de facto" authority, just as surely as today's Nobel peace prize winner may have been yesterday's terrorist, the regulative principles of real-life institutions must be constructed, fabricated from the ball of confusion that is real life.

For my specific, far from perfect, exemplar of Nuremberg, two performative exigencies were uppermost. Rhetorical performance must first legitimate the authority of this forum, a formidable task for a trial by the victors of the vanquished. Rhetoric must also move beyond this daunting objectivity of event to the more human forensic scale of guilt, responsibility, confession, mitigation, retribution. My question then is how, if at all, was rhetorical performance able to do this?

The full(er) answer to this question moves far beyond the confines of this report I can at best outline my overall approach here. Without begging the question too much, I think we can say that a rhetorical forum needs a certain sense of sponsorship, of serious regard, by those who witness its proceedings. If no one

pays any serious attention, it will degenerate into what the national party conventions seem to be on the verge of becoming: empty sideshows. Secondly, and this is so obvious it is frequently overlooked, a rhetorical forum is authenticated not only by the quality of performances it evokes, but also by the degree of seriousness displayed by the participants as performers. Let us approach each of these considerations. In this discussion, I hope to show that, at Nuremberg, as in institutional life generally, rhetorical performance was able to ply its craft on multiple levels.

Once it was determined that there would be trials (No less an authority figure than Winston Churchill thought we should just shoot the lot of them) the next question, of critical importance, was what sort of trial. Would the defense have counsel? Could they make their own case to thetribunal (constructed, it will be recalled, from distinguished jurists of the allied countries)? Could there be cross-examination? In passing, I note that there was – to say the least – no tradition of cross-examination in the Soviet Union.

Would the trial be "public"? A considerable contribution to the legitimation of this forum was offered by, of all things, the adversarial principle of procedural justice.

This will seem at least odd to those who bemoan the sophistry of rhetoric. The oldest known rhetorical principle, dating back to Protagoras and the sophists, is the principle of the *dissoi logo*. Crudely stated, it is that any genuine issue admits to at least two arguments (*logo*). It may be affirmed or denied. The cost of any such procedural codicil (as both the early British position and latter Soviet position seemed to sense) is that it repositions this "black guilt," this "obvious guilt" as a matter of uncertainty. There was also the question of providing a forum for these evil thugs to debase the proceedings. The best response to these concerns was given in a speech predating these discussions, a speech delivered by Attorney General Robert Jackson the day after Franklyn Roosevelt died. He said, in part:" I have no purpose to enter into any controversy as to what shall be done with war criminals, either high or humble. If it is considered good policy for the future peace of the world, if it is believed that the example will outweigh the tendency to create among their own countrymen a myth of martyrdom, then let them be executed. But in that case let the decision to execute them be made as a military or political decision… Of course, if good faith trials are sought, that is another matter. I am not troubled as some seem to be over problems of jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches that there are

certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts.You must put no man on trial before anything that is called a court…under the forms of judicial proceedings is you are not willing to see him freed if not proven guilty."

With these eloquent words, future chief prosecutor Jackson helped lay the groundwork for a proceeding unique for its time and ours. As for the discourse itself, it ranged from the eloquence of accusation, to the defiance of defense, perorations for the ages, testimony from the third circle, confessions to the beyond, and everywhere in between. It would be something akin to editorializing to say that these proceedings gave to barbarism a human face. In fact, amidst all the tedium, a great many mistakes and blunders were made as prosecutors and defendants respectfully attempted to document and to disavow the unimaginable.

The final section in my somewhat picaresque treatment looks at the proceedings, if you will, from the other side. While it may seem like heresy to credit the defendants with much of anything rhetorically, I have come to a conclusion that might be something of an insight; or it may merely be perverse. I want to suggest that many of the defendants' final words, and in at least one case, an actual confession, did dramatically enhance the stature, authority, and legitimacy of this rhetorical forum.
Let us begin with the confession because I believe it provides the clearest case. In the book I am currently writing (called, *The Weight of Rhetoric*), I have a portion of one chapter devoted to what I call "confessional rhetoric." I argue that, while this is not a terribly prominent genre, it is very important and also quite difficult to do properly. I have even come up with five felicity conditions for properly confessing:
I. An explicit admisson of wrong-doing is made.
II. The admission must be true.
III. There must be remorse for the act committed, or not committed.
IV. The confession must be made before the proper authority (either the aggrieved party, or failing that, an audience/agency empowered to acknowledge, forgive, punish.
V. The magnitude of the offense must be worth the effort and burden of confessing.

