ISSA Proceedings 2014 – The Legacy Of The U.S. Atomic Superiority, Supremacy And Monopoly: Dispelling Its Illusion In Barack Obama's Berlin Speech

Abstract: The nature of the dilemma facing the world living with nuclear weapons is not technical, but political. This study reflects upon the extent to which the U.S. nuclear policy has been influenced by the mistaken assumption that the nation's nuclear supremacy should be enduring. The study focuses specifically on the speech delivered by the U.S. President Barack Obama, who calls for international cooperation on nuclear matters, in Berlin on 19 June 2013.

Keywords: Atomic diplomacy, Barack Obama, Berlin speech, nuclear policy, nuclear weapons

The nature of the dilemma facing the world living with nuclear weapons is not technical, but political. To a certain extent, the end of the cold war changed reliance on nuclear weapons into their further proliferation. On the one hand, in negotiations between the United States and Russia, the desire to reduce dependence on nuclear weapons corresponds with the determination to cut back on either their number or variety. On the other hand, atomic diplomacy holds on to the position of strategic superiority. This study reflects upon the extent to which the U.S. nuclear policy has been influenced by the mistaken assumption that the nation's nuclear supremacy should be enduring. The study focuses specifically on the speech delivered by the U.S. President Barack Obama, who advocates international cooperation on nuclear matters, in Berlin on 19 June 2013.

The U.S. nuclear supremacy has been founded upon a "popular fallacy"- a cause of the false sense of security and power. Nuclear weapons after the destruction of Hiroshima have not yet convincingly proved themselves to be an asset. However, the atomic superiority has locked the U.S. administration into a policy of trying to

outrace other nations in the development of new and more means of mass destruction. Such efficaciousness in diplomacy as much as unforeseen events might lead to another fallacious assumption concerning the utility of nuclear weapons. That is, their alleged capacity to avert military confrontations. Since the collapse of its atomic monopoly in 1949, the experience of the U.S. foreign policy has confirmed that nearly the opposite of these political assumptions is true. Nevertheless, it survives as myth to the present by giving impetus to the nuclear arms race.

1. *The end of the U.S. moral leadership*

A month after the uranium bombing of Hiroshima, on 12 September 1945, the *New York Times* article, "Atomic Bomb Responsibilities," questioned whether the U.S. sacrificed its moral leadership of the world for the achievement of the atomic fission (Baldwin, 1945, p. 4). Regardless of the validity of arguments that try to make war moral, the scientific achievement of manufacturing the atomic bomb changed the world. Even though Defense Secretary Forrestal described the duration of the U.S. nuclear monopoly as the "years of opportunity," the emphasis of monopoly on secrecy discouraged the U.S. administration from taking progressive steps for the international control of atomic energy. Instead, the U.S. monopoly encouraged its strategic thinking and planning to hold on to its political, diplomatic and military advantage.

Taking for granted the Soviet large conventional forces, the United States relied heavily on nuclear weapons in its defense and alliance policies. As a matter of fact, the threat of the atomic bomb was institutionalized in the U.S. military doctrine, and even in its operational planning. On the one hand, the United States is the only country that actually used the bomb, giving such reasons as patriotism, the advancement of science and technology, and the protection of the free world. On the other hand, the United States had no justification for integrating the atomic bomb into its foreign policy because it had come into being not as a result of open debate, but as the result of a secret project (Mendelsohn, 1990, p. 343). Wartime security indeed prevented the members of Congress from knowing the Manhattan Project – not to mention its funding hidden in the military budget. Overall, that the threat of the atomic bomb came to be the U.S. master card in diplomacy turned out to be a *fait accompli*.

After failing to reshape the real world in the nuclear age, the United States had to keep reviewing its nuclear strategy significantly in response to changing

technologies, advancing nuclear weapons, and evolving political contexts. In spite of its primary responsibility for safeguarding public health and safety from the hazards of the peaceful application of nuclear energy, the U.S. Atomic Energy Commission (AEC), a predecessor of the Nuclear Regulatory Commission (NRC), thus promoted the viewing of a nuclear test as an exciting holiday event. Such an official attempt to celebrate the status of the nuclear power resulted in more than 200 atomic explosions above ground with witnesses present between 1945 and 1962.

These explosions went beyond sublimity to sheer terror, leaving trauma and a life of radiation poisoning as much as for the victims at Hiroshima and Nagasaki. As the U.S. federal agency continued to insist the nuclear tests were safe, thousands of civilians who lived downwind of the AEC's Nevada test site – in Arizona as well as in Nevada – were subjected recurrently to radiation exposures for two decades. In spite of its unique position of power and responsibility in history, the U.S. government integrated the atomic monopoly to its strategy for containing Soviet expansion with wishful thinking.

With the end of the cold war, mutual nuclear deterrence embedded in the bipolar structure came to be dysfunctional as a legitimate practice in making a stable hierarchical nuclear world order. During the opening decade of the atomic age, the United States and the Soviet Union issued nuclear threats. The U.S. officials seriously considered using nuclear weapons until the 1962 Cuban missile crisis (See Betts, 1987), which was to repulse the Soviet threats by the U.S. atomic deterrence. Moreover, the antinuclear stand of many developing countries promoted disarmament politics at the United Nations (UN) general assembly. Such Third World movements failed to delegitimize nuclear weapons either as "weapons of mass destruction" or as "inhumane weapons," but to embed deterrent practices in the means and motives of U.S. foreign policy in the cold war. Over time the non-use of nuclear weapons after the U.S. use of the plutonium bomb on Nagasaki has been symbolic of a *de facto* prohibition against the first use of nuclear arms.

For the damage control of moral leadership, the U.S. Presidents began taking a conciliatory attitude of getting rid of nuclear arsenals towards the world, especially towards the Soviet Union (later Russia). John F. Kennedy advocated that nuclear weapons "must be abolished before they abolish us." Ronald Reagan called for their "total elimination." In a 2009 Prague speech, which for the first

time brought the Novel Peace Prize to the incumbent U.S. President, Barack Obama declared the nation was to take “concrete steps towards a world without nuclear weapons.” Nevertheless, after four years those steps became shrouded in a series of steps towards disarmament along with a promise to impose restrictions on the country to trigger its nuclear strikes. In addition, the quest for a nuclear-free world was shrunk merely into four out of the twenty-six paragraphs. There President Obama required consent from Russia to reduce both sides’ deployed strategic nuclear weapons and from Republicans in the Senate to ratify the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT).

2. *A declining symbolic power of nuclear weapons*
In the development of nuclear strategy, the legacy of the Manhattan Project appears in a plethora of acronyms like MAD (mutually assured destruction) and NUTs (nuclear-use theorists). These puns contribute to playing down not merely a historical significance of the new weapon, but also a unique position of the U.S. power and responsibility in history. In the opening of the cold war world system, the United States alone took up nuclear supremacy. Instead of founding an international control scheme for atomic energy, its administration sought to make political use of that monopoly as a bargaining card. Hence the Truman administration launched a project on making the hydrogen bomb soon after the Soviet Union succeeded in making its first nuclear test. As a result of such arms race, the two superpowers began stockpiling nuclear bombs as well as undertaking research on and development of more sophisticated nuclear weapons.

The Soviet challenge to the U.S. strategic superiority confronted the U.S. presidents with difficult choices as commander-in-chief. During the Truman administration, the United States held out to the Soviet Union a set of selective and incomplete norms to delegitimize nuclear weapons at the UN. By representing them as a credible threat of punishment, the United States enabled to put deterrence into practice. Its reliance on nuclear weapons gave rise to a hierarchical, but increasingly contested global order along with the U.S.-Soviet nuclear stand-off (Kaufman, 1956, p. 19). Then its victory in the 1991 Gulf War marked a drastic change of the U.S.-Russia bilateral relationship from confrontational to cooperative in the theater of operation. On the one hand, the risk of a superpower confrontation dramatically declined. On the other hand, the breakdown of the bipolar structure in the cold war came to fall on further nuclear

proliferation in making bilateral and multilateral nuclear deterrence dysfunctional.

Even after the cold war ended, the United States explored a way to enjoy nuclear superiority to give force to its diplomacy. In the name of national security, President Obama hence framed the United States and Russia in the lower levels of nuclear weapons on both sides by calling for “a new international framework for peaceful nuclear power.” For the reduction of global nuclear arsenals, he associated his moral and policy agenda with that of John F. Kennedy. By reciting a phrase – “peace with justice” – from Kennedy’s address in Berlin half a century ago (Entous & Barnes, 2013, p. A8; Nicholas & Boston, 2013, p. A12), Obama attempted to remind his audience of Kennedy’s call for “nuclear-arms control and nonproliferation.” In an optimistic tone, he sought to raise his hopes for moving the world as well as the country further away from nuclear arms race.

In spite of being criticized as naïve at home and abroad, Obama indeed held on to mutual nuclear deterrent for post-cold war contingencies. “Report on Nuclear Employment Strategy of the United States,” released with his Berlin speech, made it clear: the United States would never unilaterally disarm without comparable changes by Russia. In other words, the United States continued to display “nuclear folly” to see nuclear inferiority as imminent threat against national security. Yet the latest data exchange spelled out the U.S. nuclear superiority to Russia. In addition to the factual predominance of nuclear weapons, the Obama administration, supported by the Joint Chiefs of Staff and U.S. Strategic Command, concluded that 1,000 warheads would be sufficient with the triad of strategic forces for a nuclear capability (Blechman, 2013, p. A13). In the military and political perspective, Obama might take the proper steps to balance the equally important goals of nuclear safety and the U.S. world prestige.

On the other hand, the inferiority of its conventional as well as its nuclear forces compared to those of the United States pressured Russian President Vladimir Putin to modernize Russia’s nuclear forces and to modify its nuclear war plans. While showing no interest in delegitimizing nuclear weapons, Putin carefully calculated a formula that would meet this challenge to both national security and fiscal responsibility. Such speculations might resonate with U.S. President Dwight Eisenhower’s emphasis on massive nuclear retaliation in order to deter Russia from attacking the United States. The Russian unwillingness to go further explicated its legitimate needs of nuclear weapons not just as the instruments of

national power, but also as active rather than passive nuclear defense measures. On the whole, the U.S. supremacy in science and technology served only to heighten international tensions mainly because no country would disarm at the expense of its national security.

3. *A shift in nuclear politics*
In spite of ruling out any actual use of nuclear weapons, the UN permanent security members – the Non-Proliferation Treaty (NPT) conferred a privileged status to those five members that possessed nuclear weapons on January 1, 1967 – could employ a variety of veiled nuclear threats. The United States carried on the policy of neither confirming nor denying the presence of nuclear weapons even though the end of the cold war shifted a focus from the East-West to the North-South issue. Such a drastic shift lost the multilateral context of equivocating Western deployments, and public and diplomatic statements. Thus, in response to Obama's requesting a "struggle for freedom and security," the Third World nations called into question asymmetrical obligations imposed by the non-proliferation regime, in which the NPT system helped legitimize the practice of "rational" nuclear deterrence (e.g., prohibitions on possession, acquisition, transfer, and testing of nuclear weapons).

By taking on the leadership of a world, Obama expressed grave concern about the spread of nuclear weapon-making materials around the globe. Here the president redefined John F. Kennedy's phrase "peace with justice" as "the security of a world without nuclear weapons." By adding the magic word "security" to his vision of a post-cold war world pledged in Prague four years ago, he suggested his limited ability to influence the country's dependence on nuclear arms. Instead, he drew the analogy between horizontal nuclear proliferation and "fear of global annihilation" so as to center the North-South conflict on the proliferation and non-proliferation agenda. With the diplomatic overture, he framed the number of invisible tensions in speaking of rejecting "the nuclear weaponization that North Korea and Iran may be seeking." Nevertheless, Obama fell short of providing a basis for a deal on "a new international framework for peaceful nuclear power."

