ISSA Proceedings 1998 – Framing Blame And Managing Accountability To Pragma-Dialectical Principles In Congressional Testimony

On July 7, 1987, Marine Lieutenant Colonel Oliver L. North appeared before the Select Committee of the United States Congress investigating the Iran-Contra affair. The name Iran-Contra refers to a two pronged initiative conducted covertly by the National Security Council**[i]** (NSC) to (a) sell weapon systems to Iran in exchange for the release of Americans taken hostage by fundamentalist Islamic groups in Lebanon, and (b) divert profits from these weapons transaction in support of the Contra rebel resistance movement fighting the Sandinista government in Nicaragua. North served on the staff of the NSC and was the individual widely thought to be responsible for many of the covert activities under investigation by the select committee (*Newsweek*, January 19, 1987: 17).

Congressional Hearings have as their ostensible goal the uncovering of "truth." This occurs in part through unmasking and making public the various acts and activities of individuals and organizations of interest to the American government and people.
This truth oriented goal is identified in the observations provided by two members serving on the Select Committee conducting the Iran-Contra hearings, Congressman Bill McCollum (R-Florida) and Senator Paul S. Sarbanes (D-Maryland). Their commentary occurred on the last day of the initial questioning of North by the attorneys for the Select Committee.

[Example A: 324-325]
01 McClm: Their job, I thought, in my opinion, whether it's Senate counsel or House counsel, is to bring out facts, not to give positions, not to slant biases. And I think Mr. Liman has been going through a whole pattern of biased questions today. He has done some of that in the past, but it has been particularly egregious this morning.

04 Sarb' And I think the witnesses that come before us come here in order to help us to get at the truth… But, I think Counsel's questioning has been reasonable and tough, but it's been within proper parameters… it's a responsibility of Counsel and of the members of this committee to press the witnesses very hard to find out the truth in this matter.

These remarks in the participant's own voices highlight several important aspects of congressional hearings. First, the publicly stated goal of such hearings is to bring the facts or "truth" into public view. Second, there are at least two participants who occupy different roles. A questioner presents questions to respondents who provide answers. Participants in the hearing process share the responsibility for getting facts or truth of a matter into the open. With this responsibility comes accountability on the part of each participant to the process. In example A, McCollum asserts the function of the questioner is to uncover facts, the questioners being in this case the legal counsels for the Select Committee who performed the majority of the questioning of Colonel North and other witnesses.
Sarbanes represents the function of the hearings as "to get at the truth." Witnesses, occupying the role of answerer, participate in order to help uncover the truth.

1. The Problem
While serving to illuminate underlying assumptions, the metacommentary between McCollum and Sarbanes presents a sharp contrast in the characterization of the questioning being done by the legal counsel to the Senate side of the Select Committee, Arthur Liman. McCollum is accusing Liman of asking questions that are slanted or biased. These question asking tactics deviate from the ideal of fact finding. Sarbanes presents a very different accounting of Liman's actions by characterizing his questions as 'reasonable and tough.' The manner of questioning is subordinated to the need and responsibility for getting at the truth.
Quine (1960) presents the problem of indeterminacy as the potential for different systems of translation to co-exist, each system being capable of producing a complete and useful interpretation that is different from those provided by other systems. In our example, however, both McCollum and Sarbanes appear to be orienting to the same interpretive framework in their remarks yet they also derive very different evaluations as to the conduct of the questioning.

This indeterminacy creates two problems for the inquiry process.
First, how can we determine what system is guiding the interpretation of discourse in the face of many possible systems?
Second, how does the same system of interpretation produce diametrically opposing interpretations of an act or actions?

This work approaches these questions from a pragma-dialectical perspective in suggesting congressional testimony is guided by a blend of Gricean pragmatics combined with an argumentative dialectic. Particular structural features inherent in this system of interpretation provide opportunities within the dialectic process for participants to demonstrate accountability to the process while challenging the accountability of others. A specific feature of the Gricean system, generating conversational implicatures from maxim violations provides participants with the resources to construct incommensurable positions that serve to thwart the ability to arrive at a decision as to which facts will be accepted. The procedures designed to arrive at critically examined outcomes carries within it the seeds of its own disruption.

2. The Inquiry Process
The Gricean system and pragma-dialectics will be described followed by examination of meta-commentary illustrating the orientation of players to these principles and how accountability to the process is pushed via interpretation of the conversational maxims.
A series of extended examples highlighting moves of the participants in the creation of incommensurable positions is presented towards the end of the paper to show the interpretive problem potential inherent in the pragmatics of the process.
Perhaps the most common discourse mechanism employed to uncover facts is the question-answer dialogue (Walton, 1989) of the kind used in courts and other arenas where testimony is sought, probed, and evaluated. This dialogue is a form of dialectic involving a questioner and a respondent. The goal of the dialectic is for the participants to exchange questions and answers on a topic until the truth is uncovered.
By truth, we do not mean an a-priori set of assumptions existing independently of the participants. Rather, the notion of truth is treated here as a set of socially constructed and negotiated premises which become accepted, though perhaps reluctantly by some co-constructors, as the explanation or account that is to be

privileged.

The value placed upon truth obtained from discourse depends in part on the applicability of the interpretation beyond the discourse space in which it was derived as well as on the quality of the mechanisms used to construct the truth. This interpretive probing and testing of facts is an activity well suited to the pragma-dialectic approach to argumentation (van Eemeren & Grootendorst, 1992; 1994). Pragma-dialectics views argumentation as a type of critical discussion between interlocutors.

Standpoints or substantive positions held by each participant are identified through exchanges between the participants. Each standpoint or position must be adequately defended if it is to achieve privileged status. The privileged status of acceptance held by any given standpoint is subject to immediate challenge at any time. A standpoint loses privileged status upon failure of the proffered defence.
The idealized nature of the question-answer dialectic holds that questions and responses should be free from bias. Thus, arguments should not be made in favor of a motivated position held by either participant. The participants should not bring already formed standpoints to the dialectic process. Yet, the underlying presuppositions of speech acts are subject to argumentative testing much in the same way that pragma-dialectics engages in the evaluation of standpoints. As the question-answer dialectic proceeds certain speech acts are retained and take on the force of standpoints which become accepted as having factual status.
The facts or truth of the matter become those items agreed to by the participants as the facts most tenable in the face of counter reasoning (van Eemeren, Grootendorst, & Snoeck-Henkemans, 1996: 55) introduced during dialectical engagement by the participants.

The pragma-dialectical approach sets forth specific rules for the conduct of critical discussions. Critical discussions, like many other forms of goal oriented discourse, however, can be seen as orienting to a more abstract set of guidelines which underlie and motivate communicative interaction. The “Principle of Communication” set forth by van Eemeren and Grootendorst (1992: 50) requires interactants to “be clear, honest, efficient, and to the point.” The Principle of Communication is a restatement of the Cooperative Principle (CP) and Conversational Maxims set forth by Grice (1975: 45). The CP requires speakers to make their conversational contributions “such as is required, at the stage in which it occurs, by the accepted purpose or direction of the talk exchange in

which [they] are engaged." The CP in conjunction with four Conversational Maxims of Quality, Quantity, Relation, and Manner functions as an interpretive system for evaluating the communicative contribution of any utterance.

The *Quality Maxim* requires speakers to say what is true.
Speakers should not say that which they know to be false and should have adequate evidence for what they do say. The *Quantity Maxim* requires speakers to provide as much information as is necessary (for the purposes of the exchange) but speakers should not provide more information than is necessary. The *Relation Maxim* requires speakers to be relevant. The *Manner Maxim* deals with how something is said.
Speakers are expected to say things in ways that are clear, efficient, orderly, and to the point. They should avoid ambiguity and obscurity of expression. Speakers and their contributions are presumed to adhere to the CP and Conversational Maxims. Grice's pragmatic point in positing such a system is not that speakers follow the CP and Maxims exactly. Much of our discourse appears to be disorderly anduncooperative (van Eemeren, Grootendorst, Jackson, & Jacobs, 1993) on the surface. When confronted by discourse that appears to violate the CP and Maxim(s), participants in the conversation need to reconstruct an interpretation of the conversational contribution which preserves as many of the Maxims as possible. The resulting interpretation is a conversational implicature.

There are four ways in which the Maxims can be violated.
Quiet and unostentatious violations are done when speakers hide their violations such as in deception. Opting out is when speakers choose to withdraw from cooperative interaction such as in refusing to answer any more questions. A clash between maxims occurs when the demands of one maxim compete with the demands of another maxim. This is the sort of problem where a speaker has to be either over or under informative (violate Quantity) in order to say only that which is believed to be true (preserve Quality). Finally, flouts are blatant attempts by speakers to violate the maxims for reasons other than unostentatious violations, opting out, or clashes. Deceptive violations, when uncovered, carry a presumption of uncooperativeness by the speaker. Opting out and clashes between maxims suggest their own built in interpretations. Flouts require the hearer to generate conversational implicatures as to the nature of the violation.
The CP and Maxims provides a flexible system for interpreting and evaluating the information value of a given utterance in that the maxims are considered in

relationship to the purposes or goals of the talk exchange. The flexibility of this system is apparent in its application to the question-answer dialectic of congressional testimony.

While all of the participants are accountable to the CP and Maxims, what constitutes accountability to the maxims is considered in relationship to the types of contributions expected from the participants. For instance, the Quality Maxim as envisioned by Grice applies to assertives. Question asking in the dialectic is used to test whether the presuppositions that motivate the question are true or not. These presuppositions come from prior assertions made by the respondent. It is up to the respondent to ensure the responses are true or there is sufficient reason to believe the response is true.
At the same time, the motives of the questioner can be called into question under the quality maxim if the question is biased or favoring a particular interpretation. The quality maxim functions in this sense much like a sincerity principle.
The Quantity Maxim functions as an efficiency condition. Applied to questioners, this maxim would require questioners to ask only questions which the answer is not known. Previously asked questions should not be recycled if an adequate response has been provided. Questioners are also responsible for asking questions that will ensure the obtaining of information to uncover the truth. Respondents are required to provide sufficient information in their answer.
The preference for agreement between the response and previous speech act is such that responses should address the requirements set forth by the previous speech act (van Eemeren & Grootendorst, 1992; Sacks, Schegloff, & Jefferson, 1975).

The Relation Maxim is a restatement of the ideas contained in the CP. This reformulation of the CP emphasizes the need for contributions to relate meaningfully at either the global or local level (Tracy, 1984). Questioners are accountable to the global level in that questions need to have a visible connection to a higher order goal or purpose (Jacobs & Jackson, 1992). Questioners have considerable latitude in the question-answer dialectic as to what counts in terms of local relevance. Questions can be put before the respondent in any desired order and the questioner has a choice as to which questions get inserted into the discourse space, in accord with the need to get at the truth. Responses are restricted at the local level to the immediate functional demands of the prior response.

The response has to answer the question. Finally, the Manner Maxim requires both questions and answers to be straightforward, unambiguous, and to the point. To represent congressional hearings as functioning solely to uncover truth is to be politically naive. These hearings often become highly politicized affairs where questions of power and privilege are decided. In the Iran-Contra hearings, issues included possible violations of the Constitution as well as partisan side taking along party lines. I have argued in other works that different language games are conducted under cover of the dialectic (Aldrich, 1993; Aldrich, 1997). However, before decisions can be made as a result of hearings, a consensus has to be reached as to what is given the status of 'truth.' The establishment of this consensus is the function of dialectic. Since the CP is framed in terms of the dialectic or importance of getting at truth, the moves by each player become accountable to the dialectic.

3. Orientations To The Process

It can be very difficult to determine which particular system of interpretation is in effect given the problem of indeterminacy and competing argumentation schemes (van Eemeren, Grootendorst, & Snoeck-Henkemans, 1996: 291). Meta-communication or talk about talk (Watzlawick, Bavalis, & Jackson, 1967) provides one means by which underlying interpretive systems can be identified.

Such meta-communication can take the form of explicit discussion of the rules to be followed (as is often done by committees prior to the start of hearings) or be found in remedial talk (Goffman, 1971) used to repair hitches in the flow of discourse. The Iran-Contra hearings generally, and the testimony of Colonel North specifically, provide a rich source of meta-commentary about the conduct of the hearing process and the type of interpretive system in use. This orientation can be seen in the following examples taken from the testimony of North before the select committee. The public goal of congressional inquiry is to uncover facts or truth. The questioner claims this dialectical goal as the main function of the hearings in example B while the respondent claims personal orientation to this goal in example C.

[Example B: p. 10]

Nields: And it is a principal purpose of these hearings to replace secrecy and deception with disclosure and truth. And that's one of the reasons we have called you here, sir.

[Example C: p. 260]

Liman: Now, do you recall – and I don't want to belabor this, believe me, but we have to get facts.
North: I am here to give you the facts, Counsel.

These assertions found in the meta commentary about the discourse do more than simply support the claim that a truth oriented dialectic language game is in play, they function as pragmatic resources through which each participant can account for his own moves in relationship to the standards of the dialectic process.

In example C, Liman claims fact finding as his goal. His move also contains a rationale for his questioning tactics. Questioners are expected to ask questions which move the dialogue forward and orient towards higher order purposes. Asking questions about topics previously covered or staying too long in any one area of inquiry can be interpreted as violating the Relation and/or Manner maxims. Liman's move functions to pre-empt potential charges of uncooperativeness in the way he is conducting his questioning of North by highlighting the overall point behind his actions.

With fact finding as the principle goal of the question-answer dialectic, questioners are responsible for asking questions which function to help the respondent get facts out onto the table. The types of facts obtained depend in large part upon the conduct of the questioning. The questioner has the requirement to ask relevant questions and to not miss anything which should be asked.

[Example D: p. 97]
Nields: I want to make sure that I have asked all the questions that are important to ask.

4. Interpreting The Process
Both the questioner and respondent are accountable to the ideals of the CP and normative set of pragma-dialectical rules. The next few examples highlight both the types of framing available to participants in declaring adherence to the principles as well as problems of accountability to these principles. Counsel for the House of Representatives, John Nields presents a benign framing of his use of questions to help North get information out on the table.

[Example E: p. 65]
Nields: I understand that, and we appreciate your testimony, and I'm going to

continue to ask questions to see whether it jogs any other recollections.

This type of self presentation (Goffman, 1959) is consistent with the Quality Maxim in framing the questioning as being sincere, and with the Relation Maxim in making the higher order purpose visible of getting the available facts out into the open. This type of formulation is also very consistent with the rules for critical discussion (van Eemeren & Grootendorst, 1992) in terms of seeking all available information.

The above formulation by Nields is in stark contrast to the ad hominem attack used by Arthur Liman in response to North's persistent inability to recall specific events.

[Example F: p. 252]
North: That is certainly my recollection. If we could just go to that–
Liman: I'm going to come to it in more detail later, but if you have something that you want to say now, you better say it while you remember it.
North: Unkind.

Liman exercises his control of the discourse space by shifting his line of questioning from one subject to another. His move also implies North has a poor memory. Reduced availability of information is a problem for a dialectical process that is so information dependent. Liman's move also has a flavor of blame imbedded in it for this is the type of move which could be used to question the overall cooperativeness of a respondent. A pronounced series of memory lapses can be characterized as opting out of the discourse space through omission rather than commission.
Deviations from the ideals of the CP and pragma dialectic principles provide grounds for substantive challenges on the part of participants. At the same time, committing fallacious moves in response to perceived violations doesn't help the player in terms of his own accountability to pragma dialectical procedures. Liman attempts a subsequent move to repair some of this damage to his own position.