There were not many confessions among the defendants at Nuremberg. But in the one brave and stoic statement by Wilhelm Keitel, there is a remarkable congruity

with the conditions I mentioned:

"Now at the end of this Trial I want to present equally frankly the avowal and confession I have to make today. In the course of the trial my defense counsel submitted two fundamental questions to me, the first one…was: 'In case of a victory would you have refused to participate in any part of the success?' I answered: 'No, I should certainly have been proud of it.' The second question was, 'How would you act if you were in the same position again?' My answer: 'Then I should rather choose death than to let myself be drawn into the net of such pernicious methods.' From these two answers the High Tribunal may see my viewpoint. I believed, but I erred, and I was not in a position to prevent what ought to have been prevented. That is my guilt. It is tragic to have to realize that the best I had to give as a soldier, obediance and loyalty, was exploited for purposes that could not be recognized at the time, and that I did not se that there is a limit even for a soldier's performance of his duty. That is my fate.'"

It is an explicit admission. All evidence attests to its truth. Remorse is shown. And surely the magnitude of offense has occasioned the discourse. But what about the proper party? Is *this* the proper party? What I did not realize at the time I first thought through those conditionals, is that sometimes if everything else is in place, the forum *becomes* the proper party. I have no desire to enoble or canonize a person who, by his own admission, was guilty of incalculable evil. But in Keitel's remorseful address to this "High" tribunal, more may have been done than all the eloquence in the world to inscribe the authority and legitimacy of the Nuremberg proceedings.

In the longer version of this essay, I compare and contrast Nuremberg to two other instances of a forensic rhetorical forum: the still-ongoing Truth and reconciliation Commission in South Africa, and the mercifully concluded"Trial of Pol Pot." For quite differing reasons, I hypothesize that neither of these encounter contexts approached the performative rhetorical accomplishmentsof Nuremberg. Does this mean that the Nuremberg trials were a successful rhetorical performance? What a stupifying question. The scale on which such a performance might be measured is simply not known or available to me. The trials were scenes within scenes, a chiasma of activities, finally not open to genuine human closure. What they were able to do, I believe, is offer a modicum of recognition to the human face of barbarism. This is no small accomplishment. For the larger questions, there is only hope – or despair. For anyone who examines these crimes closely, we must marvel at the mid-century hubris of humankind, the rational animals, purporting to mete out justice before the bar of civilization. But there is

something hopeful to this naively Utopian project. It is that, even though no act of reason could ever redeem these historic crimes, it has taken no small effort of reflection to ensure that they never be forgotten.

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ISSA Proceedings 1998 – What Went Wrong In The Ball-Point Case? An Analysis And Evaluation Of The Discussion In The Ball-Point Case From The Perspective Of A Rational Discussion

1. Introduction

In May 1991 a 53-year old woman is found dead in her house. Pathological investigation shows that she has a BIC ball-point inside her head, behind her eye. An accident? A murder-case? The finding is the introduction to one of the most interesting and complex criminal cases of the last years in the Netherlands. The former husband and the son are under suspicion. Rumour has it that the son, during his school years, has referred to the perfect murder more than once. Finally, in 1994, J.T., the son, is arrested. This is done after the police were given a statement by a psycho-therapist in which this therapist contended that the son confessed to her that he killed his mother. He would have shot a BIC ball-point with a small crossbow. On the basis of this statement of the therapist, who wanted to remain an anonymous witness, in combination with the statement of the forensic pathologist and the statement of the police, the prosecutor starts a criminal procedure.

The District Court sentences J.T. on September 29, 1995 for murder to twelve years imprisonment. J.T. appeals and after many procedural complications he is finally acquitted by the Court of Appeals in 1996. The Court of Appeals is of the opinion that, on the basis of what is said by the expert witnesses, it is not possible to formulate a hypothesis of what has actually happened. The expert witnesses, the witness on behalf of defense and the witness on behalf of the prosecution, all testify that when a ball-point is shot at a human head with a crossbow, this always results in a damage to the pen when it penetrates into the head. Therefore, it is impossible to shoot a ball-point at a human head with a crossbow without damaging the pen, as would have happened in this case. The Court also says that,

because it could not find a convincing support for the statements of the therapist on the basis of other information, it could not decide that the statements of the therapist are in accordance with what has actually happened. Therefore the indicted fact could not be proven beyond reasonable doubt.

