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

1. Introduction

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

The term 'ordinary arguers' here refers to people who do not have any specific knowledge of argumentation theory and who have not received any specific education in this field. Do they regard all fallacies as absolutely unreasonable? Do they make any exceptions? Do they distinguish degrees of (un)reasonableness? Generally speaking, we are interested in investigating ordinary arguers' standards for reasonableness and in examining their consistency in applying these standards. This article reports the findings of the first research conducted within this framework, focusing on *ad hominem* fallacies.

2. Conventional validity

In the pragma-dialectical argumentation theory, the various moves made in argumentative discourse are seen as part of a discussion procedure for resolving a difference of opinion concerning the acceptability of a standpoint (van Eemeren & Grootendorst, 1984 and 1992). The moves made by the protagonist and the antagonist are regarded as reasonable only if they contribute to the resolution of the difference of opinion. The pragma-dialectical discussion procedure is specified

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

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

Systematic experimental research is required in order to to trace more accurately the factors that influence ordinary arguers' judgements concerning the permissibility or non-permissibility of certain discussion moves and to exclude interfering variables. Such research would consist in asking ordinary arguers to assess the permissibility, acceptability or validity – in other words, the reasonableness – of various types of discussion moves in which a pragma-dialectical rule is violated. The research is to start from deliberately constructed discussion fragments. The experiment reported here is definitely not aimed at empirically testing the problemvalidity of the pragma-dialectical argumentation theory: the problem-validity of a normative theory cannot be falsified or corroborated on the basis of empirical data. The experiment concerns the conventional validity of the pragma-dialectical discussion rules; it concentrates on

the first rule, the rule for the confrontation stage or *confrontation rule*.

3. Pragma-dialectical reasonableness judgements

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

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

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

4. Independent variables

Taking pragma-dialectics as the theoretical starting point for this research, it is – from a methodological point of view – superfluous to run a pilot study to make sure that the instrument developed for measuring (un)reasonabless is indeed

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

The speech acts with or without an ad hominem fallacy were not simply presented in isolation but in a well-chosen context: the dialogues in which they appeared were part of a discussion. Three types of discussion were represented: scientific, political, and domestic. A scientific discussion is the type of exchange of ideas that resembles most closely the ideal of critical discussion (some philosophers of science even regard a scientific discussion as the outstanding example of critical discussion).**[vii]** The other two discussion types are generally taken to be specimens of exchanges that are further removed from a critical discussion. The reason for presenting the fallacies in a specific discussion context is that judgements concerning the reasonableness of discussion moves are not formed *in abstracto.* The pragma-dialectical concept of reasonableness is linked to the notion of 'critical discussion' and the one type of discourse approaches the critical ideal more closely than the other. For investigating the conventional validity of the pragma-dialectical confrontation rule it is crucial to compare judgements about ad hominem violations of this rule in different discussion types.
It is to be expected (prediction 1) that the subjects will regard speech acts with an ad hominem fallacy in a scientific discussion less reasonable – in the pragma-dialectical sense – than those in a discussion which is not predominantly oriented towards truth-finding. It is also to be expected (prediction 2) that the subjects will not indicate any significant differences in the degree of reasonableness of contributions to each of the three discussion types in cases in which no violation of the confrontation rule is
committed.
These two basic predictions are of vital importance for establishing the conventional validity of the pragma-dialectical confrontation rule. Less

straightforward are some predictions concerning differences in the degree of reasonableness of contributions to the two non-critical discussion types: a violation of the confrontation rule in the domestic domain will probably be regarded as less unreasonable than a violation in a political debate (prediction 3). In a domestic context, discussions take place between partners, close friends and relatives in an informal setting; a personal attack will then generally less often, or not at all, result in loss of face, unlike in discussions in a more formal setting. On the basis of insight from conversation analysis, it is further to be expected that ordinary arguers – irrespective of the type of discussion concerned – will regard speech acts involving an ad hominem violation of the confrontation rule as less reasonable than speech acts that do not involve such a fallacy (prediction 4). Committing an argumentum ad hominem is, after all, a flagrant violation of the politeness principle operative in ordinary conversation.**[viii]**

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

In a direct attack, the opponent's knowledgeability, intelligence, personality or good faith is questioned by portraying him or her as ignorant, stupid or unreliable. In an indirect attack, the opponent's motives are questioned: it is pointed out that he or she has a stake in the standpoint presented and is therefore biased. In a tu quoque attack, the opponent's credibility is questioned by pointing at a discrepancy between the expressed ideas and his or her other actions in the present or the past.
This independent variable is embedded in an independent variable mentioned earlier, i.e. the presence of a speech act involving a fallacy. The predictions related to this variable are less stringent than the earlier predictions: if there is any difference at all, then the direct attack will be regarded as the most unreasonable, the indirect attack will take a middle position, and the tu quoque attack will be considered the least unreasonable (prediction 5). In some discussion contexts, tu quoque has at least the appearance of being reasonable: serious participants in a conversation may be expected to show a certain amount of consistency between their words and deeds. A direct attack, however, will

generally be regarded as a grave insult, because in most cases it challenges the prevailing decency values, and leads to loss of face of the addressee.
Ordinary arguers' judgements of the (un)reasonableness of discussion moves will in practice not only depend on the presence or absence of a speech act violating the confrontation rule, or the type of discussion or the type of ad hominem involved, but also on other, partly socio-psychological, variables, such as the nature of the standpoint at issue ('neutral' vs 'loaded'), the verbal presentation (open and direct vs implicit and indirect), and the personality of the judging subject (young vs old, high vs low education). Examining all these variables in one single study is clearly unfeasible. In addition to the three independent variables mentioned above, one further independent variable was manipulated in the experiment: the order in which the discussion types were presented to the subjects. In constructing an instrument for measuring the (un)reasonableness of discussion contributions, all other potentially relevant variables were, as far as possible, kept constant.

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

A total of 92 pupils (50 from HAVO-4, i.e. pupils with four years of higher secondary education, most of them 16 years old; 42 from VWO-5, i.e. pupils with 5 years of pre-university education, most of them 17 years old) took part in a pencil-and-paper test consisting of 48 short dialogues. The subjects' task was to indicate for each dialogue how reasonable they regarded the reaction of the antagonist; they were to express their judgements on a seven-point scale (1 = very unreasonable; 7 = very reasonable). 36 of the 48 dialogues contained an ad hominem fallacy; in the remaining 12 dialogues there were no fallacies. One third of the dialogues occurred in a discussion which was explicitly announced as domestic to the subjects, one third in a political discussion, and one third in a scientific discussion. In order to make an estimate of the consistency of the subjects' judgements, each variant of ad hominem was represented in each type of discussion by four short dialogues.

For methodological reasons, the 48 discussion fragments were constructed in accordance with a fixed pattern. Each fragment consisted of two turns, one by

speaker A and one by speaker B. In order to avoid any influence of the source on the judgements, the identity of both A and B was not specified. In each case, speaker A presented a standpoint followed by an argument in support of that standpoint. In order to control interfering variables, the standpoint was in all cases marked by a standpoint indicator ('I think', 'In my opinion', etc.). The argumentation was always presented in the same order: first the standpoint, then the argument.

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

Here are some examples of dialogues from the domestic domain:

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

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

Combination (3)
A: I think you'd better not eat so much chocolate, dear; it's affects your weight.
B: Look who's talking! Your own tummy is getting bigger and bigger.

Here are some examples of dialogues from the political domain:

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

Combination (5)

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

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

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

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

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

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

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

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

election campaign, people have to pay considerably more taxes since you have come to power.

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

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

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

A definition of the notion ‘critical discussion’ could not be provided to the subjects. The test is, after all, not designed to prove that the subjects were able to learn something from the instruction and could apply this newly-acquired knowledge in practice. In order to avoid answers that are only socially preferred, the instruction emphasized that there were no right or wrong answers: the subject’s opinion was all that counted. To ensure that all subjects would as much as possible react to the fragments in the same way, the instruction emphasized that in their judgements of the (un)reasonableness of B’s reaction, they were to assume that A and B were both speaking the truth.**[ix]** To ensure that the subjects would place the 16 discussion fragments in the right domain, the fragments belonging to one particular discussion type were presented together; with each fragment the type of discussion situation was explicitly mentioned, for

example: Domestic situation 1, Domestic situation 2, etc.

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

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

6. Results

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

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

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

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

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

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

In accordance with prediction 1, the fallacies were judged most strictly in a scientific discussion (test of simple main effect for the domestic domain: $F=72.03$; $df1=1$ and $df2=91$; $p<.00$; for the political domain: $F=165.21$; $df1=1$ and $df2=91$; $p<.00$; for the scientific domain: $F=357.51$; $df1=1$ and $df2=91$; $p<.00$). In a scientific discussion, which is closest to the ideal of a critical discussion, the difference in reasonableness scores concerning fallacious and non-fallacious moves proved to be much bigger than the corresponding (mean) differences in the other two discussion types ($F=172.61$; $df1=1$ and $df2=91$; $p<.00$).

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

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

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

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

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

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

As predicted, the tu quoque variant is regarded as the most reasonable (mean reasonableness score: 4.45), followed by the indirect attack (3.9) and the direct attack (2.91). This pattern can, as a matter of fact, be discerned within each of the individual discussion types; without exception, the difference between the direct attack and the indirect attack or tu quoque is considerably bigger ($F=352.75$; $df1=1$ and $df2=91$; $p<0.00$) than the difference between tu quoque and the indirect attack ($F=77.82$; $df1=1$ and $df2=91$; $p<0.00$). It is striking that a direct

attack is never accepted as a reasonable move. The indirect attack and tu quoque are judged as unreasonable only in a scientific (critical) discussion.

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

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

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

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

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

7. Conclusion

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

The experiment that we have carried out indicates that ordinary arguers' judgements concerning the reasonableness of discussion moves are by no means chaotic or whimsical. On the contrary, their judgements appear to be well-structured and systematic in a way that is – to a certain extent -predictable. Of course, the research reported here does not answer questions concerning the conventional validity of the remaining nine discussion rules and ordinary arguers'

judgements concerning violations of these rules. Nevertheless, on the basis of the results gained from our experiment, we venture to recommend the following general hypotheses as a starting point for further empirical research:

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

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

NOTES

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

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

iii. See van Eemeren & Grootendorst (1994).

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

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

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

vii. See de Groot (1984).

viii. See van Rees (1992).

ix. This was explicitly added to the instruction after it transpired in a pre-test that it was confusing to the subjects that they did not know whether the discussion partners were speaking the truth.

x. Bowker & Trapp (1992) identified differences in the reasonableness

judgements of subjects from different sexes. Unfortunately, a theoretical rationale for the differences was not provided.

xi. As explained before, we abstracted from the control variable 'order of presentation'. No subtle differences related to the order of presentation were found. Also, no differences occurred between the reasonableness judgements of boys and girls.

xii. An entirely different question is whether the judging subjects actually bring their avowed reasonableness criteria to bear in their own argumentative practices.

xiii. It is still to be investigated to what extent the results of the present research may be generalized to extra-experimental, real-life discussion situations.

REFERENCES

Bowker, J.K. & R. Trapp (1992). "Personal and ideational dimensions of good and poor arguments in human interaction". In: F.H. van Eemeren & R. Grootendorst (Eds.), *Argumentation Illuminated* (pp. 220-230). Amsterdam: Sic Sat.

Eemeren, F.H. van & R. Grootendorst (1984). *Speech Acts in Argumentative Discussions. A Theoretical Model for the Analysis of Discussions Directed towards Solving Conflicts of Opinion.* Berlin: Foris/Mouton de Gruyter.

Eemeren, F.H. van & R. Grootendorst (1992). *Argumentation, Communication, and Fallacies*. Hillsdale, NJ: Lawrence Erlbaum.

Eemeren, F.H. van & R. Grootendorst (1994). "Rationale for a pragma-dialectical perspective". In: F.H. van Eemeren & R. Grootendorst (Eds.), *Studies in Pragma-Dialectics* (pp. 11-28). Amsterdam: Sic Sat.

Groot, A.D. de (1984). "The theory of science forum: subject and purport". In: *Methodology and Science* 17, 230-259.

Rees, M.A. van (1992). *The Use of Language in Conversation. An Introduction to Research in Conversation.* Amsterdam: Sic Sat.

ISSA Proceedings 1998 – Ubuntu

Or Acknowledgment: An Analysis Of The Argument Practices Of The South African Truth And Reconciliation Commission

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

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

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

This essay analyzes the argument strategies used in the Commission's construction of the story of South Africa's human rights atrocities between 1960

and 1993. Through an analysis of portions of the proceedings, I will attempt to understand how that story interweaves as complete a picture as possible of the atrocities, the public shaming of those who admit committing the atrocities, and the Commission's prescriptions for reconciliation.