[Example G: p. 401]
Liman: Did Mr. Sullivan refresh your recollection, where you want to add to the answer, because I'm not saying that in criticism. I am saying that so that if there is something that should be added to this record, it should be added.
Sullivan: Next question, Mr. Liman.

Liman makes a much more direct orientation to the goal of getting maximal information out into the open in a way similar to Nields' tactics already discussed. That this response seems to pander to the ideals of the dialectical process is apparent in Sullivan's curt response and the knowledge that this move followed a series of lengthy and acrid exchanges between Liman and Sullivan as to North's need for having his memory refreshed with constant input from Sullivan and the notebooks containing evidence. The point is not to question the sincerity with which each player is making moves in a dialectical discourse space, but to show the orientation of each player to the ideals of the process through their meta-commentary.

The questioner has considerable power due to his position in the Q-A dialectic relative to the answerer. Questioners get to set the pace of questions as well as choosing which questions to ask and when to ask them. Examples H and J are responses from the chair of the select committee, Senator Daniel Inouye (D-Hawaii) to charges by Sullivan that the questioner is not allowing North to respond adequately to the question.

[Example H: p. 115]
Sullivan: Could counsel please permit the witness to finish his answer and not to interrupt him in mid-answer.
Inouye: The counsel may decide the pace, sir.

[Example J: p. 134]
Inouye:We will proceed in the fashion we wish to.

Up to this point a claim has been made that congressional hearings orient towards a question-answer dialectic in which the declared goal or point of the process is to uncover truth. This process imposes certain standards for evaluation of the informative contributions of the participants through the CP and Conversational Maxims combined with the pragma-dialectical rules for critical discussion.

These orientations are apparent in the meta commentary provided to us by the participants in the testimony of Colonel North before Congress.

Also apparent in some of these examples is a blaming quality as the participants challenge the accountability of each other's moves to the ideals of the dialectal process. If moves are found lacking in terms of their dialectical appropriateness, any information produced by the defective moves itself becomes defective. Both

the questioner and respondent have access to the underlying pragmatics of the dialectic. Each side makes strategic use of the pragmatics in holding the other side accountable to the process.
The primary questioners, Nields and Liman, view North's contributions to the discourse as being less than responsive to the questions. In fact, they point towards what they feel is overt uncooperativeness on the part of North and his attorney, Brendan Sullivan. This amounts to opting out. North and Sullivan take a different orientation in regards to the pragmatic principles. North's moves have the flavor of under informativeness on the one hand and over informativeness on the other. North can claim this as resulting from a clash between the demands of the Quality Maxim to tell the truth and the Quantity Maxim of providing sufficient information. North and Sullivan move to make the claims of clash between these maxims explicit to the questioner and audience of the hearings.

[Example K: p. 18]
01 Nields: And, the President was then suffering domestic political damage, was he not, as a result of the publicity surrounding the Iranian arms mission?
02 North: Well, I – you'll have to leave that assessment to the political pundits. My concern –
03 Nields: No, I'm asking you.
04 North: You're asking what?

In turn 01, Nields asks whether North believed President Reagan suffered harm from the public disclosure of the weapons transactions with Iran. North's response explicitly avoids answering the question in any fashion. North tries to opt out by deferring the question to 'political pundits' for assessment. In turn 03, Nields challenges North's move by explicitly identifying North as the target of the answer. Several turns later, Nields obtains a 'yes' response from North to this question.

[Example L: p. 254-255]
01 Liman: And so that there were copies of the five [memoranda]
02 North: Exactly.
03 Liman: And, did you look over them, to see whose names were written on them?
04 North: I think we've already been through this once, counsel –
05 Liman: You said you didn't recall, and I'm asking you whether you looked.
06 North: I don't even remember looking. I remember, if there was something –

07 Liman: Well, you've answered it, then.
08 North: Yeah.
09 Liman: You've said you did not look, is that right?
10 Sulln: Would you like to answer the question, counsel, for him?
11 Liman: No, I'd like him to keep his answers to the questions.
And if it's – if that's the answer, then we ought to move on. Is that the answer that you did not look?

In turns 01 and 03, Liman questions North whether the memoranda requesting approval of the diversion of funds to support the Contras had names on them or not. Identification of a name would suggest someone higher in the Reagan administration than North possessed knowledge about the covert operations.
In turn 04, North challenges Liman's right to ask questions about an area that has already been discussed. In doing so, North calls into question the relevance of this line of questioning at the global level. Rather than taking up North's point, Liman asserts he is asking a different question than what North addressed. Liman claims relevance of his question by grounding it in the activity of whether North looked to see if there were names on the memos or not. There is a subtle shift here from North's memory (recall or no recall) to North's actions (looking or not looking). In turn 07, Liman acknowledges North's move in the previous turn as having answered the question. Liman moves yet again in turn 09 to reformulate the question so as to get an "on record" (Brown & Levinson, 1978) response from North that is directly responsive to the question. Sullivan offers a strenuous objection in turn 10. The implication here is that Liman is overreaching his dialectical ground as a questioner. Liman affirms the need to adhere to the Quantity Maxim and move the questioning forward if North has actually provided an on record answer to the question.
Liman also asserts in turn 10 that it is the deficient responses that move beyond the pale of inquiry which motivates the recycling of questions.

[Example M: p. 128]
01 Nields: And did you let them know how much the contra needed money for munitions?
02 North: I'd let them know how much the contra needed everything. The Nicaraguan freedom fighters were at a point where they were dying in the field under Soviet HIND helicopters –
03 Nields: And did you do that together with Spitz Channell? pardon?

04 Sulln: Let him finish please.
05 North: (to Mr. Nields): Pardon?
06 Sulln: I know you don't like the answer, but let him finish.
07 Nields: I like the answer fine. It was not responsive.
08 Sulln: Well fine, then let him answer.
09 Nields: He had finished answering the question.
10 Sulln: He had not finished answering or I wouldn't have raised the subject.
11 Inouye: Proceed.
12 North: I don't know whose turn it is Mr. Chairman.

Nields asks North an open-ended question in turn 01. North doesn't have to limit his answer to yes/no in order to be responsive. North tries to provide additional information about the effectiveness of Soviet attack helicopters against the Contra "freedom fighters." Nields shuts down this attempt by interjecting another question in turn 03. Sullivan objects and asserts North should be allowed to complete his answer. In turn 07, Nields characterizes North's answer as being non responsive to the question. In reply to Sullivan's charge that North has not finished his answer, Nields states in turn 09 that North had finished answering the question.
The legal counsel for the select committee spent much of their time trying to hold North accountable to the CP and Maxims in terms of answers that were under informative by omission of details or non responsiveness to the question and answers that were overly informative in terms of providing information that moved beyond the scope of the question. In contrast, North, and his attorney Sullivan, spent much of their time objecting to the attempts to limit North's responses. Example O follows a 10 minute response by North to a question from Nields.

[Example O: p. 111]
01 Nields: I think the only question had to do with price.
02 North: I know it has to do with price.
03 Nields: I think the only question had to do with price.
04 Sulln: Mr. Nields, Mr. Chairman, if the witness believes that something is related to the subject matter of the question he should be permitted to answer.
05 Inouye: The question related to price and I hope that the witness will respond to the question.
06 North: Mr. Chairman, I tried to respond to the question of price.

In turn 01, Nields highlights the non-responsiveness of North's answer by stating the only question being asked was price. This move suggests that North answered other 'non' questions in his response. Nields adds additional emphasis to the dialectical shortcomings of North's response through repeating his assertion in turn 03.
Sullivan's objection in turn 04 explicitly affirms the importance of allowing additional information to be expressed if the witness sees some sort of connection or relevance to the subject matter. In referring to subject matter, Sullivan is pushing for the global relevance of the Relation Maxim to be extended to replies to questions. Such an interpretation would allow answers that move beyond the local relevance to the preceding question. This would also allow overly informative answers to the local question to be supported on the basis of a higher order relevance. North asserts in the face of Inouye's objection that North has indeed responded to the question. The quantity violations of North's lengthy replies invoked the characterization of speeches by both counsels for the select committee and the committee chair.

[Example P: p. 172]
Inouye: I believe we have been extremely sensitive to your client. I believe the record will show that we have not objected to unresponsive answers. Many questions that could have been easily answered by a simple yes or no have taken 15 minutes and the Chair has not interrupted. We have permitted speeches to be made here.

The final example provides the clearest interpretation on the part of North and Sullivan that a clash between maxims is the underlying reason for the quantity of North's responses to questions. Sullivan asserts this is done not for the purposes of giving speeches. Rather, North has to violate quantity through lengthy answers in order for the truth to be told.

[Example Q: p. 184]
Inouye: But as far as I'm concerned, it was a very lengthy statement. Some people consider lengthy statements to be speeches. Counsel, proceed.
Nields: I'm perfectly happy to use the expression "lengthy statements."
You've made several lengthy statements to the committee on the subject of covert operations.
Sullivan: How about using "lengthy answer" – in order for him to get the truth before the committee?

5. Conclusion

The congressional hearing process claims an orientation to a pragma-dialectically based process of fact finding inquiry. These claims and the pragmatic structure can be found in the meta commentary obtained from the participants in these hearings. The pragmatic structure of the Gricean pragmatics provide resources for each participant to anchor their deviations from the pragma-dialectic ideals as either having to push witnesses hard lest these witnesses opt out or having to provide informationally deficient responses through claiming a clash between the maxims of Quality and Quantity.

The Conversational Maxims can be used to create an interpretive impasse to shut down the dialectical process all together. A common feature of many of the alleged violations of the Maxims is the way in which the violations are committed. How something is said is an issue for the Manner Maxims (Grice, 1975). Quality violations, particularly those occurring through omission rather than commission, can be repaired by changing the way in which something is said. Violations of Quantity are also for the most part violations of Manner. Responses that are under informative are often responses that have ambiguous features or use obscurity of expressions. Responses that are over informative can be pushed towards brevity. Opting out is of course brevity taken to the extreme condition.

The ideal system has to consider both informational content and contribution. Monitoring the manner of discourse is one activity which judges are responsible for in court rooms. What counts as acceptable questions and answers are much more limited and defined. Congressional hearings seek a broader latitude of discourse but with this latitude comes procedural opportunities that highly skilled users of language can exploit. Pragma-dialectics, as a system for evaluating discourse, needs to take into account how information is communicated (Aldrich & Jacobs, 1997) as well as what gets communicated. Only then can the latitude of discourse be satisfactorily addressed.

NOTES

[i] The National Security Council advises the President of the United States on issues concerning security and strategic planning

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ISSA Proceedings 1998 – Refuting Counter-Arguments In Written Essays

1. Introduction

Many discourse analysts and rhetoricians have noted that one valued basis for argumentation, and academic argumentation, in particular, is contrast, that is, setting out opposition (Barton 1993; 1995; Peck MacDonald 1987).

The aim of this paper is to look more closely into one specific type of contrast and describe its structures and usage. The contrast I have in mind is the refutation of counter-arguments, defined as arguments (i. e., reasons) in favor of the standpoint (the conclusion) opposite to writer's own standpoint. In order to see how writers actually refute counterarguments, I chose a book called *Debating Affirmative Action: Race Gender, Ethnicity, and the Politics of Inclusion*, edited by Nicolaus Mills 1994. The book is mostly a collection of argumentative texts by academic scholars, which debate a well defined issue, and clearly and unequivocally pronounce themselves most of the time either pro or con affirmative action. In less than 200 pages (not all the 307 pages of the book are argumentative texts), about 130 counter-argument refutations have been found. These texts are enough to give us a good idea about the most popular ways of refuting counter-arguments in written texts when debating controversial political or social issues in an academic milieu.

A counter-argument can be refuted in two possible ways:
1. by denying the truthfulness or the acceptability of the propositional content of the counter-argument, thereby denying its value as counterargument;
2. by accepting the truthfulness of the propositional content of the counter-argument, but, nevertheless, rejecting the opposite standpoint and therefore denying the relevancy or the sufficiency of the proposition to serve as counter-

argument. The first type will be called *denial*, the second *concession* (see Perelman 1969: 489; Henkemans 1992: 143-153).

Two subtypes of denial have been discerned:
1. when the denied proposition is replaced by another, which serves as a pro-argument, or is argumentatively neutral;
2. when the denied proposition is not replaced by another. The first subtype will be called *antithesis* (the proposition that has been denied is the 'thesis', and the one replacing it is the 'antithesis'), the second *objection*.

Concession also has been classified into two sub-types:
1. when the rejection of the opposite standpoint is directly made and in plain words (*direct-rejection concession*);
2. when it is only implied (*indirect-rejection concession*) (see also Azar 1997). *Figure 1 summarizes this classification:*

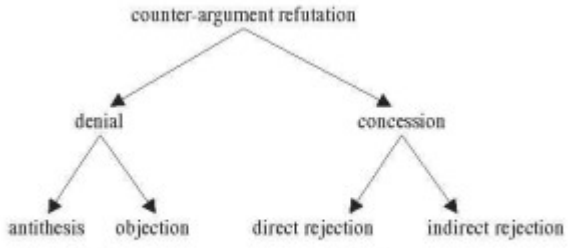

Figure 1: Types of counter-argument refutation

We will see now in further detail, together with examples, the four subtypes of Counter-argument refutation.

2. Antithesis
Antithesis is by definition a two-part structure, one expressing explicit denial of a proposition (in our case it is the denial of the counterargument) the other expressing an assertion (in our case it serves as a pro-argument) In our limited corpus, one can find that the denial part of the antithesis always precedes the other part. Only few example have been found, i. e.,
1. *Far from* preventing another Mount Pleasant (a Washington DC neighborhood where a three- day riot was sparked when a black policeman shot a Salvadoran man – M.A.), affirmative action might *actually* provoke one (p. 178).

The linguistic devices expressing antithesis consist of many forms. In our example it is *far from … actually …* .The more usual expression, *not … but …*, has not been

found in our corpus as expressing antithesis; instead, we find: *not X Y; not X Rather Y; X Such is the silliness … Y.*

3. Objection

Objections are far more frequently used in our corpus (I would write the percentage here four-five times more than antitheses).

Theire linguistic expressions are: *This objection is unpersuasive; One objection centers on …; A second objection is that …; It simply distorts reality; I reject the proposition; This argument, however, denies the simple truth that …; Again, this is not the case; But that simply is not true; In response, I would first note that … .*

A reason is always given for not accepting the content of the proposition serving as a counter-argument, and it is usually not syntactically formulated. Below is an example containing a syntactical reason:

2. Although many of my liberal and progressive comrades view affirmative action as a redistributive measure whose time is over or whose life is no longer worth preserving, *I question* their view *because* of the persistence of black social miser, the warranted suspicion that goodwill and fair judgment among the powerful doe not loom as large toward women and people of color (p. 86).

It is worthwhile to remark the concession appearance of (2) ('Although … '). But according to our definitions of *counter-argument refutation* and *objection* as a kind of *denial*, the fact that the utterance starts with a syntactically concession clause cannot by itself exclude it from being an objection. The concessivity in this utterance does not concern the proposition relevant to the counterargument, but only the matrix sentence 'many of my liberal and progressive comrades view … '. This proposition is indeed accepted as true, but not the embedded one, which says that the time of affirmative action is over.