Not only in the media, but also among lawyers, this so-called 'ball-point' case raised many questions with respect to the quality of the Dutch criminal system. A lot of mistakes would have been made by the police and by the courts during the trial with respect to the way in which the evidence was handled. Because of my own background as an argumentation theorist, I would like to concentrate on the question what could be said about this case from an argumentative point of view: what went wrong in the discussion about the evidence from the perspective of a rational argumentative discussion? In the reviews of this case, generally speaking, two important points of critique can be distinguished.**[i]**
The first point is that the decision of the district court was mainly based on the statement of the therapist, which turned out to be a very weak element. The second point of criticism is that the court did not engage in an explicit discussion of the accident theory, that the woman had fallen in the ball-point by accident.
These two points amount to the critique that the argumentation in the justification of the District court was unsatisfactory with respect to the central question whether J.T. had indeed killed his mother. According to the official rules and the official practice of district courts in criminal cases, the court has done nothing wrong. But considered from the perpective of a fair trial ànd considered from the perspective of a rational argumentative discussion, the argumentation of the District Court can be criticized in several respects.
What I would like to do is to go into these points of critique from the perspective of argumentation theory. I will use the pragma-dialectical theory of Van Eemeren and Grootendorst developed in *Argumentation, communication, and fallacies* (1992) (also known as the theory of the *Amsterdam School*) as a magnifying glass for highlighting those aspects of the ball-point case which can be criticized from the idealized perspective of a rational discussion. I will use this theory for analyzing and evaluating the ball-point case from the perspective of a rational argumentative discussion. I will connect my analysis and evaluation wit ideas developed by Anderson and Twining (1991 and 1994) and by Wagenaar, van Koppen and Crombag (1993) about ideal norms for the assessment of evidence in criminal cases.

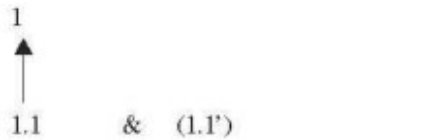
2. The analysis of the argumentation in the ball-point case

To establish whether the argumentation put forward in defence of a legal position is sound, first an analysis must be made of the elements which are important to the evaluation of the argumentation. In the evaluation based on this analysis the question must be answered whether the arguments can withstand rational critique. In a so-called rational reconstruction an analysis of the argumentation is made in which the elements which are relevant for a rational evaluation are represented.**[ii]**

The aim of the *analysis* is to reconstruct the argumentation put forward by the various participants to the discussion and to reconstruct the structure of the discussion with respect to the question which parts of the argumentation have been attacked. The aim of the *evaluation* is to determine whether a standpoint has been defended successfully against the critical reactions put forward by the various antagonists during the discussion in accordance with the rules for a rational legal discussion.**[iii]**

2.1 The reconstruction of the argumentation structure

In the reconstruction of the argumentation in the ball-point case I will use various analytical concepts developed in pragmadialectical theory. In the reconstruction, a pragma-dialectical approach distinguishes between various forms of argumentation.**[iv]** In the most simple case, called a *single* argument, the argumentation consists of just one argument with, usually, one explicit (1.1) and one unexpressed premise (1.1'). Represented schematically (I):



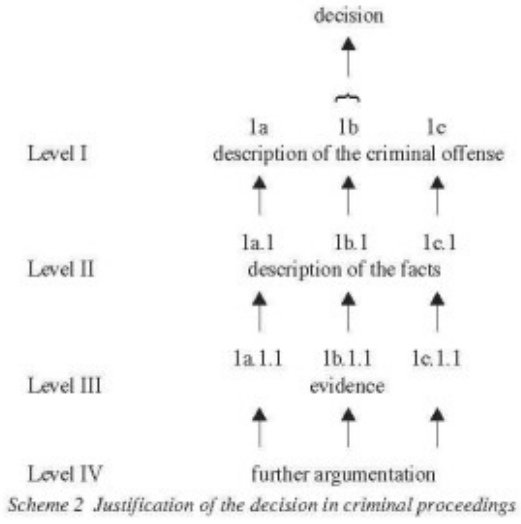
Schema 1 Schema of a single argument

Scheme 1: Schema of a single argument

Often the argumentation is more complex, which means that there are more arguments put forward in defence of the standpoint. When a legal standpoint is supported by more than one argument, the connections between these arguments may differ in nature. Van Eemeren et al. (1996) distinguish various forms of complex argumentation, depending on the types of connection between the single

arguments. They distinguish between *multiple* (alternative) argumentation in which each argument constitutes in itself sufficient support for the standpoint; *coordinatively compound* (cumulative) argumentation in which a number of arguments are linked horizontally and which provide in conjunction a sufficient support for the standpoint; and *subordinate* argumentation in which a number of arguments are linked vertically and which provide in conjunction a sufficient support for the standpoint.**[v]**