The rise of the developing powers not only weakened the rationality of strategic deterrence, but also prevented the United States from playing an "exceptional" role on the world stage. While keeping hold of the non-proliferation regime, Obama advocated for democratic principles. His conciliatory words sounded a cautiously optimistic tone in the call for diplomacy. Nevertheless, the NPT world

system could no longer cover up the inequality between a “system of deterrence” and “system of abstinence” with regard to the acquisition and production of fissile materials for nuclear weapons (Walker, 2000). On the one hand, the U.S. “efforts to secure nuclear materials around the world” reflected the diminished threat of superpower nuclear use. On the other hand, the United States failed to confront the non-nuclear states that viewed the special status of the nuclear powers as double standard and increased political pressure on them for delegitimizing nuclear weapons.

President Obama called those non-nuclear powers to take a constructive approach in “the struggle for freedom and security and human dignity.” In diplomatic terms, his pursuit of security interests replaced “Kennedy’s stirring defense of freedom.” Obama then rephrased “the security of a world without nuclear weapons” as “dream,” and furthermore dissociated “a new international framework for peaceful nuclear power” from military ambitions to build a nuclear weapon. In making a case for “global security,” he sought to carry out a prudent and peaceful exploration of the U.S. nuclear programs. Overall, Obama balanced strategic interests with moral opprobrium by taking into compelling account the role of moral restraint in international politics and the non-use of nuclear weapons that evolved through the cold war.

4. *Fallacy of atomic diplomacy*

The development of the “super bomb” in the early 1950s marked an important turning point in the nuclear age. Along with international pressure for nuclear restraint, the morality of nuclear weapons and deterrence became an unwritten rule through a pile of bilateral and multilateral arms control agreements. In his remarks at the Brandenburg Gate, President Obama called on Russian President Putin to reduce the danger of nuclear confrontation. However, Russia formally abandoned the 1982 Soviet no-first-use policy in 1993. China, which had maintained a no-first-use policy since its first nuclear explosion in 1964, also changed the defensive nature of its nuclear use in response to the U.S. plans for a national missile defense. While the capacity to use nuclear weapons remains confined to a small number of states, a greater variety of actors are getting involved. Therefore, the global arms control process is becoming not only more multilateral, but also more transitional and pluralistic.

Despite the U.S. diplomatic approach, Russia and China rely more on nuclear weapons than on conventional strength for national security. Yet neither of their

post-cold war nuclear policy is more pro-nuclear than the U.S. foreign policy that emphasizes the role of power rather than the rule of law. In the call for the full delegitimization of nuclear weapons, President Obama implicitly confirmed that the United States believes firmly in the benefits of retaining nuclear capabilities. As a whole, the failure of nuclear arms control might be the problem of forgetting what actually took place in Hiroshima and in Nagasaki. In the post-cold war world, the fear of nuclear war recedes entirely from public memory, thereby eroding inhibitions on the use of nuclear weapons for the cause of self-defense.

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ISSA Proceedings 2014 – On What Matters For Virtue Argumentation Theory

Abstract: Virtue argumentation theory (VAT) has been charged of being incomplete, given its alleged inability to account for argument validity in virtue-theoretical terms. Instead of defending VAT against that challenge, I suggest it is misplaced, since it is based on a premise VAT does not endorse, and raises an issue that most versions of VAT need not consider problematic. This in turn allows distinguishing several varieties of VAT, and clarifying what really matters for them.

Keywords: virtue argumentation theory, argument quality, validity, conflicting virtues.

1. *Introduction*
Virtue argumentation theory (henceforth, VAT) is a relatively new contender in the arena of argumentation theories – a martial metaphor that some virtue theorists may not be ready to endorse without reservation, by the way (see, e.g., Cohen, 1995). To the best of my knowledge, the name was coined by Andrew Aberdein as late as in 2007, in a paper where he outed Daniel Cohen as a sort of closeted virtue argumentation theorist, quoting persuasive textual evidence from Cohen's previous work (2004, 2005). However, Aberdein (2007, 2010a) has made also abundantly clear that VAT is but the latest offspring of an illustrious scholarly tradition, to wit, virtue theory in general, dating back to ancient philosophy, and most notably to Aristotle's ethical writings. As it is well known, that particular approach has been gaining a lot of momentum in recent years, in the context of virtue ethics (Foot, 1978; MacIntyre, 1981; Hursthouse, 1999) and positive psychology (Seligman & Csikszentmihalyi, 2000), as well as in the area of virtue epistemology (Sosa, 1991; Zagzebski, 1996), which share many topics of concern with argumentation theories. So it should not come as a surprise to see that VAT is currently prospering: for instance, "Virtues of Argumentation" was the topic of the latest international conference of the Ontario Society for the Study of Argument (Windsor, 22-25 May 2013), with Daniel Cohen featuring as one of the keynote speakers; nor is the relevance of VAT confined to argumentation theories,

given that a non-specialistic high-profile philosophy journal such as Topoi is currently preparing a special issue on “Virtues and Arguments”, guest edited by Andrew Aberdein and Daniel Cohen.

In spite of all these indications of success, the surest sign of the growing importance of VAT is the fact that it also attracted a fair share of criticism and doubt. Some of these were relatively mild, and would be better understood as constructive efforts to improve on this recent approach: so, for instance, Heather Battaly (2010) has argued that the frequent efforts at distinguishing fallacious and non-fallacious *ad hominem* arguments (e.g., Walton, 1998; Tindale, 2007; Woods, 2007) should be framed in the context of virtue epistemology. If Battaly is right, then also several scholars who do not currently regard themselves as virtue theorists ought to take argumentative virtues into greater consideration. Other critical commentaries, however, have been less kindly disposed towards VAT: this is the case with a recent article by Tracy Bowell and Justine Kingsbury (2013), in which VAT was charged with an inability to offer an alternative account of what a good argument is, and in particular of validity. That challenge was later answered by Aberdein (2014), and the present paper also intends to address the same problem, although from a very different angle. In fact, in what follows I will engage in a modest effort at meta-argumentative reconstruction (in the sense of meta-argumentation detailed in Finocchiaro, 2013), to make the following points:

* the key problem with Bowell and Kingsbury’ criticism is that it aims at the wrong polemical target;
* in contrast, taking that criticism as central and thus responding to it in details, as Aberdein did, has the undesirable consequence of further derailing the discussion on VAT towards issues that are tangential to its aims and unlikely to be productive;
* since there are more pressing theoretical concerns with VAT, priority should be given to those matters, by both proponents and critics of VAT;
* ironically, the whole debate analysed here exemplifies one of those key concerns, to wit, how to establish the virtuous path when multiple argumentative virtues conflict with each other.

While my analysis is intended to defuse Bowell and Kingsbury’ attack against VAT, it does not end up making their criticism useless. On the contrary, along the way I will show that it works well as a litmus test: how one reacts to their argument reveals the kind of virtue theorist that person is prepared to be.

2. *A case against VAT – and why it doesn't matter*

Bowell and Kingsbury set out to prove that "virtue argumentation theory does not offer a plausible alternative to a more standard agent-neutral account of good argument" (2013, p. 23). In order to make that point, they employ an argument (denoted as BK from now on) that can be reconstructed as follows:

1. They *define a good argument in terms of validity,* as "an argument that provides, via its premises, sufficient justification for believing its conclusion to be true or highly probable, or for accepting that the course of action it advises is one that certainly or highly probably should be taken" (p. 23).
2. They argue that considerations on the arguer's character can be pertinent to establish the *truth* of her claims, including the premises of her arguments (e.g. in legitimate *ad hominem*), but are never relevant to evaluate the *structure* of the argument – which is what matters for validity.
3. They consider and reject *two apparent counterexamples* to 2*:* inductive arguments whose validity may be affected by unstated facts, and arguments based on reasoning too complicated for the untrained to follow (such as the Monty Hall puzzle).
4. They conclude that argument assessment cannot be reduced to considerations on the arguer's character: "*virtue argumentation theory cannot be the whole story* when it comes to argument evaluation" (p. 31, my emphasis).

In his response to BK, Aberdein (2014) mostly focused on points 2 and 3 above: that is, he tried to show how the arguer's character can provide insight on the structure of the argument and its validity (contra 2), and how this happens also in those counterexamples that Bowell and Kingsbury thought to have rejected (contra 3). I will not discuss here whether Aberdein is successful in his efforts, because I want instead to put pressure on step 1 of BK, as well as inviting further reflection on 4.

The starting point of BK is in how argument quality is defined: this is a truly pivotal move, because the attack is aimed at *argument evaluation*, but it hinges on alleged limits of VAT in dealing with *validity*. So, unless validity plays a key role in argument assessment, the whole criticism falls apart. Bowell and Kingsbury are of course aware that VAT is unlikely to endorse a definition of argument quality that reduces it to validity, and this is how they frame the issue: "This [i.e., their own definition of argument quality] is not an account of good argument that a virtue argumentation theorist would accept. The virtue theorist

thinks that what makes an argument good is that the person presenting it has argued well, whereas we think that what makes it the case that an arguer has argued well is that they have presented an argument that is good in the sense described in the previous paragraph" (2013, p. 23). Unfortunately, this strikes me as a particularly unhelpful way of describing the situation, akin to the proverbial dilemma "which came first, the chicken or the egg?" – we all know how that sort of discussion leads nowhere. In particular, here Bowell and Kingsbury overlooks the substantive reasons that prompted VAT to focus on the arguer's character in the first place.

Looking at the literature, it is absolutely clear that VAT was borne out of a deep-seated suspicion towards a definition of good argument limited to validity, given the latter inability to justify people's intuitions on argument quality. Consider for instance the following (real) textbook example of an allegedly good argument: "Both Pierre and Marie Curie were physicists. Therefore, Marie Curie was a physicist" (quoted in Cohen, 2013, p. 479). If we look at this piece of text with a rich notion of "quality" in mind, we find it hard to hold it in high esteem, since it does not seem very "good" in any meaningful sense. On the contrary, it is manifestly *bad* in a variety of respects: uninformative, trivial, pedantic – you name it. That is why some people may even have what I like to call "a Cohen's reaction" to it – something like *"Really? That's your example of a good argument?!"* (again, Cohen, 2013, p. 479, emphasis in the original).

Let us name this the *problem of balidity:* it hinges on the fact that some inferential structures, in spite of their unquestioned validity, are still terminally bad *qua* arguments. Nor is balidity a rare affection: as a case in point, consider the-mother-of-all-enthymemes (assuming enthymeme to be a female gendered noun, which is something I was unable to establish): "Socrates is a man, therefore Socrates is mortal". If reconstructed as a truncated syllogism with the implicit premise "All men are mortal", it is perfectly valid – yet it is still not a good argument, other than for the purpose of illustration (which is, not surprisingly, the only use it ever had). Could anyone seriously picture Aristotle, or anyone else, using this line as a piece of real-life arguing, e.g. to persuade an interlocutor of the mortality of Socrates? Certainly not: it is only meant, and always was, as an example, not an argument.

Someone might object to the whole idea of balidity, on the ground that instances like those mentioned above are best understood as *non-argumentative at all.*

Simply put, the idea would be to claim that a certain linguistic expression, even though it conveys a clear (and, in this case, valid) inference pattern, may serve a function that has nothing to do with arguing – e.g., exemplifying what an argument is. However, this view has two main flaws: first, it is inconsistent with presenting similar sentences as tokens of the type "argument", and it fails to explain how they could exemplify what is supposed to be "good" in an argument (by comparison, consider an example of a delicious apple, which is typically an apple with the appropriate qualities, not something else entirely); second, scholars have been treating similar cases as arguments (in fact, prototypical ones) for several centuries, so a very convincing error theory would be required to explain how we were all so deeply mistaken. Absent such a theory, it is much more parsimonious to treat these cases as arguments that are valid and yet bad (*balid*, for short), and therefore try to provide an account of argument quality that does not reduce it to mere validity.