And here is an example with a conditional clause serving as a reason:

3. Proponents of the merit conception may argue that the tracks need not be separated perpetually. One can imagine a time when differences in racial perspectives will not exist, and the racial meritocracy will no longer be needed. Unfortunately, such a world will never materialize *if* one adopts the notion that race is merit (p. 287). The first part of the last sentence is a denial (an objection), and the *if*-clause gives a reason in the form of a conditional. A reason for an objection can also be found in the form of a contrastive sentence connected by *but*:

4. Race is proposed as merit based on the value of the perspective that each racial minority brings to the admitting institution. *But* perspective may not correspond

with race (283).

The second sentence is in fact a reason for not accepting the preceding proposition. This function of the *but*-sentence is perfectly understandable, since, according to Anscombre and Ducrot 1997, a *but*-sentence always orients toward the opposite orientation of its preceding adversative sentence, and in our case it serves as a reason (i. e., an argument,) for rejecting the preceding sentence.
Another example of the same kind, but without a contrastive connective, which begins with the concessive adverbial 'although' (as in example (3)), is as follows:
5. *Although* affirmative action sounds like a natural way to tackle the problems many Latinos experience in D.C. and other cities, it's a very rough stick to use on a very complex problem (p. 175).
Perelman 1969: 489 already noted that 'Generally, denial has much the same role as concession. The speaker renounces an assertion that he himself might have supported, or that has the support of third parties, but he retains just enough of it to let it been seen how well informed and perspicacious he was to have recognized the lack of value in a proposition'. One can see that this is very apparent in all of our *objection* examples, but one can find in the last page of our corpus an objection containing no concession at all, and the objection itself is built in a subtle way, thereby allowing the counter-argument to defeat itself:
6. It is against that legacy that one reads, *with overwhelming sadness*, Sheryl McCarthy's 'defense' of Moses: 'Why is it that the only time everybody talks about standards is when women or people of color are trying to advance or be heard? Mediocrity is a common characteristic of white male academics, . . . Let's hire women and people of color who are as ordinary as the white males who already dominate academia, and there will be no trouble in keeping up current standards. No trouble at all' (p. 317).
'with overwhelming sadness' is the only hint revealing the writer's personal opinion.

4. Direct-rejection concession
When the writer, despite his/her acceptance of the truthfulness of the propositional content of the counter-argument nevertheless asserts his/her standpoint, and implies, or says in plain words, that the counter-argument is not good enough to justify the refutation of his/her standpoint, then we have direct-rejection concession.; Only one real instance has been found; and this subtype of concession is very rare:

7. *Although* affirmative action has primarily benefited the black middle class, that is no reason to condemn preferential treatment (p. 54).

The second part of this concession sentence rejects directly a conclusion which is assumed by the opponents of affirmative action to follow from the first part.
The lack of the direct-rejection concession can be explained by the unwillingness of the writers to be too blunt in their argumentation. Writers within an academic discourse community, as well as readers, value politeness and tend to express solidarity (Barton 1995: 234. Rejection of a conclusion in an open and direct way, which other members of the community consider to be a legitimate conclusion of an accepted premise is counter to those values. On the other hand, the subtype of concession, the indirect-rejection concession, is by far the most frequent counter-argument refutation, and suits very well the request of politeness and solidarity.
However, before moving to the indirect-rejection concession, let us look at a peculiar instance of direct-rejection concession:
8. Many whites and some blacks now argue that preferential racial treatment creates deep-seated feelings of deficiency and mediocrity in its beneficiaries. They warn that race-conscious practices, in hiring or education, cast suspicious on the competence of those given an advantage. But if that is so, we need the new Civil Right Act more than ever, to overcome the sense of inferiority that has afflicted American white men for year. Think of it. For decades, white men have known they've received favored, front-on-the-line positions in jobs, education, and the benefits of race-conscious society (p. 126).
The peculiarity and astuteness of this direct-rejection concession lies in the second part of the concession: the writer takes the counterargument and uses it, ironically, as a pro-argument.

5. Indirect-rejection concession
This concession is what Perelman 1969 had in mind when he wrote:
Concession is above all the antidote to lack of moderation; it expresses the fact that one gives a favorable reception to some of the opponent's real or presumed arguments. By restricting his claim, by giving up certain theses or arguments, a speaker can strengthen his position and make it easier to defend, while at the same time he exhibits his sense of fair play and his objectivity (p. 488). And he adds: Each time a speaker follows the interlocutor onto his own ground he makes a concession to him, but one which may be full of traps (p. 489).
In the indirect-rejection concession, the writer accepts the truthfulness of the

proposition serving as counter-argument and recognizes its potential harm and therefore puts forward another argument: a pro-argument, implying that this second argument outweighs the counter-argument. Various connectives and metadiscourse expressions have been found in the book, and we illustrate some of them below:

A. Concessive expressions introducing the first part of a concession relation: *Of course; In theory; certainly; Despite; So yes; Although; While; It may be that; Of course; Naturally; Admittedly; Even if; Many argue that …; Some critics might argue that …; The objection is that …; It assumes that …; It seemed that …; I concede that …; One objection centers on …; They argue that …; It may be countered that …; The opponents of … say …; According to …; The argument against is …; Among the attractions of this theory are … .*

B. Contrastive expressions introducing the second part: *But; Yet; However; On the other hand; One problem with this approach is …; In response, I would first note that.*

It is, perhaps, worth mentioning that almost all the indirectrejection concessions are constructed in the form of two propositions which illustrate two different things about one and the same topic, for example (the topics are marked by italic letters):

9.There would be *fewer blacks* at Harvard and Yale; but *they* would all be fully competitive with the whites who were there (p. 206).

10. I will not argue that the old *racism* is dead at any level of society. I will argue, however, that in the typical corporation or in the typical admissions office, there is an abiding desire to be not-*racist* (p. 205)

11. They (the proponents of affirmative action – M.A.) know that not all of *their opponents* are racist; they also know that many of *them* are (p. 66).

Below is a rare example where the two propositions of the concession comment about different topics:

12. The critics of affirmative action piously proclaim that the goal of civil rights should be a 'color-blind society' that rewards people solely on the basis of individual merit … . Who can be against that?

What the critics don't like to talk about is the fundamental success of affirmative action, visible in large and small towns across the country (p. 183f).

In the second part of the concession, there is no reference to 'the goal of civil right', to 'civil rights', or to 'color-blind society', which could have served as shared topic of the two parts of the concession.

A special sort of indirect-rejection concession arises when the writer shows the double standard (or hypocrisy) of his/her opponents when they use a certain fact as a counter-argument and at the same time ignore the same fact in other controversies, which are similar to the one in debate:

13. The opponents of affirmative action program say they are opposing the rank unfairness of preferential treatment. But there was not great hue and cry when colleges were candid about wanting to have geographic diversity, perhaps giving the kid from Montana an edge. There has been no national outcry when legacy applicants whose transcripts were supplemented by Dad's alumni status – and cash contributions to the college – were admitted over more qualified comers (p. 212f).

The writer acknowledges that rank unfairness is indeed caused by preferential treatment, but, nevertheless, he or she does not accept the opponents' conclusion. Instead, he or she puts forward a pro-argument, saying that rank unfairness caused by all sorts of preferential treatment was always a fact of life, and nobody cared. This implies an accepted double standard attitude on the part of the opponents of affirmative action, and it also implies a refutation of the opponents' standpoint.

To close this short presentation, it is important to point out that all the above counter-arguments were actual counter-arguments, which had been used by real opponents to support their standpoint and no prolepsis, i. e., anticipatory refutation in the form of a concession, was found. A *prolepsis* may be in the form of a direct-rejection concession, not an indirect-rejection concession, since this is, by definition, a reason serving as a pro-argument, and a prolepsis, as a figure of speech, gains its persuasive force not by reason, but by psychological manipulation (See Robrieu, 1993). The lack of prolepsis, which can also explain the rarity of the direct-rejection concession in our corpus, is another indication that the argumentation tools used in our collection of essays are similar to those used in regular academic-discourse community. Contrast is crucial to many aspects of academic argumentation, especially as a basis for creating knowledge via argumentation (Hunston 1993). It would seem that counter-argument refutation is necessary in establishing differences between proposed and opposed claims in research articles, as well as in debating political and social controversies.

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ISSA Proceedings 1998 – Arguing Over Values: The Affirmative Action Debate And Public Ethics

1. Purpose and Rational

It has long been recognized that public values are inculcated through the stories and myths revealed in public discourse (see, for example, Cassirer 1944 and Eliade 1963). One story, especially pervasive in western societies, is the "rags to riches" phenomenon. According to this narrative, known in the United States as the American Dream, individuals could, through their own determination, skill, or happenstance, overcome the circumstances of their birth and achieve greatness. This myth was exemplified in the nineteenth century stories of Horatio Alger.

Until the 1960s, in the United States, this narrative, with rare exception, was limited to white males. The Civil Rights Act of 1964 through its prohibition of

discrimination eliminated many structural barriers to equal participation. But the removal of discrimination alone would not enable all Americans to compete equally. Some individuals came to competition hobbled by years of racism. Thus, a policy of Affirmative Action evolved. Affirmative Action established the requirement that government, and those who do business with the government, act affirmatively to recruit and promote women and minorities in order to foster equal participation in the American Dream. For three decades Affirmative Action, in varying incarnations, was the law of the land and resulted in significant changes in employment demographics. It also led to a backlash principally among arch conservatives and white males who claimed to suffer from "reverse discrimination."

In 1996, voters in the state of California overwhelmingly supported a state ballot initiative, Proposition 209, which abolished Affirmative Action in state employment and education. In California such propositions, if passed by a majority, become law. Somewhat surprisingly, one in four minority voters and one out of two woman cast their ballots to eliminate the very programs established for their benefit. Leaders in other states began similar initiatives and federal lawmakers moved to enact comparable national legislation. Other anti-Affirmative Action activists continued to pursue judicial relief. Civil Rights leaders warned that elimination of preferences would significantly and adversely affect employment and educational opportunities for minorities.

This essay examines the remarkable and politically incendiary debate over Affirmative Action in the US. More specifically, representative anecdotes of the main public argumentation over the debate to abolish Affirmative Action will be analyzed to determine its nature and the implications it may have on race relations, public values, and notions of community. Such an inquiry is warranted for several reasons.

First, the Affirmative Action debate touches "the raw nerves of race, gender, and class – all of which are flash points of social debate and so emotionally charged that they beg for rational discussion and analysis" (Beckwith & Jones 1997: backflap).

Second, the public affirmation of legislation reveals public values. Anti-Affirmative Action argumentation began with reactionaries, was subsumed by conservatives and is now voiced by some liberals. Understanding the core values behind these shifting values reveal new conceptions of the "public" and "community" are therefore of interest to argument scholars in that they inform us as to how

cultural narratives shape or fail to shape discourse in the public forum. Finally, while Affirmative Action may be a uniquely American program, how cultures cope with the diversity of their populace is an issue many nations must address. In Europe, in particular, many are struggling with issues of discrimination and segmentalism. Argumentation scholarship serves a useful public function if it can inform these debates through analog to what is transpiring in the US.

2. Competing Narratives

One profitable approach to understanding the debate over Affirmative Action is to first explicate the competing stories told by the opposing advocates. Supporters of Affirmative Action inevitably characterize women and minorities as victims of discrimination.

Such discrimination is historical fact. Prior to the civil rights movement and enactment of the Civil Rights Act in 1964, blacks in America were systematically relegated to second-class citizenship.

Segregation was not only evident in "whites only" lunch counters and drinking fountains, it was legal. Shortly before signing the Voting Rights Act of 1965, President Lyndon Baines Johnson called the sweeping changes of the era the beginning of freedom for all Americans to share "fully and equally in American society" (57). But Johnson argued that removing barriers to freedom was not enough. In a now famous passage, Johnson argued that to be fair, more needed to be done:

"*But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say: 'you are free to compete with all the others," and still justly believe that you have been completely fair.' Thus it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result* (57)."

For Johnson, equality required that society act affirmatively to level the playing field. Through enforcement of the Civil Rights Act and presidential Executive Order 11246 the Johnson administration required that those private contractors

who did business with the federal government provide data as to the number of minorities in the work force contracted for employment. Employers were held accountable for disparities between the work force and the labor force regardless of the cause for these disparities. Thus, as Eastland (1996) argues, “the disparate impact approach made employers responsible for all that had happened to the shackled runners before they got to the starting line (47).”

The Affirmative Action policy instigated with Johnson was expanded under Presidents Nixon, Ford, Carter and even Reagan and Bush, though both of the latter two presidents opposed Affirmative Action. By 1996 Affirmative Action not only applied to blacks, but women and other racial and ethnic minorities. In order to achieve the goal of matching the percentage of women and minorities employed by a business or enrolled in a university with the numbers found in society, preferences for hiring and promotion were commonplace.
Sometimes this necessitated modifying hiring criteria, lowering standards, or taking into account the race, sex, or ethnicity of applicants. Governments utilized set-asides (guaranteeing a percentage of work for minorities and women only) and occasionally courts ordered quotas to achieve diversity in government employment (e.g., police and fire departments).

The goal of such actions is a more diverse workplace and a reduction in poverty by those groups separated from the main stream by discrimination. Gains have clearly been made in the last 30 years, but supporters of Affirmative Action argue that there is much that remains to be accomplished. Edley (1996) presents the following evidence to document the racial disparities in economic conditions:
– black unemployment hovers at twice that among whites.
– the median annual income for black males working full-time is 30 percent less than for white males.
– while one in every seven white children under the age of six lives below the poverty level, one of every two black children does.
– according to the 1990 census, only 2.4 percent of the nation’s businesses are owned by blacks.
– less than three percent of college graduates are unemployed, but whites are almost twice as likely as blacks to have a college degree.
– white males hold 97 percent of senior management positions in Fortune 1000 industrial and Fortune 500 service organizations.
Only 0.6 percent of senior management are African American; 0.3 percent are

Asian and 0.4 percent are Hispanic – the median net worth of black households is only 8 percent of that of whites (42-44). Similar data is presented concerning the economic disparities of women.

Advocates of Affirmative Action also cite studies documenting the extent of discrimination in the current work place. Bergmann (1996) presents a study conducted by the Urban Institute in which pairs of men, one white and one black applied for entry level jobs chosen at random from the newspaper. Even though the pairs of men were matched in terms of physical size, education and claimed experience, and even though black job seekers were coached in mock interview sessions to act like the white person they were paired with, the Urban Institute found that the young white men were offered jobs 45 percent more often than the young black men. When the researchers paired whites with Hispanics fluent in English, the Anglos received 52 percent more job offers.

With this data in mind, the pro-Affirmative Action narrative becomes clear: women and minorities (victims) need protection and assistance from government (hero) lest they be discriminated against either intentionally or de facto by business and higher education (villains). Bergmann (1996) makes this contention explicit:

"*Exhortation against discrimination, which can be ignored, has not inspired much progress, nor have expensive lawsuits against a handful of discriminators – these can take decades to work their way through the courts. Affirmative action provides a series of practical steps for dismantling discrimination: rounding out promising candidates, getting rid of artificial barriers, outflanking influential people who do not want to see change, shoehorning capable candidates into positions not previously held by people of their race or gender, and grooming the best of them for larger roles* (9)."

Of course, opponents of Affirmative Action tell a different story. When the Civil Rights Act and the Voting Rights Act were first proposed, the main opposition came from southern congress men. These men were seen as reactionaries stubbornly trying to preserve the segregationist south. As such they were largely marginalized.