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

1. Constructing a New National Unity Through the New Constitution

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

The price was amnesty. The negotiation could have called for a general amnesty law produced by the Parliament, but this would have been to ignore the victims of past atrocities entirely. Those negotiating with the old regime recognized that the country could not forgive the perpetrators unless the honor and dignity of the victims was restored and reparations were made. And so a final clause was attached to the 1993 Interim Constitution the discursive evidence of South Africa's negotiated revolution which reads in part: "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of

human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."
These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimization. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament under this constitution shall adopt a law determining a firm cut-off date …, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
With this Constitutions and these commitments we, the people of South Africa, open a new chapter in the history of our country".**[i]**

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

After much discussion and debate, inside the new Parliament and out in the public, the scene was finally set for the appointment of the Truth and Reconciliation Commission, the setting of its objectives, and the development of its quasi-judicial procedures to achieve them. The charge to the Commission was daunting:
1. to conduct inquiries into gross violations of human rights , including violations which were part of a systematic pattern of abuse;
2. the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or representatives of such victims, which establishes their identity and the nature and extent of the harm suffered by such victims;
3. facilitate and promote the granting of amnesty in respect to acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty;

4. prepare a comprehensive report which sets out its findings based on factual and objective evidence;
5. make recommendations to the President with regard to granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; and finally
6. make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society.**[ii]**

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

Individual amnesty took the place of the general amnesty the security and military personnel originally demanded. It would be granted only to those who personally applied for it, disclosed full details of past misdeeds where they could demonstrate a "political objective", and expressed sincere remorse in front of the victims who had suffered because of their actions. Now a quasi-judicial set of procedures would have to be developed to hear the arguments and evidence that could result in amnesty, reparations, and reconciliation. The Commission with its three main committees would have to work through more than six thousand applications and decide what should be done. Its judicial-like rules for argument would have to produce reconciliation and a new South African unity.

2. Judicial Argument Forms and Audience Expectations

That judicial forums serve as one of society's most important story tellers is not new. Oliver Wendell Holmes, Jr., likened the legal forum to the writing of a narrative of the moral history of a society,**[iv]** and Ronald Dworkin has likened this process to a group-written moral "chain-novel."**[v]** It remains important, however, to note that those presiding over judicial forums, in this case the Commissioners, are creating, as Robert Cover observed, a "normative universe"**[vi]** maintained through debate about, decision on, and enforcement of what is determined to be proper or "lawful" in our interactions with one another. Writing the moral history of South Africa's past was essential in the building of a new nation after the first non-racial election and the installation of Nelson Mandela's government. The country was still haunted by the legacy of its past as an apartheid state and by the atrocities caused by apartheid policy. From the beginning, apartheid policy was constituted as a legal problem. Apartheid policy had been described in international law as a crime against humanity, yet persons who had implemented and supported the apartheid policy were still active in important public positions. Some of those who had resisted apartheid policies by committing violent acts occupied influential positions in the new South Africa.

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

These performances have all of the trappings of courts of law – barristers, rules of discovery, cross-examination and official opinions issued by Committee members. But could they not just grant legal amnesty but deal with the following: How could the granting of amnesty be performed by a judicial forum to serve the purpose of

promoting reconciliation in the South African state and in South African society without impairing the sense of justice or the force of law?

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

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

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

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

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

Did de Klerk know about these atrocities? Did he consider them the necessary actions of a police state determined to wipe out "terrorists"? Did he condone them? De Klerk argued, in response, that the ANC challenged the state by advocating a revolutionary race onslaught. He admitted that terrible things were done, but claimed that the ANC did terrible things as well. But again and again he denied that he personally authorized or knew about these specific acts. To

support his position he pointed out that he established a commission to investigate these claims. He repeatedly stated that no one in his government had been outside the law. Most of those present seemed not to believe de Klerk's denials of responsibility. Commissioners, journalists, victims and the media were indignant. "He's lying," said one commissioner bluntly. At a press conference after the hearing Tutu lamented the negation of de Klerk's apology. How could he apologize and yet claim that he didn't know.

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

At every turn in the case being presented against her, she denied all responsibility and expressed disdain for the Commission's proceedings. When TRC lawyer, Hanif Vally, began his cross- examination Midikizela Mandala took on an aggrieved tone and said loudly: "I will not tolerate you speaking to me like that". When Tutu begged her to acknowledgement her wrong doing and express remorse, she refused. Madikizela-Mandela used her final moments in the hearing to deliver a prepared speech. She concluded: "I have come to a public hearing… so we can put to bed all the speculation, so my accusers can come into the open, so that everybody can judge whether the accusations were based on fact or

fiction… Beyond today I hope that those who seek to vilify me cannot claim ignorance. Unfortunately I have a history no different from that of each one of us." Here she deviated onto a tangent about her role as "Mother of the Nation" which Tutu soon stopped, saying: "It sounds like a campaign speech and does not answer any questions of my colleagues." Madikizela-Mandela replied: "My political detractors have used means both fair and foul to undermine my stature. It would not be proper for me to deal with such issues in a forum like this one."**[viii]**

4. Conclusions

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

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

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

And then there is the problem of reparations. The reparations committee of the Commission will begin its work early in 1999. Who will pay? And how much? Although substantial financial compensation is being recommended, the beneficiaries of apartheid continue to control the economic machinery of the country. The victims of apartheid, for the most part, remain poor and outside the power structure. The long-term goals of national unity and healing depend on the righting of those long-term human abuses.

What conclusions can be drawn from an examination of the Commission's judicial

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

NOTES

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

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

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

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

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

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

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

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

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

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

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

The figures of Nineteenth century America – Thoreau, Barnum, Wells – loom over our still unfinished epoch with an expansiveness that seems larger than life. In mirroring back to us a cultural history more grand, and grandiose, than our own, they introduce nagging questions about what has become of magnitude as

solitude, magnitude as magnificence, magnitude as the soul's tumult: the implacability of rage within. Whether we might actually find or construct a map for the typical nineteenth century consciousness, it is clear that the vast panorama of that vision has receded.

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

1. Retracing Modernity: Some Preliminary Codicils

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

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

Retrieving as much as we can from Aristotle's treatment, we might conclude that a strict identity logic will quickly exhaust itself, where the relationships of magnitude are concerned. An important correlary follows from this realization. To the extent that magnitude is always glimpsed in relation to some external aspect, we will either need to find some fixed archemedian point to gain *the full measure* of things, or we will need to gain access to a rich lifeworld of events, projects and actions, so that our measures acquire relational meaning in practice. This is what

I mean by *the eventfulness* of rhetoric. And it brings us as close to a dialectical relation as I am able to offer in these pages. In the world of modernity, as before, rhetoric's language of magnitude has attempted to give order, priority, perspective, and depth of recognition to a myriad of simultaneous and successively jarring events. But not only does rhetorical magnitude offer weight and measure to what it encounters. Increasingly, its own destiny is weighed and measured by these events as well.

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

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

2. The public

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

Looking backwards, probably the least outwardly apologetic treatment of this "zone" of civic life comes from Jurgen Habermas.In his first book, *The Structural*

Transformation of the Public Sphere, as well as the much more widely distributed encyclopedia excerpt ("the Public Sphere"), Habermas noticed in the public a zone of emergence that seemed to defy its bourgeois enlightenment origins. As he wrote in this early work:

"The bourgeois public sphere arose historically in conjunction with a society separated from the state. The "social" could be constituted as itsown sphere to the degree that on the one hand the reproduction of life took on private forms, while on the other hand the private realm as a whole assumed public relevance. The general rules that governed interaction among privatepeople now became a public concern. In the conflict over this concern, in which the private people soon enough became engaged with the public authority, the bourgeois public sphere attained its political function" (Habermas 1962:127).

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

As in many a concept in rhetoric, the idea of the public is itself a rhetorical invention. Social facts do not necessarily require empirical residences, however. And this is not to discredit their historical force. A key chapter in the story of the "public" idea took place at considerable geographic remove from Habermas's *ancien regime* of European culture: in the so-called new world to be known, by itself at least, as "the American century." This chapter is initially authored by John Dewey and the liberal-progressive pragmatists; and its call to activism is echoed by an entire modern school of thought in rhetorical theory.

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

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

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

Bitzer is able to write, with nary a trace of irony: "The machinery of a state –

offices, officials, laws, tribunals, and the like – are invented to assure the well-being of the public."

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

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

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

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

However, even if we extend this interpretative generosity to Dewey,we are still forced to dilute the meaning of "action" to the point that issues of power and control are flattened beyond recognition.

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

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

is a term of entelechy, *not* of ethics. Abigail Rosenthal makes the point I have been circling around:
"Well, let us say briefly this: in the late-nineteenth and early-twentieth century, Western people believed in themselves. They believed, that is, that they were members of the most enlightened and progressive association of related cultures in the history of the world, and that they had both a right and a duty to bring their cultural light into the remotest corners of the inhabited world. Since that belief's heyday, members of Western culture have seen World war I, the Armenian massacre, the great depression, the failure of the versailles treaty, the Hitler and Stalin eras, the nuclear arms race, the ecological threats to the habitability of the planet, and other catastrophes, almost all of them issuing out of or related to factors in Western culture" (Rosenthal, 1987).

Rosenthal is looking for an explanation for the upsurge in what she considers, "moral relativism." But I think her recitation of "big events" illustrates a related theme as well. John Dewey, like many progressive optimists of his era, simply assumed that the avenues of activism and socio-political progress were necessarily public mechanisms, and accordingly that the great events, with their enduring consequences, would be able to generate great and enduring publics, with great leaders, and great symbols accessible to all. But the events which unfolded, while arguably human in constitution, were immeasurably larger in compass than any actional perspective might grasp. Lacking an archimedian point,a lever, a mechanism of agency, each moment of phobic recognition became its own dialectical ground of inertia. And so a rhetoric of compensatory resignation set in. A culture of delusion was succeeded by a culture of disillusion.
Lloyd Bitzer's valliant attempt to revive Dewey's public idea has been castigated too many times, from quarters too intellectually impoverished to deserve charitable reconstruction here. Rereading his concluding words, in the midst of yet another post-war disillusionment, I find it difficult not to experience – in almost equal portions – inspiration and a poignant sadness. Words such as these:
"We seem unable or unwilling to acknowledge that some truths are not to be found in these kinds of time frames, but rather *become,* over time, and perhaps pass in and out of existence. Why should we not acknowledge that some truths exist as faint rays of light, perceived perhaps dimly in a near-forgotten past, but which light up again and again in the experience of generations?… The great task of rhetorical theory and criticism, then, is to uncover and make available the public knowledge needed in our time and to give body and voice to the universal

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

3.The spectacle
"The diversionists have arrived. Some toy with "desire," the "libido," etc.; denounce responsibility as a "cop's word"; set traps for others and trap themselves in the blind alley of schizophrenization. Their strict complement, Foucault ("This century will be deleuzian or will not be," he says; we can rest assured that it is not) presents all society as caught up entirely in the nets of power, thereby erasing the struggles and the internal contestation that put power in check half the time" Cornelias Castoriadis (1976).
The legacy of the "public" dream (or ideology, if one prefers) has been, in the short run at least, a dispiriting one. And into the vortex of vacated universalism, has come that nightmarish deformation of modernist dreams: the spectacle. The triumph of signification without referents, as well as the eternal youth of Barthe's dead authors (He must have had Barnum in mind) spectacle is the celebration of the bad infinite as the only infinite in town. Spectacle is too many things to adequately encapsulate here. That is because it is too many things, period. It is, in the old critical theory jargon, the choreography of appearances as commodity for visual consumption: the mass ornament. It is the sublime left out in the sun too long, and turned rotten with neon.

To say that spectacle is a rhetorical formation that situates argument will seem strange to those who identify argumentation with critical reflection. For it seems the overarching function of spectacle to erase such reflection in the self-consuming pleasure of the gaze. What I will content myself with in this short excursus is the two-fold observation that yes, an attenuated demonstrative argument of hyperbole is usually going on with spectacle. The redoubtable Guy DeBord has written of spectacle: "The spectacle presents itself as something enormously positive, indisputable, and inaccessible. It says nothing more than 'that which appears is good, that which is good appears.' The attitude which it demands in principle is passive acceptance which in fact it already obtained by its

manner of appearing without reply, by its monopoly of appearance." So there is, in Debord's terms, a sort of arguing going on with spectacle.
It is a kind of panorama of assertion, with no apparent space for mental reservation or resistance. This is not a bad vernacular rendering of the baffling Marxist concept of reification. But it doesn't quite say all that needs to be said. This is because spectacle doesn't ever say it all either. It only purports to. It seeks to dazzle us, to bowl us over with the breathless fulfillment of false totality. As Debord himself inadvertently demonstrates, spectacle always needs to have some sort of subtitle, or decoding caption. Put another way, its imposing choreography of imagistic appearances is always self-congratulatory, but never self-explanatory. This is why we get such euphoric and meaningless consumer captions as , "It doesn't get any better than this," or "When you've said Bud, you've said it all." That is part one of the observation. Part two is sub-titled, "Yes, but…"

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

"… delirium masks reality or spares itself from a reality while at the same time saying a truth about it. More true? less true? Does delirium know a truth which is true in a different way than objective reality because it speaks a certain subjective truth, instead of a presumed objective truth? because it presents the state of the subject's desire? This 'mad truth' of delirium is not evoked here to introduce some kind of relativism or epistemological skepticism. I am insisting on the part played by truth in delirium to indicate, rather, that since the displacement and deformation to delirium are moved by desire, they are not foreign to the passion for knowledge, that is, the subject's subjugation to the desire to know."
So these present themselves as the negative and affirmative aspects of a certain elusive normative content, in the grand Fuji blimp of world wide spectacle.