The justification of the decision of the judge in a criminal process in general consists of a complex argumentation, consisting of various 'levels' of subordinate argumentation. On the first level (I), the argumentation consists of compound argumentation consisting of a description of the criminal offense. On the second level (II), the argumentation consists of several single arguments, describing the facts which form instances of the components of the criminal offence. On the third level (III), the argumentation consists of a number of single arguments, the evidence for these facts. The argumentation on level III is sometimes defended by further argumentation of the fourth level (IV). In scheme (II):



Scheme 2 Justification of the decision in criminal proceedings

Scheme 2 : Justification of the decision in criminal proceedings

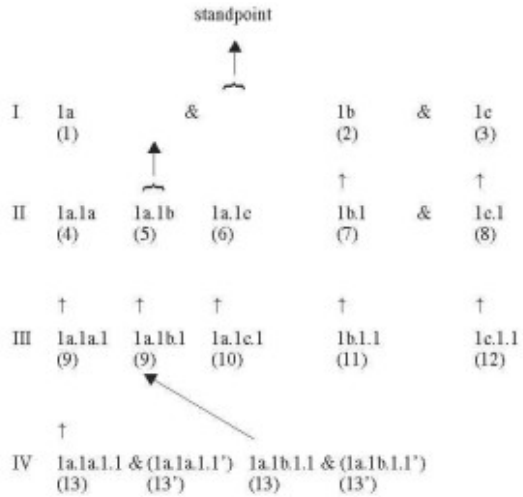
The decision of the *District Court* in the ball-point case is that the accused must be sentenced with an imprisonment of twelve years. This standpoint is based on the coordinative compound argumentation (argumentation on level I) that, because certain facts can be considered as proven, ànd that these facts constitute an instance of the criminal offense of clause 289 of the Dutch Criminal Code, and

that the accused is guilty, the punishment which is connected to this criminal offense must be applied**[vi]**:

The argumentation on level II in defence of the components of 1a, 1b and 1c consists of a description of the concrete facts. The concrete facts, in turn, are each defended by single arguments which imply that the court 'believes' the evidence as presented (argumentation level III). As a defence of the supportive force of the statements of the therapist (9) the court puts forward the argumentation on level IV).
In the reconstruction this argument (13) is represented in the form of the two separate supporting arguments 1a.1a.1 and 1a.1b.1, which have an identical content. Schema (3) describes the arguments on the various levels and (4) gives a schematic representation. The decimal numbers reflect the pragma-dialectical hierarchy. I have used the numbers 1-13 for reasons of efficiency: it is easier to refer to these numbers.

Scheme 3: Argumentation of the district court
Decision: The accused must be punished with an imprisonment of twelve years.
1a intentionally and with forethought killed (1)
1a.1a We are justified in believing that it is proven beyond reasonable doubt that J.T. acted intentionally and after clear thought and pre-meditated (4)
1a.1a.1 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow (9)
1a.1a.1.1 The District Court found her statement consistent and convincing (13)
1a.1b We are justified in believing that it is proven beyond reasonable doubt that he shot a ball-point through one of her eyes into the head with a small crossbow (5)
1a.1b.1 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow (9)
1a.1b.1.1 The District Court found her statement consistent and convincing (13)
1a.1c We are justified in believing that it is proven beyond reasonable doubt that Mrs. de M. died as a result of the fact that J.T. shot a ball-point through one of her eyes with a small crossbow (6)

1a.1c.1 We are justified in believing in the trustworthiness of the statements of the coroner's report (10)
1b On or about May 25, 1991 in Leiden (2)
1b.1 then and there (7)
1b.1.1 We are justified in believing in the trustworthiness of the statements in the police report on the finding of the body (11)
1c a woman named Mrs. de M. (3)
1c.1 a woman named Mrs. de M. (8)
1c.1.1 We are justified in believing in the trustworthiness of the statements in the police report on the investigation by the coroner (12)



Schema 4 Schematic representation of the argumentation of the district court

Schema 4 : Schematic representation of the argumentation of the district court

2.2 The reconstruction of missing premises
In the reconstruction of the argumentation, all the argumentative steps must be made explicit. As we have seen, by reconstructing the argumentation structure, we get a clear picture of the various arguments put forward in defence of a standpoint and of the relations between these arguments. In such a reconstruction it becomes clear that many argumentative steps remain implicit, and it is the task of the analyst to give a rational reconstruction of these implicit arguments.
When reconstructing implicit arguments an analyst can use logical as well as pragmatic insights.**[vii]** To establish what has been left unexpressed from a

logical perspective, the analyst must try to find out which statement is necessary to make the argument logically valid. If an arguer is sincere and does not believe that his argumentation is futile, this means that he assumes that others will be inclined to apply the same criteria of acceptability as himself.