One victory was in an explicit prohibition against the use of quotas to achieve integration. As the civil rights fights of the 1960s came to a close, Affirmative Action became a bipartisan effort. Richard Nixon oversaw a significant expansion of Affirmative Action. As did Ford and Carter. More importantly, explicit racism

became unacceptable. Kinder and Sanders (1996) note that passionate defenses of segregation and deliberate appeals to racism that characterized campaign discourse in the south during the late 1950s were no longer publicly acceptable. In fact, there was little public opposition to Affirmative Action during the 1970s. This began to change with the election of Ronald Reagan.

One significant component of the Reagan revolution, as it came to be known, was the attitude that government was not the solution to the nation's problems, government was the problem. Whereas supporters of Affirmative Action applauded government's role of assuring redress for past discrimination and protection from current bigotry, opponents saw yet another instance of government intrusiveness. In addition, Affirmative Action itself had changed. While Johnson had originally presented Affirmative Action as a remedy for the consequences of slavery, the policy had been expanded to include women, Asians, Native Americans and Hispanics. Only white, non-Hispanic males were not covered by Affirmative Action. Yet, LaNoue (1993) calculated that during the 1970s the population of those eligible for Affirmative Action grew seven time faster than the population of those not so eligible, and more than five times faster in the 1980s. As a result, in 1995, a year before Californians voted on the proposition to end preferences, 73 percent of the population fell within the protections of the policy (Eastland 1996).

The result of preferences being given to such a large percent of the population was a backlash among some white males. Stories of reverse discrimination circulated and some reached the courts. White males who scored higher on standardized tests, only to have their places taken by lower scoring minorities, sued for redress.
Alan Bakke, for example, sued the University of California at Berkeley med school for giving preference to an African American.
Similarly, standards for physically demanding jobs in law enforcement and fire fighting were softened to permit women to successfully compete. The emphasis on achieving "results" that mirrored societal representation also seemed more and more like quotas. It also had the unanticipated consequence of pitting women against minorities and minority against minority. In the case of Hopwood v Texas, a white woman was denied admission to the University of Texas' law school because the law school set aside 15 percent of its admissions for Hispanic students. And in California, U.C. Berkeley and UCLA refused to enroll Asian

students in order to give preference to blacks and Hispanics because Asians were already disproportionately represented at those institutions.

The result of these changes was a preference policy that many Americans considered unfair. Pojman (1992, 188) indicates that "*Affirmative Action simply shifts injustice, setting blacks and women against young white males, especially ethnic and poor white males. It does little to rectify the goal of providing equal opportunity to all." In their 1993 study, Sniderman and Piazza of Stanford and Berkeley contend that their data shows whites oppose Affirmative Action mainly because it violates "convictions about fairness and fair play that make up the American Creed" (in Eastland 1996, 157). They conclude that "The principle of preferential treatment runs against the Creed. . . . It produces resentment and disaffection not because it assists blacks. . . but because it is judged to be unfair*."

Opponents of Affirmative Action further contend that this unfair policy is not warranted because minorities do not need protection from racism. Racism is a far less prevalent than it once was.
Sniderman and Piazza (1993) conclude that while prejudice had not disappeared, it "no longer organizes and dominates the reactions of whites; it no longer leads large numbers of them to oppose public policies to assist blacks across-the-board" (in Eastland 1996, 157).
In fact, Wilson (1978) argues that economic class has more to do with black's lack of opportunities than does outright racism. Statistical analyses documenting income differentials came under attack by Sowell (1984), "Often the very same raw data point to different conclusions at different levels of aggregation. For example, statistics have shown that black faculty members earn less than white faculty members, but as these data are broken down by field of specialization, by number of publications, by possession (or nonpossession) of a Ph.D. and by ranking of the institution that issued it, then the black-white income difference not only shrinks but disappears, and in some cases reverse – with black faculty earning more than white faculty with the same characteristics"(114). Even if racism was responsible for the economic travails of blacks, Wilson (1990) contends that Affirmative Action is ill-equipped to redress these economic difficulties because its greatest benefits go to those among the minority community who need them the least.

"*Minority individuals from the most advantaged families tend to be disproportionately represented among those of their racial group most qualified*

for preferred status, such as college admissions, higher-paying jobs, and promotions. Thus policies of preferential treatment are likely to improve further the socioeconomic positions of the more advantaged without adequately remedying the problems of the disadvantaged"(157).

The story told by anti-Affirmative Action advocates is that preferences are unfair and unnecessary. But the story does not end there. Those who favor the elimination of Affirmative Action also contend that it is disadvantageous to those it purports to assist.

First, it stigmatizes minorities and women. These advocates claim that when we see a black doctor or a Hispanic lawyer we assume they achieved their status because of a policy of preference, not because of their ability. And worse, we assume that they are less able because they needed help to even start their careers (Edley 1996). This stigmatization is especially problematic because the individual is powerless to thwart it.

A second adverse consequence of Affirmative Action is the fostering of a victim mentality. Affirmative Action preferences exist because minorities and women have suffered in the past, or will suffer absent these policies. That makes them victims. There would be no need for such preferences, say those opposed to preferences, if there were no victims. But Steele (1990) argues that the very act of identifying blacks as victims encourages them to exploit there own past victimage as a source of power and privilege:

"In this way, Affirmative Action nurtures a victim-focused identity in blacks. The obvious irony here is that we become inadvertently invested in the very condition we are trying to overcome. Racial preferences send us the message that there is more power in our past suffering than our present achievements – none of which could bring us preference over others" (137).

The victim-focus debilitates because it creates self-doubt and leads to scapegoating. Connerly (1996) contends that "We are saying to young black kids, if at first you don't succeed, redefine success, because your failure must have been the result of culturally biased exams, the lack of role models, and a racist society. Our kids have come to believe that they cannot survive in a world without special consideration. Their competitive spirit has been weakened by this dependency on Affirmative Action" (67). The effect of this self-doubt is so pernicious that Steele considers advising his children to turn down preferential treatment, and Eastland celebrates a Hispanic fire fighter who turned down an Affirmative Action promotion.

The final way that Affirmative Action harms those it purports to protect, according to those opposed to this policy, is that it entrenches thinking in terms of race. Support for Affirmative Action is a belief that racial progress can be accomplished through the use of race-conscious policies. Supreme Court Justice Harry Blackmun made this assumption explicit in his opinion in *Regents of University of California v Bakke* (1978): "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently" (xxv). To those who favor abolishing Affirmative Action this approach merely compounds the problem. The goal, argue these advocates, should be a color-blind society. This is the dream to which Martin Luther King spoke so eloquently: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." In such a society equality would prevail and color would not matter. That is the purported goal of those who oppose Affirmative Action.

The importance of the appeal to equality is illustrated by the wording of the California proposition that ended Affirmative Action. No where in the proposition is Affirmative Action mentioned. Instead, Proposition 209 is called the California Civil Rights Initiative (CIRRI). Its wording is taken from the Civil Rights of 1964. The proposition states: Neither the State of California nor any of its political subdivisions or agents shall use race, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's systems of public employment, public education or public contracting." Supporters of Affirmative Action challenged the wording of the proposition even before the election alleging that the failure to state that the proposition abolished Affirmative Action was misleading. The court did not agree.

From this examination of the arguments offered in opposition to Affirmative Action it is reasonable to conclude that the story being told depicts white males as the victims of the unfair, unwarranted, counterproductive policy promulgated by misguided (villains) liberals. The heroes of this tale are those who reject preferential treatment and those who campaign against it.

3. Audience Adherence

California Proposition 209 passed with 54 percent of the vote. When broken down by race, ethnicity and gender we learn that 61 percent of males and 48 percent of

females voted for the proposition. Twenty-six percent of blacks, 24 percent of Latinos, 39 percent of Asians, and 63 percent of whites favored this proposition.

Ladd (1995) analyzed survey data from 1985 to 1994. His findings indicate that Americans prefer hiring and admissions decisions be based on merit not on a preference to make up for past denials of opportunity. This data suggests that American voters are finding the arguments of the anti-Affirmative Action advocates more compelling. While we cannot be sure why this is the case, it appears this is not simply a case of citizens voting their own self-interest. Sizable numbers of women and minorities voted to end Affirmative Action, and studies by Kinder and Sanders (1996) lead them to conclude:

"*Self-interest turns out to be largely irrelevant to public opinion on matters of race. For the most part when faced with policy proposals on school desegregation or Affirmative Action, whites and blacks come to their views without calculating what's in it for them. . . . And this means self-interest cannot explain the huge differences we see between black and white Americans on matters of racial policy*" (88-89).

If the explanation lies, at least in part, on the narratives presented, we can identify several components of the anti-Affirmative Action argument that might account for the .greater adherence.

First, these advocates successfully co-opted the hero of the Affirmative Action supporters. Martin Luther King is a powerful and revered figure in race relations. It is easy to see why tying their opposition to preferences to King's vision of a better, color-blind world rang true to many voters.

Second, those opposed to Affirmative Action invoked a powerful mythos – the color-blind world. From the Declaration of Independence which pronounced inalienable rights for all of us, through the formulation of the American Dream, Americans have always professed a belief in the equality of opportunity for all. That one group (or many groups) should receive preferential treatment runs counter to this core value. Especially when those asked to suffer had no direct part in the transgressions against women and/or minorities.

Third, opposition advocates more successfully combined examples and generalizations. The literature of those opposed to Affirmative Action is replete with cases of individuals who were passed over because of preferential treatment for women or minorities. These stories make the narrative more concrete and personal. There was a dearth examples of those who benefited from Affirmative Action. Perhaps this is an outgrowth of the stigmatization argument. Identification of one's self as the beneficiary of Affirmative Action is to call into

question one's legitimacy. Nevertheless, the failure to personify the outcome of preferences has impaired the effectiveness of the pro-Affirmative Action narrative.

Finally, the movement from explicit segregationist and racist argument to what Himelstein (1983) calls the use of racial code words permits the advocate and audience to share the latent message without needing to make it explicit. Himelstein defines a racial code as "a word or phrase which communicates a well-understood but implicit meaning to part of a public audience while preserving for the speaker deniability of that meaning by reference to its denotative explicit meaning" (156).
In Himelstein's study conservative white politicians in Mississippi during the 1970s needed the support of racially resentful white voters, but they also needed to avoid being labeled racists. The solution was the use of code words. References to "racial discord" or "federal intrusion" or "outside agitation" reminded southern white voters that the real issue before them was race. Others who have profitably studied the use of racial codes include Rose (1992), Howell & Warren (1992), and Page (1978).

In the current debate, those opposed to preferences studiously avoid racist language and stridently deny racist intent. Nevertheless, their language conveys the same racist overtones to one who looks for it as David Duke's or George Wallace's. For those who feel threatened by women and minorities in the workplace or university, racial codes permit the evoking of those attitudes without the explicit use of racist argument. Similarly, those who are made uneasy by the successes of women and minorities have their concerns legitimated and allayed. Their uneasiness in not the result of their own bigotry or racism, it is the stigma which attaches itself involuntarily to those who may have benefited from preferences. It cannot be bigotry or racism if the same feelings are manifested in the benefiting individual.

4. Implications
The preceding analysis yields several implications. First, the Affirmative Action debate as currently practiced could endanger the sense of community necessary for consensus (Habermas 1984).
The use of racial codes necessarily undercuts and is antithetical to ideal speaking situations (Habermas 1970). In the same vain, employing Affirmative Action as a wedge issue, dividing liberal and conservative voices, threatens shared

conceptions of the public. On the other hand, perpetuating racial distinctions, even going so far as to use racial distinctions in the quest to overcome such distinctions, marginalizes disparate voices and may equally obviate consensus building.

Second, the appeal to a color-blind world, while intuitively appealing, miscasts the debate. Contemporary perspectives on culture do not envision a homogeneous culture where race, gender and ethnicity merge to one. Such an eventuality may be undesirable even if it were attainable. For who is capable of divorcing themselves from themselves? As Cose (1997) writes: "Race is an essential part of who we are (and how we see others) that is no more easily shed than unpleasant memories. Few of us would choose to be rendered raceless – suddenly without a tribe" (xxii).

Then where does that leave scholars of argumentation? Promoting talk. Ideal, consensus advancing, talk. We have reached the moment when conversation about race relations is more than appropriate. Argumentation scholars have a unique opportunity to foster such talk. We need free, explicit, explorative, continuing conversation about where we are, where we might be going, and how we might profitably get there.

Finally, we need to reconceptualize the notion of victim presented in the argumentative discourse of both those who favor Affirmative Action and those who do not. Currently, both camps speak in terms of a zero-sum game. If women and minorities win, white males lose. If white males win, women and minorities lose. Such a perspective is neither profitable, nor conducive to reaching consensus.

Instead we might profitably build on the jointness of our circumstances; our shared investment in the collective. Edley (1996) writes of the need for interest accommodation. From this perspective advocates search for common ground and community rather than employing "moral calculation, rights-based litigation, or raw majority power. . . Perhaps the majority can each give a little, rather than insisting that one has all the entitlement marbles and the other must bear all the costs. For example, in a situation where layoffs of last-hired workers may obliterate the gains from Affirmative Action, some commentators have suggested job-sharing or wage reduction schemes" (251). Similarly, since much of the dispute over Affirmative Action concerns disagreement between whether it is necessary to use preferences to achieve outcomes or whether it is more important to assure an equitable process, Edley argues that a first step may be to reach

consensus on the “disadvantages still worked by the lingering poisons of racial caste” (257). Only through moving the policy debate from the contentious quasi-judicial model to one of mutually beneficial negotiation can we hope to resolve the competing tensions and achieve community.

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ISSA Proceedings 1998 – The Function Of Argumentation Dialogue In Cooperative Problem-Solving

1. Introduction

The aim of the research described in this paper is to understand the functional role of argumentation dialogue in cooperative problem-solving, and ultimately, to understand how argumentation can give rise to cooperative learning. By cooperative learning, we mean the type of learning that occurs specifically in virtue of cooperation between people in performing some activity. We propose refinements of known cooperative learning mechanisms on the basis of analyses of cognitive-interactive processes that are at work in argumentation dialogues, for the specific case of a corpus of cooperative problem-solving dialogues in the domain of school physics problem-solving.

Firstly, the study of argumentation dialogue is situated within recent tendencies in cooperative learning research. Then three hypotheses concerning the way in which argumentation dialogue could lead to cooperative learning are discussed: knowledge explicitation, attitude revision and co-elaboration of meaning in relation to conceptual change. An approach to analysing the extent to which these mechanisms are at work in argumentation dialogue is proposed, based on five interrelated dimensions: dialectical, rhetorical, epistemological, conceptual and interactive. Results of analysing these dimensions in a specific corpus are summarised. The analyses reveal the relations between participants' reasoning and the types of knowledge expressed during argumentation, the way in which argumentation outcomes function with respect to changes in attitudes, and the argumentative contexts in which meaning is co-elaborated and conceptual change occurs.

2. The study of verbal interaction in cooperative learning research

During the last decade, the efforts of many researchers have been directed towards identifying specific forms and phenomena of verbal interactions between learners that correlate with learning effects, under certain specific conditions. This *interactions paradigm* (Dillenbourg, Baker, Blaye & O'Malley 1996) can be represented as follows : conditions -> interactions -> effects ["->" symbolises causality]. However, when one considers real cooperative learning situations, that usually extend in time over an hour or more, this linear schema turns out to be too simple.