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

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

4. The Rhetorical Forum

The final rhetorical formation for addressing the legacy of magnitude beyond measure is that of the rhetorical forum. The public, the spectacle and the forum are, as we have seen, the exotic legacy of the deliberative, ceremonial and forensic genres. If I may quote myself, a rhetorical forum creates " a symbolic environment within which issues, interests, positions, constituencies and messages are advanced, shaped, and provisionally judged" (Farrell 1993: 282). Less jargonistically put, a rhetorical forum is an encounter-setting where discourse may be gathered, situated, thematized, stabilized. Students of argumentation, I suspect, are sufficiently familiar with the concept of "forum" to require no more than an attenuated description of it here.
What I would like to do, however, is to amend my category schema somewhat, by allowing two qualifications. First, it will not do to separate forum off entirely from the previously discussed types of public and spectacle. The most enduring cases of rhetorical forum have always had some public aspect to them. They are known, talked about, often controversial. And then there is the fact that their own operations typically engender discussion, colloquy, a process that seems to me not all that different from Habermas' idealization of discursive will formation. So far as spectacle, there are clearly family resemblances here as well.

Consider the extended example I use to illustrate rhetorical forum: the famous Nuremberg trials. The city of Nuremberg was itself symbolically chosen as scene. It was virtually rubble, but for an area on the fringe where stood the ironically named, "Palace of Justice." This latter locale was where the all-important initial trials were held. Widely circulated photos at the time heightened the profound contrast. To the press and, I suspect, any moderately inquisitive observor, this semiotics of display said something like, "in the midst of barbarism, a search for the restoration of civility." Perhaps an attempt to find real justice in this Palace of name only? The inside of the Palace is arranged so as to stress of course the moral seriousness, the formality of these proceedings. This is why you see the flags, the hangings, the elevated sight-lines for justices as jury. All this is spectacle, or at least theater. We can be grateful that they did not bear more modern traces of commodification: spin doctors, play-by-play announcers, commercial interruptions, and of course endorsements; perhaps the Nike "swoosh" on the judicial robes. My second qualification is that there is no *a priori* reason why the forum should be limited to judicial examples, and forensic proceedings, with a mode of judgment the preferred mood. All I would say at this point is that the most conspicuous and successful prototypes of the rhetorical

forum, at this juncture of history, have typically been forensic in character. Perhaps temporal distance remains the best arbiter of perspective where rhetorical magnitude is concerned.

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

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

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

The full(er) answer to this question moves far beyond the confines of this report I can at best outline my overall approach here. Without begging the question too much, I think we can say that a rhetorical forum needs a certain sense of sponsorship, of serious regard, by those who witness its proceedings. If no one pays any serious attention, it will degenerate into what the national party conventions seem to be on the verge of becoming: empty sideshows. Secondly, and this is so obvious it is frequently overlooked, a rhetorical forum is authenticated not only by the quality of performances it evokes, but also by the

degree of seriousness displayed by the participants as performers. Let us approach each of these considerations. In this discussion, I hope to show that, at Nuremberg, as in institutional life generally, rhetorical performance was able to ply its craft on multiple levels.

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

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

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

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

The final section in my somewhat picaresque treatment looks at the proceedings, if you will, from the other side. While it may seem like heresy to credit the defendants with much of anything rhetorically, I have come to a conclusion that might be something of an insight; or it may merely be perverse. I want to suggest that many of the defendants' final words, and in at least one case, an actual confession, did dramatically enhance the stature, authority, and legitimacy of this rhetorical forum.

Let us begin with the confession because I believe it provides the clearest case. In the book I am currently writing (called, *The Weight of Rhetoric*), I have a portion of one chapter devoted to what I call "confessional rhetoric." I argue that, while this is not a terribly prominent genre, it is very important and also quite difficult to do properly. I have even come up with five felicity conditions for properly confessing:

I. An explicit admisson of wrong-doing is made.

II. The admission must be true.

III. There must be remorse for the act committed, or not committed.

IV. The confession must be made before the proper authority (either the aggrieved party, or failing that, an audience/agency empowered to acknowledge, forgive, punish.

V. The magnitude of the offense must be worth the effort and burden of confessing.

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

"Now at the end of this Trial I want to present equally frankly the avowal and confession I have to make today. In the course of the trial my defense counsel submitted two fundamental questions to me, the first one…was: 'In case of a

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

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

In the longer version of this essay, I compare and contrast Nuremberg to two other instances of a forensic rhetorical forum: the still-ongoing Truth and reconciliation Commission in South Africa, and the mercifully concluded"Trial of Pol Pot." For quite differing reasons, I hypothesize that neither of these encounter contexts approached the performative rhetorical accomplishmentsof Nuremberg. Does this mean that the Nuremberg trials were a successful rhetorical performance? What a stupifying question. The scale on which such a performance might be measured is simply not known or available to me. The trials were scenes within scenes, a chiasma of activities, finally not open to genuine human closure. What they were able to do, I believe, is offer a modicum of recognition to the human face of barbarism. This is no small accomplishment. For the larger questions, there is only hope – or despair. For anyone who examines these crimes closely, we must marvel at the mid-century hubris of humankind, the rational animals, purporting to mete out justice before the bar of civilization. But there is something hopeful to this naively Utopian project. It is that, even though no act of reason could ever redeem these historic crimes, it has taken no small effort of reflection to ensure that they never be forgotten.

REFERENCES
Arendt, Hannah, (1964) *Eichmann in Jerusalem: A Report on the Banality of Evil.* New York: Viking Press.
Aristotle (1991). *On Rhetoric: A Theory of Civil Discourse,* George Kennedy (trans.) New York: Oxford University Press.
Benjamin, Walter (1969) *"Theses on the Philosophy of History," Illuminations, Hannah Arendt* (ed.), New York: Schocken Books.
Bitzer, Lloyd F (1978).. " Rhetoric and Public Knowledge." In: D.M.Burks, ed. Rhetoric, *Philosophy and Literature: an Exploration*. West Lafayette: Purdue University Press.
Debord, Guy (1983). *Society of the Spectacle.* Detroit: Black & Red.
Dewey, John (1927). *The Public and its Problems*. New York: Swallow Press.
Habermas, Jurgen (1971). *"Does Philosophy Still have a Purpose?" Philosophical-Political Profiles* (1983), Cambridge: The MIT Press.
Habermas, Jurgen (1973). *Legitimation Crisis, T. McCarthy* , trans. Boston: Beacon Press.
Ignatieff, Michael (1985). "Is Nothing Sacred? The Ethics of Television," *Daedalus,* Vol. 114, 4.
Jackson Robert H (1947). *The Nuremberg Case,* New York: Alfred A.Knopf.
Marrus, Michael R (1996). *"The Holocaust at Nuremberg,"* International Conference to Commemorate the 50th Anniversary of the Nuremberg Trials, Wayne State University, Oct. 14, l996.
Rosenthal, Abigail (1987). *A Good Look at Evil,* Philadelphia: Temple University Press.
White, James Boyd (1994). *Acts of Hope: Creating Authority in Literature, Law, and Politics*, Chicago: University of Chicago Press.

ISSA Proceedings 1998 – What Went Wrong In The Ball-Point

Case? An Analysis And Evaluation Of The Discussion In The Ball-Point Case From The Perspective Of A Rational Discussion

1. Introduction

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

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

indicted fact could not be proven beyond reasonable doubt.

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

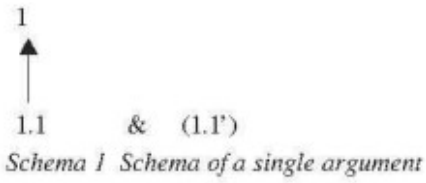
2. The analysis of the argumentation in the ball-point case
To establish whether the argumentation put forward in defence of a legal position is sound, first an analysis must be made of the elements which are important to

the evaluation of the argumentation. In the evaluation based on this analysis the question must be answered whether the arguments can withstand rational critique. In a so-called rational reconstruction an analysis of the argumentation is made in which the elements which are relevant for a rational evaluation are represented.**[ii]**

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

2.1 The reconstruction of the argumentation structure

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



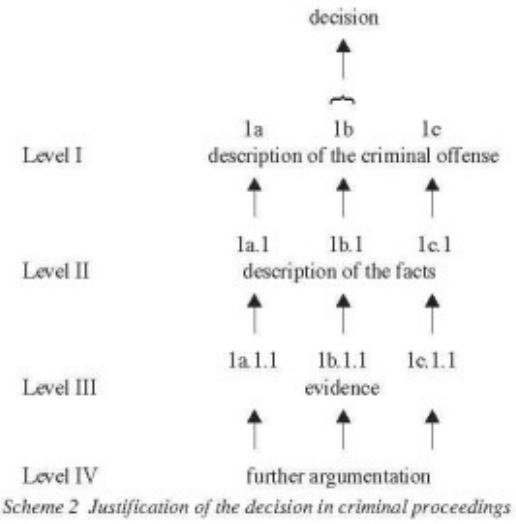
Schema 1 Schema of a single argument

Scheme 1: Schema of a single argument

Often the argumentation is more complex, which means that there are more arguments put forward in defence of the standpoint. When a legal standpoint is supported by more than one argument, the connections between these arguments may differ in nature. Van Eemeren et al. (1996) distinguish various forms of complex argumentation, depending on the types of connection between the single arguments. They distinguish between *multiple* (alternative) argumentation in which each argument constitutes in itself sufficient support for the standpoint; *coordinatively compound* (cumulative) argumentation in which a number of

arguments are linked horizontally and which provide in conjunction a sufficient support for the standpoint; and *subordinate* argumentation in which a number of arguments are linked vertically and which provide in conjunction a sufficient support for the standpoint.**[v]**

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



Scheme 2 Justification of the decision in criminal proceedings

Scheme 2 : Justification of the decision in criminal proceedings

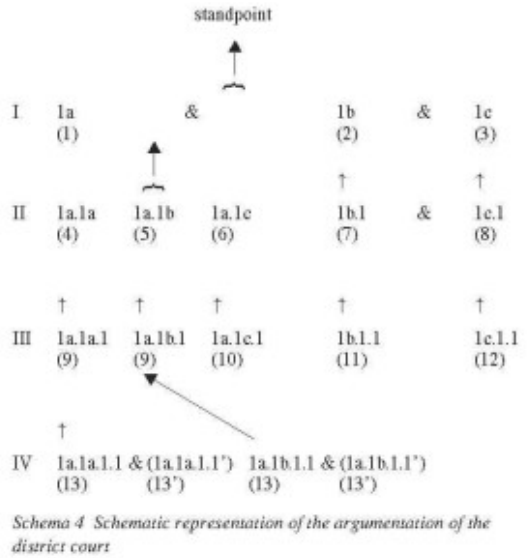
The decision of the *District Court* in the ball-point case is that the accused must be sentenced with an imprisonment of twelve years. This standpoint is based on the coordinative compound argumentation (argumentation on level I) that, because certain facts can be considered as proven, ànd that these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

The argumentation on level II in defence of the components of 1a, 1b and 1c

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

Scheme 3: Argumentation of the district court
Decision: The accused must be punished with an imprisonment of twelve years.
1a intentionally and with forethought killed (1)
1a.1a We are justified in believing that it is proven beyond reasonable doubt that J.T. acted intentionally and after clear thought and pre-meditated (4)
1a.1a.1 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow (9)
1a.1a.1.1 The District Court found her statement consistent and convincing (13)
1a.1b We are justified in believing that it is proven beyond reasonable doubt that he shot a ball-point through one of her eyes into the head with a small crossbow (5)
1a.1b.1 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow (9)
1a.1b.1.1 The District Court found her statement consistent and convincing (13)
1a.1c We are justified in believing that it is proven beyond reasonable doubt that Mrs. de M. died as a result of the fact that J.T. shot a ball-point through one of her eyes with a small crossbow (6)
1a.1c.1 We are justified in believing in the trustworthiness of the statements of the coroner's report (10)
1b On or about May 25, 1991 in Leiden (2)
1b.1 then and there (7)

1b.1.1 We are justified in believing in the trustworthiness of the statements in the police report on the finding of the body (11)
1c a woman named Mrs. de M. (3)
1c.1 a woman named Mrs. de M. (8)
1c.1.1 We are justified in believing in the trustworthiness of the statements in the police report on the investigation by the coroner (12)



Schema 4 Schematic representation of the argumentation of the district court

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

2.2 The reconstruction of missing premises

In the reconstruction of the argumentation, all the argumentative steps must be made explicit. As we have seen, by reconstructing the argumentation structure, we get a clear picture of the various arguments put forward in defence of a standpoint and of the relations between these arguments. In such a reconstruction it becomes clear that many argumentative steps remain implicit, and it is the task of the analyst to give a rational reconstruction of these implicit arguments.

When reconstructing implicit arguments an analyst can use logical as well as pragmatic insights.**[vii]** To establish what has been left unexpressed from a logical perspective, the analyst must try to find out which statement is necessary to make the argument logically valid. If an arguer is sincere and does not believe that his argumentation is futile, this means that he assumes that others will be inclined to apply the same criteria of acceptability as himself.

These criteria will include the criterion of logical validity. Therefore, the analyst must examine whether it is possible to complement the invalid argument in such a way that it becomes valid. From a pragmatic perspective, however, the premis which makes the argument logically valid, the so-called *logical minimum*, sometimes contributes nothing new and is, therefore, superfluous. To try to make the missing premiss more informative, the analyst can try to formulate the so-called *pragmatic optimum* which complies with all the rules of communication. Often, this is a matter of generalizing the logical minimum, making it as informative as possible without ascribing unwarranted commitments to the arguer and formulating it in a colloquial way that fits in with the rest of the argumentative discourse.