In this perspective, which is the one endorsed by VAT, balid arguments are instances in which validity does not rescue the argument from its badness. As Cohen quipped, only someone with logical blinders on (2013, p. 479) could fail to see their spectacular lack of value, in spite of their validity. What Bowell and Kingsbury omit to notice is that balid arguments are also the main motivation for VAT. So, a better reconstruction of the VAT standpoint on argument quality would be the following: the virtue theorist thinks that what makes an argument good *cannot just be validity* (given the existence of balid arguments), and thus conceives argument quality as depending on the act of arguing well. This is not just a matter of perspective, but rather a substantial disagreement on what counts as good argument, based on a verifiable appeal to people's intuitions.

The upshot is that Bowell and Kingsbury give us a definition in which validity is necessary and sufficient for quality, whereas virtue theorists reject sufficiency, and may also reject necessity, depending on how radical they are (more on this later on). So BK argues against VAT from a premise that VAT explicitly rejects: it is not hard to see that this is unlikely to produce much progress.

3. *Varieties of VAT*

Turning to step 4 of BK, one notes that Bowell and Kingsbury (2013) tend to shift aim across their paper, or at least leave open multiple interpretations of it. Sometimes their critique of VAT is framed in terms of failure (e.g., "VAT does not offer a plausible alternative to a more standard agent-neutral account of good

argument", p. 23), but more often it is presented as a *charge of incompleteness*: e.g., "any agent-centered account that cannot accommodate [a validity-based characterization of argument quality] will be unable to offer a complete account of good argument" (p. 24). Bowell and Kingsbury may not consider these two positions as truly distinct, since in their view validity is the crux of argument quality, therefore if VAT cannot give us validity, then it is a failure at evaluating arguments, period. However, for virtue theorists, who do not consider validity as the crux of argument quality, the two charges are clearly different. In what follows I will stick to the more modest reading of Bowell and Kingsbury' accusation, as it is spelled out in point 4 of BK (taken from their own conclusions): "virtue argumentation theory cannot be the whole story when it comes to argument evaluation" (p. 31).

The question I want to pose is the following: *Should virtue theorists be worried* by this charge of incompleteness? The answer depends on what kind of virtue theorist one is prepared to be. To simplify, let us distinguish between:

* *Moderate* VAT: *validity is necessary* but insufficient for argument quality; hence it is perfectly possible for an argument to be balid, whereas all good arguments are also valid.
* *Radical* VAT: validity is *neither sufficient nor necessary* for argument quality – hence looking at validity is a non-starter to assess argument quality.

In a moment I will turn to the empirical question of what kind of virtue theorists are to be found "in the wild", taking as prime examples the leading proponents of VAT, Daniel Cohen and Andrew Aberdein. But first let us note that radical virtue theorists are by definition immunized against BK: if validity is neither sufficient nor necessary for argument quality, who cares whether or not it depends from the arguer's character?

Looking at textual evidence, it would seem that Daniel Cohen takes precisely that stance: "Valid reasoning is apparently neither necessary nor sufficient for an acceptable argument" (2013, p. 479). Although Cohen is quick to add that "acceptable" is not synonymous of "fully satisfying", this certainly sounds as an endorsement of radical VAT. Now, denying the sufficiency of validity for argument quality is not especially hard, since balid arguments make a pretty strong case in that direction, as discussed. But to reject necessity too, one must produce at least one instance (and possibly several) of an argument which is indisputably good,

and yet invalid – what I suggest we call a *goodacy*, i.e. a good fallacy. This strikes me as something much harder to do. Yet Cohen thinks he can deliver on this, so let us turn again to his work for elucidation.

Unfortunately, I do not think his treatment of this particular point can really win the day for radical VAT. This is how Cohen argues against the necessity of validity for argument quality: "Under certain circumstances, it is not necessarily unreasonable to overlook an argument's flaws. One might, for example, resort to a meta-argument like this: 'I can see that the argument doesn't work as it stands, but the conclusion is so attractive that I'm sure someone will be able to fix it. I'll accept this flawed one for now.' The French mathematician and physicist Henri Poincaré suggested that he sometimes operated this way: accepting a formula as a provisional lemma in proving theorems before he had any proof for that lemma" (2013, p. 479).

If we look at this as an example of a goodacy, I believe we are bound to be disappointed. After all, what is being accepted as good here is the *conclusion,* not the argument for it: while this is indeed a fairly common instance (we often have clear intuitions on certain matters, even when we lack the means to prove them to our satisfaction), this has little to do with the quality of the argument. In fact, by *provisionally* accepting something as a lemma, Poincaré was certainly not suggesting that he had a good proof for it – and indeed, the whole point of provisionality is because you can get away with it for the time being in light of practical considerations, but sooner or later you will have to deliver "the whole thing". So I do not see meta-arguments of the kind suggested by Cohen as convincing cases of goodacies.

In my view, if one really wants to be radical on VAT, then the most promising direction to take is looking at cases where *validity does not matter* for the interested parties, rather than being objectively absent. Goodacies may or may not be the unicorns of argumentation, but there is no lack of instances in which people (i) experience an argumentative exchange as being fully satisfying, while (ii) bypassing entirely any consideration of validity, or even (iii) regarding such considerations as a threat to the optimal flow of arguing they are currently experiencing. When you are having the time of your life animately discussing with your friends, scrutinizing the validity of each other arguments may very well be considered a fatal *faux pas.* Granted, presenting similar instances as evidence against the idea that validity is necessary for argument quality is not without

problem: a predictable, but far from trivial objection would be to note that, as long as mutual rational questioning of each other arguments is out, then it is hard to see why we should insist in calling that particular activity "argumentation" at all. Still, it seems to me that similar cases are more promising for radical VAT than instances were lack of validity is fully acknowledged, like the one discussed by Cohen, because in the latter situation the notion of "quality" does not truly apply to the argument, but rather to its conclusion.

However, my purpose here is not to defend a radical version of VAT, but rather to note that (i) it is not easy to be a radical virtue theorist, yet (ii) if you manage to hold to that particular position, then you do not need to worry at all about BK. This, in turn, provides us with the intellectual resources to offer a streamlined, and possibly more informative reconstruction of BK. As far as I can see, Bowell and Kingsbury line of argument can be summarized as follows:

BK, compact version: Unless radical VAT can be defended, either it can be explained how validity is determined by the arguer's character, or it must be conceded that VAT does not provide a complete theory of argument evaluation.

Radical virtue theorists deny the premise (they are ready to defend radical VAT), so they can ignore the disjunctive conclusion. Moderate virtue theorists, in contrast, have to decide whether they want to take the first or the second horn of it. Again, their choice in that respect will tell us something on the kind of virtue theorist they intend to be, differentiating two sub-types of moderate VAT:

* *Modest moderate VAT*: validity is necessary, albeit not sufficient, for argument quality, and moreover it is an aspect of quality that does not require considerations of character to be established.
* *Ambitious moderate VAT*: validity is also considered necessary and non-sufficient for argument quality, but it is conceived as determined by virtue theoretical considerations, like any other facet of quality.

Aberdein, in his reply to BK (2014), clearly endorses the latter position: so here I am taking the liberty of outing him as an ambitious virtue theorist, in spite of his moderation. It is also worth noting that virtue theorists of Aberdein's persuasion, i.e. ambitious moderates, are the only ones that need take issue with BK. For the radicals, the challenge it poses is non-existent; for the modest moderates, accepting the charge of incompleteness is not a problem to start with, since they

agree that argument evaluation, while requiring an appeal to the arguers' virtues to establish quality in general, does not need to make use of similar means in dealing with the specific problem of validity. But, to paraphrase Bowell and Kingsbury, since validity cannot be the whole story when it comes to argument evaluation, then leaving validity outside of the scope of virtues does not make VAT any less necessary to understand argument quality. That is what makes modest moderates immune to BK.

But is modest moderate VAT a genuinely interesting theoretical option? I believe it is – or, at least, I want to argue that, *prima facie*, there is *nothing wrong in being modestly moderate*, when it comes to VAT. Two main reasons stand out for that claim: first, modest moderation is a very natural theoretical stance to have, with respect to VAT; second, one can be moderate in a very ambitious sense, that is, without making virtues any less crucial to argument evaluation. The first point I take to be rather self-evident. As discussed, from day one VAT presented itself as an attempt to move *beyond* validity in assessing argument quality: as such, it was never necessarily committed to providing a complete theory of argument evaluation, especially for what it pertains validity, because that is precisely what VAT is not interested in – at least not primarily. This brings us to the second point: VAT may be "modest" in that it leaves validity to non-virtue-based considerations, but it also denies any special role to validity in determining argument quality, to get a fresh look at *everything else that matters* – open-mindedness, fairness, sense of proportion, contextual appropriateness, mutual respect, etc. So modest moderate VAT may not give us the whole story of argument evaluation, but it certainly provides the bulk of it, relegating validity to little more than a footnote, albeit a necessary one.

4. *Conclusions: do not feed the validity buffs!*

If my reconstruction is correct, BK does not fare particularly well as an attack against VAT: it is based on a definition of argument quality that virtue theorists universally reject, and its conclusion needs to worry only one version of VAT, i.e. ambitious moderation, out of three – too bad for Aberdein, but good for the rest of us! On the plus side, diagnosing BK helped us uncovering different varieties of VAT, which hopefully may prove useful to foster the debate.

However, I think BK and Aberdein's reaction to it (2014) epitomize a potential stand-off in the dialogue between proponents and critics of VAT, so I would like to try and intervene as an interested third party in the debate. At risk of caricaturing

a serious dispute, the whole affair reminds me of the following hypothetical dialogue between Dan, a virtue theorist, and Bo, a “validity buff”, that is, a stalwart defender of validity as the key to argument quality:

Dan: *Look, there are plenty of valid arguments that are not good in any reasonable sense. That’s fascinating! It means we need more than validity to capture argument quality.*
Bo: *Well, maybe so, but what about validity?*
Dan: *Are you not listening? I have no beef with validity – keep it, for all I care! I want to talk about everything else that matters for argument quality, and yet has nothing to do with validity.*
Bo: *AHA – then you cannot account for validity!*
Dan: *Jeez, some key argumentative virtue is missing here…*

This is just a cartoon, of course, but it emphasizes a real problem: by insisting on validity as key in argument evaluation, Bowell and Kingsbury (2013) focused attention on something which is, explicitly, of very little interest for the general rationale and purposes of VAT; in turn, by taking up their challenge and dealing with it, it could be said that Aberdein (2014) allowed the debate on VAT to be momentarily derailed towards matters that are, at best, tangential to it. Nor my present efforts should be regarded as being beyond reproach, since what I am doing is to argue that we should not care much whether validity is analysable in terms of virtues, and this is tantamount to deny that we have to address the worries raised by Bowell and Kingsbury – an attitude that many argumentation theories would not find especially commendable.

It seems that what we have here is a *conflict of argumentative virtues,* in which nobody can honestly claim to have upheld all relevant virtues at once: no matter what the actors of this minor academic drama do, they will violate at least some argumentative virtue. To put it simply, Bowell and Kingsbury, by exerting the virtue of careful critical scrutiny (focus on any unclear or defective details in a target argument), violated the virtue of relevant engagement (i.e., avoid focusing on what is manifestly of minor importance in your target argument): this, in turn, risked side-tracking the discussion on VAT. Aberdein, by closely addressing their line of attack, exerted the virtue of dialectical responsiveness (address all potentially sound criticism), but failed to apply the virtue of maximal relevance in theory construction (focus primarily on what is most significant), and thus allowed the discussion to be side-tracked. Finally, my own approach tried exerting

maximal relevance, but thereby failed to demonstrate dialectical responsiveness: in fact, readers will notice that whether or not VAT can account for validity is not discussed anywhere in this paper, so Bowell and Kingsbury' arguments to that effect are simply not answered.