These criteria will include the criterion of logical validity. Therefore, the analyst must examine whether it is possible to complement the invalid argument in such a way that it becomes valid. From a pragmatic perspective, however, the premis which makes the argument logically valid, the so-called *logical minimum*, sometimes contributes nothing new and is, therefore, superfluous. To try to make the missing premiss more informative, the analyst can try to formulate the so-called *pragmatic optimum* which complies with all the rules of communication. Often, this is a matter of generalizing the logical minimum, making it as informative as possible without ascribing unwarranted commitments to the arguer and formulating it in a colloquial way that fits in with the rest of the argumentative discourse.
In the analytical overview of the District Court, on various levels bridging arguments must be made explicit. Because our main concern is the argumentation with respect to the evidence, I concentrate on the argumentation on level III and IV of the argumentation where the various elements of the evidence are located and where the force of the evidence is justified. On these levels, various arguments must be made explicit.
A reconstruction of the arguments and missing premises on which the discussion in the procedure before the District Court centres is given in schema (5). The arguments 9’ and 13’ are the bridging arguments for the argumentation consisting of 9 and 13.

Scheme 5 : Reconstruction of missing premises
A
5 We are justified in believing that it is proven beyond reasonable doubt that he shot a ball-point through one of her eyes into the head with a small crossbow
because
9 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow
and

(9’) If we are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow, then we are justified in believing that it is proven beyond reasonable doubt that he shot a ball-point through one of her eyes into the head with a small crossbow

B
9 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow
because
13 We find the statement of the therapist consistent and convincing
(13’) If we find the statement of the therapist consistent and convincing, then we are justified in believing the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow

These arguments 9’ and 13’ form essential steps in the argumentation of the District Court. In the evaluation it must be checked whether the explicit and implicit arguments can withstand rational critique.**[viii]**

3. The evaluation of the argumentation in the ball-point case
In a pragma-dialectical approach, the aim of the evaluation is to establish whether the protagonist has succeeded in defending his standpoint sufficiently. For the evaluation of the argumentation of the ball-point case, this implies that we must establish whether the argumentation of the District Court is acceptable if we submit it to the various critical tests of a pragma-dialectical evaluation.
In a pragma-dialectical evaluation the rules for a successful defence concern the question of whether the protagonist has successfully defended the initial point of view and subordinate points of view (arguments) called into question by the antagonist.**[ix]** The protagonist has successfully defended an argument against an attack by the antagonist if the propositional content of the argumentation is identical to a common starting point and if the argumentation scheme underlying the argumentation is appropriate and applied correctly.**[x]**
So, in our evaluation we must check whether the arguments of the District Court

which have been called into question are acceptable and whether the argumentation scheme underlying the argumentation is applied correctly. First I will focus on the acceptability of the line of argumentation defending (1) which forms the central point of discussion. Then I will go into the question whether the District Court has responded adequately to other attacks by the defense.
In the evaluation of the acceptability of the line of argumentation supporting 1, the relevant question to be answered is whether the *argumentation schemes* underlying the argumentation in defence of (1) are applied correctly. This implies that it must be checked whether all relevant critical questions belonging to the argumentation scheme can be answered satisfactorily. Which argumentation schemes underlie the argumentation for the evidence in the decision of the District Court?**[xi]**

As we have seen, the support for 1a (1) consists of the arguments reconstructed as the arguments 4,5,6 (see schema 3 and 4). The support for these arguments consists of 9, 10 and 13 (and 13'). Because the acceptability of the argumentation consisting of 9 is dependent on the argumentation consisting of 13 and 13', we must submit the latter to a critical test.**[xii]** The argumentation consisting of 13 and 13' is based on an argumentation scheme which, in pragma-dialectical terms, expresses a *symptomatic* relation.**[xiii]** The court tries to defend its decision that X has property Z by pointing out that something, Y, is *characteristic* for Z:
Scheme 6 : Argumentation scheme of symptomatic argumentation
X has property Z because
X has (the characteristic) property Y and
Y is characteristic for Z

The critical reactions that are relevant to this type of argumentation scheme are the following evaluative questions:
1. Is Y valid for X?
2. Is Y really characteristic for Z?
3. Are there any other characteristics (Y') which X must have in order to attach characteristic Z to X?