In the analytical overview of the District Court, on various levels bridging arguments must be made explicit. Because our main concern is the argumentation with respect to the evidence, I concentrate on the argumentation on level III and IV of the argumentation where the various elements of the evidence are located and where the force of the evidence is justified. On these levels, various arguments must be made explicit.

A reconstruction of the arguments and missing premises on which the discussion in the procedure before the District Court centres is given in schema (5). The arguments 9’ and 13’ are the bridging arguments for the argumentation consisting of 9 and 13.

Scheme 5 : Reconstruction of missing premises

A

5 We are justified in believing that it is proven beyond reasonable doubt that he shot a ball-point through one of her eyes into the head with a small crossbow

because

9 We are justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he, intentionally and after clear thought and premeditated, shot a ball-point through one of her eyes into the head with a small crossbow

and

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

with a small crossbow

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

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

3. The evaluation of the argumentation in the ball-point case
In a pragma-dialectical approach, the aim of the evaluation is to establish whether the protagonist has succeeded in defending his standpoint sufficiently. For the evaluation of the argumentation of the ball-point case, this implies that we must establish whether the argumentation of the District Court is acceptable if we submit it to the various critical tests of a pragma-dialectical evaluation.
In a pragma-dialectical evaluation the rules for a successful defence concern the question of whether the protagonist has successfully defended the initial point of view and subordinate points of view (arguments) called into question by the antagonist.**[ix]** The protagonist has successfully defended an argument against an attack by the antagonist if the propositional content of the argumentation is identical to a common starting point and if the argumentation scheme underlying the argumentation is appropriate and applied correctly.**[x]**
So, in our evaluation we must check whether the arguments of the District Court which have been called into question are acceptable and whether the argumentation scheme underlying the argumentation is applied correctly. First I will focus on the acceptability of the line of argumentation defending (1) which forms the central point of discussion. Then I will go into the question whether the District Court has responded adequately to other attacks by the defense.

In the evaluation of the acceptability of the line of argumentation supporting 1, the relevant question to be answered is whether the *argumentation schemes* underlying the argumentation in defence of (1) are applied correctly. This implies that it must be checked whether all relevant critical questions belonging to the argumentation scheme can be answered satisfactorily. Which argumentation schemes underlie the argumentation for the evidence in the decision of the District Court?**[xi]**

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

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

Question (1) is a general question which asks for a justification for the acceptability of the argument. Question (2) and (3) are questions which are specific for the argumentation scheme of a symptomatic relation. Question (2) implies that we ask whether property Y is indeed an intrinsic property. To answer this question in a satisfactory way, the protagonist will have to present subordinate argumentation to show that it is indeed an intrinsic property. Question (3) implies that the antagonist is of the opinion that Y is indeed a characteristic property, but thinks that it is necessary to mention more properties in order to call something Z. To answer this question in a satisfactory way, the protagonist must put forward compound argumentation in which he mentions

other characteristics of Z and shows that these characteristics are present in the case at hand. So if the antagonist raises his doubts by posing question (2) and/or (3), he thinks that the argumentation is not sufficient and he forces the protagonist to supplement his argumentation with additional arguments. The relevant evaluative questions for the argumentation of the District Court are:
1. Is it really justified to believe that the statement of the therapist was consistent and convincing (Y)?
2. Is being justified in believing that the statement of the therapist was consistent and convincing (Y) really a good reason for being justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he shot a ball-point through one of her eyes into the head with a small crossbow (Z)?
3. Is it not possible to think of other relevant and necessary considerations (Y') for being justified in believing in the trustworthiness of the statements of the therapist that J.T. confessed to her that he shot a ball-point through one of her eyes into the head with a small crossbow (Z)?

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

With respect to the answer to *question 1* we could raise our doubts with respect to the fact that her statement was really *consistent* and *convincing*. The court does not explain in which respects the statement is consistent and why it is convinced by the statement of the therapist. What we miss here is an explanation of the considerations which made that the court felt convinced. So, from the perspective of a rational discussion we could say that the answer to the first question is 'no', and the court would have to put forward supporting subordinate argumentation. (Apart from this, the argumentation seems circular: in order to be convinced of the truth of the statement the Court puts forward the argument that the statement is convincing.)**[xiv]**
With respect to the answer to *question 2* we could raise our doubts with respect to the fact that consistency is a sufficient reason for being justified in believing what the therapist has stated. In other words, are there any other considerations which are also relevant for the trustworthiness of her statement and can the earlier mentioned considerations form a sufficient ground in the absence of the later mentioned considerations? In this context, we could say that from empirical research we know that consistency of the statements of a witness is not always a

guarantee for the truth of these statements.**[xv]** So, to be able to show that the second question can be answered satisfactorily, the court would have to put forward supporting arguments.
With respect to the answer to *question 3* we could refer to the considerations given in the answer to the second question. Are there any other relevant considerations for believing in the statement, and if these considerations are present, why are they not applied?

Furthermore, we could say that such a 'double de auditu' statement must be submitted to more rigorous tests than the relatively weak criterion of consistency alone. So, to be able to show that the third question can be answered satisfactorily, the court would have to put forward compound argumentation. So, what we miss in the argumentation of the court from the perspective or a rational discussion is a further elaboration on the grounds on which the court has decided that the statement of the therapist is convincing, and whether it meets other requirements of a trustworthy account of the behaviour of J.T and of his explanations for his behaviour. Further arguments supporting 13 and 13' are required.
These further arguments which are needed as a support of 13 and 13' could be characterized as what Anderson calls the *background generalizations* upon which the relevance of the evidence rests. Wagenaar et al. (1993) call these considerations the *commonsense presumptions* which underlie the probative value of the evidence. These presumptions serve as the 'anchors' which constitute on various levels the 'sub-stories' on which the evidence is based. Twining calls them the commonsense *generalizations* or *background generalizations*, the generalizations that are left implicit in ordinary discourse. According to these authors, these commonsense background generalizations must be made explicit in order to assess their acceptability. In pragma-dialectical terms, the acceptability depends on the question whether they correspond with certain starting points which are acceptable to the participants.**[xvi]**
According to Anderson and Twining (1991), in most cases these generalisations are indeterminate and vague and subject to exceptions. According to Twining, the problem with these generalizations is that they are at the same time necessary and dangerous. They are necessary as the glue in inferential reasoning, and, as a last resort as anchors for parts of a story for which no particular evidence is available. They are necessary as providing the only available basis for constructing rational arguments. They are at the same time dangerous because,

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

Because, in the present form, the argumentation consisting of 13 and 13' is not acceptable, and these arguments form the final basis in a subordinate line of argumentation for argument (1) (1a), (1) is not acceptable from the perspective of a rational discussion. Because 13 and 13' form subordinate argumentation for (9), (9) is not acceptable, and because (9) forms subordinate argumentation for (4) and (5), these are not acceptable. And because (4) and (5) form together with (6) compound argumentation for (1), (1) is not acceptable.
So, according to the pragma-dialectical rules, the argumentation is not acceptable. This result is in line with the rules for anchoring the narrative supporting the decision developed by Wagenaar et al. (1993). According to their rule (3), essential components of the narrative must be anchored, according to their rule (5) the court must give reasons for the decision by specifying the narrative and the accompanying anchoring, and according to rule (6) the court should explain the general beliefs used as anchors. As we have seen, this is not the case. Argument (13) needs support by anchors explaining why the court believes in the truth of the statement of the therapist.
Our final judgement about the argumentation line supporting argument (1) (1a) is therefore that it has not been justified beyond reasonable doubt that J.T. has killed his mother by shooting a ball-point through one of her eyes into the head with a small crossbow. Because this argument forms part of compound argumentation, this implies that the decision has not been defended successfully.
Considered from the perspective of the ideal norms formulated in the pragma-

dialectical theory and Wagenaar et al. and from the perspective of the dangerous character of generalisations as described by Anderson and Twining, the cause of the weakness of the argumentation of the District Court lies in the fact that the basis for its argumentation is not acceptable because it does not specify the criteria for the use and the reasons for belief in the statements of the expert witness. The implicit argument (13') underlying the argumentation can be criticized in many respects and therefore cannot function as a final basis for the argumentation.

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

pathologist Visser) it does adequately answer the counter-arguments put forward by the defense, and therefore according to the pragma-dialectical rules (10 and 11) has not defended successfully argument (1) against attacks of the antagonist.
With respect to this point, the evaluation is in tune with the rules developed by Wagenaar et al. (1993). According to their rule (7), there should be no competing story with equally good or better anchoring. Because the 'story' of Worst and van Rij has not been refuted by Visser, there is no reason to doubt the quality of its anchoring, and therefore the argumentation of the District Court does not meet the requirement of rule 7.
So, according to our ideal norms for a rational discussion in criminal proceedings the justification of the District Court is not acceptable on this second point.

4.Conclusion

I have shown what went wrong in the ball-point case from the perspective of an idealized critical discussion. What we saw was that, from the perspective of the rules of criminal procedure, the discussion in this case was correct with respect to the way in which the District Court defended its decision. From the perspective of a fair trial and from the perspective of a rational discussion, however, several points of critique can be given.
The first point of critique concerns the quality of the argumenta-tion of the District Court with respect to the statements of the therapist. As we have seen, the argumentation with respect to these statements is based on a common-sense presumption which remains implicit and which can be criticized in various respects. Therefore, the anchor for the evidence which supports the main part of the argumentation of the District Court turns out to be too weak to consider these facts as proven beyond reasonable doubt. As a consequence, we are justified to have our doubts about the quality of the argumentation with respect to the 'manner of death' of the District Court from the perspective of a rational discussion. From the perspective of a rational discussion which formulates norms which can be considered as a methodological maximum, a relevant ideal norm for a rational justification of a decision about the evidence in a criminal process could be that, if asked to do so, a judge is obliged to specify the grounds on which his belief in the testimony of an expert witness is based. Such an obligation would be required especially if, as in the ball-point case, the decision rests for the main part on this testimony. In this way, the decision about the evidence could be criticized by the parties and other judges with respect to the quality of the evidence.
The second point of critique concerns the fact that the District Court did not

explicitly reject alternative explanations of the death of Mrs. de M. From the perspective of a rational discussion, we could criticize the decision of the District Court because of the fact that it did not give insight into the considerations for rejecting alternative explanations of the death of the mother. Because the District Court did not react to adequately 'anchored' counter-arguments, the decision does not meet the requirements of a rational discussion. From the perspective of a rational discussion, a relevant ideal norm could be that, if the defense presents a relevant alternative view on the case which could be in favour of the accused, the judge has an obligation to explain why he thinks this alternative view less probable than the view presented by the prosecution.

I have shown how the pragma-dialectical theory, ideas developed by Anderson and Twining and norms developed by Wagenaar van Koppen and Crombag can be connected in the analysis and evaluation of argumentation in criminal cases and how the argumentation in a concrete case can be criticized from the perspective of a rational discussion.

NOTES

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

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

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

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

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

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

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

viii. For a logical analysis of the contra-argumentation for the fact that J.T. cannot have killed his mother see Kaptein (1997:60-61).

ix. See the pragma-dialectical rules 11 and 12 formulated by Van Eemeren and Grootendorst (1984:170-171).

x. See Van Eemeren and Grootendorst (1992:209).

xi. For a discussion of other types of argumentation schemes in legal argumentation See Feteris (1997b), Jansen (1996,1997), Kloosterhuis (1994,1995,1996).

xii. Note that the arguments 9 and 13 are used to defend 4 as well as 5.

xiii. See for a more extensive treatment of argumentation schemes Van Eemeren and Grootendorst (1992:94-102).

xiv. For a description of the fallaciousness of circular reasoning see Van Eemeren and Grootendorst (1982:153-157).

xv. From empirical research by, among others, Loftus (1979) we know that witnesses often tell stories which are not only based on what they have observed, but also on inferences about what happened, and on transformations which make the recollection more consistent and more understandable. According to Merckelbach and Crombag (1997:314 ff) during the retention stage, memories change: (a) a witness can forget what he has observed, (b) he can add information from another source – post hoc information – to his memory, and (c) he can exchange parts of his own observation with information from another source. Therefore, recovered memories cannot be trusted completely for their truth.

xvi. These ideas on common-sense presumptions as background generalizations are based on ideas developed by Cohen (1977:247), who says that so-called 'common-sense presumptions' state what is normally to be expected. However, they are rebuttable in their application to a situation if it can be shown to be abnormal in some relevant respect.

REFERENCES

T. Anderson, W. Twining (1991). *Analysis of evidence*. Boston and London: Butterworths.

L.J. Cohen (1977). *The probable and the provable*. Oxford: Clarendon.

L.J. Cohen (1989). *Memory in the real world*. Hove: Erlbaum.

F.H. van Eemeren, R. Grootendorst (1992). *Argumentation, Communication, and Fallacies*. New York: Erlbaum.

Eemeren, F.H. van, E.T. Feteris, R. Grootendorst, T. van Haaften, W. den Harder, H. Kloosterhuis, T. Kruiger, J. Plug (1996). *Argumenteren voor juristen. Het analyseren en schrijven van juridische betogen en beleidsteksten*. (Argumentation for lawyers) (third edition, first edition 1987) Groningen: Wolters-Noordhoff.

Eemeren, F.H. van, R. Grootendorst (1992). *Argumentation, communication, and fallacies. A pragma-dialectical perspective.* Hillsdale NJ: Erlbaum.