Whether or not my reconstruction of this minor scholarly debate is correct, a general point should be apparent by now: there is no guarantee that, by exerting an argumentative virtue, the arguer will not also violate another virtue. This raises an obvious and yet crucial question for VAT: in similar conflicts of argumentative virtues, what is the virtuous option? On what grounds?

Now, *that* is a good challenge for VAT, not quibbling on something that VAT was never inclined to consider central, i.e. validity. If VAT cannot deliver a solution to the frequent conflicts of argumentative virtues we encounter in everyday life, then it has a serious problem, one that applies to all varieties of VAT. Besides, the theoretical means to engage with that particular problem are within the province of VAT, and two possibilities immediately come to mind: either assuming some *ordering of virtues*, so that certain virtues should have precedence over others, whenever a conflict arises, or adopting some *doctrine of the mean*, following in Aristotle's footsteps. The former solution lends itself nicely to neat formalisms, but it raises the thorny issue of establishing criteria to generate (and possibly change over time and/or across contexts/cultures) the relevant ordering. As for the doctrine of the mean, it certainly fits nicely in any virtue-theoretical framework, but it is not easy to spell out in sufficient detail to handle real-life conflicts of argumentative virtues, which in turn may severely limit the scope of application of VAT.

Not surprisingly, Cohen listed conflicts of argumentative virtues in his to-do-list, at the end of his keynote address on VAT at OSSA 2013: "Questions such as just which virtues are needed for the different roles in arguments, how they might relate to one another, *how conflicts among them might be resolved,* and how they differ from skills" (p. 484, my emphasis). To explain why none of these problems were taken up in that particular paper, Cohen noted that "all of them have been addressed at length by others elsewhere" (p. 484). Unfortunately, he did not provide any exact reference for that claim, and I was unable to locate a satisfactory treatment of conflicts of argumentative virtues in the relatively small literature on VAT. Thus I suspect that Cohen here was slightly exaggerating: while some of the problems he mention (e.g., distinguishing between virtues and

skills) have been addressed at length by other scholars (e.g., Aberdein, 2007), some others have not, and I think conflicts of argumentative virtues belong to the latter group.

In fact, it is only in Cohen's own work that I could find a brief discussion of conflicting virtues in argument, both before (2005) and after (2009) that Aberdein "invented" VAT in 2007. In a nutshell, Cohen tends to think of conflicting argumentative virtues as *counterbalances:* for instance, he sees an interlocutor that concedes too much and too readily to the counterpart (the "Concessionaire") as the opposite in a spectrum that starts with the "Deaf Dogmatist", that is, someone who never concedes the opponent's point, no matter what. This leads him to explicitly invoke Aristotle's doctrine of the mean, albeit only in passing: "If Aristotle is right and the golden mean is found by aiming for the opposite extreme from our natural inclinations, then we could do worse than trying to emulate the Concessionaire. The Concessionaire does, after all, listen well and has the honesty and self-confidence to acknowledge good points. If we hope for as much in our fellow interlocutors, we should cultivate it in ourselves" (2005, p. 62). In a similar vein, Cohen discusses open-mindedness and sense of proportion as two key virtues of argumentation, regulated by the same sort of balancing act; in his own words, "although it is a necessary precondition for getting the most out of our arguments, open-mindedness can also be a counterproductive trait of mind in argumentation. The problem is that arguments are open-ended in a number of different ways with the potential to be extended *ad infinitum*. Open-mindedness exacerbates matters. It needs the counterbalance provided by a sense of proportion" (2009, pp. 59-60).

While I have much sympathy for this counterbalancing view of conflicting virtues, Cohen's remarks are still far from providing us with a general, detailed theory of what the relevant counterbalances are, and how they are supposed to work: as far as I can see, a well-structured map of argumentative virtues is still missing. Until that map is sketched out in greater detail, the jury is still out on whether or not VAT can deliver a satisfactory understanding of conflicts of argumentative virtues. Still, the point remains: this is a worthy quest for virtue theorists, as well as a suitable target for their critics. With so much yet to be done, no energy should be wasted on less essential matters, and virtue theorists should stop feeding the validity buffs.

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ISSA Proceedings 2014 – Access Denied: Crafting Argumentative Responses To Educational Restrictions On Undocumented Students In The United States.

Abstract: The state of Georgia has enacted laws restricting the access that undocumented Latino/a students have to universities. The restrictions are comparable to those imposed on African-Americans in the old South. The students have formulated a set of argumentative responses to challenge the legitimacy of the restrictions. The strategies include enrolling in Freedom University. This underground university helps to both humanize the students for the public while

affording them the opportunity to join an educational community.

Keywords: DREAMers, Freedom University, Georgia Undocumented Youth Alliance, immigration, public argument, and student protests.

1. *Introduction*

Over the last decade a number of jurisdictions in the United States have enacted laws to restrict the access undocumented college students have to in-state tuition and scholarship opportunities. While some states have pushed back against this nativist impulse and enacted laws affording undocumented students access to post-secondary education, there continue to be students who are denied educational access. The most severe educational restrictions are found in the old segregated South, and they are often part of a larger package of laws intended to control the behaviors of the entire undocumented population in that state. The states of Alabama and South Carolina have instituted a total ban on the admission of undocumented students to state-funded colleges. My home state of Georgia has banned students from attending the most competitive schools and stripped undocumented students of the right to pay in-state tuition.

The suppression of an immigrant population is not a problem confined to the United States. France, for example, has struggled with political conflict resulting from a rising Islamic population and fear that French traditions could be lost. In the Netherlands, young immigrants have found themselves at risk of being ejected from the country, as they become adults. In France and the Netherlands, advocates for the undocumented have attempted to redefined the controversy by highlighting the ways in which restrictions would negatively impact families by tearing them apart (Nicholls, 2013, p. 176). This is consistent with a recurrent pattern employed by opponents of legislative restrictions on non-citizens – the redefinition of the conflict to focus on the values of community and family.

This essay hopes to make two contributions to the on-going immigration debate by reviewing actions take by undocumented youth in Georgia to reestablish access to public universities. The argument choices made in this local controversy could have ramifications for the larger immigration debate in both the United States and Western Europe. Against the backdrop of state restrictions, advocates have formulated a set of communicative responses that suggest that the immigration debate can be shifted to better protect the interests of the undocumented. First, by moving the dispute from a focus on border security to

educational access, the argumentative ground may be tilted in the favor of those advocating immigration reform. The narrative of individual hard work leading to success is a long-standing appeal in American culture. The undocumented students themselves tell stories of aspiring to achieve professional success by chasing the American Dream. These moving stories are slowly replacing the tales of the faceless illegal immigrant skirting a fence on the border of Mexico and the United States. Second, in response to requests from undocumented students, professors have played a role in this controversy by facilitating educational opportunities for them. This paper will review local efforts, including the establishment of Freedom University and the ways in which Freedom University's communicative campaign contributes to the effort to humanize students, afford them educational opportunities, and reverse state restrictions. Additionally, Freedom University provides the students access to the rhetorical trappings of the educational system including academic garb, graduation exercises, and student protests at administrative offices to use in the conflict with state legislators.

The essay is divided into three sections. The first section traces the recent trend in the United States to impose restrictions on undocumented residents. The second section describes and assesses the argument strategies deployed by students to push their position with both legislative decision-makers and the public. The final section suggests lessons that other groups might take from the strategies deployed by the students in Georgia.

2. *History of immigration restrictions*

The roots of the recent immigration debate can be traced back to a series of policy decisions made in both the Clinton and George W. Bush administrations and the ensuing political gridlock that has dominated American politics since 2005. In the 1996 Personal Responsibility and Welfare Opportunity Act, the Federal government singled out undocumented residents and precluded them from receiving food stamps and welfare benefits. The legislation legitimized the process of carving out exceptions to basic social service access and erasing undocumented residents from the social safety net. This marked the resurgence of the nativist impulse in the United States and came a decade after Democrats and Republicans joined together to pass comprehensive immigration legislation.

In the 1990s, there was an on-going struggle in the United States between groups with divergent views of immigration. On one hand, there were political advocacy

groups lobbying for in-state tuition for undocumented students; on the other hand, there were think tanks calling for stricter rules for undocumented residents. A rhetorical characteristic shared by both sides of the debate was that the youth did not rhetorically represent their own interests in the dialogue (Nicholls, 2013, p. 48). In many cases, both Democrats and Republicans lobbied on behalf of comprehensive immigration legislation that would both secure the Mexican/U.S. border and liberalize the patchwork of laws that drove the undocumented underground. The extension of rights for the disenfranchised was justified by discussion of what immigrants would do for the citizenry and the economy. The rhetorical turn to argumentation that justified the extension of personal rights based on the potential benefits to the voting public and the economy was a legacy of the Reagan revolution and permeated the discourse of policy advocates (Aguirre & Simmers, 2011, p. 15). These lines of argument have been found in the debates about the Development, Relief, and Education for Alien Minors (DREAM) Act dating back to August of 2001. The DREAM Act would provide resident status to undocumented graduates of high schools who are in good legal standing.

The DREAM Act and other policies intended to benefit the undocumented have suffered from political complications arising from the War on Terror. Immigration policy was rolled into the jurisdiction of the Department of Homeland Security following the 2001 terror attacks. The Mexican/US border was redefined as a site that was susceptible to border crossings by Islamic terrorists and the militarization of the border was enhanced. The politics that suborned immigration policy reform to national security interests was followed by rapid changes in the politic climate. Despite the support of George W. Bush, immigration legislation that would have further strengthened border security and liberalized immigration rules for non-citizen residents did not make it through the Congress. The last effort, the Comprehensive Reform Act of 2007, was stalled by a series of procedural votes in the Senate. The DREAM Act was attached to this comprehensive policy, and this was the last time the act was debated in a serious fashion by the government in Washington D.C.

While the DREAM Act remains a promise unfulfilled for undocumented students in the United States, it has played a rhetorical role in the struggle for student rights. The act had the effect of constituting the largely Hispanic undocumented youth in the United States into a defined rhetorical community. While legislators

and public policy advocates formulated the legislation, the proposed act effectively established the undocumented youth as a distinct political force. Those youth built upon the framework articulated by others and took on their own fight to attain the American Dream.

The pattern of national legislative failure also left conservatives in border-states concerned about border enforcement and security. As early as 2007, states began to pass legislation making it more difficult for employers to hire undocumented residents. A burgeoning population of undocumented workers in conjunction with federal inaction led the Arizona legislature to expand its role in enforcing immigration statues. The appropriation of immigration enforcement by Arizona became a full-blown international controversy with the passage of SB 1070 in 2010. After the law was tested in court, the state was allowed to check the legal status of anyone involved a law enforcement stop, including routine traffic stops. The pattern of passing aggressive anti-immigrant statutes in Arizona was modeled by a number of states. In the case of Georgia, legislation and rules passed by the state have targeted undocumented college students and pushed this group to aggressively advocate their case in the public sphere.