Firstly, once learners become more competent at solving a given type of problem, and they have learned how to cooperate together better, then the form of their

interaction usually changes (i.e. there is a backward arrow from effects to interactions).
Secondly, what is important for explaining learners' activity is not so much the set of objective conditions, but rather the way in which these conditions are understood by the subjects themselves. There is thus also a backward arrow from interactions to conditions, to the extent that subjects' understanding of the problem-solving situation is continually negotiated during verbal interaction. Given these facts, it is difficult to use existing quite general (neo-Piagetian and Vygotskian) theories of cooperative learning, that have often relied on a simple distinction between cooperation and conflict, in order to identify the precise interactional phenomena that can be correlated statistically with learning effects. What is required is the development of more specific and local models of cooperative learning (Mandl & Renkl 1992) that will enable us to understand how three types of processes interact dynamically: dialogue, cooperation and problem-solving. Cooperative learning will then be viewed as emerging from the complex interaction of these three processes.

It is within this research paradigm that we pose the question of the role, or *function*, of one specific type of dialogue – argumentation dialogue – with respect to cooperative problem-solving. If we could understand the way that argumentation functions in cooperative problem-solving, then this should help to gain better understanding of how and when cooperative learning occurs. There are number of reasons for singling out argumentation for special scrutiny in the study of learning within the context of formal schooling.
Historically, argumentation or debate is one of the cornerstones of the teaching provided in occidental universities. One would expect that the ability to argue with respect to a specific point of view reveals a deeper form of understanding of the domain of discourse. More recently, a number of hypothetical cooperative learning mechanisms associated with argumentation can be abstracted from research on learning in different domains of cognitive science.These will be discussed later in the paper.

3. Understanding the functions of argumentation dialogue in cooperative problem-solving

In cooperative problem-solving, differences of opinion can arise on several levels – for example, with respect to local sub-goals of problem-solving, alternative solutions to problems, methods to be adopted, and ways of conceptualising the

domain. In many cases, the participants may not be aware of these differences. In other cases they may be aware of them, but may simply 'let the matter drop' without argumentation. In the most infrequent case, participants may mutually recognise that their different proposals can not all be accepted, and engage in argumentation. When learners do engage in argumentation, there are a number of different reasons why they might do so. Thus Walton (1989) has proposed a typology of argumentative discussions according to the participants' subjective goals, such as attempting to persuade each other, to hit out at one's opponent, to cooperatively search for the truth of the matter at hand, or even to demonstrate to oneself that one's position is at least defensible. Clearly, all or any of these possibilities could obtain in specific argumentations between learners, although in practice it is difficult to identify which goals subjects are pursuing.

Here we adopt an approach to understanding the function of argumentation dialogue in cooperative problem-solving that depends on considering the dyad as a cognitive unit of analysis, on defining situational constraints and describing how argumentation functions with respect to the learners' overall activity. In other terms, instead of inquiring as to individuals' motivations, we inquire as to how argumentation influences the overall course of the learners' activity, how it contributes to its overall aims. Of course, individuals' motivations to argue may be in accordance with overall cooperative goals ; but they may, locally, diverge from them.

Elsewhere, we have described cooperative problem-solving activity as a process of negotiation (Baker 1994, 1995) on the level of the problem-solving domain, as well as on that of managing the interaction itself. The overall goal of the activity is to reach agreement on a solution to a problem, under constraints relating to the knowledge domain (e.g. a solution expressed in terms of physics rather than biology may be required) and the social-institutional situation (e.g. the solution must satisfy the learner's conception of the teacher's expectations). The principal means by which this overall goal can be achieved is by successive refinement of proposed solutions, methods, sub-goals, … during the interaction. Negotiation can take place with respect to different objects, using different strategies simultaneously. For example, an argumentation that occurs on the level of attitudes towards a proposed problem solution can be accompanied by successive refinement of the meaning of terms used in the statement of the contested solution(s). Our aim is thus to understand the function of argumentation within such a negotiation process, oriented towards agreement with respect to a solution to a given problem.

Intuitively, there are a number of possible functions of argumentation with respect to cooperative problem-solving. One is that argumentation functions as a type of *decision procedure* with respect to the "common ground" of dialogue (Clark & Schaefer 1989). Thus, in the case where participants A and B propose, respectively, partial problem solutions p and q, and A and B mutually believe that both p and q can not be accepted, the proposition that emerges as the winner from the argumentation (e.g. p is successfully defended, q is refuted) is the one that is added to the common ground, and which forms part of the basis of subsequent joint activity.

According to this possibility, argumentation would have basically an *additive* function with respect to the common ground. Similarly, argumentation might have a *subtractive* function, in the case where a previously mutually believed proposition is removed from the common ground once it has been refuted in argumentation.

A second possibility would be the case where argumentation functions as a *verification procedure*: as a result of argumentation, the foundations of a given proposal are better established. Thirdly, argumentation could fulfil a *clarification function*: argumentation with respect to a proposal obliges the participants to co-elaborate a more precise meaning for it ("precization", in the sense of Naess 1966).

We explore possible functions of argumentation by working backwards from possible cooperative learning mechanisms and attempting to determine the extent to which they could be triggered by correlate interactive processes, using an approach to argumentation analysis that is adapted to achieving these objectives.

4. Argumentation and cooperative learning mechanisms

Very little research exists on the study of spontaneously produced argumentative interactions in cooperative learning situations. Most research on argumentation and learning has been concerned with either the generation and evaluation of argumentative texts (e.g. Voss, Blais & Means 1986, Voss & Means 1991), or else on argumentative interactions that are provoked, in situations that were not designed to promote learning (e.g. Resnick et al. 1993). In our view, this state of affairs is largely due to methodological constraints that have excluded the study of spontaneous interactions in learning situations. This is illustrated by the long line of research that has been carried out within the "socio-cognitive conflict" paradigm (Doise & Mugny 1981).

Blaye (1990) has shown that, for a matrix classification task, although the number

of socio-cognitive conflicts that occurred was not predictive of cognitive progress, results could not indicate whether or not argumentation related to learning. Our re-interpretation of this, and other, work is that the types of problem-solving tasks studied were not sufficiently complex in order for them to be *debatable*, i.e. argumentation dialogue, as a possible object of study, was effectively excluded from the experimental situation. Debatability requires a certain degree of complexity in the task domain, and the existence of different possible viewpoints from which to debate. In much research, these types of tasks, as well as spontaneous verbal interaction, are excluded since it is difficult to propose experimental measures of individuals' competence with respect to them. It seems that argumentation is most probably related to a particularly elusive form of learning – a greater degree of understanding in the task domain (Ohlsson, 1995).
Three main types of cooperative learning mechanisms, that could be triggered by argumentation dialogue, can be abstracted from the cognitive science literature: knowledge explicitation, attitude change and co-elaboration of meaning and knowledge in relation to conceptual change. We discuss each in turn.
In any argumentation dialogue, the participants will need to generate arguments (defences) in favour of their own proposals (theses), and counter-arguments (attacks) with respect to their opponents' proposals. In argumentations that occur in cooperative problem-solving situations, the arguments that are generated could be considered to correspond to the (often implicit) reasoning that underlies the problem solutions that are proposed and debated. This process of *explicitation* of reasons or arguments is one possible mechanism by which argumentation may lead to cooperative learning, given that it relates closely to what has been termed the "self-explanation effect" (e.g. Chi, *et al*., 1989 ; Chi & VanLehn, 1991).

Chi, VanLehn and colleagues demonstrated that subjects who were asked to "self-explain" their solutions to physics problems had improved problem-solving performance. In other words, the subjects who verbalised their understanding, when prompted by the experimenter, had better problem-solving performance than subjects who did not verbalise. Webb (1991) confirmed the effect by showing that the explanations produced had to be quite elaborated in order for the explainer to learn, which shows that it is the cognitive activity of producing explanations, perhaps involving restructuring of knowledge, that is important in learning. It should be noted that in these experimental situations, the subjects were in fact explaining to another person – the experimenter. To that extent, the self-explanation results could also apply to the situation where subjects make

their reasoning and understanding explicit in argumentation dialogue. The basic mechanism at work here is in fact meta-cognitive (e.g. Brown 1987): learning may occur since explicitation of knowledge stimulates reflection and obliges a greater degree of coherence in a subjects' knowledge. In an argumentative interaction, the constraints on individual coherence might be expected to be even greater than in the case of self-explanation, since each participant can also impose these coherence constraints on their partners.

Whilst the explicitation mechanism makes appeal to the process of argument generation and evaluation during argumentation itself, a second possibility is that argumentation *outcomes* have some influence on the participants' cognition. One possible case would be the following: participant A believes that p, and proposes p as a possible solution to the common problem; B calls p into doubt, and an argumentation ensues, the outcome of which is that p is mutually recognised to have been refuted; this refutation leads to the effect that A no longer believes that p.

This is of course an idealised case: as Dennett (1981) has pointed out, it is quite possible to be obliged to accept the conclusion of an argument, but not to believe it. Clearly, there are many other possible links between outcomes of argumentation dialogue and changes in attitudes, such as belief. These possibilities can be explored more systematically by linking research on argumentation dialogue with research on *belief systems*, that has been carried out in linguistic philosophy (Harman 1986) and in artificial intelligence (e.g. Doyle 1979, DeKleer 1986, Gardenförs 1992). Belief revisions may also occur during argumentation itself, as a result of the explicitation mechanism mentioned above.

A third type of interactive learning mechanism that may be linked with the process of argumentation itself relates to the fact that in order to evaluate a proposal, to attack it or defend it, one often has to inquire into, or make refine, the precise *meaning* of the proposal.

Thus argumentation may be associated with negotiation of meaning and knowledge, and the refinement of concepts. Cooperative learning could occur by the internalisation (in the sense of Vygotsky) of these more refined meanings and concepts.

In summary, on the basis of existing research in cognitive science, there appear to be three basic mechanisms by which argumentation dialogue could lead to cooperative learning: explicitation of reasoning during argumentation leads to knowledge restructuring, argumentation outcomes lead to attitude changes, and

negotiation of meaning during argumentation leads to better understanding in the domain of reference.

5. An approach to analysing argumentation dialogue in cooperative problem-solving situations

Given that our aim is to understand the functions of argumentation dialogue in cooperative problem-solving, within a theoretical framework that enables us to link these functions to possible learning mechanisms, we have seen that the following types of dimensions need to be analysed: the process of argumentation itself, including the generation of attacks and defences leading to determinate outcomes, attitudes underlying argumentation dialogue, together with changes in them, the domain of reference of the debate, the way it is conceptualised, and the way in which conceptualisations are refined during the interaction. We therefore propose an approach to analysing these types of dialogues along five dimensions: dialectical, rhetorical, epistemological, conceptual and interactive.

Along the *dialectical dimension*, argumentation is viewed as a verbal game to be lost or won. It is analysed here using the dialogic logic of Barth and Krabbe (1982) as a description language, and as a means of predicting argumentation outcomes (who has won and who has lost). Trognon (1990) has demonstrated the relevance of this dimension to the study of human cognition, since argumentation outcomes as predicted by dialogic logic generally correspond to human intuitions.

The *rhetorical dimension* is understood here not in the classical sense of the attempt to persuade an auditorium, possibly by non-rational means, but in the more general sense of the set of cognitive effects of sequences of argumentative speech acts (cf. Van Eemeren & Grootendorst 1984) on speakers as well as on hearers.

Taken together, the dialectical and rhetorical dimensions correspond generally to pragma-dialectics (Van Eemeren & Grootendorst) ; we distinguish the two dimensions here in order to study the relations between them (see discussion of attitude changes above, section 4 of this paper).

The *epistemological dimension* refers to the analysis of the nature of knowledge that is appealed to in argumentation, and which underlies it. This is important for the study of the types of argumentation considered here – and perhaps for many other types – for two main reasons. Firstly, certain arguments carry more ‘weight’ than others, in virtue of the type of knowledge that they appeal to.

For example, an appeal to commonly known facts, or to facts of perceptual experience, is usually difficult to refute. Secondly, it has been shown for teaching-

learning domains such as physics, that certain types of knowledge are more firmly anchored in subjects' minds, and thus more difficult to change than others (DiSessa 1988). This aspect is also dealt with in belief revision research under the term *epistemic entrenchment* (Gardenförs 1992). In the teaching and learning of physics, we distinguish types of knowledge according to an epistemological approach to physics teaching and learning (Tiberghien 1994, 1996) – knowledge of theories, models and experimental fields –, according to domains of physics knowledge as it is taught (e.g. electricity, energy, mechanics, …), the social situation in which knowledge was acquired (at school, in the home, …), and the social position of a person from whom the knowledge was acquired (a teacher, a parent, an expert seen on television, another student, …). Thus, for example, from the point of view of learners, knowledge of a physics model acquired from a teacher may give rise to an argument that carries more 'weight' than one that draws on knowledge derived from reasoning carried out by another learner.

Whilst the epistemological dimension deals with the nature of knowledge, *the conceptual dimension* is concerned with the form of representation of knowledge, the way that it is conceptualised. In this case, what is crucial is not so much the way in which individual concepts are defined, but rather the way in which concepts are *differentiated* from each other (Vignaux 1988, 1990). In argumentation theory, this corresponds to what Perelman and Olbrechts-Tyteca (1969) have termed "argument by dissociation".

Suppose that two people argue with respect to the question as to whether it is better for humanity to expend resources on growing plants to eat, or else on breeding animals. The way that the concepts "plant" and "animal" are differentiated may turn out to be crucial to the debate (in fact, the basic difference lies in the way in which each obtains energy – via photosynthesis or else via digestion).

Another important conceptual operation in this context is *generalisation*. Thus Walton (1989) has described how most debates have a tendency to move towards discussing more and more fundamental or general issues (he gives the example of a debate on the desirability of tipping that transforms itself into a discussion on the role of the state in regulating commercial affairs). In an analogous fashion, we might expect similar processes to operate in debates between learners, who should be led to discuss the fundamental conceptual framework underlying their activity.

Finally, the *interactive dimension* operates on the epistemological and conceptual

dimensions, within a dialectical and rhetorical framework. It is concerned with the successive refinements of meaning and knowledge that occur in argumentative interactions.
These phenomena have been dealt with in linguistics by the study of reformulations (e.g. de Gaulmyn 1987; Vion 1992). In Baker (1994) we have analysed these successive refinements in terms of a general set of *transformation functions* that operate on the knowledge expressed in cooperative problem-solving interactions.

There are four classes of transformation functions:
extensional (the previous proposal is extended in some way, new information is added, elaborated, or derived by inference), contractional (the inverse of extension, where the content of the previous proposal is restricted in some way), foundational (the second proposal provides justification or explanation for the previous one) and neutral (the previous content remains unchanged, as in repetition or linguistic reformulation; this function thus works on the level of maintaining mutual understanding and agreement, rather than on problem-solving itself). Our basic hypothesis is that argumentative interactions impose a special type of *interactive* and *interactional pressure* (Bunt, 1995) on participants (to resolve the verbal interpersonal conflict, to be internally coherent, to preserve face, …) that may force meanings and knowledge to be refined.
In performing analyses along these dimensions, the dialectical dimension is primary. Precisely because it is extremely reductionist, it allows us to isolate more clearly those aspects of the argumentation dialogue that are not taken into account by this dimension. Similarly, we can use the normative dialectical model as a starting point for determining the dialectical rules to which learners' argumentations conform, within the context of a real interaction.
For example, although repetition of attacks may be proscribed within an ideal dialectical model, such repetitions may be performing other functions, such as ensuring that one's interlocutor has adequately perceived and understood the attack. The dialectical dimension is also primary to the extent that the other dimensions are only studied in terms of their relation to it. For example, the rhetorical dimension is studied in so far as it relates to (dialectical) argumentation outcomes, we must first isolate an utterance as an argumentative attack before asking the question as to its relative 'weight' along the epistemological dimension, and so on.