Feteris, E.T. (1987) 'The dialectical role of the judge in a Dutch legal process'. In:

J.W. Wenzel (ed.), *Argument and critical practices. Proceedings of the fifth SCA/AFA conference on argumentation.* Annandale (VA): Speech Communication Association, pp. 335-339.
Feteris, E.T. (1989). *Discussieregels in het recht. Een pragma-dialectische analyse van het burgerlijk proces en het strafproces.* Dordrecht: Foris.
Feteris, E.T. (1990). 'Conditions and rules for rational discussion in a legal process: A pragma-dialectical perspective'. Argumentation and Advocacy. *Journal of the American Forensic Association*. Vol. 26, No. 3, pp. 108-117.
Feteris, E.T. (1991). 'Normative reconstruction of legal discussions'. *Proceedings of the Second International Conference on Argumentation*, June 19-22 1990. Amsterdam: SICSAT, pp. 768-775.
Feteris, E.T. (1993a). 'The judge as a critical antagonist in a legal process: a pragma-dialectical perspective'. In: R.E. McKerrow (ed.), *Argument and the Postmodern Challenge. Proceedings of the eighth SCA/AFA Conference on argumentation*. Annandale: Speech Communication Association, pp. 476-480.
Feteris, E.T. (1993b). 'Rationality in legal discussions: A pragma-dialectical perspective'. *Informal Logic*, Vol. XV, No. 3, pp. 179-188.
Feteris, E.T. (1994a). 'Recent developments in legal argumentation theory: dialectical approaches to legal argumentation'. *International Journal for the Semiotics of Law*, Vol. VII, no. 20, pp. 134-153.
Feteris, E.T. (1994b). *Redelijkheid in juridische argumentatie. Een overzicht van theorieën over het rechtvaardigen van juridische beslissingen.* Zwolle: Tjeenk Willink.
Feteris, E.T. (1995). 'The analysis and evaluation of legal argumentation from a pragma-dialectical perspective'. In: F.H. van Eemeren, R. Grootendorst, J.A. Blair, Ch.A. Willard (eds.), *Proceedings of the Third ISSA Conference on Argumentation*, Vol. IV, pp. 42-51.
Feteris, E.T. (1997a). 'The analysis and evaluation of argumentation in Dutch criminal proceedings from a pragma-dialectical perspective'. In: J.F. Nijboer and J.M. Reijntjes (eds.), *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence,* Lelystad: Koninklijke Vermande, p. 57-62.
Feteris, E.T. (1997b). 'De deugdelijkheid van pragmatische argumentatie: heiligt het doel de middelen?. In: E.T. Feteris, H. Kloosterhuis, H.J. Plug, J.A. Pontier (eds.), *Op goede gronden. Bijdragen aan het Tweede Symposium Juridische Argumentatie*. Nijmegen: Ars Aequi, pp. 98-107.
M.M. Henket (1997). 'Omgaan met de feiten. Opmerkingen naar aanleiding van de Leidse Balpenzaak'. In: E.T. Feteris, H. Kloosterhuis, H.J. Plug, J.A. Pontier

(eds.), *Op goede gronden. Bijdragen aan het Tweede Symposium Juridische Argumentatie*. Nijmegen: Ars Aequi, pp. 50-55.
H. Jansen (1996), 'De beoordeling van a contrario-argumentatie in pragma-dialectisch perspectief'. In: *Tijdschrift voor Taalbeheersing,* jrg. 18, nr. 3, pp. 240-255.
H. Jansen (1997). 'Voorwaarden voor aanvaardbare a contrario-argumentatie'. In: E.T. Feteris, H. Kloosterhuis, H.J. Plug, J.A. Pontier (eds.), *Op goede gronden. Bijdragen aan het Tweede Symposium Juridische Argumentatie*. Nijmegen: Ars Aequi, pp. 123-131.
H.J.R. Kaptein (1997). 'Pennen als dodelijke wapens? Over criminele klok- en klepelkunde en een (logische?) kloof tussen feiten en recht. In: In: E.T. Feteris, H. Kloosterhuis, H.J. Plug, J.A. Pontier (eds.), *Op goede gronden. Bijdragen aan het Tweede Symposium Juridische Argumentatie.* Nijmegen: Ars Aequi, pp. 56-63.
Kloosterhuis, H. (1994). 'Analysing analogy argumentation in judicial decisions'. In: F.H. van Eemeren and R. Grootendorst (eds.)*, Studies in pragma-dialectics*. Amsterdam: Sic Sat, p. 238-246.
Kloosterhuis, H. (1995). 'The study of analogy argumentation in law: four pragma-dialectical starting points'. In: F.H. van Eemeren, R. Grootendorst, J.A. Blair, Ch.A. Willard (eds.), *Proceedings of the Third ISSA Conference on Argumentation. Special Fields and Cases*, Amsterdam: Sic Sat, p. 138-145.
Kloosterhuis, H. (1996). 'The normative reconstruction of analogy argumentation in judicial decisions: a pragma-dialectical perspective'. In: D.M. Gabbay, H.J. Ohlbach (eds.), *Proceedings of the International Conference on Formal and Applied Practical Reasoning.* Berlijn: Springer, p. 375-383.
P.J. van Koppen, D.J. Hessing, H.F.M. Crombag (1997). *Het hart van de zaak. Psychologie van het recht.* Deventer: Gouda Quint.
E.F. Loftus (1979). *Eyetwitness testimony.* Cambridge, M.A.: Harvard University Press.
H.L.G.J. Merckelbach, H.F.M. Crombag (1997). 'Hervonden herinneringen'. In: P.J. van Koppen, D.J. Hessing, H.F.M. Crombag (eds.), *Het hart van de zaak. Psychologie van het recht.* Deventer: Gouda Quint, pp. 334-352.
J.F. Nijboer (1997). 'Over een balpen en een voorbeeldige voetballer'. In: E.T. Feteris, H. Kloosterhuis, J. Plug, H. Pontier (eds.), *Op goede gronden. Bijdragen aan het tweede symposium juridische argumentatie,* Rotterdam 14 juni 1996, pp.64-70.
N. MacCormick en R. Summers (1991). *Interpreting statutes.* Aldershot etc.: Dartmouth.

Plug, H.J. (1994). 'Reconstructing complex argumentation in judicial decisions'. In: F.H. van Eemeren and R. Grootendorst (eds.), *Studies in pragma-dialectics*. Amsterdam: Sic Sat, p.246-255.
Plug, H.J. (1995). 'The rational reconstruction of additional considerations in judicial decisions'. In: F.H. van Eemeren, R. Grootendorst, J.A. Blair, Ch.A. Willard (eds.), *Proceedings of the Third ISSA Conference on Argumentation. Special Fields and Cases*, Amsterdam: Sic Sat, p. 61-72.
Plug, H.J. (1996) 'Complex argumentation in judicial decisions. Analysing conflicting arguments'. In: D.M. Gabbay, H.J. Ohlbach (eds.), *Proceedings of the International Conference on Formal and Applied Practical Reasoning*. Berlijn: Springer, p. 464-479.
D.A. Schum (1994). *The evidential foundations of probabilistic reasoning*. New York etc.: John Wiley & sons.
W. Twining (1994). *Rethinking evidence*. (first edition 1990). Oxford: Oxford University Press.
Wagenaar, W.A., P.J. van Koppen, H.F.M. Crombag (1993). *Anchored narratives. The psychology of criminal evidence*. London: Harvester Wheatsheaf.

ISSA Proceedings 1998 – A Critique Of The Dialectical Approach: Part II

1. Introduction

This paper is part of a project designed to explore the nature of the dialectical approach in argumentation theory, its relationship to other approaches, and its methodological fruitfulness. The main motivation underlying this project stems from the fact that the dialectical approach has become the dominant one in argumentation theory; now, whenever a given approach in any field becomes dominant, there is always the danger that it will lead to the neglect or loss of insights which are easily discernible from other orientations;

this in turn may even prevent the dominant approach from being developed to its fullest as a result of the competition with other approaches.

In a previous paper (Finocchiaro 1995), I undertook a critical examination of two leading examples of the dialectical approach. I argued that Barth and Krabbe's (1982) demonstration of the equivalence of the methods of axiomatics, natural deduction, and formal semantics to formal dialectics works both ways, so that the former acquire the merits of the latter, and the latter the limitations of the former. I also argued that Freeman's (1991) demonstration that the structure of arguments as products derives from the process of argumentation is insufficiently dialectical insofar as it involves a conception of dialectics in which dialogue is easily dispensable, and insofar as it suggests that argument structure is rooted more in an evaluative process than in a process of dialogue between distinct interlocutors.

In this paper I plan to examine the ideas of other authors who have written on or have used the dialectical approach. I shall use as a guide the following three working hypotheses suggested by the just stated conclusions reached in my previous paper. The first is the claim that if one takes the point of view of formal dialectics, the formal dialogical approach is not essentially different from the monological approach, but rather the two approaches are primarily different ways of talking about the same thing. The other two working hypotheses involve informal rather than formal dialectics. The second working hypothesis is that perhaps there are two versions of the informal dialectical approach, depending on whether one emphasizes the resolution of disagreements or their clarification. The third working hypothesis is that the dialectical approach is fundamentally a way of emphasizing evaluation, a way of elaborating the evaluative aspects of argumentation.**[i]** These are working hypotheses in the sense that I shall be concerned with testing their correctness, namely with determining whether they are confirmed or disconfirmed by other actual instances of the dialectical approach. Since I shall be examining only examples of the informal dialectical approach, I will be dealing primarily with the second and third working hypotheses.

2. Johnson on the Dialectical Approach

In their paper entitled "Argumentation as Dialectical," Blair and Johnson (1987: 90-92) claimed that to say that argumentation is dialectical involves four things:

1. we should emphasize the process as well as the product;

2. the process involves two roles, that of questioner and that of answerer;
3. the process begins with a question or doubt, perhaps only a potential question or doubt; and
4. argumentation is purposive activity, in which there are two purposes corresponding to the two roles.

In his latest paper, Johnson (1996: 103-15) speaks more generally of a pragmatic approach and restricts the dialectical component to just one of three elements, the others being the teleological and the manifestly rational. The most basic feature is that argumentation is teleological in the sense that its aim is rational persuasion. For Johnson, the dialectical aspect of argumentation now becomes largely a consequence of the fact that it aims at rational persuasion. For now by dialectical Johnson means that argumentation must include answering objections and criticism. His own words are worth quoting: "That argumentation is dialectical means that the arguer agrees to let the feedback from the other affect her product. The arguer consents to take criticism and to take it seriously. Indeed, she not only agrees to take it when it comes, as it typically does; she may actually solicit it. In this sense, argumentation is a (perhaps even *the*) dialectical process *par excellence*)" (Johnson 1996: 107). Johnson then goes on to argue that, because argumentation is teleological and dialectical, it needs to be manifestly rational; that is, not only must it be rational, but it must
be so perceived by the participants.
It is beyond the scope of the present remarks to discuss Johnson's account more fully. Here, the main thing I want to stress is his conception of the dialectical nature of argumentation. It obviously refers to a critical or evaluative element. He seems to be saying that arguing for a conclusion has two aspects: that of providing reasons and evidence in support of the conclusion, and that of taking into account counter-arguments and counter-evidence. Moreover, since this taking into account can take the form of either refuting the objections or learning something from them, it is clear that what is involved is not merely negative criticism of the objections but also positive evaluation, as the case may be.
Although Johnson's notion of the dialectical is clear, there is an aspect of his discussion which is not so clear. The difficulty stems from the fact that he plausibly finds it useful to distinguish argument and argumentation, and on the basis of this distinction he seems to say that what is dialectical is argumentation, not argument. In his own words:
Although it seems clear that if the process of arguing is to achieve its goal, the

arguer must deal with the standard objections, it is not clear that we would be wise to take this same view of the argument itself – else a great many arguments (which many times fail to deal with objections) would *ipso facto* have to be considered defective – this consequence seems unduly harsh [Johnson 1996: 104-5].

The issue here is whether we want to make dialectics – or evaluation in my terminology – an integral part of the process of arguing. Perhaps this issue could be described as involving two versions of the dialectical approach, in a strong and in a weak sense. The strong dialectical approach would make the evaluation of objections an essential part of the process of arguing, whereas the weak dialectical approach would make it only a part of a complete evaluation of an issue or claim. This is reminiscent of my distinction between the weak and strong dialectics discussed in my earlier paper.

Be that as it may, my conclusion here is that Johnson's account is such as to support my working hypotheses, primarily the one about the evaluative nature of dialectics, and secondarily the one about the existence of two versions of the dialectical approach.

3. An Example of the Pragma-Dialectical Approach

My next example of a dialectical approach is Snoeck Henkemans's (1992) account of complex argumentation. I take her work to be an excellent application and elaboration of the pragma-dialectical approach of the Amsterdam school. Examining her work can also serve here as a good substitute for examining the general framework of van Eemeren and Grootendorst's approach because she deals with a relatively concrete and specific problem. The aim of her doctoral dissertation (Snoeck Henkemans 1992) was to give a pragma-dialectical analysis of complex argumentation, and in particular of the difference between multiple and coordinatively compound argumentation. Having used these terms, I should give some terminological clarification.