While Arizona provided a model, additional political conditions led to Georgia to pass Board of Regents (BOR) Rule 4.1.6, which restricts the ability of undocumented students to attend select universities, and the Georgia Illegal Immigration Reform and Enforcement Act of 2011 (HB 87), which imposes significant penalties on prospective employers. First, the 2008 recession and ensuing economic insecurity led many to assert that the undocumented were a drain on the economy by reducing the employment opportunities available to Georgians. The neo-conservative line of argument used to pass the immigration legislation of 1986 was rendered ineffective by the recession and the fear of job loss. Additionally, Georgia's the demographics were changing quickly. The Hispanic population increased from 8% of the population in 2000 to 16% of the population in 2010. Fewer job opportunities in conjunction with a spike in the Hispanic population led politicians to use statutes to protect voters. The anti-immigrant climate worked in conjunction with the restrictive policies to drive immigrants from the state.

In October of 2010, BOR Rule 4.1.6 was approved and it prohibited undocumented students from attending colleges that had rejected qualified citizens of Georgia in the preceding two years. The adoption of the rule was

followed by a broader set of restrictions outlined in HB 87. This law made it illegal to transport or harbor undocumented residents. The law also created an obligation for employers with more than ten employees to use an electronic verification system to certify a worker's legal status. It crippled agricultural sectors of the Georgia economy and drove undocumented residents into the shadows (Peña, 2012, p. 247).

The students responded in a more assertive fashion than others in their community. They risked arrest and deportation and spoke in the public sphere. The risk was magnified by the repeated stories found on social network sites that reported deportation checkpoints in and around the city of Atlanta. The students organized into a number of groups, including the Georgia Undocumented Youth Alliance (GUYA), a group that used both traditional local networking techniques and contemporary social networking sites to push back against the restrictions. During the 2011-2013 period, GUYA was the immigration group with the most active Facebook presence in Georgia. While other groups, including the Georgia Dreamers Alliance, have pushed against the laws in Georgia, it was the GUYA that led the initial charge for student rights. GUYA organized and participated in marches, protests, and delivered speeches in public space. The students protested their political dislocation by occupying areas reserved for citizens. Nicholls has labeled the use of distinctive public space, born of legislative restrictions, as the strategy of creating niche-openings to establish rhetorical opportunities for the undocumented (Nicholls, 2013, p. 11).

Undocumented students in the United States were constituted into a group by the anti-immigrant policies, and their identity was cemented with the drafting of the DREAM Act. Nationally, the group is commonly referred to as the 'Dreamers.' The policy advocates portrayed the students as the best and the brightest who embodied the cultural values that made the United States great. The phrase "the best and the brightest" is a long-standing term in American culture with roots in 18th century British literature. The youth were differentiated from other immigrants in an effort to move political moderates to support the act. The students were young, intelligent, and hardworking. And, most importantly, they were in the United States illegally due to no fault of their own.

In the period immediately following the constitution of the Dreamers, some students followed the rhetorical path of their advocates and worked to distinguish themselves from other undocumented residents. This had two important effects

on their argument patterns. First, by narrowing the scope of the controversy to providing educational opportunities for students, the appeals were more likely to be considered by moderates and conservative citizens. The students were motivated and smart, and as such, they could make positive contributions to society. Second, the narrowing of the issue to education had the unintended negative effect of providing a marker to distinguish deserving from undeserving immigrants. The deserving population aspired to improve themselves through education. The undeserving worked as domestic labor in hotels and restaurants. In many cases, these undeserving who knowingly broke the law to enter the country were the parents of the 'deserving' students.

The public argument strategy of the students has evolved over time and is more sophisticated than it was when the Dream Act was formulated in 2001. The early representations have been replaced by a more sophisticated approach that celebrates the entire immigrant community. By looking at the ways the students redefine the controversy to include more than a narrow set of legal definitions of citizenship and student, one can observe the role that youth play in empowering a subjugated community (Anguiao & Chávez, 2011, p. 82). While there have been a number of research projects in the communication field attending to the development of discourse in the Latino/a population, there has been limited attention paid to the rhetorical approaches of the youth in this oppressed community. Specifically, the undocumented students are a distinctive population. They have been defined as having no 'legal' rights, which traditionally eviscerates a group's opportunity to mobilize support for political reform (Anguiano & Chavez, 2011, p. 81). Yet, today they are an influential political group in Georgia.

3. *Rhetorical responses in Georgia*
The students used a variety of communicative tactics in their fight to re-establish their right to education in Georgia. The rhetorical devices reflect a merger of 1960s protest strategies and the use of social media, as well as a commitment by students to advocate their own case in restricted public space.

The group affirms the values of protest and civil disobedience found in the struggles of the 1960s. Given that Georgia was a segregated state, the students draw heavily from the civil rights movement when crafting public argumentation. In a reference to the segregationist Jim Crow laws of the 20th century, the students describe educational policies as "Juan Crow" laws on the GUYA Facebook page. In November of 2001, their page highlighted a panel the group

co-hosted with the Georgia Latino Alliance to describe the modern resegregation of the South. According to Lovato, Juan Crow is the “matrix of laws, social customs, economic institutions, and symbolic systems” used to impose psychical and psychological isolation on the undocumented (Lovato). The Jim Crow laws similarly called for racial separation in education, housing, public businesses and transportation. African-Americans were often met, for example, with signs indicating that they were not welcome guests in even the poorest of businesses.

The use of the phrase “Juan Crow” is a powerful rhetorical device in the effort to decriminalize the status of being “undocumented” in the United States. Both the African-Americans of the 1960s and today’s Latino/a’s have been made to feel like criminals by laws and statutes passed in Georgia. A dominant theme is that the undocumented Latino/a residents have violated the law and should be categorized as criminals. This illegal/legal dualism has focused the debate on the question of whether the undocumented immigrants have broken the law. This framework obscures racial undercurrents and limits civic dialogue about immigration. For example, this debate does little to uncover the motives for migration from Central America. Proponents of a secure border do not discuss the reasons why someone might flee their home country. The dominant rhetoric works to perpetuate a society in which nonwhites are “controlled, marginalized and disciplined” (Lawston & Murillo, 2009, p.50).

The GUYA Facebook page also has several posts and pictures of undocumented students meeting in 2011with the civil rights icon John Lewis, further drawing the comparison to the civil rights battle. Since the Lewis-GUYA meeting, Lewis has called for the reversal of the educational restrictions on undocumented students. Lewis remains a force in American politics, and those with even a cursory awareness of the civil rights movement have seen the picture of a bloodied John Lewis on the Pettis Bridge. His support of GUYA reminds the public that the struggle of the undocumented shares many of the characteristics of the civil rights battle. And, this relationship benefits the curators of the civil rights legacy by reminding people that the civil rights battle is part of a larger human rights struggle that includes the undocumented student movement in Georgia.

GUYA protests have taken the form of the marches of the 1960s. For example, GUYA, just like the activists of the 1960s, protest at the Arch at the University of Georgia and regularly find themselves on the steps of the President’s office protesting their exclusion from the campus. Prior to rallies, posts on networking

sites call for marchers to dress in academic robes. The students celebrate their academic performance and their language reflects the values we hope to see in any young person in society. The use of the Arch is particularly significant. It is a cultural symbol at the University of Georgia. When constructed in the 1850s, the Arch was part of a fence and gate built to secure the campus from the town. The gate disappeared shortly after the structure was built and the border between the town and the campus was open to all. To this day, the Arch is a location where people from the university and the town express political viewpoints.

A tradition at the university is that a student should not pass through the Arch until completing the requirements for graduation. Students continue to step around the Arch more than 100 years after the tradition was initiated. Each year, graduates line up in their caps and gowns to have a picture taken as they first walk through the Arch. GUYA members and other students graduating from Freedom University appropriated that tradition with the graduation of their first class in 2012. More than twenty students dressed in caps and gowns and marched through the Arch to celebrate their academic progress. This is an interesting case study in how the Latino/a population crosses a border in the struggle to craft a political identity (Cisneros, 2014, p. 20).

The Arch also has been a site of some of the more painful moments in the history of the University. The use of the Arch by the graduates of Freedom University recalls the protests of the early 1960s in the United States. For example, in 1961 some in the UGA community protested the admission of two African-American students at the Arch. The Arch was a place where the struggle between the Jim Crow South and an integrated University played out in 1961. The symbolism of that moment echoed as the graduates of the Freedom University and victims of Georgia's Juan Crow laws paraded through the Arch to celebrate their accomplishments.

Drawing a further parallel to the civil rights movement, GUYA has promoted the use of non-violent protest techniques. In 2011, for example, members of GUYA participated in a panel on the use of non-violent protest techniques by contemporary protest movements at the King Center. The students pushed the boundaries of citizenship by embracing the notion of educational citizenship as defined by classroom performance, and this type of tactic is something espoused by advocates at the King Center. The meeting was held in the King's Center Freedom Hall. The use of the King's Center location for the GUYA panel is

interesting; it is both a monument to the bravery of the 1960s civil rights movement and a national park that is policed by the Federal National Park Service. The students navigated the conflicted space in their effort to craft better messages.

While the student's adapted tactics used by other groups, an important characteristic of their campaign was the willingness to speak on their own behalf. While politicians and policy advocates constituted the undocumented students as a political force with the drafting of the DREAM Act, it is the students themselves who serve as the most effective advocates today. The students have delivered speeches in hostile situations and exhibited a willingness to put themselves at risk. The work of Keish Kim, a long time student advocate, highlights the forceful nature of student rhetoric.

In November of 2011, Keish Kim was granted the opportunity to speak against Rule 4.1.6. She affirmed that the undocumented were hard working students who came from tax paying families who made great sacrifices to come to the United States. She and her supporters attended the meeting wearing a scarlet U to signify their compromised legal position. Her speech contained many of the arguments found in the rhetoric of other undocumented students. The students suffer from hardship as children. In some cases, that hardship takes place in their country of origin. In other cases, the hardship is tied to struggling in the United States. The work and determination of the students to advance in society is recognized and celebrated. An important change in the narrative over the years is the role that parents are prescribed in the story. In early iterations, some claimed that the students were victims of decisions made by their parents and should not be held accountable for the illegal actions of their parents (Nicholls, 2013, p. 128). Students, like Keish Kim, now regularly celebrate the sacrifices that parents made to afford them the chance to live in the United States.

Having a student speak before the Board of Regents was an important moment for the movement. The students have availed themselves of the opportunity to speak at public meetings and in public locations, sometime at genuine personal risk. Ms. Kim spoke before a packed room at the Atlanta meeting. She told the group that at a time in life that students should aspire to great things, Rule 4.1.6 made the students feel naive for believing in the American Dream. In this speech, the position of the opposition is reduced to nothing more than a set of numbers. The technicality of the rule and the lack of a nine-digit social security number

were all that prevented these worthy students from attending the college of their choice (Kim). In addition to the reference by Kim to the Regents' rule in this speech, the students in their campaign regularly used Rule 4.1.6. On the GUYA Facebook page there is a set of pictures in which a diverse group holds signs with 4.1.6 posted with a red slash through the numbers.

A recurrent element of the rhetorical campaign is the repeated use of the phrase "undocumented and unafraid." There are a number of blog posts, leaflets, posters, and YouTube videos, in which the students declare they will no longer be found in the shadows, rather they are undocumented and unafraid. This is an important statement in light of the risk of deportation, especially in the years 2011 and 2012. The phrase plays a role in the rhetorical redefinition of citizenship from simply a legal construct that excludes the undocumented residents to a cultural one in which they fight for their educational rights. The students are unafraid because they are citizens of an intellectual community and are demanding the state recognize their place in that community.

The students are aware the risks involved in the strategy of public protest and the necessity of inhabiting public space. The social network sites that posted upcoming marches and protests regularly post stories about police roadblocks and of college age residents being deported. They regularly demand a place at the table at the annual Board of Regents meeting while simultaneously engaging in protests outside the meeting. They also protest on the campuses to which the law denies them access. Students engaged in self-risk in ways that recall the protests of the 1960s when the youth protested while risking being drafted into the Vietnam War.