6. Presentation of the corpus and summary of results of the analysis

6.1 The corpus and the physics problem-solving task

The analysis techniques described above have been applied to a corpus of verbal interactions**(i)** collected in a physics classroom in the Lyon area (students aged 16-17 years). The corpus consists of transcriptions of four verbal interactions between pairs of students, seated side-by-side, each interaction having lasted approximately 45 minutes. The students' task was to draw "energy chains" for simple experimental situations – for example, a bulb is connected to a battery by two wires; a weight is attached by a string to the axle of a dynamo, which is also connected to a bulb by two wires (when the weight falls, the axle turns and the bulb lights up). Energy chains are simple qualitative models of energy storage, transfer and transformation; arrows correspond to different forms of transfer, and different types of boxes to reservoirs and transformers of energy. Energy chain diagrams must be constructed within constraints of certain simple rules, for example: "A complete energy chain must start and end with a reservoir" (this corresponds to the law of conservation of energy). The didactic rationale of this task (Tiberghien 1994, 1996) is that, by attempting to establish correspondences between the model and the experimental situation, under a set of syntactic rules, the students will be led to co-construct a *semantics* for the model, i.e. to have an understanding of the meaning of the concept of energy.

From the point of view of the study of argumentation and cooperative problem-solving, this task presents a large space of debate, since the students draw on a variety of different types of knowledge – for example, knowledge of other areas of physics learnt in school, such as electricity, and knowledge of energy acquired in everyday life, such as with respect to household electrical appliances. Here we restrict ourselves to summarising results of a systematic analysis of the corpus. Fuller details, with detailed analyses of concrete examples, can be found in Baker (1996a, 1996b, *to appear*).

6.2 Summary of results

According to the explicitation learning mechanism, relating to the self-explanation effect mentioned above, participants in argumentation render explicit the steps of the reasoning underlying the problem solutions that they propose, in the form of defences. In this case, there should be a close correspondence between the type of knowledge that manifestly underlies their problem solving, and the type of knowledge that is expressed during argumentation. This assumption can therefore be evaluated by analysis along the epistemological dimension. Such an

analysis produced two main results.

Firstly, students are generally stable and consistent in terms of the type of knowledge used in their argumentations, throughout a given interaction. For example, some students consistently argue in terms of facts of everyday experience – “a bulb connected to a battery will not shine forever” ; “my ear-rings shine but they do not give out heat ; so it’s not true that whenever there is light there is heat”. Others consistently make appeal to the institutionalised knowledge provided by the teacher, such as the rules of the energy chain model – “a complete energy chain must start and end with a reservoir” – or previously taught knowledge of electricity – “there must be a transfer from the bulb to the battery as well as one from the battery to the bulb, otherwise the circuit would not be closed”. Stability of epistemic points of view probably relaes to the spontaneous adoption of specific roles with respect to cooperative problem-solving (e.g. “critic”, “proposer”), as well as to the students’ cognitions.
Secondly, there is often a mismatch between the type of knowledge expressed by a given student during argumentation, and the type of knowledge that manifestly underlies the solution proposed by the student. This implies that the explicitation hypothesis needs to be refined. For example, in one argumentation sequence, students A and B proposed the following energy chains for the battery-wires-bulb experimental situation (Figure 1):

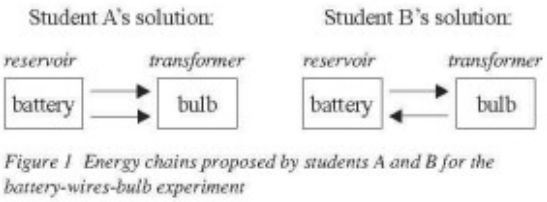

Figure 1 Energy chains proposed by students A and B for the battery-wires-bulb experiment

Figure 1 Energy chains proposed by students A and B for the battery-wires-bulb experiment

From our previous analyses of students’ problem-solving in this domain (e.g. Devi, Tiberghien, Baker & Brna 1996) it was clear that B’s reasoning was based on a confusion between knowledge of electricity and knowledge of energy: in his solution, the energy transfer arrows between battery and bulb go round in a circle, like the standard representation of electrical current in a circuit. However, in terms of energy, there should be a single transfer of energy, in the form of

electrical work, from the battery to the bulb. Student B argues for his solution solely in terms of the rules of the energy model ("the chain starts with a reservoir [battery] and ends with a reservoir [the same battery], so it satisfies the energy model rule"), and not in terms of electricity. In this case (and others) therefore, the student's argumentative behaviour does not correspond to simple explicitation. In the case of student A however, she argues in terms of linear causal reasoning ("the energy is produced first by the battery, then flows along the two wires to reach the bulb"), which does correspond to the solution she proposes.

The conclusion that we can draw with respect to the explicitation mechanism is therefore that argumentation does not always stimulate explicitation of reasoning underlying proposals.
Rather, it may trigger the search for other forms of knowledge that are available in the problem-solving situation, which may be used in argumentation. There may be a number of explanations for this phenomenon. In some cases, beliefs underlying proposals may not be available to conscious inspection ; in others, the type of knowledge that is searched for may be viewed as providing stronger argumentative support than the knowledge underlying the student's original problem-solving processes. From this analysis we can propose a different mechanism by which argumentation could lead to cognitive change: the search for new knowledge sources as arguments may *widen the epistemic field of verification of proposals*, and thus lead to improvement in the quality of solutions.

In order to study attitude change as a result of argumentation outcomes, we first analysed all argumentation sequences along the dialectical dimension, thus predicting outcomes (successful defence or refutation; in some cases, a non-dialectical compromise outcome was produced, or even no clear outcome). We then analysed the dialogue following the argumentation sequence in order to study students' verbal behaviour with respect to the conflicting theses and the outcomes. The criteria for attitude change used were quite simple: if a student asserted a proposition p, or its negation not-p, he or she was assumed to believe it, or its negation. For example, if student A's proposal p was refuted, yet A continued to assert p in the subsequent dialogue, this was taken as evidence for A's continued belief in p. In the case where p is no longer mentioned by A, then no interpretation could be made. For each argumentation sequence, and for each student, we constructed a belief system (a network of propositions linked to

justifications) relating to the propositions expressed during the sequence. We could thus attempt to hypothesise the belief revision principles upon which the students operated, in relation to argumentation.

The results of this analysis were quite unequivocal: students were *falsificationist* with respect to proposals of their partners, and *confirmationist* with respect to their own proposals. In other words, in the case where there was at least one commonly accepted counterargument to a thesis T, then T would not be commonly accepted, irrespective of argumentation outcomes (for example, even if T was successfully defended). It appeared that a proposal/thesis had to be 'flawless' in order for it to be a candidate for the "collectively valid" (Miller 1987). Conversely, and again irrespective of argumentation outcomes, provided that a given student had at least one commonly accepted argument in favour of his or her proposal/thesis, then this was sufficient for that student to retain belief in that proposal (even if refuted in the argumentation). We can therefore say that the function of argumentation in the context of cooperative problem-solving (at least for this corpus) is not an additive one. Rather, argumentation functions as a means of eliminating 'flawed' proposals from consideration, as a means of eliminating certain candidates for addition to the common ground. The students' rationality seemed to be: "if there is something wrong with it, then that can't be the right solution". The remaining case is the one where for both of two conflicting proposals/theses, each has one or more arguments in favour of it, as well as some in its disfavour. In this case, the students always attempted to find a compromise, by combining elements of each solution.

Finally, we analysed argumentation sequences along the conceptual and interactive dimensions, within a dialectical framework, in order to determine the dialectical contexts within which knowledge is co-elaborated, and its meaning transformed. Such transformations of knowledge and meaning take place in two contexts: as part of the argumentation process itself (the exchange of argumentative moves, attacks and defences) and as part of the process of finding an outcome to the argumentation.

Significantly, transformations of meaning and knowledge that took place during the argumentation process were often implicit (i.e. not expressed explicitly), and most often led to refinements that were positive, from a normative point of view. For example, with respect to the argumentation situation illustrated in Figure 1, student A's counter-argumentation with respect to B's proposal may be

summarised as follows: “There are not two batteries in the experimental situation, so what you say is absurd.”
Implicitly, this counter-argumentation (which was in fact fully mutually understood, and led to concession by B) works via an implicit *reductio ad absurdum* that includes an implicit elaboration of the meaning of the energy chain rule (R1): “A complete energy chain must start and end with a reservoir”. In A’s view, R1 should be reformulated to (R1’) :“[R1]… and the beginning and ending reservoirs can not correspond to the same object”. Assuming R1’, then, if B’s chain is complete, and the reservoirs correspond to “battery”, then there must be two batteries in the experiment (!). But since there is clearly only one battery, then B’s proposal is absurd. Interactive transformations that took place as a means of resolving the argumentation were, however, often superficial combinations of solutions on a purely linguistic level. For example, in the case where one student proposed that an energy transfer corresponded to “mechanical work”, and another that it corresponded to “force”, then the students juxtaposed elements of each solution, agreeing on the superficial compromise “mechanical force”. As mentioned above, however, the desire to search for a compromise was always rationally motivated by the existence of opposed proposals, each of which had something in their favour and something in their disfavour (the desire to extract the ‘grain of truth’ from each).

The principal conceptual operation that was at work in these argumentations was *dissociation* of concepts, and domains of knowledge, the most important case being dissociation of concepts relating to *energy* from those relating to *electricity*. In the battery-wires-bulb experiment, this dissociation process was triggered by the attempt to determine the meaning of the term “transfer”, for the case of the transfers between battery (reservoir) and bulb (transformer).
Typically, as the result of a protracted discussion, the common interpretation could be summarised as : “I agree that there must be a second transfer from the bulb to the battery [see B’s solution in Figure 1] in order to close the circuit ; but it’s not really a transfer of energy”. In this way, argumentations were not so much *resolved* as *dissolved*, by redefinition of the universe of reference.

This process of dissociation of concepts is potentially important for conceptual change in physics. In fact, the problem in this case is not to replace students’ everyday conceptions with physics conceptions, but rather to enable them to dissociate the fields of appropriate application of concepts.

7. Conclusions

The basic question addressed here was as follows: what is the function of argumentation dialogue with respect to cooperative problem-solving? We understand this question as referring to the influence that argumentation has on the overall course of cooperative problem-solving activity. Our results indicate three basic functions for argumentation dialogue in this context. Firstly, argumentation functions as a *trigger for information search* within the problem-solving situation, as a means for evaluating the acceptability of different proposals. In this way, the process of verifying solutions could be improved. Secondly, argumentation functions as a *filter of defective proposals*, rather than as a means of identifying the most acceptable, or best supported, proposals. Thirdly, argumentation functions as a provider of a *special interactive pressure to co-elaborate meanings* of concepts in the domain of discourse.

In order to fully understand the implications of these results we need to recall an important feature of the argumentation situation studied here. The didactic situation is designed so that the elaboration of new understanding (of the concept of energy) is at stake for the students. The students therefore engage in argumentation with respect to concepts that they themselves do not yet fully master, and in the absence of help or arbitration from a person who does fully possess the requisite understanding (their teacher). Given these considerations, it is understandable that students search for information in the problem-solving situation that can help resolve the conflict of opinions, that they reject defective proposals, and that they attempt to gain a better understanding of the domain of discourse (the didactic objective of the situation itself, from the point of view of the teacher and researchers).

These results are at present restricted to the corpus described above. Our ongoing work is concerned with applying the analysis method described above to other problem-solving domains, and to situations involving computer-mediated argumentative interactions (cf. Baker & Lund 1997). In our view, the way forward in understanding the function of argumentation in cooperative problem-solving situations is to elaborate a more systematic analysis of didactic and argumentative situations themselves (cf. Golder 1996). This should enable us to design situations that allow the emergence of argumentation dialogues that are productive from the point of view of learning.

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NOTE

i. The corpus (in French) is publicly available at: http://www.ens-lyon.fr/~lund/DRED/

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ISSA Proceedings 1998 – 'The Search For Grounds In Legal Argumentation: A Rhetorical Analysis Of Texas v. Johnson'

Legal opinions are essentially rhetorical documents: they pronounce a decision then justify that decision through a series of arguments aimed at particular audiences. Although law has often been held up as an archetype of practical argument, legal arguments must adhere to a stricter level of scrutiny then many other types of argument. Court decisions, particularly those made by the Supreme Court, are analyzed by a variety of experts, some of who have direct influence on the argument as it is being constructed (Golden and Makau, 1982: 172). These audiences constrain the possible means of persuasion which may be incorporated into the argument.

These constraints serve to limit the types of arguments which may be made in a case, the types of evidence which may be used to support the argument, and the very form that the argument may take. Despite these restrictions, legal argument is dynamic; new arguments are made and accepted, the law changes over time.

Legal argumentation covers a wide variety of issues. Each issue has a different set of questions which must be addressed by the Court when it announces a decision. Free speech cases provide a limited set of non-legal concepts which the judge may integrate into the decision. These concepts include the speaker, the speech and the audiece of the speech. These become the materials which the judge may use to overcome the constraints set on the decision by the audience. In this paper, I will examine how the Court uses the construct of audience in the Texas v Johnson case. This case reveals how dynamic legal argumentation can be, even given the strict constraints the Supreme Court must operate under.

1. Developing a Theory of Constraints

Court documents are constrained by the expectations of the audience. These constraints are not formally codified; they exist in the author's conception of the expectations of this audience. The audience judges the correctness of a justice's interpretation of the law, and this judgment is internalized by the author of the opinion.

James Boyd White notes, "In every opinion a court not only resolves a particular dispute one way or another, but validates or authorizes one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority, or another" (1988: 394).

Stare decisis is the most pressing constraint on a Supreme Court judge. Golden and Makau note, "Use of stare decisis gives the court's readers greater confidence in the Justices' impartiality" (Golden and Makau 1982: 160).

The tapestry of the law forms the backdrop for the finding of any particular case. The author of an opinion must weave his or her finding into the cloth in such a way as not to radically disrupt the patterns which the audience has come to expect for the type of case being decided. These patterns consist of the materials which a justice may use to justify the opinion including the constitution, state law, and prior court cases. Stanley Fish provides an excellent example of a decision which would be considered a break from the pattern of the law, "A judge who decided a case on the basis of whether or not the defendant had red hair would not be striking out in a new direction; he would simply not be acting as a judge, because he could give no reasons for his decision that would be seen as reasons by competent members of the legal community" (1989: 193).

Fish's observations about the nature of the legal system culminated in the idea of the "interpretive community." Although there is no clear delineation of this community's boundaries, Fish did provide that an interpretive community is, "not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinction, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property" (1989: 141). Interpretive communities explain why judges are constrained in the writing of the opinion, the judges, invested in the community, are pressured to uphold the community's standards.

Fish's theory is reminiscent of Perelman and Olbrechts-Tyteca's theory of

audience. Perelman and Olbrects-Tyteca argue that the primary criteria for whether an argument is reasonable is the universal audience. This audience is bounded by the culture; a culture shared by both the speaker and the audience (1969: 33). Fish's interpretive communities flesh out those boundaries; he defines the cultural expectations under which both the Supreme Court justices and their audience operate.