By complex argumentation is meant argumentation where a conclusion is supported by more than just a single reason, either in the sense that two or more reasons are given to support the conclusion, or in the sense that the reason which directly supports the conclusion is itself in turn supported by another reason. When two or more reasons support the same conclusion, the reasons may be completely independent of one another or inter-related to some extent. Snoeck Henkemans, following the Amsterdam school, speaks of "multiple" argumentation when the two or more reasons are completely independent. This case corresponds

to what other scholars call convergent or independent reasons. When the two or more reasons are inter-related, she speaks of “coordinatively compound” argumentation; this corresponds to what others call linked, interdependent, cumulative, or complementary. When a reason that supports the conclusion is itself supported, she calls this case “subordinatively compound” argumentation; it corresponds to what others call serial structure or chain arguments. As if such terminological confusion were not enough, it ought to be remembered that the Amsterdam school also speaks of a “standpoint” to refer to a conclusion, and of an “argument” to refer to a reason.

One of Snoeck Henkemans’s (1992: 85-99) main accomplishments is to examine how these various structures result from various kinds of dialogue in which the proponent is involved in answering various kinds of criticism. In particular, multiple argumentation results when the proponent accepts some criticism of a premise and offers a new reason for the conclusion. Subordinatively compound argumentation results when the proponent tries to answer criticism of the acceptability of a premise. Coordinatively compound argumentation results when the proponent tries to answer criticism of the sufficiency of a premise. The case of criticism of the relevance of a premise generates subordinatively compound argumentation in which a reason is given for the unexpressed premise linked to the explicit reason.**[ii]**

This analysis is for the most part interesting, intelligent, and plausible. But I want to offer some critical observations. First, I would say that the upshot of Snoeck Henkemans’s analysis is to show primarily that and how complex argumentation is an attempt to overcome criticism of the conclusion, understanding that the criticism may be actual or potential. Now, I believe this thesis to be essentially correct, but it seems to me that it advances the evaluative approach more than the dialectical one. That is, it tends to show how argumentation is essentially a form of evaluation. I do not deny the presence of the dialectical element in the sense of dialogue, but I wish to stress that the purpose of the dialogue is to elicit evaluation. Thus, if the evaluation can be elicited by the proponent’s imagining of potential objections, then the dialogue is not essential. Of course, one may then speak, and the proponent of the dialectical approach do speak, of an internal dialogue, but that is just a manner of speaking.

Another striking aspect of Snoeck Henkemans’s analysis is that it exploits the notions of acceptability, sufficiency, and relevance of a reason or premise. In a sense what she is doing is to take these notions as relatively unproblematic, and

to analyze complex argumentation in their terms. Although this is valuable, there is a difficulty here stemming from the fact that it is not always clear whether a given criticism is directed at the acceptability, or the sufficiency, or the relevance of a premise. This in turn implies that, despite its theoretical elegance, this theoretical framework is not too useful as a practical instrument for the analysis and understanding of actual argumentation.

A related difficulty stems from the artificiality of the dialogical situations examined. These dialogues are artificial in the sense that they are too atomistic. That is, like other proponents of the dialectical approach, Snoeck Henkemans tends to consider dialogues where the interchange involved bits of discourse that are too small to be realistic. The more realistic situation is one where the basic unit of discourse in a dialogue is already an instance of complex argumentation and the interlocutor's criticism is itself another complex argument. To determine how the two relate requires that we begin with a non-dialogical analysis of each discourse, along the lines of what proponents of the dialectical approach would label a structural approach. This suggestion will be illustrated presently.
The critical conclusion suggested here is that Snoeck Henkemans's analysis is not primarily dialectical but evaluative insofar as it is correct, and it is inadequate insofar as is is primarily dialogical.

4. Walton on the Dialectical Approach
In his latest book entitled *Argument Structure: A Pragmatic Theory,* Douglas Walton (1996) offers many insights which are beyond the scope of the present paper. One line of argument is, however, directly relevant; it is found in the first two chapters. There, Walton seems to argue that the dialectical approach is needed in order to properly distinguish argument from reasoning on the one hand and from explanation on the other.
He begins by admitting that argument is a special case of reasoning, namely reasoning which fulfills the probative function consisting of premises supporting a conclusion. But he claims that such probative reasoning must be viewed in a dialectical context. Doing this requires understanding that the probative function can be fulfilled in several different types of dialogue: critical discussions, negotiations, inquiry, deliberation, quarrels, and information seeking. In Walton's own words, "what is characteristic … in all these contexts, is the existence of a proposition that is unsettled, that is open to questioning or doubt, and open to being settled by a dialogue exchange between (typically) two parties" (Walton

1996: 26).

Similarly, in regard to the distinction between argument and explanation, Walton aims to improve the best textbook definitions by adding a dialectical element. He regards as basically right the criterion advanced by Copi and Cohen (1990) which says the following about an expression of the form "Q because P": "If we are interested in establishing the *truth of Q* and P is offered as evidence for it, then '*Q because P*' formulates an argument. However, if we regard the truth of Q as being unproblematic, as being at least as well established as the truth of P, but are interested in explaining *why Q is the case*, then '*Q because P*' is not an argument but an explanation" (Copi and Cohen (1990: 30). Walton objects that this applies only to critical discussions, and that in order to generalize the test one must ask two questions about the proposition at issue, namely:

1. Does the respondent doubt it or disagree with it, implying an obligation on the part of the proponent to support it with premises that provide reasons why the respondent should come to accept it as a commitment?
2. Is the proposition one the respondent is prepared to accept (or at least not to dispute), but desires more understanding of why it is so, or lacks clarification about it? [Walton 1996: 62]

It might seem as if there is an irreducible dialogical element here. This is especially true for those troublesome cases which have been advanced by various scholars as instances of reasoning which can be both arguments and explanations. However, Walton himself makes a number of qualifications the upshot of which is to suggest that the dialectical context is not that important after all, but may be mere window dressing on probative reasoning (for the distinction between reasoning and argument) and on the questionability of Q (for the argument-explanation distinction). In Walton's own words:

Although this dialectical test focuses on the presumed attitude of the respondent (according to the evidence of the text of discourse in the given case), what is basic is the underlying type of conventionalized speech act and type of dialogue both participants are supposed to be engaged in. It is not the proponent's, or the respondent's, purpose that is the key to the argument-explanation distinction. It is the goal of the type of dialogue they are supposed to be engaged in, as a conventional type of social activity which has normative maxims and principles.

Explanation is one type of activity, argument another. But the key to testing in a given case is to look for the element of unsettledness … as indicated by the context of the discourse [Walton 1996:63].

My conclusion about Walton's work is that his primary interest seems to be dialogues: to study their nature, structure, types, and so on. It is not surprising that such a study exhibits a deep dialectical component. Nor is it surprising that it leads Walton to study the relationship between dialogues and other things such as arguments, fallacies, and so on, and thus to study the dialectical elements of these other things. But such dialectical elements are things seen one when one is wearing dialogical glasses. One can choose to wear monological glasses, and then, for example, argument becomes probative reasoning, and the difference between argument and explanation becomes a matter of whether in "Q because P" the truth of Q is contextually problematic. This conclusion, of course, supports my first working hypothesis.

5. Examples of Concrete Argumentation

As a further test of my working hypotheses, I now want to examine some actual cases of argumentation. They are taken from *The Federalist Papers*, a work which is certainly well known as a crucial document of American history and as a classic of political theory, but which is largely unappreciated and little studied as a source-book of argumentation and material for argumentation theory. Yet, I would go so far as to say that it has few rivals in this regard as well.

There is no question, of course, that the context is one of a critical discussion, the main issue being whether not the U.S. Constitution should be ratified. The essays were written in 1786-1787, immediately after the constitutional convention in Philadelphia had written a constitution, which was then being considered for ratification by each of the original thirteen states. There is also no question of the dialogical, and to that extent dialectical, context in which pro-constitution arguments contained in *The Federalist Papers* were being advanced. However, to what extent the various ideas of the proponents of the dialectical approach are applicable remains to be seen.

Let us also readily admit that the authors of the federalist essays (Alexander Hamilton, James Madison, and John Jay) behave as good arguers in Ralph Johnson's sense discussed above. That is, the federalists not only advance reasons and evidence favoring the ratification of the constitution, but they examine, criticize, and try to do justice to the objections and counter-arguments. But this same fact also shows that they are taking evaluation seriously, that they conceive their task of arguing for the constitution as involving inference, but also as involving evaluation. They know that to be effective they have to discuss the

arguments on both sides, but rather merely "present" the arguments, they have to evaluate them. We can also agree with Johnson that this evaluative (or "dialectical") requirement has to be used with care, and that there would be contexts in which it may be too harsh to apply it. A beautiful illustration of this problem is provided by what is perhaps one of the most ingenious of the federalist arguments, namely Madison's argument that a large republic is more likely to controls the harmful effects of factions and the tendency for a tyranny of the majority.

Madison's own words are worth quoting:
The other point of difference is
a. the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders
b. factious combinations less to be dreaded in the former than in the latter.
c. The smaller the society, the fewer probably will be the distinct parties and interests composing it;
d. the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and
e. the smaller the number of individuals composing composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.
f. Extend the sphere and you will take in a greater variety of parties and interests;
g. you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or
h. if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.
i. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.
j. Hence it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic – is enjoyed by the Union over the States composing it.
k. In the extent and proper structure of the Union, therefore, we behold a republican remedy to the diseases most incident to republican government [Rossiter 1961:83-84].

Suppose someone were to criticize this argument by objecting that it is flawed because it does not even mention the problem that, for example, the constitution (allegedly) violates the principle of the separation among branches of government (insofar as federal judges are appointed by the executive branch). The latter objection was, of course, an argument against ratification, and the federalists did answer it in another paper (No. 47). However, what would be the point of criticizing this particular argument for this reason? The only thing such a criticism would accomplish would be a reminder that there are other issues that need to be examined besides the advantageous effects of size in regard to factions and majorities. In other words, the criticism would remind us that the argument in question is not conclusive, that by itself it does not establish the conclusion beyond any reasonable doubt. But this limitation would be easily granted by the federalists; indeed, it is implicit in the context. Thus, we may say that the criticism would be too weak, almost worthless.

This passage is also a good illustration of the problem of distinguishing explanation and argument. For this purpose, let us begin by noting that the argument supports its conclusion by explaining how and why the situation it describes would come about from the situation described in the premises. The passage basically examines the effects of a republic's size on the the composition and behavior of factions and majorities, arguing that a large size produces greater justice and less abuse of power. This is similar, though more complex that the two examples from Stephen Thomas which Walton discusses. I believe that unlike Thomas, Walton would regard the passage as an argument and not an explanation. And I would agree with Walton. Despite the presence of explaining in the arguing, we do not have an explanation. And we do not have an explanation because the context is such that the issue is precisely whether or not large size has this claimed beneficial effect. On the other hand, despite the debate over ratifying the constitution which is in the background, I do not think we need to appeal to any dialectical or dialogical principles to arrive at this interpretation of the passage.

Finally, the passage can also serve as an illustration of the relative merits of the "structural" and the dialectical approaches in analyzing the complex structure of an actual piece of argumentation. It might seem that the question whether the passage is an instance of single or multiple argumentation would be easiest. If we try to apply any dialectical principles of analysis, such as those of Snoeck Henkemans discussed above, the first thing we realize is that we need to have

identified a conclusion. Next, we need to identify at least two other propositions, each of which in some sense supports the conclusion. Then the dialectical questions would be whether the proponent accepts criticism of one but not of the other(s), or is trying to answer criticism of the sufficiency of each premise. Now, in the passage quoted above, in order to make any progress at this point, we would have to consider the first full sentence (a-b) as a conclusion and the second full sentence (c-d-e) and the third full sentence (f-g-h) as being each single propositions supporting the first (despite the fact that they each contain three clauses); and then the dialectical questions could plausibly be answered by saying that each full sentence is open to a potential charge of insufficiency.Thus the second and third sentences constitute coordinatively compound reasons supporting the first. The fourth sentence (i) might be taken as anticipating criticism of the acceptability of the third one; thus the two of them constitute a "subordinatively compound" structure. In regard to the fifth (j) and sixth (k) sentence, the most natural thing to say would be that (j) is a further conclusion supported by (a-b) and (k) a further conclusion supported by (j). However, in Snoeck Henkemans's dialectical terminology, we would have to say that (j) answers or anticipates a criticism of the acceptability of (k), and (a-b) answers or anticipates a criticism of the acceptability of (j). Such dialectical terminology might be taken to be passably adequate. However, I suspect that such terminology can be seen to make sense only after the fact, namely to justify an analysis arrived at by other, more structural means.

In any case, one may also raise questions whether the rules are even passably adequate. The following passage can illustrate this point. It comes from the first federalist paper, where Hamilton outlines his plan for supporting the ratification in the subsequent essays. At one point he gives the following summary of the arguments to be developed:

My arguments will be open to all and may be judged by all. They shall be at least offered in a spirit which will not disgrace the cause of truth. I propose, in a series of papers, to discuss the following interesting particulars: – [l] The utility of the UNION to your political prosperity – [m] The insufficiency of the present Confederation to preserve that Union – [n] The necessity of a government at least equally energetic with the one proposed, to the attainment of this object – [o] The conformity of the proposed Constitution to the true principles of republican government – [p] Its analogy to your own state constitution – and lastly, [q] The additional security which its adoption will afford to [q1] the preservation of that species of government, to [q2] liberty, and to [q3] property. In the progress of this

discussion I shall endeavor to give a satis-factory answer to all the objections which shall have made their appearance, that may seem to have any claim to your attention [Rossiter 1961: 36].

What is the structure of this reasoning?