In 2010, the GUYA inspired a small group of faculty at the University of Georgia to establish an educational program for them (Peña, 2012, p. 246). Freedom University opened its door in October of 2011 in Athens and initially serviced thirty-three students. The school took its name from the Freedom Schools of the 1960s that provided educational opportunities for young African-Americans in the segregated South. The students met in an undisclosed location and enrolled in one class during the first semester (Gutierrez & Tamura, 2011). By 2013, the university added a campus for students in Atlanta at the King Center. The college has an impressive array of activists and scholars on the board of directors. While the university received limited media coverage when it first opened, it received a burst of publicity when board member and Pulitzer Prize winner Junot Diaz

discussed the program in a 10-minute segment of the Colbert Report. At the end of the interview, Stephen Colbert presented Professor Diaz with a Freedom University sweatshirt shirt he designed with FU prominently displayed on the shirt (Colbert). The dual meaning of the abbreviation was not lost on Freedom University supporters. Since that time, many have embraced the FU moniker and its implied message to state policy-makers.

Freedom University plays a role in the struggle to provide educational opportunities for its students. For example, the instruction the program offers students serves as a way for colleges across the nation to determine if a student is a good fit for their college. The school provides hope for students who fear that the restrictions have robbed them of their chance to attend college. The school also provides the students with a sense of community and an aspirational cohort to work with on assignments. While college admissions offices do not officially recognize the coursework, it does help the students make their case for admission.

Once a student is accepted into a college, Freedom University engages in fundraising to help that student pay for college. The sacrifices made by the students are described in the fundraising efforts of Freedom University. Hugo M's story is a representative one. He talks about the ways in which his time at the University prepared him for college and the fact that the scholarship program allowed him to overcome educational obstacles and aspire to a college degree. He is a student holding down two jobs who is seeking a medical assistant degree. Other students Freedom University has placed at regional and national institutions have similar compelling personal stories and need for financial support.

In addition to these service-based commitments, Freedom University plays an important rhetorical role in framing the on-going immigration debate. First, the campus and its proximity to the University of Georgia help to alter the nature of the immigration border debate. Stories about Freedom University move the immigration debate from the securitized Mexican/US border to a focus on deserving students who find themselves at the border of a university. This locates the students as educational citizens based on their drive and intellect while highlighting their exclusion from the traditional university community by an unjust policy.

Second, Freedom University provides the students with a site that allows them to better challenge the exclusionary policies of the state. They share the local Athens community with the members of the University of Georgia community. While their classroom is a segregated one, they are members of the local intellectual community. They are receiving instruction from a gifted faculty and motivated volunteers. By continuing to pursue their education, these students are able to better deploy the symbolic trappings of the educational system in protests. The fact that students continue their struggle to achieve their educational goals adds to the story they share with others in a way that would be diminished if they were labeled dropouts.

4. *Conclusion*

While some immigrants have fled communities due to restrictive legislation and a hostile political climate, the youth in Georgia have stayed to fight for their rights. They engage in effective public protests and stand in public to stake their claim to a college education while continuing to advance themselves educationally. The students have worked to network with a number of groups in Georgia and beyond when pressing their case. The rhetoric of the group has highlighted the ties to the civil rights movement that played out in Georgia in the 1960s. Additionally, they have reached out to student groups in other states with educational restrictions to share stories and communicative strategies. In Alabama and South Carolina students also are excluded from colleges and universities. In a number of Midwestern and Southern states, undocumented residents pushed for eligibility to in-state tuition rates. Undocumented students across the United States struggle to attain full legal and educational citizenship.

The locally based student movement in Georgia was a response to the restrictions imposed by state policymakers. With national action on a variety of public policy issues unlikely in the near future, local responses may be the best path forward for advocates of progressive politics. The narrow approach to the extension of rights and privileges used by the undocumented students in Georgia have some applicability to undocumented individuals in both the United States and in Western Europe. Governments have become better at restricting the effectiveness of large-scale protests. And, there are recurrent claims by the protesters that the traditional media outlets have been ineffective in sharing the stories of the undocumented in newspapers and on television. This condition when coupled with the inability of the national government to act has moved the students to engage

in a targeted local approach. The tactics used by the Georgia students provide a potential pathway forward for the undocumented struggling for their rights in the United States and Western Europe. Specifically "in countries as diverse as France, the Netherlands, the United Kingdom, Belgium, Spain, and the United States, undocumented immigrants have launched high-profile campaigns for greater rights, less repression, and the legalization of their status (Nicholls, 2013, p.176)." In each case, the undocumented are stepping into the public sphere to assert their claims.

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ISSA Proceedings 2014 – The Symbolic Meaning Of Radbruch's Formula; Statutory (Non-)Law And The Argument Of Non-Law

Abstract: Statutory "law" that "intolerably" (Radbruch) violates supra-statutory law is non-law. The content of the argument is not based on eternal and unchangeable natural law that positive law should conform to, but upon the fundamental (human) rights that prevail in a historical period. In the modern state the catalogue of fundamental (human) rights is so extensive that it offers a sufficiently broad basis for the removal of any legal incorrectness (including statutory non-law). Thus, the argument of non-law also has great symbolic value. It persuades us that legal thought should always make sense.

Keywords: legal positivism, Radbruch's formula, the argument of non-law, the symbolic meaning of Radbruch's formula, legal sense, sense of justice, mutuality, coexistence.

1. *Radbruch and his formula*
One of the most penetrating critiques of legal positivism is the so-called Radbruch formula. Already at the beginning of his theoretical path, Radbruch (Gustav Radbruch, 1878-1949) was aware "that it equally belongs to the concept of right law that it is positive as it is the duty of positive law to be right as to content" (Radbruch, 1914: 163, and 1999: 74). The basic characteristic of Radbruch's legal-philosophical thought was that, as a Neo-Kantian, he accepted value-theoretical relativism and advocated the standpoint that legal values cannot be "identified" (Germ. *erkennen*), but only "acknowledged" (Germ. *bekennen*) (Radbruch, 1914: 22, 162, and 1999: 15).**[i]**

An inevitable consequence of value relativism is that the sovereignty of the people and democracy are the central characteristics of the rule of law. The content of

law has to be decided in a democratic, responsible and tolerant way. In the paper *Der Relativismus in der Rechtsphilosophie* (Relativism in Legal Philosophy), special importance is assigned to tolerance: "Relativism is general tolerance – just not tolerance of intolerance" (Radbruch, 1934: 21).

For Radbruch, law is a "*reality whose meaning is to serve the legal value, the idea of law*" (Radbruch, 1999: 34).**[ii]** The idea of law includes justice (in the meaning of the principle of equality), purposiveness (the idea of purpose), and legal certainty. The principle of equality (equal cases have to be treated equally and unequal cases have to be treated in an adequately different manner) has an absolute value, but is only of a formal nature. Of a contentual nature is the idea of purpose, which is relative and extends over the three highest legal values, which, however, cannot be ranked. The starting point may be either man as individual, man as social being, or man as creator of cultural goods (Radbruch, 1999: 54 ff.).**[iii]** And finally, there is legal certainty, which in Radbruch's time before the Second World War had priority over justice (in the meaning of purposiveness). The circumstance that the highest legal value as regards content cannot be identified requires that this content be determined by the authorities with regard to legal certainty (Radbruch, 1999: 73-75).

The experience with Nazism made Radbruch intensify his standpoints and, after the Second World War, also complement them concerning the relation between individual legal values. His well-known paper *Gesetzliches Unrecht und übergesetzliches Recht* (Statutory Lawlessness and Supra-Statutory Law, 1946) also contains this characteristic passage:

"*The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice*" (Radbruch, 1946: 277).**[iv]**

Radbruch's formula has two derivations. *The formula of intolerability* (Germ. *Unerträglichkeitsformel*) states that when the conflict between statute and justice reaches an "intolerable degree", the statute as "flawed law" must yield to justice. *The formula of deniability* (Germ. *Verleugnungsformel*) applies when the statute deliberately negates equality. In this case, the statute "is not merely 'flawed law', it lacks completely the very nature of law" (Radbruch, 1946: 277).**[v]** The formula of deniability is considerably less important because the intention of negation is very difficult to prove.**[vi]** If the negation is intolerable, we have the formula of intolerability again (R. Dreier, 2011: 42).**[vii]**

Radbruch does not give in to the temptation of revenge. Striving for decisions that are correct as to contents and for justice at the same time requires respect for legal certainty. "And we must rebuild a *Rechtsstaat*, a government of law", he states, "that serves as well as possible the ideas of both justice and legal certainty" (Radbruch, 1946: 281).**[viii]** Non-law must only be fought against legally (i.e. by legal means) and "with the smallest possible sacrifice of legal certainty" (Radbruch, 1946: 278).**[ix]**

Radbruch's formula of intolerability has often been invoked in the practice of German courts and the German Constitutional Court.**[x]** A very significant decision refers to the 11th Ordinance to the Citizenship Act (of 25 November 1941).**[xi]** The Constitutional Court decided that the Ordinance was null and void from the very beginning. The Ordinance had fatal consequences for Jews and their assets. As an example, I cite just the first sentence of the first paragraph: "A Jew having a habitual residence abroad cannot be a German citizen." The second sentence of the same paragraph accepts the assumption that one already has a habitual residence when it can be established in view of the circumstances that he does not live there just temporarily. In the decision of the Constitutional Court, the first item of the pronouncement comprises just expressions from Radbruch:

*"[L]egal provisions from the National Socialist period can be denied validity when they are so clearly in conflict with fundamental principles of justice that a judge who wished to apply them or to recognize their legal consequences would be handing down a judgment of non-law rather than of law."***[xii]**

After the fall of the Berlin Wall, Radbruch's formula was also invoked in the decision of the Constitutional Court dealing with the shooting of fugitives trying to escape from GDR across the Berlin Wall.**[xiii]** In the decision it was repeatedly

stated that Radbruch’s formula was only applicable to cases of extreme non-law. It was a majority standpoint that the killings of fugitives at the Berlin Wall were serious non-law as well.**[xiv]** What has been contentious is the issue of justifying the reasons authorising the use of firearms.**[xv]** The dilemma is whether it can be said retroactively that the justifying reasons (Germ. *Rechtfertigungsgründe*) were non-law. The Constitutional Court of the GFR did not completely answer this question. The court allowed that the strict prohibition of the retroactivity of justifying reasons was not valid when the gravest criminal acts clearly showing contempt for human rights that are generally accepted in the international community were concerned.**[xvi]**

2. *Pitamic’s view*
I mention the Slovenian legal theoretician and philosopher *Pitamic* (Leonid Pitamic, 1885-1971)**[xvii]** because his final view of law and the nature thereof comes close to Radbruch’s. Both Radbruch as well as Pitamic deal with the problem of statutory (non-)law I am deal with in this paper.

Pitamic, from the very beginning, struck out on a new path: he was convinced that law could not be understood and explored by a single method aiming at a pure object of enquiry. He argued that it is necessary to employ other methods besides the normative method (especially the sociological and the axiological methods), which, however, should not be confounded. Methodological syncretism can be avoided by distinguishing clearly between different aspects of law and by allowing the methods to support each other (see Pitamic, 1917: 365-367).

Step by step, these results prompted Pitamic to combine the positive-law and the natural-law conceptions of the nature of law. For Pitamic, the essential elements of law are order and human behaviour. These elements are interdependent. The order is associated with legal norms regulating external human behaviour. It is also essential that law ceases to be law when its norms cease to be at least *grosso modo* effective (Pitamic, 1956: 192−193). However, not any order can function as an element of law; the condition is that it is an order which prescribes “only external human behaviour and does not prescribe or allow its contrary, ‘inhumane behaviour’, otherwise it loses its legal quality” (Pitamic, 1956: 194).