Fish's notion of interpretative community is far from static, "neither interpretive communities nor the minds of community members are stable and fixed, but are, rather, moving projects – engines of change – whose work is at the same time assimilative and self-transforming" (1989: 152). Change in the community occurs thorough interpretation. Each time a decision is made, it reflects both the concerns of the present situation and the interpretive community's conception of the past, "the hand of the past can appear to us only in an interpreted form, in the form of a constructed intention that can always be constructed again in the light of whatever evidence from whatever source seems relevant; and therefore the past we will be bound to will acquire its shape within the horizons of the living and lived-in present" (1994: 183). Each new situation encountered reshapes the community's conception of the past and leads the community into an alternate future. Much like Gadamer's fusion of horizons, Fish's interpretive community continually rewrites its history in terms of its present conditions (Gadamer 1989: 293).

Fish's theory of interpretive communities provides valuable insight into the norms of the legal community. The interpretive community of the law legitimizes a way of thinking about the law which is inculcated into its practitioners at each level of participation from law school through judgeship. Central to this socialization is the judicial opinion, it is studied by law students, read by lawyers, and written in respect to other opinions by judges.

Fish's interpretive community explains some of the constraints that a Supreme Court justice must negotiate when writing an opinion.

The judge must begin the discourse with a particular case; past cases are read in relation to the present circumstances. The community expects that the present case will be understood in relation to the past, but the present case also molds the past. Yet these constraints also free the opinion writer to manipulate the texts on which the opinion is based, as long as this manipulation is justified within the bounds of the community's expectations. Fish writes, "Interpreters are

constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence in a given enterprise; and it is within these same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed" (1989: 98).

Stanley Fish explains that the materials that the judge uses to justify an opinion are constrained, but he does not explain precisely the expectations for using these materials as support for an argument.

Ronald Dworkin's theory is an attempt to determine how these materials are used to support a legal argument. His position complements Fish's interpretive communities, Dworkin is interested in what counts as good evidence in a judicial opinion.

Dworkin views judicial opinion writing as argumentation. His primary goal is to discover the grounds of legal argument which serve as valid starting points for the legal community. Dworkin's work exemplifies the constraints placed by the audience on Supreme Court opinions; his search for correct interpretation of the law is an explanation of what first principles are accepted by the legal community. Dworkin is in search of theoretical disagreements, or what he calls "law's grounds." Like Stanley Fish, Dworkin notes that the grounds for legal argument are determined by the community: "Legal practice, unlike many other social phenomena, is argumentative". Every actor in the practice understands that what it permits or requires depends on certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible.without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims" (1986:13).

Law's Empire, Dworkin's primary treatise on legal interpretation, presents two main themes: law is interpretation and law has integrity. It is the second theme that has drawn the greatest criticism from legal scholars. However, Dworkin's identification of the legal community's shared expectations provides an outstanding explanation of how judges are constrained by their community.

Dworkin notes, "Judges normally recognize a duty to continue rather than discard the practice they have joined" (1986: 87). The practice which constrains judges include a shared world view, set of values and vocabulary (1986: 63). Members of

the legal community reinforce their standards through education and practice, judges are highly invested in their social structure. Each case a judge hears and decides adds to and reinforces those standards, the judge's decision in these cases rests on an interpretation of these standards.

For Dworkin, interpretation should be constructive. He defines this as, "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it belongs" (1986: 52). Dworkin notes that the object under question is constrained by the history of a practice. An interpreter of social practices, of which law is a subset, engages in creative interpretation. Creative interpretation using a constructive approach is "a matter of interaction between purpose and object" (1986: 52). The purpose, or context, of the interpretation sets the standards by which an object is to be judged. Dworkin does not believe that context provides an Archemdian point, but allows judgment of an interpretation.

There are three stages, or steps, to interpretation in Dworkin's theory. The first is called the "preinterpretive" stage. During this time, "the rules and standards taken to provide the tentative content of the practice are identified" (1986: 65-6). According to Dworkin, there is a strong need for consensus at this stage in order to preserve harmony amongst the interpretive community. This is when the raw materials of interpretation are decided upon. A judge must determine what counts as evidence to the audience in terms of the particular decision being rendered.

The second stage is called the "interpretive stage." During this period the interpreter, "settles on some general justification for the main elements of the practice identified at the preinterpretive stage" (1986: 66). Here the interpreter finds a value judgment which shows the practice of law at its best. For Dworkin, this act of justification is solitary, but is preformed against the knowledge of the values of the community.

The justification process involves two types of issues: does the justification "fit" the practice which is being interpreted, and what types of substantive issues would show the practice in the best light? The justification for both of these issues includes an argument as to why the decision is worth pursuing; what values does it upholds for the community? The second stage allows judges to escape the constraints of the legal community, if only for a moment. It is in this stage that a judge frames the opinion and establishes the value hierarchy to which the legal materials gathered in the pre-interpretive stage will be applied.

Finally, there is a "postinterpretive" or "reforming" stage. During this stage

interpreters adjust their conception of what is "really require(d) so as better to serve the justification he accepts at the interpretive stage" (1986: 66). Dworkin notes that in the real world interpretive judgments do not progress cleanly through each of these stages, but instead they are more a matter of, "seeing at once the dimensions of their practice, a purpose or aim in that practice, and the post-interpretive consequence of that purpose " (1986: 67).

Dworkin's most valuable contribution is his explanation of why conflicts of interpretation occur. He identifies core beliefs which can be used by an interpreter to explain where interpretations differ, "at the first level, agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up. Exposing this structure may help to sharpen argument and will in any case improve the community's understanding of its intellectual environment"(1986: 71). At the abstract level, there is no controversy, it is only when values are applied to concrete issues that interpretations differ. This echoes Perelman And Olbrechts-Tyteca's claim that it is only the creation of hierarchies, necessitated by particular concerns, which will bring values into conflict (1969: 80).

The analogy of a tree is used to explain Dworkin's conception of stasis. The trunk represents the starting points of any argument in a field, those ideas which are uncontroversial to an audience. Dworkin calls this a plateau. The branches contain arguments that may be disputed, "(political philosophers) can, however, try to capture the plateau from which argument about justice largely proceed, and try to describe this in some abstract proposition taken to define the 'concept' of justice for their community, so that arguments over justice can be understood as arguments about the best conception of that concept." (1986: 74) This would suggest that differences of interpretation would occur not over the importance of a value, but in how it is portrayed.

Value arguments play a pivotal role in the justification of legal argument. However, these value arguments need connection to particular situations. The particularization of a value construct is done through the creation of a paradigm. Dworkin argues that the paradigms play a more important role in legal argumentation than abstract value propositions, "The role the paradigms play in reasoning and argument will be even more crucial than any abstract agreement over a concept. For the paradigms will be treated as concrete examples any

plausible interpretation must fit, and argument against an interpretation will take the form, whenever this is possible, of showing that it fails to include or account for a paradigm case" (1986: 72).
Conceptions are values; universal and timeless, but they cannot come into play with out a connection to the events which precipitated the controversy being decided. Paradigms are specific to a particular set of events, they are the application of values.

Dworkin draws the most criticism is from his claim that law has integrity. While this statement may not seem problematic on its face, Dworkin uses the notion of integrity to ground the valid interpretation, "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards" (1986: 239). Integrity in law accounts in some measure for the constraints placed on the judge. There is an expectation that judges will justify their opinion by relating it to other cases; i.e. use precedent. If the finding of the case is different than other cases like it, the judge must distinguish the present case from those that came before it.
Dworkin's search for the grounds of legal argument illuminates both the constraints which inhibit the author of a Supreme Court opinion and the moments of freedom in the interpretive process.

There are two major constraints which emerge from Dworkin's theory.
First, judges are constrained during the pre-interpretive stage when they select the materials which will serve as the grounds. These materials are defined by the community and are expected to be used as support in the legal argument.
Secondly, the finding of an individual case should resonate with similar cases which have been decided previous to the instant case. This is the idea that law has integrity, law will treat individuals in the same situation in the same way.

During the interpretive stage, however, judges are able to shape the application of these materials by linking them to a value hierarchy. Different interpretations of the same case occur because judges establish different value hierarchies to support their reading of prior cases. The interpretive stage allows judges to frame the particular case.
Fish and Dworkin introduce two important concepts to a theory of legal interpretation. First, interpretation takes place against the expectations of a

community. This community functions to provide the material for interpretation, as well as constrains how that interpretation is judged. Second, there is a sense of the political inherent in the community. Institutions are created by human beings and they reflect the concerns of humanity. Dworkin provides a mechanism by which the political concerns of the judge can be inserted into a free speech opinion.

Often, cases which invoke first amendment precedent are conflicts between the government and an individual. Jurists are asked to interpret the Constitution or to decide if a state or federal statute conflicts with their interpretation of first amendment protections. These cases invoke classic questions of hermeneutic theory – how do justices read precedent in relation to the complexities of speech rights in the present? Dworkin notes, "Contemporary lawyers and judges must try to find a political justification of the First Amendment that fits most past constitutional practice, including past decisions of the Supreme Court, and also provides a compelling reason why we should grant freedom of speech such a special and privileged place among our liberties" (1996: 199). The Supreme Court, when faced with a free speech case, must balance the needs of the community with its decision in a particular case.

The legal community expects that certain materials, most notably similar cases, will be used to justify the decision a judge is making is a particular case. Yet these cases alone cannot establish a conclusion in a particular case. Drucilla Cornell points out, "no line of precedent can fully determine a particular outcome in a particular case because the rule itself is always in the process of reinterpretation as it is applied. It is interpretation that gives us the rule, not the other way around" (1992: 157).

Non-legal concepts allow judges a moment of freedom in interpretation. During the first stage of the decision making process, a judge must determine the relevant facts. Although these determinations are bounded by the issue at hand, this step allow a judge to choose the raw materials of a case. These facts are not nearly as constrained as the precedent used in the decision. In the case I have chosen to illustrate this argument, Texas v Johnson, each opinion uses the construct of audience to shape its application of precedent**(i)**.

Two types of audiences occur in this opinion. The first, which I call the constructed actual audience, is a description of the audience present at the time of the speech event. In this case, both Brennan and Rehnquist give presence to different persons present during the burning of the flag. The second type of audience which occurs in this case I call the event's attributed audience. Unlike

the constructed actual audience, this description is not based on empirical data. Instead, this is an idealized audience, one based on values. Both of these audiences are rhetorical constructions; neither is an exact representation of the audience present during the speech event.

2. Texas v. Johnson

During the 1984 Republican National Convention in Dallas, Gregory Johnson participated in a march to protest the policies of the Reagan administration. At the end of the march, in front of Dallas City Hall, Johnson was handed a flag, which he burned while other protesters chanted. Johnson was the only one of the protesters to be arrested for the demonstration. He was charged with desecration of a venerated object.

In a 5-4 decision, the Supreme Court held that the Texas Statute infringed on Johnson's speech rights. The majority opinion, written by Brennan, isolated two major issues; 1) is flag burning expressive and 2) because flag burning is conduct, does the government have a legitimate interest in regulating the nonspeech elements related to the conduct? The majority found that flag burning was expressive and that Texas did not have a legitimate state interest to ban the activity because no harm was likely to result from this expression.

Brennan's majority opinion uses an interpretation of the audience in order to argue that flag burning is expressive conduct and as such deserves first amendment protection. He notes, "anyone who observed appellant's act would have understood the message that appellant intended to convey" (400). This construction allows Brennan to argue the factual claim that flag burning is expression because its message could be clearly understood.

Brennan uses the constructed actual audience in order to dismiss Texas's claim that it was trying to prevent a breech of the peace. He begins by recounting the scene which culminated with Johnson's burning of the flag, highlighting only the aftermath of the demonstration, "After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard" (399). Brennan continues his interpretation of the constructed actual audience, "No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning" (399). This interpretation establishes two of the arguments that Brennan will later rely on; first that because there was no threat to the audience, Johnson's speech rights should be paramount. Second, the interpretation of a message as offensive

is not sufficient justification for abridging speech rights because no breech of the peace was likely from Johnson's action. These constructed audiences are presented before Brennan actually makes the argument that there was no likelihood of a breech of the peace, thus setting the stage for his later conclusion.
When Brennan does tackle the question of whether flag burning was likely to lead to a breech of the peace, he privileges the use of the constructed actual audience. Brennan lays out Texas's event's attributed audience, "The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis" (408). He rejects the use of an event's attributed audience for determining the likelihood of breech of the peace, "we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression…" (409). This dovetails nicely with his own use of the collective to argue that Texas did not have a legitimate interest in preventing a breech of the peace in this particular case.
Brennan then uses the lower court's constructed actual audience to reinforce his argument, "the flag burning in this particular case did not threaten such a reaction. 'Serious offense occurred,' the court admitted, 'but there was no breach of peace nor does the record reflect that the situation was potentially explosive" (401).
The opinion stays consistent by developing the constructed actual audience as support for the argument that no breech of the peace was likely as a result of Johnson's burning of the flag.

Brennan does, however, offer an event's attributed audience to argue that restrictions on flag burning could not be justified by classifying the action as fighting words. "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs" (409). This event's attributed audience does not hold the flag as a personal symbol, but is rather able to distinguish a critique of the government from their own emotions concerning the importance of the flag.
Brennan primarily uses the event's attributed audience to argue that Texas's second stated interest, to protect the flag as a national symbol, is a violation of the first amendment because it is a restriction of a particular point of view. He presents his version of Texas's event's attributed audience in order to show the

Texas law would stifle expression critical of the flag, “The State apparently is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not exist, that is, that we do not enjoy unity as a Nation” (410).

The opinion ends with Brennan’s event’s attributed audience, one which is expressly contrasted with Texas’s version, “We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned then by – as one witness here did – according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom this cherished emblem represents” (420). Brennan thus presents a collective who uses expression to counteract the message of flag burning rather than taking serious offense and resorting to violence.

Rehnquist authored a powerful dissenting opinion, on which he is joined by White and O’Connor. Rehnquist’s opinion is based primarily on the importance of respect for the flag, “For more than 200 years, the American flag has occupied a unique position as the symbol of our nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here” (422). This statement is followed by a long exposition on this history of the flag, both in war and in peace.

Once the value of the flag has been established, Rehnquist refutes the primary contentions of the majority opinion. He argues that flag burning is not expression; it is likely to cause a breech of the peace; and the state has a legitimate interest in protecting the integrity of the symbol. Rehnquist uses conceptions of the collective as evidence for each of his arguments.

After a lengthy exposition on the history of the flag in American life, Rehnquist argues explicitly with the majority’s finding that flag burning should be considered expression protected by the first amendment. He begins by equating flag burning with fighting words, “his act, like Chaplinsky’s provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways” (431). After this analogy is made, he uses an event’s attributed audience to justify the restriction of flag burning, “The highest source of several States have upheld state statutes prohibiting the public

burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order" (431). Interestingly, Rehnquist does not take up Brennan's challenge to provide specific instances where flag burning has provoked violence; instead he offers an interpretation of a collective overcome by the emotional drama of watching a flag burn.
Rehnquist's second main argument is that the state has a legitimate interest in protecting the flag. Rehnquist argues that the reaction of the collective is the most important factor in determining whether to protect flag burning, "The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense" (438).