First let us note that the conclusion is not explicitly stated in this passage, but it is easily formulated; it is that the constitution should be adopted. To make a long story short, I would say that (m) and (n) are coordinatively compound; that (l) and (m) are linked, and so are (l) and (n), that is, each pair is more intimately interdependent than is the case for coordinative compounding; and that there are five independent reasons, namely (l-m-n), (o), (p), (q2), and (q3).

In other words, here we have a case of "multiple argumentation", where several independent arguments are given to support the ratification of the constitution. Yet the Amsterdam dialectical rules do not apply. It would be incorrect to say that the federalists accept (as valid) any criticism of the reasons given; they rather are aware of such criticism and try to answer it. Several distinct reasons are given not because the federalists think that any of them is invalid, but because none of them is sufficient. Why then, Snoeck Henkemans might ask, not regard the whole passage and the whole case in favor of the constitution as an instance of coordinatively compound, rather than multiple, argumentation?

There are two reasons for this. First, the five distinct arguments seem to me as different from each other as any arguments are which support the same conclusion. Thus, if this is not multiple argumentation, I doubt any would be. Second, even if we regarded the whole argument as a single one, and the various reasons as merely coordinatively compound, then we would need to make distinctions among different kinds of coordinative compounding. One kind would be that illustrated by the relationship among (l-m-n), (o), (p), (q2), and (q3); another would be illustrated by (m) and (n), or to be more precise by (l-m) and (l-n); a third one by (l) and (m) and by (l) and (n). Regardless of the labels used, the three kinds of relationships are different.

6. Conclusion

There seem to be theoretical-conceptual difficulties, as well as practical ones, with the dialectical approach. The theoretical difficulties cluster around such questions as the following. What is the relationship between actual and potential dialogue? Is actual dialogue really necessary for a dialectical approach? Is potential dialogue sufficient? Must we not make a distinction between atomistic

dialogue consisting of an exchange of small units of discourse such as sentences or words, and more realistic dialogue consisting of the exchanges of relatively long pieces of structured discourse? If and to the extent that the latter is primary, does not the structuralist alternative to the dialectical approach acquire primacy? What is the role and importance of the resolution of disagreements, as contrasted with their clarification?**[iii]** What is the role of criticism and evaluation in the dialectical approach? What is the role of evaluation in argumentation? Is argumentation anything more than inference-cum-evaluation? Is an argument anything more that the defense of a claim from actual or potential objections?

The practical difficulties with the dialectical approach are that its application to actual argumentation suffers from many limitations. This appears to be true even when such argumentation occurs in the context of actual debates, dialogues, and controversies. None of this is meant to suggest that the dialectical approach should be abandoned. On the contrary, this criticism is offered in the hope that by taking it into account, the dialectical approach can become better and stronger.

NOTES

i. In their new work, Fisher and Scriven (1997) elaborate an account of critical thinking which they label the 'evaluative' conception. I am inclined to think their work could be utilized to add further support to this hypothesis.

ii. Although Snoeck Henkemans criticizes the account advanced by James Freeman in some of his earlier papers, her own account is more similar to the one advanced in Freeman's (1991) book on the topic.

iii. This type of issue is similar to that treated by Tannen (1998) under the label of "debate versus dialogue."

REFERENCES

Barth, E.M., and E.C.W. Krabbe (1982). *From Axiom to Dialogue*. Berlin: Walter de Gruyter.

Blair, J.A., and R.H. Johnson (1987). Argumentation as Dialectical. *Argumentation* 1, 41-56.

Copi, I.M., and C. Cohen (1990). *Introduction to Logic*. 8th ed. New York: Macmillan.

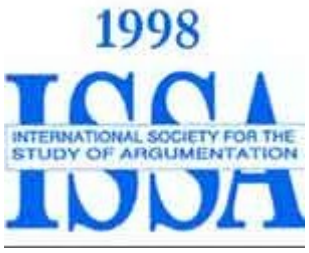
Eemeren, F.H. van & R. Grootendorst (1992). *Argumentation, Communication, and Fallacies: A Pragma-Dialectical Perspective.* Hillsdale, NJ: Lawrence Erlbaum Associates.

Eemeren, F.H. van & R. Grootendorst, eds. (1994). *Studies in Pragma-Dialectics.*

Amsterdam: International Centre for the Study of Argumentation.
Eemeren, F.H. van, R. Grootendorst, & F. Snoeck Henkemans, eds. (1996). *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments.* Mahwah, NJ: Lawrence Erlbaum Associates.
Finocchiaro, M.A. (1995). The dialectical approach to interpretation and evaluation. In: F.H. van Eemeren et al. (Eds.), *Perspectives and Approaches: Proceedings of the Third ISSA Conference on Argumentation* (vol. 1, pp. 183-95), Amsterdam: International Centre for Study of Argumentation.
Fisher, A., and M. Scriven (1997). *Critical Thinking: Its Definition and Assessment*. Point Reyes, CA: Edgepress; and Norwich, UK: Centre for Research in Critical Thinking.
Freeman, J.B. (1991). *Dialectics and the Macrostructure of Arguments*. Berlin: Foris Publications.
Johnson, R.H. (1996). *The Rise of Informal Logic.* Newport News, VA: Vale Press.
Rossiter, C., ed. (1961). *The Federalist Papers*. New York: Mentor Books.
Snoeck Henkemans, A.F. (1992). *Analysing Complex Argumentation*. Amsterdam: SICSAT.
Tannen, D. (1998). *The Argument Culture: Moving from Debate to Dialogue*. New York: Random House.
Walton, D. (1996). *Argument Structure: A Pragmatic Theory.* Toronto: University of Toronto Press.

ISSA Proceedings 1998 – Truth And Justice In Mass Media Reporting And Commentary: Serving More Than One Master In

American Adversarial Contexts



1. Background

When writing for the mass media, reporters must usually explain complex matters in simple terms (Fiordo, 1997). Were media reporters to explain complex matters in complex terms, they would employ a style generally unsuited to their audiences. Writing for the mass media requires a style that is plain and direct (Roth, 1997; Harrigan, 1993). Although the principle of clarity is frequently violated for commercial and thematic media purposes, plainness remains a primary criterion of style (Kennedy, Moen & Ranly, 1993; Knight & McLean, 1996). Mass media writing should also have substance and be ethical (Zelezny, 1996).

A problem existing in American mass media reporting and commentary is analyzed in this paper. Two cases are used to illustrate a difficulty that surfaces frequently in American journalism. While this same troublesome condition may occur in the journalism of other countries, its manifestation in US journalism alone is examined here. For this study, 127 American television news broadcasts were viewed and 132 American newspaper and magazine articles read. All had content pertaining to the problem addressed. Because of its straightforward use in journalism (Kennedy, Moen & Randy, 1993), general semantics has been selected for this analysis. General semantics separates reports from inferences and judgments.While reporters utilize all three, the most heavily weighted should ideally be the report. The report is a statement verifiable through our senses (or the scientific extensions of our senses). An inference is a statement about the unknown made on the basis of what is known. And, a judgment is an evaluative or emotive statement highly autobiographical in its function. Reporters will be understood in this paper to be writers or speakers who ideally communicate to us through reports primarily and inferences and judgments secondarily (Hayakawa & Hayakawa, 1990). Reporting and commentary are thus distinguished through higher frequency of inferences and judgments in commentary.

Subsequently, the reporter might construct an accurate and just account of the facts related to a topic or issue. The account should take the context of the facts into account (whether the context is the field of medicine, law, education, or whatever). Without reference to a context, we lack appropriate standards. What a statement means in relation to one set of criteria depends in part on what it

means in relation to some context (Morris, 1964; Albrecht & Bach, 1997, 153). For example, a woman speed skater in the Nagano Olympics had to cover 500 meters in 39 seconds or less to win an Olympic medal; however, a woman speed skater in a regional 500 meter race may win a medal with a time of 47 seconds or less. Apart from the context of Olympic versus regional competition, the time would have a limited meaning since the context would be undefined. We would merely know the time it takes a particular female skater to cover 500 meters. In a medical report about reducing sodium in our diets, a "lite" soy sauce with 540 milligrams per tablespoon would be endorsed over one with 1130 milligrams per tablespoon. However, the diet of people with hypertension might require that soy sauce be avoided entirely. So, a 65 year old woman with a threatening case of hypertension may have to minimize sodium from all sources while a 20 year old female with no health problems may be able to consume an all-you-can-eat salty supper with minimal risk.

Truth is a term frequently used in the rhetoric of reporting. While reporters can address what has been verified (or what is verifiable) without violating journalistic ethics (Geib & Fitzpatrick, 1997), they might best construct the information available to them in a valid, fair, and accurate context. Much professional reporting is reasonable: for example, the reporting of Bill Moyer, Catherine Crier, or Bill Gaines. I target here, however, reporting that does not:
1. acknowledge neutrally and uncritically (yet realistically) that some information is classified and unavailable to the public at the time of reporting,
2. let the public know that some information is confidential and justly so,
3. explain to the public that some confidential information cannot be shared without sacrificing justice,
4. note the information being reported is speculative or premature, and
5. emphasize that professionals in law and media serve competing goals-that is, more than one master.

Acknowledging in an American context the tensions between the disclosure of truth and the implementation of justice constitutes a major theme of this paper. Proceeding with a respect for media reports, I urge here that in the US, reporting that deals heavily with legal matters should enlighten the public to the complexities of the US judicial system and legal principles with respect to the shared guidelines of truth and justice. Facts and constitutional protection must both be weighed. Rather than placing truth at the top, media reporters might

more accurately place truth counterbalanced by justice at the top. Claims of reporters should display the data, warrants, and backing (Toulmin, 1958; Toulmin, Rieke and Janik, 1984; Eemeren, Grootendorst & Henkemans, 1996) for statements pertaining to law and fact.

2. Communication and Law

Although the field of communication and media law has developed worthy texts (Overbeck, 1998; Matlon, 1988; Zelezny, 1997), the pursuit of a concern with truth and justice must extend itself beyond these useful texts to texts from the field of law per se. While legal education in liberal arts curriculum has precedents in American higher education, such courses are not generally available. As regards journalists, legal communication eductors (Gillmor, Barron & Simon, 1998) hold that while a "basic understanding of the law governing the press is essential," no journalist should be (or is) "expected to play the role of lawyer in deciding whether or not to publish."

Journalists who understand the law and legal system may foresee potential problems. Once a journalist identifies a potential legal problem, such as libel, a lawyer can be consulted to determine the litigation risk (xxi). Since journalists often report on legal matters, knowing legal materials and research becomes crucial. Like lawyers, journalists can find the "cases, statutes, treaties, and other sources of law" that will prove useful (xxii) in reporting. Pember (1998) asserts that no nation may be "more closely tied to the law than the American Republic." In the US, "law is a basic part of existence" (2). While technically it is incorrect to discuss the US judicial system (since there are 52 different judicial systems – one for the federal government, one for the District of Columbia, and one for each of the 50 states), due to their similarity and for convenience, the US judical system will be addressed (15).

Since reporting truth with justice depends on a free press, a brief review of freedom of expression is in order. Courts have ruled that free speech presupposes civility and good behavior; it may not serve as an instrument for abuse or inciting violence. Also, courts have ruled that if a decision is made in terms reasonably carrying more than a primary meaning, a court will assign the meaning that least interferes with the rights and liberties of individuals (Butcher, 1992, 308). The freedom of expression allowed in the US and a few dozen other democracies is unique in world history (Lijphart, 1984). Leaders of many countries place national or personal security above the freedom of their citizens. Mass media reporting is but a tool for propaganda or national development a weapon against rivals. Some

leaders still censor the mass media directly as well as arrest, torture, and murder mass media reporters. Governments may also control the media through subsidies the media need to survive, thereby weakening or destroying editorial independence (Overbeck, 1998, 32). Free expression for the public media have been earned through tragic efforts; this legacy is respectable. However, with free expression comes media reporting that expresses complex matters in ways which obscure truth and justice as well as in simplistic ways which distort or falsify truth and justice. Justice in the present context means US justice.

3. Legal Ethics and Professional Responsibility in the US Adversarial System

Truth with the restriction and discipline of justice may best guide reporters. Neither truth nor justice alone, but truth tempered by justice or facts bridled by law, might best serve as the ground for reporting. To hold truth up without its counterbalancing from US law, especially constitutional law and the American Bar Association's Principles of Professional Responsibilities (1987), may work against accurate and lucid reporting .

Legal godterms can be clarified and confusion reduced. The practice of the US adversarial system offers hope for clarifying theoretical confusion. Whether lawyers or judges comment on the godterms in the practice of law, the practice of law has to integrate the competing values of truth and justice. In asserting that "our adversary system rates truth too low among the values that institutions of justice are meant to serve," Judge Frankel (1980, 100) reminds us that truth is but one value. In fact, he adds that many of the rules and devices of adversary litigation are suited to "defeat the development of the truth" (102). Since interested parties employ lawyers, the adversarial process "achieves truth only as a convenience, a by-product, or an accidental approximation." Furthermore, Frankel holds the business of a lawyer is to "win if possible without violating the law." The goal of lawyers is "not the search for truth as such" because "truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time" (103). In short, the metaphor of the "hired gun" embodies the "substance of the litigating lawyer's role." So, although the "discovery of the truth," according to Frankel, might best serve as a lawyer's paramount commitment in principle, the "advancement of the client's interests" reigns in practice (115).