Question (1) is a general question which asks for a justification for the acceptability of the argument. Question (2) and (3) are questions which are specific for the argumentation scheme of a symptomatic relation. Question (2) implies that we ask whether property Y is indeed an intrinsic property. To answer this question in a satisfactory way, the protagonist will have to present

subordinate argumentation to show that it is indeed an intrinsic property. Question (3) implies that the antagonist is of the opinion that Y is indeed a characteristic property, but thinks that it is necessary to mention more properties in order to call something Z. To answer this question in a satisfactory way, the protagonist must put forward compound argumentation in which he mentions other characteristics of Z and shows that these characteristics are present in the case at hand. So if the antagonist raises his doubts by posing question (2) and/or (3), he thinks that the argumentation is not sufficient and he forces the protagonist to supplement his argumentation with additional arguments. The relevant evaluative questions for the argumentation of the District Court are:
1. Is it really justified to believe that the statement of the therapist was consistent and convincing (Y)?
2. Is being justified in believing that the statement of the therapist was consistent and convincing (Y) really a good reason for being justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he shot a ball-point through one of her eyes into the head with a small crossbow (Z)?
3. Is it not possible to think of other relevant and necessary considerations (Y') for being justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he shot a ball-point through one of her eyes into the head with a small crossbow (Z)?

The acceptability of the argument depends on the question whether these questions can be answered satisfactorily.

With respect to the answer to *question 1* we could raise our doubts with respect to the fact that her statement was really *consistent* and *convincing*. The court does not explain in which respects the statement is consistent and why it is convinced by the statement of the therapist. What we miss here is an explanation of the considerations which made that the court felt convinced. So, from the perspective of a rational discussion we could say that the answer to the first question is 'no', and the court would have to put forward supporting subordinate argumentation. (Apart from this, the argumentation seems circular: in order to be convinced of the truth of the statement the Court puts forward the argument that the statement is convincing.)**[xiv]**
With respect to the answer to *question 2* we could raise our doubts with respect to the fact that consistency is a sufficient reason for being justified in believing

what the therapist has stated. In other words, are there any other considerations which are also relevant for the trustworthiness of her statement and can the earlier mentioned considerations form a sufficient ground in the absence of the later mentioned considerations? In this context, we could say that from empirical research we know that consistency of the statements of a witness is not always a guarantee for the truth of these statements.**[xv]** So, to be able to show that the second question can be answered satisfactorily, the court would have to put forward supporting arguments.
With respect to the answer to *question 3* we could refer to the considerations given in the answer to the second question. Are there any other relevant considerations for believing in the statement, and if these considerations are present, why are they not applied?

Furthermore, we could say that such a 'double de auditu' statement must be submitted to more rigorous tests than the relatively weak criterion of consistency alone. So, to be able to show that the third question can be answered satisfactorily, the court would have to put forward compound argumentation. So, what we miss in the argumentation of the court from the perspective or a rational discussion is a further elaboration on the grounds on which the court has decided that the statement of the therapist is convincing, and whether it meets other requirements of a trustworthy account of the behaviour of J.T and of his explanations for his behaviour. Further arguments supporting 13 and 13' are required.
These further arguments which are needed as a support of 13 and 13' could be characterized as what Anderson calls the *background generalizations* upon which the relevance of the evidence rests. Wagenaar et al. (1993) call these considerations the *commonsense presumptions* which underlie the probative value of the evidence. These presumptions serve as the 'anchors' which constitute on various levels the 'sub-stories' on which the evidence is based. Twining calls them the commonsense *generalizations* or *background generalizations*, the generalizations that are left implicit in ordinary discourse. According to these authors, these commonsense background generalizations must be made explicit in order to assess their acceptability. In pragma-dialectical terms, the acceptability depends on the question whether they correspond with certain starting points which are acceptable to the participants.**[xvi]**
According to Anderson and Twining (1991), in most cases these generalisations are indeterminate and vague and subject to exceptions. According to Twining, the

problem with these generalizations is that they are at the same time necessary and dangerous. They are necessary as the glue in inferential reasoning, and, as a last resort as anchors for parts of a story for which no particular evidence is available. They are necessary as providing the only available basis for constructing rational arguments. They are at the same time dangerous because, especially when unexpressed, they are often indeterminate in respect of frequency, level of abstraction, empirical reliability, defeasibility, identity (which generalization?).