However, the legal norm “ceases to be law when its content seriously threatens the existence and social interaction of the people subject to it” (Pitamic, 1956: 199). For this it is not sufficient that there is some kind of inhumanity in the

content of the legal norm (e.g. high taxes that are unjust); there has to be "a conspicuous, obvious, severe case of inhumanity" [such as the mass slaughter of helpless people (Pitamic, 1960: 214)]. There has to be a "crude disturbance" (for instance, the extermination of the members of another race), which interferes so intensely with law that its nature is negated (Pitamic, 1956: 199).**[xviii]**

Ulfrid Neumann convincingly observes that Pitamic "does not invoke ethical criteria beyond law, but appeals to elements of the legal concept itself" (Neumann, 2011: 281). This form of justification is to some extent in accordance with Radbruch and his formula. The similarities between Radbruch and Pitamic consist predominantly in the fact that their projects both aim at the justification of the legal concept and that they both, in a similar way, explore the boundary which may not be transgressed by a conflict between single elements of law in order to remain within lawfulness. The Rubicon is crossed once the order is "blatantly inhumane" (Germ. *krass unmenschlich*). We are here faced with an obvious parallel to Radbruch's "formula of intolerability"
(Germ. *Unerträglichkeitsformel*)**.[xix]**

It cannot be concluded from Pitamic's oeuvre that he drew on Radbruch's theories. In the work *An den Grenzen der Reinen Rechtslehre* (On the Edges of the Pure Theory of Law), Radbruch's name is only mentioned once in association with heteronomous obligations (Pitamic 1918, 750). In Pitamic's most important book, Država (The State, 1927), Radbruch is not quoted at all. The majority of reasons for their affinity lie in the fact that Radbruch and Pitamic underwent a similar development, which ultimately led to similar results.

Pitamic encountered theory and philosophy of law as Kelsen's disciple and was impassioned by normative purism as a form. He was not very deeply affected by the sharp distinction between the *is* (Germ. *Sein*) and the *ought* (Germ. *Sollen*) since he also contemplated law sociologically and axiologically. From the very beginning, he was perturbed by the self-sufficiency of law as a normative system. In the face of the assertion that an ought can only be derived from an ought, he advanced the thesis, inspired by Aristotle, that man is by his very nature implanted into normative relations.**[xx]** His experiences with the barbarism of the 20th century certainly had an influence on Pitamic, who, just like Radbruch, placed law in relation to values. Radbruch argues that law strives for justice, while Pitamic seeks the solution in a concept of law that also has to be humane. Radbruch's formula is articulated more thoroughly than Pitamic's legal concept.

However, Pitamic can also be understood as saying that conscious disavowal of equality is inhumane and that an inequality which is intolerably inhumane lacks legal character.

Thus, Radbruch and Pitamic are also in agreement by outgrowing the division into natural law and self-sufficient statutory law. It lies in the nature of law to include issues of correctness as to the contents as well as effectiveness of legal decisions. If we only deal with correct law, we can be utopian and miss reality. If we only deal with positive law, we are in the centre of reality but can miss the values that represent the basis and give meaning to our dealings. Law is also a value phenomenon and consists of value decisions that must not fall below an adequate ethical minimum if they want to preserve the nature of law. If the ethical minimum is not achieved, we are at a point that is "intolerable" or a "crude disturbance" of law.**[xxi]**

3. *Some open questions*
The argument of statutory (non-)law has several facets that are worth dealing with in more detail. The argument is a radical critique of apologetic legal positivism and partially also of scientific legal positivism that closes its eyes to the true contents of law. Due to its positivist attitude, scientific legal positivism cannot be held responsible for the atrocities and abuses committed in the name of "law". The responsibility lies with those making decisions and carrying them out.**[xxii]** What may be objectionable regarding scientific positivism is the fact that it does not explicitly tell how far its range extends. If it does say it – this is what Hart does and also Kelsen in his own way – then one has to focus on the quality of the positivist approach itself.

The argument of (non-)law – I am talking about it in the sense of Radbruch's formula of intolerability – is a critique of self-sufficient statutory positivism. The content of the argument is not based on eternal and unchangeable natural law that positive law has to be in accordance with, but on basic (human) rights as implemented in a particular historical period. In Radbruch's case, these are the basic (human) rights that were established together with the modern state. These rights are summarised in the "so-called declarations of human and civil rights" and are so firmly anchored that "only the dogmatic sceptic could still entertain doubts about some of them" (Radbruch, 1945: 14).**[xxiii]**

Radbruch's formula of intolerability primarily functions so as to falsify a statutory

law which is claimed to be law. Thus, the argument of (non-)law does not claim that something is law, but rather claims that something is not *law*. Kaufmann declares in a well-founded way that “our knowledge is much more reliable at falsifying than at verifying” (Kaufmann, 1995: 518). But one has to be careful also in falsifying. Legal certainty requires that only that is falsified which really strikes the eye, which is “intolerable” (Radbruch), which is a “crude disturbance” because it is “a conspicuous, obvious, severe case of inhumanity” (Pitamic), or which is “extreme non-law” (Alexy **xxiv**).

It would be naive to think that falsification is not based on a standard that has to be verified. We have just dealt with that and seen that the basis of falsification are basic (human) rights and generally valid principles of international law. Both cases concern rights and principles that are positive and, as such, legally stronger than the statute in contradiction with them. Being legally stronger gives them the character of *supra-statutory* law, which laws and other provisions have to comply with.**[xxv]**

The result of falsification is that statutory non-law is denied legal validity. If instead of the “law” being qualified as non-law, a new law is drawn up, this is an act of the verification of law. The verification act is substantially more difficult than the falsification act and, additionally, the results of verification “are much less precise” (Kaufmann, 1995: 521). Thus, we are dealing with a difficult issue that reminds us that one has to be as circumspect as possible and that no new wrongs may be done in the name of amending old ones. An absolute legal certainty does not exist. If we do not want to sacrifice legal certainty, we can only approach the noble aim of justice without ever being able to achieve it completely.

The argument of (non-)law is usually applied in the rule of law reacting to the non-law of previous periods that were lawless at least so to a certain extent. In such cases, the falsification acts are the responsibility of the legislature, which replaces the previously valid law with a new one. An important role is occupied by the courts, especially the Constitutional Court, which abrogates the controversial laws (and other general legal acts) or declares them non-law. Legal acts that are non-law cannot have any further legal consequences and hence individual legal acts based on them have to be annulled or at least abrogated.

The argument of (non-)law is a legal and/or moral argument. It is a moral

argument for all those who sharply distinguish between law and morals; for them, moral unlawfulness is an argument that makes it legitimate that immoral positive law is changed in a legal manner. The most typical supporters are noble legal positivists. They state that, as scientists, they are not interested in the content of law. Thus, Kelsen says that he does not know what justice is, but immediately adds that behind the standard of legal justice there lies "the justice of freedom, the justice of peace, the justice of democracy, the justice of tolerance" (Kelsen, 2000: 52).

If the argument of (non-)law is also a legal argument, our standpoint is that "non-law" should not have any legal consequences. This thesis is compatible with those legal scientists who also deal with law from the point of view of contents and try to understand the legal participants (e.g. judges) who make legal decisions in concrete cases. *Mutatis mutandis*, this must also be said especially of legal participants who make authoritative legal decisions.

The typical legal participants making authoritative legal decisions are judges. In the rule of law where courts of law ensure the constitutionality and legality of legal acts, their role keeps gaining significance. If I limit myself to countries with constitutional courts (e.g. Slovenia), it must be said that countries of this type have set up a mechanism by which possible statutory non-law can be reacted to very effectively. A judge who believes that the statue he has to apply is non-law (i.e. statutory non-law) will stay the proceedings and make an appropriate request to the Constitutional Court.**[xxvi]**

In the modern state, the catalogue of basic (human) rights is so extensive that it offers a sufficiently broad basis for eliminating any legal incorrectness (including statutory non-law). The constitutional catalogue of basic (human) rights makes the achievements of rationalist natural law positive and thereby opens the door to Radbruch's formula becoming an element of valid law. It is not an exaggeration to say that thereby natural law enters into constitutional law, as is the title of Hassemer's paper (Hassemer, 2002: 135-150). Natural law entering into constitutional law is not suprapositive law, but an integral part of positive (constitutional) law.

4. *The symbolic meaning of Radbruch's formula*

Thus, Radbruchs's formula has another dimension, which nowadays is its most important virtue. In a very insightful manner, it reminds us that any law may be

problematic as to its contents:

"*A good lawyer would stop being a good lawyer if he were not fully aware, at any moment of his career, that his profession is at the same time necessary and deeply problematic*" (Radbruch, 1999: 105).

"*Something very difficult is imposed upon us lawyers: we have to believe in our vocation and at the same time, within some deepest layer of our being, over and over again have doubts about it*" (Radbruch, 1999: 105).

In this sense, Radbruch's formula has a symbolic value; its value transcends the circumstances in which it was created and to which it reacted. It is not only intended for legislators and other lawgivers, it is also intended for understanding law and implementing it. A statute, also a criminal one, is only rarely (if at all) so unequivocal that its understanding is a pure reconstruction of the "thought" (i.e. norm) it imparts.**[xxvii]** It is in the nature of the interpretation of statutes that it is, sometimes more and sometimes less, also a "thinking through to the end of something that has been thought" (Radbruch, 1999: 108). Legal norms are not given automatically, legal norms are only the meaning of the statutory text. Smole's Antigone would say in a literary manner, as reported by the Page,**[xxviii]** that also the sense of the (written) thought has to be found.

Smole's above-mentioned Antigone is one of the excellent re-interpretations of Sophocles' Antigone.**[xxix]** The primary special feature of Smole's Antigone (1959) is that Antigone never appears on the stage: she is in the background all the time, behind the stage, behind the text, within us and behind us. Since Antigone is physically absent, the main persona is Creon, who – in contrast to Sophocles – is much less high-principled and therefore much more pragmatic ("you may trade and haggle/", he says, "make merry but abide by the city's laws and regulations;/ – within the law"**[xxx]**), philosophically and personally a sceptic ("even the/ king, who is, in spite of all, a man, sleeps sounder if he is first of all a/ human being and king only in the last account. But that's enough of chatter;/ we have work to do!"**[xxxi]**), yet in spite of his doubts, he is unrelenting when the foundations of power are in question:

"*But someone who seeks/ fundamental changes in our world, with abolition of the monarchy and/ other institutions, some overweening planner, with a new utopia, who is/ not thirsting for my blood, but questions the whole basis of the monarchy/*

− *that is the enemy.*”**[xxxii]**

Others, who keep going to see her and talk to her, report on Antigone. Of fundamental importance is certainly the above-mentioned report by the Page that Antigone keeps examining because she wants to obtain a deeper sense of the thought that makes her resist Creon’s order that Polyneices should not have a grave. Finally, Antigone finds Polyneices and buries him. She is, as Ismene says, “a gentle flower that opens just to shed its petals.”**[xxxiii]**

The symbolic power of Antigone’s deed tells us that the range of legal argumentation ends where the sense of law ends. It is in the character of law and its nature not only that so-called law is not law any more if it is humanly intolerable. These are extreme cases that are typical of authoritarian political systems. In political systems that accept the rule of law and are based on it, it is the opposite direction that is natural. Its basic characteristic is that it seeks to find the right measure, which is humane and takes into account that law is about mutual and interdependent relations that are tolerable to both sides.**[xxxiv]**

This bilateral tolerability is one of the basic aspects of the rule of law as a legal principle. Here the topic of a new paper can start. Its main thesis is that bilateral tolerability is the principle directing the definition of legal rules and the manner of their application. The principle of tolerability aims at a goal, has weight, and defines the scope (range) of the meaning within which the legal rules operate.