Contrary to Judge Frankel's view is Professor Freedman's stand on truth and justice (Freedman, 1975). Referred to by Judge Frankel (1980, 113) as the "earnest and idealistic scholar who brought the fury of the (not necessarily

consistent) establishment upon himself when he argued in our adversarial system for values that compete with truth over truth as a singular value." Freedman argued on theoretical as well as practical grounds for truth and its tempering values of justice, defense, liberty, and winning.

In the US adversarial system, a trial is in part a search for truth. However, the individual has several fundamental rights: a counsel, a trial by jury, due process, and the privilege against self-incrimination. These basic rights serve as "procedural safeguards against error in the search for truth." A trial thus is "far more than a search for truth" since our constitutional rights "may well outweigh the truth-seeking value": in fact, these rights and others "may well impede the search for truth rather than further it" (2). Our system requires that certain processes be followed which ensure the dignity of the individual, irrespective of their impact on the determination of truth (3). Freedman sees truth as a basic value in the adversarial system. While he maintains that truth-seeking techniques include "investigation, pretrial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence in summation," he emphasizes that since our society honors an individual's human dignity, truth-seeking is not an absolute. On occasion, truth may be subordinated to values that are situationally important: for example, the Fifth Amendment's privilege against self-incrimination or the attorney-client privilege of confidentiality (4-5).

Freedman extends his case to support: (l) the zealous advocate who will let justice prevail for a client though the heavens fall if justice requires they do (9-11), (2) the keeping of secrets between lawyer and client even to the point of supporting a client on a testimony the lawyer knows will constitute perjury (28-31), and (3) making the truthful witness through cross-examination appear to be mistaken or lying (43-45). To prevent the lawyer-client relationship from being destroyed, these constitutional rights must be preserved: counsel, trial by jury, due process, and the privilege against self-incrimination (5-6). In the corroborative words of Norton, lawyers serve "more than one master" and have a primary duty to pursue truth and justice (Norton, 1980, 261).

The American Bar Association Model Rules of Professional Conduct, adopted by the ABA House of Delegates on 2 August 1983 and amended repeatedly (ABA, 1995), supports the complex view that lawyers serve more than one master or that adversarial law has godterms, such as justice, that compete with truth. Rule 1.6 deals with the confidentiality of information. While a lawyer may reveal information to the extent the lawyer believes is necessary to prevent the client

from committing a criminal act, a lawyer should not reveal information about a client unless the client consents with the exception of specified disclosures (20). Confidentiality applies not only to matters the client communicates in confidence but also to the information tied to the representation regardless of its source (21). In Rule 3.3 on candor toward a tribunal, a lawyer should not take a false statement or offer false evidence. However, in some jurisdictions a lawyer may have a client testify even if the lawyer knows the testimony will be false. The disclosure of perjury is subordinate to constitutional rights to counsel and due process (62-65).

4. Public Communication and Mass Media

Unlike fiction, the law usually lacks an omniscient author of wrongs and remedies. In stories acted out by stars like Clint Eastwood and Chuck Norris, we witness the wrong and then see the heroes remedy it. When wrongs come before lawyers, judges, and juries (none of whom are witnesses), no omniscient author is available to resolve the dramatic conflict in the style of a 30 to 90 minute program or movie. The facts have to be constructed and the law observed. Truth and justice, balanced against one another, may be pursued to untangle the confusion and complication of media accounts. The significant difference between facts and law needs clarification. The facts are "what happened," and the law is "what should be done because of the facts" (Pember, 1998, 15).

In this final section, the notion that lawyers must bow to several godterms in their professional practice of law is applied. Media reporters might best acknowledge these complications to advance the validity of their accounts. Two cases from legal reporting will help demonstrate the perspective presented in this paper. Because media writers have such high profiles in the reporting of legal events, they receive my attention here. Media writers, however, may communicate legal information generally better than most lay professionals interested in disseminating such information. The journalist as an ethical professional is respected.

In reporting the fatal shooting on 31 December 1989 of Kevin Weekley in rural East Grand Forks (Black, 1998, 1C), the reporter tells us who were charged in this murder investigation, the charges that each faced, and the remaining charges of first and second degree murder. The reporter asserts that on 15 July 1997 half the charges faced by the four defendants were dropped because the statute of limitations had expired. While the law allows for the defendants to have rights

and privileges, the knowledge of these rights and privileges are assumed by the writer rather than explained. The reader untrained in the law might know something about statutes of limitations but might also benefit from a line or two putting their legality in context. A sequel to this murder case (Black & Copeland, 1998, 1C) continued to cover the dramatic elements more instructively than the legal aspects. A female witness in the Weekley murder trial told police in Mandan, North Dakota that a white male grabbed her as he entered the back door of her apartment, threw her to her knees, and delivered this harsh message: "If you testify, you die." A real life drama with greater power than a fictional drama falls short of an adequate legal explanation with backing. While the story was reasonably well written, I believe it would have been stronger had the legal rules favoring any defendant been mentioned. Instead, an attorney for one of those charged with Weekley's murder is quoted as admonishing: "You have to remember that almost all of the witnesses are part of the underworld." The truth and the law need further attention here, and this story has, I believe, been reported better than most.

Turning from one of North America's favorite media themes to another, we move from violence to sex. As regretful as I am personally to give President Clinton's sex scandal any more coverage, the case with Monica Lewinsky will allow for a ready elucidation of truth and legal tensions in untangling media reports. If the public generally needs legal education from its media writers, in this case, the failure to provide the legal context of the journalistic coverage challenges journalistic and public relations ethics (Seib & Fitzpatrick, 1997; Seitel, 1995) with all respect due US federal freedom of information laws. As Overbeck (1998) reminds us, without freedom to gather news, freedom to publish amounts to little more than a "right to circulate undocumented opinions-a right to editorialize without any corresponding right to report the facts." For democracy to work, we must be knowledgeable of our government and have access to its open meetings and records (303).

Granting restrictions in the US Freedom of Information Act and loopholes in US Government in the Sunshine Act, millions of documents have become public and some private meeting doors have opened (303-304). Putting aside for now issues connected with any president's personal sex life as being legally open or sheltered, we will look at the Lewinsky-Clinton sex scandal as portrayed in a nationally respected magazine with respect to untangling truth and justice.

One subtitle in a "special report on Clinton's crisis" reads: "A tangled web of

politics, seduction and litigation." The article suggests a hopeful untangling it might accomplish (Gibbs, 1998, 21-33). Instead, the article, better written than most, presents the dramatic characters in several acts. The accounts of the events and facts derive largely from undocumented or partially documented opinions and many unsubtantialed claims. Readers are invited to share gossip on the alleged, sordid acts of President Clinton. We might, argumentatively speaking, appreciate the account more if it had factual over narrative value. The article shares a story with us: a story based on claims with sketchy or no evidence, a story that celebrates fiction for sales over evidence for justice. The opportunity to be a popular novelist shadows the opportunity to be a just reporter. Perhaps, the authors, being denied access to enough sources and facts, exercise their right to editorialize without exercising their responsibility to report facts. So, the authors choose to circulate views predominantly undocumented. The partisan accusations flourish while open inquiries wane. Rather than being enlightened with evidence, the readers receive a polemic on the evils of this Presidency. The quest for truth and justice has faded. The public is finessed into jumping on the oppositional bandwagon. Hearsay and speculation reign. As a commentator and citizen who appreciates facts over fiction and justice over bias, I would favor reporting that untangles false and irrelevant material from true and relevant material. This article weaves elements of fact with fiction so artistically that the effort has to be sifted through many filters to result in the actual sand of truth and justice desired. In one part of the coverage, the author reports: "Lewinsky is graphic in detailing, and at times denigrating, the President's sexual characteristics and performance." The author adds: "Lewinsky jokes that if she ever got to leave her job at the Pentagon and return to the White House, she would be made "Special Assistant to the President for b j " (22). In a related article describing these allegations, another author (Kirn, 1998, 30) affirms two passions of President Clinton: one "alleged passion is for fellatio" and the "second, proven, passion (warning: pun ahead) is for cunning linguistics." Both authors present numerous inferences and judgments as compared to reports. Facts not being convenient, the report turns to emoting over informing. At one point, one of the authors (Kirn, 31) passes an opportunity to balance truth with justice. Referring to the possibility of Clinton facing impeachment proceedings, the author insults rather than instructs: "In an incredibly lucky constitutional break, the President's judge and jury will be the Senate-recently home to Bob Packwood, still home to Chuck Robb and Ted Kennedy." He then adds sarcastically: "Clinton just might find justice there. At least he'll have a jury of his peers." The author could have reported objectively

what the President's options are and who his judges will be. The role of justice in relation to truth would be one step closer to being extricated from obscurity and confusion instead of embroiled in it.

5. Conclusion

My concern in this paper has not been with media writers who are commentators aiming at influencing attitudes and changing behavior based on sound reporting. Rather my concern is to urge reporters to deliver fact over fiction and justice over insult. The media writers cited write, in my opinion, superbly for a market that requires a heavy blend of reports with inferences and judgments. Their style is highly polemical and proceeds, sometimes out of necessity, from undocumented opinions and unsubstantiated evidence with minimal allusion to the interplay of truth and justice. Perhaps, we need an alternative form of media reporting, a form that may appeal to readers and viewers who prefer to distinguish reporting clearly from commentary. Maybe we need an alternative form of journalism that labels reporting as discourse with a preponderance of reports over inferences and judgments and that labels commentary as discourse with a base in reports but a preponderance of inferences and judgments.

We might benefit from media reporting that:

1. explains in a concise and rigorous manner what is actually known at the time of writing instead of what is opined,
2. elucidates what an accused has a right to expect in the process of justice,
3. notes whether truth and fact play a major role at the time of writing, and
4. forecasts whether the adversarial process might (or definitely will) be a consequence of the allegations at the time of writing.

In conclusion, let us consider journalism in another key: one where truth and justice play a duet.

REFERENCES

Black, S. (1998). *Trial starts Wednesday*. Grand Forks Herald, January 2, 198, 1C & 4A.

Black, S. & J. Copeland (1998). "'If you testify, you die'." *Grand Forks Herald*, January 15, 200, 1C & 6A.

Butcher, M.H. (Ed.) (1992). *Fundamentals of Parliamentary Law and Procedure: The Rules of Procedure for Deliberative Assemblies.* Dubuque: Kendall/Hunt.

Eemeren, F.H. van, R. Grootendorst & F.S. Henkemans (1996). *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary*

Developments. Mahwah, NJ: Lawrence Erlbaum Associates.
Fiordo, R. (1997). *The rhetorical fashion window, English and Writing Conference,* Monticello, IL.
Frankel, M.E. (1980). The search for truth: An umpireal view. In: A. Gerson (Ed.), *Lawyer's Ethics: Contemporary Dilemmas* (pp.99-23), London: Transaction.
Freedman, M.H. (1975). *Lawyer's Ethics in an Adversary system*. New York: Bobbs-Merill.
Gibbs, N. (1998). Special Report/Clinton's Crisis. *Time*, February 2, 151 (4), 19-33.
Gillmor, D.M., J.A. Barron & T.F. Simon (1998). *Mass Communication Law: Cases and Comments*, 6th ed. Boston: Wadsworth.
Harrigan, J.T. (1993). *The Editorial Eye.* New York: St. Martin's Press.
Hayakawa, S.I. & A. R. Hayakawa (1990). *Language in Thought and Action*, 5th ed. New York: Harcourt Brace Jovanovich.
Josephson, M. (1987). *Essential Principles of Professional Responsibility*, 2nd ed. Riverside: University of California at Riverside.
Kennedy, G., D. R. Moen & D. Randy (1993). *Beyond the Inverted Pyramid: Effective Writing for Newspapers, Magazines and Specialized Publications.* New York: St. Martin's Press.
Knight, B. & D. McLean (1996). *The Eye of the Reporter*. Macomb, IL: Western Illlinois University.
Kirn, W. (1998). When sex is not really sex. *Time*, February 2, 151 (4), 31-32.
Lijphart, A. (1984). *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries.* New Haven: Yale University Press.
Matlon, R.J. (1988). *Communication in the Legal Profession*. Chicago: Holt, Rinehart and Winston.
Model Rules of Professional Conduct. (1995). Chicago: American Bar Association.
Morris, C.W. (1964). *Signification and Significance: A Study in the Relations of Signs and Values.* MA: MIT Press.
Norton, M.L. (1980). Ethics in medicine and law: Standards and conflicts. In: A. Gerson (Ed.), *Lawyer's Ethics: Contemporary Dilemmas* (pp. 259-271), London: Transactions.
Overbeck, W. (1998). *Major Principles of Media Law*, 1997-1998 ed. Toronto: Harcourt Brace.
Pember, D.R. (1998). *Mass Media Law*, 1998 ed. Boston: McGraw-Hill.
Roth, M. (1997). *Getting the Message Across: Writing for the Mass Media.* New York: Houghton Mifflin.

Seib, P. & K. Fitzpatrick (1997). *Journalism Ethics*. Forth Worth: Harcourt Brace College Publishers.
Seitel, F.P. (1995). *The Practice of Public Relations*, 7th ed. Upper Saddle River, NJ: Prentice Hall.
Toulmin, S. (1958). *The Uses of Argument*. Cambridge: Cambridge University Press.
Toulmin, S., R. Rieke & A. Janik (1984). *An Introduction to Reasoning*. New York: Macmillan.
Zelezny, J.B. (1997). *Communications Law: Liberties, Restraints, and the Modern Media.* New York: Wadsworth.