Early in his opinion, Rehnquist notes the importance of the flag to the nation, "Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have" (429). The attributed audience created by Rehnquist is enamored with the power of the symbol. Such a collective would be so overcome by their emotional response that they would not recognize the value of the dissent it was witnessing.
Thus, Rehnquist comes to the conclusion, "sanctioning the public desecration of the flag will tarnish its value – both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it" (437). This event's attributed audience is typical of the strategy Rehnquist employs to counter Brennan's majority opinion; he uses his collective to support his value hierarchy which would place the protection of the symbol of the flag over the expression of dissent.
Texas v Johnson is an excellent example of the power the concept of audience has in shaping the law. Brennan and Rhenquist present very different visions of the audience, which leads to different conclusions about the legal status of flag burning.

3. Implications and conclusion
Justices must balance their interpretations of the law with the expectations of their audience. The audience constrains the interpretations that justices may impose on the law. Yet the judicial opinion is more than just the mechanical application of precedent to the current case; justices have the ability to interpret the law by manipulating the materials which they use to justify their opinion. The extent to which materials may be manipulated in the decision is also determined

by the audience. Some materials are highly constrained: the constitution, statutes, and precedent. The legal community has developed expectations about the meaning of these materials and a justice cannot recreate these materials to suit his or her needs. When the author of an opinion uses legal materials as justification for a decision, these materials must be used in ways consistent with their past use. For example, a judge may not alter the findings of past cases; he or she must use a previous case without changing its content. Many areas of first amendment law have a long history of case law which follows a specific trajectory. The audience expects that when one of these cases is cited in an opinion it will be consistent with the way in which it has been cited in the past. However, the judge can frame the instant case in such a way as to call upon prior cases that support his or her conclusion. The art of using precedent is not in how it is used once it is called forth in the opinion, but in how it is called into the opinion in the first place.

Interpretations of the collective are one possible frame the author of the opinion imposes on these cases; these interpretations lead the reader to the set of precedent which the author wants to apply to the present case. Stanley Fish argues that a line of precedent does not simply announce itself to a reader, a judge must make an argument that the cases being cited are similar to the case being decided, "Similarity…is not a property of texts (similarities do not announce themselves), but a property conferred by a relational argument…" (1989: 94). In other words, the justice who is writing an opinion is able to create the relationship between the extant case and the line of precedent which he or she believes is most relevant to the decision. Interpretations of the collective are one way that authors of opinions can justify their application of precedent. In this way the rhetorical construction of the collective serves as a focal point for the decision.

One way interpretations of the collective are strategically employed is to create an analogy between the case being decided and the body of law which the author of an opinion wants to associate this case with. However, this was not the only use of the collective in Supreme Court opinions. Interpretations of the collective were also used to ground arguments about the nature of the law. Constructed actual audiences and event's attributed audiences are used to support claims made in the opinion.

The Court primarily functions as an epidictic speaker. It establishes value

hierarchies as a precursor to action. In free speech cases, the Court must balance the needs of speakers with the interests of the collective. Implicit in balancing is the creation of a value hierarchy; when the Court rules that one interest is more important than another it is declaring a specific ordering of values. Some of the values called upon in free speech cases – the promotion of a marketplace of ideas, the protection of individual self expression, and the promotion of democratic self government – are what Ronald Dworkin labels as concepts (1986: 70-1). Concepts are universalized values which serve as starting points in legal argument. The audience accepts these values in the abstract; the role of the author of an opinion is to connect these values to the extant case. This is what Dworkin calls the creation of a paradigm.

Interpretation of the collective is one way that judges create paradigms. These interpretations create links between the case under review and the values that the Court holds. Justices use their interpretations of the collective to argue that the case they are deciding is the embodiment of an already accepted value.

Paradigms are exceptionally persuasive arguments, but they are not static. Each time a judge encounters a new case he or she has the opportunity to create a new paradigm. Dworkin writes, “Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake” (Empire 72). In order for a justice to create these new interpretations he or she must explain how the case being decided is distinguished from prior case law. Interpretations of the collective allow judges to make these types of arguments. Texas v. Johnson illustrates the power the collective has in forming these paradigms. Brennan was able to successfully argue that the audience values expression over the symbolism of the flag. Rhenquist reverses this hierarchy in the hope that it may some day become a new paradigm.

NOTE

i. William Lewis has written an outstanding piece on the rhetoricity of this case.

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ISSA Proceedings 1998 – What Are The 'Anarchical Fallacies' Jeremy

Bentham Discovered In The 1789 French: Declaration Of The Rights Of Man And Citizen?

1. Introduction

The year 1998 deserves to be remembered for at least two different but convergent reasons. In 1748 – two and a half centuries ago – Jeremy Bentham was born in London, and half a century ago – in 1948 – the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations in New York. Thus this year we celebrate both the two hundred and fiftieth anniversary of the birth of a major English philosopher, lawyer, reformer, and public policy analyst; and we also celebrate the fiftieth anniversary of the most influential manifesto of international human rights.

The conjunction of these two events provides an occasion for reflection on some of Bentham's views because he wrote an essay titled "Anarchical Fallacies" in which he attacked the most popular manifesto of human rights in his day, the 1789 French Declaration of the Rights of Man and Citizen. In light of Bentham's scathing criticisms of the French Declaration, one naturally wonders what he would have had to say today were he in a position to evaluate the United Nations Declaration. Would he say of it what he said of its French predecessor, that it consists of "execrable trash," that its purpose is "resistance to all laws" and "insurrection," that its advocates "sow the seeds of anarchy broad-cast," and, most memorably, that any doctrine of "natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts"?

2. Dubious Fallacies

Let us look more closely at Bentham's argument that the French Declaration is riddled with "anarchical fallacies." What, exactly, are "anarchical fallacies"? What is fallacious and what is anarchistic about them?

In 1824, more than two decades after he had written his essay on "anarchical fallacies," Bentham arranged with some of his younger friends to publish (in London and in English) a volume called *The Book of Fallacies*. In this treatise, the first substantial contribution to the subject since Aristotle, Bentham set out an

account of what he regarded as the rhetorical and logical errors to which political discourse was especially vulnerable. One would naturally expect, therefore, to find in this book an elucidation of the "anarchical fallacies" he had already discussed many years earlier in his essay of that name.

But there are at least three problems. The first arises from the way Bentham defines "fallacy" in that book. "By the name of fallacy," he writes, "it is common to designate any argument employed or topic suggested, for the purpose, or with the probability, of producing the effect of deception – of causing some erroneous opinion to be entertained by any person to whose mind such argument may be presented." If this definition is applied to the French Declaration, a problem immediately arises: According Bentham's definition of fallacy, fallacies are the property of certain arguments (namely, the invalid ones). But the Declaration is a manifesto of aspirations, full of imperatives and hortatory pronouncements addressed to the people and the government of France. So it is not as such an argument, except in the most extended sense of that term, in which any propositions asserted on any subject constitute an "argument."

One might say, to be sure, that the Declaration is the product of an *implicit* argument, because it rests upon several tacit principles and beliefs from which its manifest content – those imperatives and exhortations – can be derived. But if it is this implicit argument Bentham wishes to attack, it is odd that he doesn't say so and that nowhere in his critique does he attempt to formulate that implicit argument. I think we must conclude that if the French Declaration is spoiled by fallacy, it is not because its reasoning is suspect, for a manifesto such as this does not consist of a chain of reasons.

However, let us be charitable and concede that there is a loose and familiar sense of the term "fallacy," in which it is roughly synonymous with "error" or "erroneous belief" or "mistaken claim" or "objectionable principle."

This confronts us with the second problem:

Under Bentham's official definition of "fallacy," the French Declaration is surely not riddled with fallacies of any kind. The loose sense of the term "fallacy," as Bentham defines it – as an argument or other prose text "suggested, for the purpose, . . . of deception" – does not apply. For it is neither reasonable nor supported by any evidence Bentham cites to believe that the French authors of the Declaration wrote with the "purpose" of deceiving their intended audience.

But a deeper criticism of Bentham's definition now comes into view. His official

definition of “fallacy” has to be judged fundamentally incorrect, because it transforms the concept of a fallacy into a complex intentional concept. (He said, it will be recalled, that a fallacy is “any argument . . . [with] the purpose of [causing deception].”)

But in ordinary usage “fallacy” is not an intentional concept at all. That is to say, a reasoner can commit a fallacy by means of asserting an invalid argument without the intention to deceive anyone. If, as Bentham insists, the French Declaration suffers from fallacies, we should expect its authors and audience alike to be equally surprised to learn this. To suggest otherwise is to impugn the sincerity of the authors of the Declaration; neither Bentham nor history gives us reason to do that.

Bentham might offer a line of self-defense against this criticism by reminding the reader that in his definition of fallacy he also said that an argument is fallacious if there is some “probability” that it would deceive. Now a probability of deception is not an intentional concept, and so Bentham might well concede that although the Declaration is not intentionally deceptive, nonetheless there is a probability that it will deceive, in the sense of tending to cause the reader of the Declaration to believe the falsehoods and ill-advised exhortations contained in it. Yet a defense along these lines is unacceptable because it yields a conception of fallacy that is far too broad and indiscriminate. Virtually any prose text is likely to mislead some reader or even many readers, but we would not want for that reason alone to describe the text as fallacious.

As a third and final problem, we must note that one will look in vain in Bentham’s *Book of Fallacies* for any account of what he called the “anarchical fallacies” in his essay of that name. This appears to be a major oversight and a bewildering omission on his part. Having diagnosed the supposed fallacies in the French Declaration years before he wrote his *Book of Fallacies*, why should he fail to mention them in his later and longer work? To be sure, one can find reference in the *Book of Fallacies* to “anarchy”; there Bentham points out that the term “anarchy” is characteristically used as an abusive epithet in political discourse. This, he says, was especially true of those who oppose any political reforms; their tactic is to condemn as anarchic all new legislation, reforms, and ventures. Ironically, Bentham himself is vulnerable to the charge that his denunciation of “anarchical fallacies” in the French Declaration comes rather too close for comfort to being just another example of precisely the rhetorical abuse that he later criticized.

3. Anarchy Unlikely

Against that background, let us turn directly to why Bentham thinks the French Declaration, as he says, "sows the seeds of anarchy broad-cast," why he thinks it is a doctrine of "the rights of anarchy – the order of chaos." The Declaration does this, he says, because its tacit message is this: "People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your duties."

This is a startling remark; no such radically anarchic language actually appears in the preamble or in any of the seventeen articles of the Declaration. The closest we come is in the second article, where all persons are told they have a "natural and imprescriptible … right of resistance to oppression" – something not found either in the American Bill of Rights of 1791 or in the 1948 United Nations Declaration. This leads Bentham to heap scorn on the very idea of an "imprescriptible" right – a right that no political or legal authority may (or can?) modify, suspend, or nullify. (In passing, we might compare the imprescriptibility of rights that Bentham attacks with the nonderogable human rights found in the International Covenant on Civil and Political Rights [1966] inspired by the Universal Declaration of Human Rights.

Today's nonderogable human rights are yesterday's imprescriptible natural rights. Their relative rarity under the current international law of human rights would have pleased Bentham, because this rarity constitutes a qualified endorsement of Bentham's utilitarian critique of imprescriptible rights. Nonetheless, he would have rejected the idea that even one such right is nonderogable.)

Despite insisting that the rights listed in the French Declaration are imprescriptible, the Declaration is completely silent on what recourse the French citizens have if in their judgment any of their "imprescriptible rights" are violated. The measures it is appropriate for individual citizens (or group of citizens) to take to secure rights disrespected by their government is a question of judgment in the circumstances, not a matter for large-scale constitutional pronouncements.

So the silence of the Declaration on this point is neither evasive nor disingenuous; rather, it is evidence of sound political caution. Bentham, putting the worst face on the French Declaration, gratuitously assumes that insurrection is the implied (and only) weapon available to persons who judge they are deprived of their natural rights.

Bentham could, of course, point in particular to the Terror and in general to the instability of French society in the aftermath of 1789, and to the evident inability of the French revolutionaries of that day to govern effectively. He could make an argument in defense of his interpretation of the Declaration along the following lines: First, the Declaration does not rule out a right to violent insurrection as the appropriate response to a government that violates its citizens' rights; second, few if any of the rights proclaimed in the Declaration were operative under law in French society at the time it was promulgated. Therefore, he might conclude, the publication of the Declaration is a tacit invitation to insurrection, and the result of insurrection is anarchy. To put it another way, it would be only natural for believers in the "natural and imprescriptable" rights of man and citizen to use direct and violent measures in an effort to secure their alleged rights, and to be willing to overthrow any government that fails to accord such rights to its citizens. Thus Bentham might have reasoned.

But such an argument cannot be sustained without evidence to back it up, and in the entirety of his critique, Bentham never produces any such evidence. He never argues that reformers and enemies of the "ancient regime" in France, drunk on the intoxicating liquor of "natural and imprescriptible rights," were bound to lose all judgment and – casting prudence aside – would strike at every form of governing authority in their foolish zeal to obtain their alleged rights. He never explains why insistence on natural rights is the sole or the dominant cause of political unrest in France.

Not only that, the Declaration's professed right to resist oppression need not be taken as a right of *violent* individual and collective resistance to government officials. We can, after all, think of collective *nonviolent* protest, of the sort made famous in the 1960s in the United States during the Civil Rights movement. If that is how we intend to act in exercising our right to resist oppression, it is not obvious why we should be told we have no such right.

Bentham overlooked the possibility of nonviolent resistance to government oppression; it probably never occurred to him to ponder, as many thoughtful philosophers and activists have argued in this century, that mass nonviolent civil disobedience is a legitimate form of protest even in a moderately just, liberal constitutional republic and a fortiori in an illiberal society. To be sure, Bentham was not an advocate, here or elsewhere, of civil disobedience. He lived in a day in which fear of "the mob" was a constant preoccupation of the English upper class, a worry made all the more troubling by the excesses of the French Revolution.

Nevertheless, is it merely sentimental and anachronistic to suggest that the worst that can be said of the French Declaration on the point under discussion is that its use of the term “resistance” in this context needs careful interpretation? I think not.

A related but even stronger objection to Bentham’s views emerges here. Let us put the French Declaration aside for the moment and think of its American and United Nations counterparts. I challenge anyone to point to any anarchic consequences in political behavior directly caused by widespread belief among Americans two centuries ago in their Bill of Rights, or among any who believe in the human rights cited in the United Nations Declaration during the half century since its promulgation. Whatever political actions have been engendered by belief in these rights, there is little or no evidence that their chief effect has been to nourish seeds of insurrection and anarchy where prior to such declarations no such inclinations existed. On the contrary, the violence associated with belief in human rights and with protests against violation of such rights almost invariably comes from the police and government officials who use their power (as the British did in Amritsar in the 1920s, as the local police across the United States did in anti-union riots of the 1930s, and as the Chinese did in Tiananmen Square in the 1980s) to crush those who nonviolently protested violations of their human rights.

Perhaps the aftermath of the storming of the Bastille in the summer of 1789 was different; perhaps shrieks and cries in the streets of Paris of “natural and imprescriptible rights” did play a prominent causal role in ending Bourbon rule and paving the way for the abuses that culminated in the Terror and then in Napoleon’s reign. But if that is what Bentham believed, and what prompted him to denounce the French Declaration within a few years of its promulgation, it is most unfortunate that he so conspicuously failed to say so.

I can only conclude that Bentham has not made out his case for the claim that the French Declaration – or any of the other largely aspirational manifestos of that day and later that were drafted along the same lines – is invalid, unsound, or false because of its “anarchical fallacies”.

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