The danger is that these implicit value judgements are presented as if they were empirical facts or empirical rules of experience. In my analysis of the argumentation of the District Court I have shown how the hierarchical relations between the various arguments can be reconstructed and which implicit arguments must be made explicit. On the basis of this analysis, in combination with the critical evaluation it becomes clear what the weak points of the argumentation of the District Court are. In my opinion, such a rational reconstruction gives a clear answer to the question which 'anchors' or 'common-sense presumptions' or 'background generalisations' exactly underlie the decision from an argumentative perspective and how these hidden assumptions can be criticized.

Because, in the present form, the argumentation consisting of 13 and 13' is not acceptable, and these arguments form the final basis in a subordinate line of argumentation for argument (1) (1a), (1) is not acceptable from the perspective of a rational discussion. Because 13 and 13' form subordinate argumentation for (9), (9) is not acceptable, and because (9) forms subordinate argumentation for (4) and (5), these are not acceptable. And because (4) and (5) form together with (6) compound argumentation for (1), (1) is not acceptable.

So, according to the pragma-dialectical rules, the argumentation is not acceptable. This result is in line with the rules for anchoring the narrative supporting the decision developed by Wagenaar et al. (1993). According to their rule (3), essential components of the narrative must be anchored, according to their rule (5) the court must give reasons for the decision by specifying the narrative and the accompanying anchoring, and according to rule (6) the court should explain the general beliefs used as anchors. As we have seen, this is not the case. Argument (13) needs support by anchors explaining why the court believes in the truth of the statement of the therapist.

Our final judgement about the argumentation line supporting argument (1) (1a) is

therefore that it has not been justified beyond reasonable doubt that J.T. has killed his mother by shooting a ball-point through one of her eyes into the head with a small crossbow. Because this argument forms part of compound argumentation, this implies that the decision has not been defended successfully.
Considered from the perspective of the ideal norms formulated in the pragma-dialectical theory and Wagenaar et al. and from the perspective of the dangerous character of generalisations as described by Anderson and Twining, the cause of the weakness of the argumentation of the District Court lies in the fact that the basis for its argumentation is not acceptable because it does not specify the criteria for the use and the reasons for belief in the statements of the expert witness. The implicit argument (13') underlying the argumentation can be criticized in many respects and therefore cannot function as a final basis for the argumentation.

Apart from this point of critique, there is a second reason why the argumentation of the District Court with respect to argument (1a) does not meet the requirements of a rational legal discussion. One of the contra-arguments of the defense was that there was another plausible explanation for the presence of the BIC ball-point in the head of Mrs. de M. The defence puts forward the testimony of three experts, Worst, Van Rij and Visser. Worst and van Rij are of the opinion that there is no other explanation for Mrs. de M's death than that she accidentally fell on the ball-point, Visser thinks this explanation of the cause of death equally plausible as the murder theory.
On behalf of the defense, the ophthalmologists Worst and van Rij contend that the fall theory is the most likely explanation of the death of Mrs. de M. In his capacity as an expert witness, Worst contends that Mrs. de M. most likely died because of a complicated, purely accidental, fall into the BIC ball-point. The ophthalmologist van Rij confirms this opinion. He contends that the most probable cause of death of Mrs. de M. is that she fell into the BIC ball-point. According to him, murder by which the ball-point has been shot into the eye by means of a shooting weapon is most un-likely. The pathologist Visser (who has been present at the autopsy) contends in his capacity as expert witness that he does not agree with Worst's opinion that a fall into the ball-point is the most probable cause of death, but he does not say that it is an unlikely cause, and thus does not exclude the accident theory. According to him there are three equally plausible causes of death: an accident, suicide, and murder.
However, the District Court does not reply to the contra-argument of the defense:

it does not answer the question why the 'story' that the death of Mrs. de M. is caused by a shot of the ball-point with a small crossbow is more plausible than the 'story' that her death is caused by a fall into the ball-point. We could say that, because the District Court does not refute the accident theory put forward by the two experts Worst and Van Rij (which is not denied by the third expert, the pathologist Visser) it does adequately answer the counter-arguments put forward by the defense, and therefore according to the pragma-dialectical rules (10 and 11) has not defended successfully argument (1) against attacks of the antagonist.
With respect to this point, the evaluation is in tune with the rules developed by Wagenaar et al. (1993). According to their rule (7), there should be no competing story with equally good or better anchoring. Because the 'story' of Worst and van Rij has not been refuted by Visser, there is no reason to doubt the quality of its anchoring, and therefore the argumentation of the District Court does not meet the requirement of rule 7.
So, according to our ideal norms for a rational discussion in criminal proceedings the justification of the District Court is not acceptable on this second point.

4.Conclusion

I have shown what went wrong in the ball-point case from the perspective of an idealized critical discussion. What we saw was that, from the perspective of the rules of criminal procedure, the discussion in this case was correct with respect to the way in which the District Court defended its decision. From the perspective of a fair trial and from the perspective of a rational discussion, however, several points of critique can be given.
The first point of critique concerns the quality of the argumenta-tion of the District Court with respect to the statements of the therapist. As we have seen, the argumentation with respect to these statements is based on a common-sense presumption which remains implicit and which can be criticized in various respects. Therefore, the anchor for the evidence which supports the main part of the argumentation of the District Court turns out to be too weak to consider these facts as proven beyond reasonable doubt. As a consequence, we are justified to have our doubts about the quality of the argumentation with respect to the 'manner of death' of the District Court from the perspective of a rational discussion. From the perspective of a rational discussion which formulates norms which can be considered as a methodological maximum, a relevant ideal norm for a rational justification of a decision about the evidence in a criminal process could be that, if asked to do so, a judge is obliged to specify the grounds on which his

belief in the testimony of an expert witness is based. Such an obligation would be required especially if, as in the ball-point case, the decision rests for the main part on this testimony. In this way, the decision about the evidence could be criticized by the parties and other judges with respect to the quality of the evidence.
The second point of critique concerns the fact that the District Court did not explicitly reject alternative explanations of the death of Mrs. de M. From the perspective of a rational discussion, we could criticize the decision of the District Court because of the fact that it did not give insight into the considerations for rejecting alternative explanations of the death of the mother. Because the District Court did not react to adequately 'anchored' counter-arguments, the decision does not meet the requirements of a rational discussion. From the perspective of a rational discussion, a relevant ideal norm could be that, if the defense presents a relevant alternative view on the case which could be in favour of the accused, the judge has an obligation to explain why he thinks this alternative view less probable than the view presented by the prosecution.
I have shown how the pragma-dialectical theory, ideas developed by Anderson and Twining and norms developed by Wagenaar van Koppen and Crombag can be connected in the analysis and evaluation of argumentation in criminal cases and how the argumentation in a concrete case can be criticized from the perspective of a rational discussion.

NOTES

i. See Henket (1997), Kaptein (1997), Nijboer (1997).

ii. See for example Wagenaar et al. (1993), MacCormick and Summers (1991:21-23).

iii. A pragma-dialectical perspective on the legal process starts from what lawyers call a 'party model' of the Dutch criminal process. Such a model differs from one in which the judge acts as an independent investigator looking for the truth, independent of what the parties say.

iv. For an extensive description of the various forms of argumentation see van Eemeren and Grootendorst (1992 chapter 7).

v. See Plug (1994,1995,1996) for a more extensive description of the various forms of complex argumentation in law.

vi. In my analysis I reconstruct the various components of the criminal offense as separate arguments.

vii. For a more extensive treatment of the subject of missing premises see Van Eemeren and Grootendorst (1982:60-72).

viii. For a logical analysis of the contra-argumentation for the fact that J.T. cannot have killed his mother see Kaptein (1997:60-61).
ix. See the pragma-dialectical rules 11 and 12 formulated by Van Eemeren and Grootendorst (1984:170-171).
x. See Van Eemeren and Grootendorst (1992:209).
xi. For a discussion of other types of argumentation schemes in legal argumentation See Feteris (1997b), Jansen (1996,1997), Kloosterhuis (1994,1995,1996).
xii. Note that the arguments 9 and 13 are used to defend 4 as well as 5.
xiii. See for a more extensive treatment of argumentation schemes Van Eemeren and Grootendorst (1992:94-102).
xiv. For a description of the fallaciousness of circular reasoning see Van Eemeren and Grootendorst (1982:153-157).
xv. From empirical research by, among others, Loftus (1979) we know that witnesses often tell stories which are not only based on what they have observed, but also on inferences about what happened, and on transformations which make the recollection more consistent and more understandable. According to Merckelbach and Crombag (1997:314 ff) during the retention stage, memories change: (a) a witness can forget what he has observed, (b) he can add information from another source – post hoc information – to his memory, and (c) he can exchange parts of his own observation with information from another source. Therefore, recovered memories cannot be trusted completely for their truth.
xvi. These ideas on common-sense presumptions as background generalizations are based on ideas developed by Cohen (1977:247), who says that so-called 'common-sense presumptions' state what is normally to be expected. However, they are rebuttable in their application to a situation if it can be shown to be abnormal in some relevant respect.

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