NOTES
i. See also Radbruch, 1934: 17-22.
ii. The English quotation is taken from Paulson, 2006: 31.
iii. Cf. also Radbruch, 1914: 101 ff.
iv. The English quotation is taken from Radbruch, 2006b: 7.
v. The English quotation is taken from Radbruch, 2006b: 7.
vi. See e.g. Kaufmann, 1995: 515.
vii. See also Saliger 1995: 5.
viii. The English quotation is taken from Radbruch, 2006b: 11.
ix. The English quotation is taken from Radbruch, 2006b: 8.
x. See e.g. BVerfGE 3, 225 (232 ff.); 6, 132 (198 ff.); 6, 389 (414 ff.); 23, 98 (106) and 54, 53 (67 ff.).
xi. BVerfGE 23, 98 ff., especially 106 ff.
xii. The English quotation is taken from Paulson, 2006: 27

xiii. BVerfGE 95, 96 ff.
xiv. See Kaufmann, 1995: 516. See also Alexy (1993: 486), who reasons in a very convincing manner: "Wenn aber alles zusammenkommt: ein ganzes und einziges Leben, das man führen soll, wie man nicht will, die Unmöglichkeit, sich mit Argumenten dagegen zu wehren, das Verbot, dem zu entfliehen, und der Todesschuss für den, der das nicht hinnimmt, dann kann an dem Urteil, dass extremes Unrecht geschah, als das Leben der zumeist jungen Menschen ausgelöscht wurde, die ihre Konzeption des guten und richtigen Lebens, ganz gleich wie immer diese aussah, selbst um den Preis ihres Todes realisieren wollten, kein Zweifel sein."
xv. Kaufmann, 1995: 516: "The bone of contention is Art. 27 II 1 of the Border Act of GDR. The provision reads: 'The use of a firearm is justified when it may stop a directly imminent committance or continuance of a criminal act that, in view of the circumstances, is also considered a heavy criminal act.' This is the norm on the basis of which the killings at the Berlin Wall were considered justified and thereby non-punishable."
xvi. See pt. 3 of the operative part of BVerfGE 95, 96. See also the literature for and against the allowability of retroactivity (for justifying reasons) cited by Kaufmann, 1995: 518, fn. 16.
xvii. See Pavčnik, 2013: 105-129.
xviii. See also Pitamic, 1960: 215: "Es kann ja auch nach positivem Recht sogar eine rechtskräftige Entscheidung aus gewissen schwerwiegenden Gründen wegen krasser Verletzungen des positiven Rechtes angefochten und außer Kraft gesetzt werden."
xix. See Neumann, 2011: 281.
xx. See Pitamic, 1960: 212. See also Pavčnik, 2010: 93−94, 101.
xxi. More about Pitamic in the introductory study I wrote for the book Pitamic, 2005: 153-173. See also Pavčnik, 2013: 105 ff.
xxii. See Philipps, 2007: 195-196: "Der Ausdruck 'Stoppbedingung', den man anstelle von 'Grundbedingung' verwenden kann, erinnert mich an etwas, das fast ein halbes Jahrhundert her ist. Ein Freund von mir und ich – wir waren Assistenten von Werner Maihofer – sind damals von Saarbrücken nach Mainz gefahren, um einen Vortrag von Hans Kelsen zu hören. An die Einzelheiten des Vortrags erinnere ich mich nicht mehr, wohl aber an eine Szene, die sich daran anschloss. Ein Student fragte Kelsen in deutlich kritischer Weise, ob der von ihm vertretene Positivismus nicht wieder zu einer Diktatur wie der vergangenen führen könne. Kelsen antwortete: 'Ob eine solche Diktatur wieder eintritt, das

hängt von keiner Rechtstheorie ab, sei sie nun positivistisch oder nicht. Das hängt nur davon ab, ob Menschen, jetzt die Menschen Ihrer Generation, rechtzeitig 'Halt!' sagen.'"

xxiii. See also Radbruch, 1948: 147: "Die völlige Leugnung der Menschenrechte entweder vom überindividualistischen Standpunkt ('Du bist nichts, Dein Volk ist alles') oder vom transpersonalen Standpunkt ('Eine Statue des Phidias wiegt alles Elend der Millionen antiker Sklaven auf') aber ist absolut unrichtiges Recht."

xxiv. Alexy, 2009: 159: "Extremes Unrecht ist kein Recht."

xxv. About generally valid principles of international law see Degan, 2000: 70-76, Škrk, 2007: 281-289, and Türk 2007: 59.

xxvi. See the Constitutional Court Act, Art. 23.

xxvii. See von Savigny, 1840: 214. For him interpretation is "Reconstruction des dem Gesetze inwohnenden Gedankens".

xxviii. Smole, 1988: Verse 118: "[S]he seeks the inmost meaning of some thought."

xxix. Steiner, 2003: 170: "As I noted above, the Sophoclean chorus tends to fall away from spoken 'Antigones' after the sixteenth century and such scholarly treatments as Garnier's. There are exceptions. Among the most intriguing is Domik Smole's Slovene Antigone, first staged in 1960. Here, the heroine never appears. It is via the chorus and several secondary personae that we experience the terror and moral-political meaning of her fate."

xxx. Smole, 1988: Verses 142-143.

xxxi. Smole, 1988: Verses 947-950.

xxxii. Smole, 1988: Verses 643-648.

xxxiii. Smole, 1988: Verse 2259.

xxxiv. Cf. Sprenger, who builds upon the notion that law has to be based on an elementary pre-legal sense. Its main characteristic is that, at either side, an adequate "Answer-Behaviour" is built into mutual legal relations (Sprenger, 2003: 334). See also Sprenger, 2012: 87 ff.

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ISSA Proceedings 2014 – Ethos And Authority Argumentation: Four Kinds Of Authority In Medical Consultation

Abstract: The authority that the patient ascribes to the doctor in medical consultation influences the way in which this consultation proceeds. In an argumentative discussion, this ascribed authority can affect the acceptability of the doctor's argumentation. To analyse a doctor's authority argumentation in medical consultation, I shall make a fourfold analytical distinction between ways in which authority can influence the outcome of an argumentative discussion.

Keywords: Authority argumentation, doctor-patient consultation, ethos, pragma-dialectics

1. *Introduction*
In medical consultation, a patient typically requests a medical consultation to have his health problem diagnosed by the doctor and, based on this diagnosis, to obtain medical advice. By his request, the patient indicates that he does not know what is the matter with him, how serious his health problem is, or how to best handle this problem, but trusts that the doctor knows this – or can refer him to a specialist based on a medical examination. The patient, thus, ascribes authority on his health problem to the doctor.

The authority ascribed to the doctor influences the way in which the consultation proceeds. The patient will expect the doctor to guide, and thereby structure, the communicative exchange in order to come to an appropriate advice (or parts thereof, such as the diagnosis and prognosis). Moreover, in case of an argumentative discussion in medical consultation, the authority that the patient ascribes to the doctor can influence the acceptability of his argumentation to the patient. First of all, the simple fact that the patient regards the doctor as an authority on his health problem might be enough for the patient to accept the doctor's argumentation about this problem. Secondly, the doctor can attempt to convince the patient of a medical advice by emphasising his expertise in the

course of the consultation or by presenting this expertise as an argument in support of the medical advice.

To analyse a doctor's use of authority in argumentative discourse, I shall, in this contribution, distinguish analytically between four ways in which authority can influence the outcome of a discussion. More specifically, I shall discuss: existing *ethos* (section 2), acquired *ethos* (section 3), the argument from authority (section 4) and the argument by authority (section 5).

2. *Existing ethos*

A patient requests a consultation by a doctor because of the doctor's medical qualifications. These qualifications for practicing medicine are highly regulated. Council Directive 93/16/EEC (Art. 23), for instance, lays down which standards that doctors have to meet to practise medicine within the European Union: amongst others, doctors have to possess "adequate knowledge of clinical disciplines and practices, providing him with a coherent picture of mental and physical diseases, of medicine from the points of view of prophylaxis [treatment intended to prevent disease], diagnosis and therapy and of human reproduction".

A patient who requests a consultation is not sure what his health problem is about, how serious it is, or what to do about it, whereas the doctor's qualifications indicate that he possesses the medical knowledge and expertise to provide adequate diagnosis and advice. In the consultation, there is consequently an asymmetry between the doctor and patient: the doctor acts as the expert and the patient as a layman (see, on the intrinsic nature of this asymmetry, Pilnick and Dingwall, 2011).

The excerpt of the consultation in *Case 1a* illustrates this asymmetry in medical expertise between the doctor and the patient.**[i]** In this consultation, the patient asks for the diagnosis of a health problem that he experienced in the past. He makes clear that he expects the doctor to possess the expertise that is necessary to provide such a diagnosis.

Case 1a

Excerpt of an argumentative discussion between a doctor (D) and a patient (P) about the patient's possible inguinal rupture

1. D: It could be the case that it had been a fracture.
2. P: Yes.

3. D: But that is also not sure.
4. P: No, no, but I thought that doctors could feel that just like that.

The statement "but I thought that doctors could feel that just like that" (turn 4) shows that the patient requests the consultation because of his expectations about the doctor's medical expertise. The doctor does not completely live up to these expectation: he cannot determine for sure whether the patient suffered from an inguinal rupture in the past (turns 1 and 3). Nonetheless, the doctor possesses the knowledge and expertise to judge whether and with how much certainty he can diagnose the possible fracture. Contrastingly, the patient requested the consultation because he lacks the medical expertise to diagnose the problem himself.

The asymmetry in medical knowledge and expertise between the doctor and the patient can influence the acceptability of the doctor's argumentation. A patient might find argumentation on medical issues presented by a doctor more acceptable than the same argumentation presented by someone who is not a doctor. The authority of the discussion party on the issue under discussion then renders his argumentation more acceptable (see also Walton, 1996, p. 64).

The potential effect that a speaker's authority has on the acceptability of his argumentation has already been studied in classical rhetoric. The rhetorical term *ethos* is used to denote the persuasiveness of a person's character. This term stems from Aristotle (*The art of rhetoric,* I2-1356a), who distinguishes it from *pathos* (the persuasiveness of emotions) and *logos* (the persuasiveness of examples or enthymemes). Traditionally, a distinction is made between *ethos* derived from a person's expertise ("what one knows") and *ethos* derived from his status ("what one is") (Tindale, 2011, p. 343). From a rhetorical perspective, the doctor's medical expertise contributes to his *ethos* in the first sense: ethos derived from what the doctor knows.

The doctor can also be expected to possess ethos in the second sense: ethos derived from his status. Even though the doctor's role in medical consultation has changed since the 1960s from a paternalistic one to one in which he acts as the patient's guide (Helmes, Bowen & Bengel, 2002, p. 150), doctors possess professional status due to their advisory role on issues of medicine.

Because of their professional status, doctors can be expected to provide medical

advice that is in the patient's best interest. In case 2, the doctor makes this explicit after an apparently hypochondriac patient expresses doubt about the way in which doctors practise medicine.

Case 2
Excerpt of an argumentative discussion between a doctor (D) and a patient (P) who complains about doctors

1. D: You know, we truly try our utmost to do it as well as possible for you […] And you do have to trust on that.
2. P: Yes.
3. D: Because that really is the case.

In this excerpt, the doctor makes explicit that she and her colleagues do everything in their power to adequately diagnose and advise the patient (turn 1). This is a rather exceptional situation: characteristically, doctors do not make their good intentions explicit in the consultation; these intentions are simply presupposed. Codes of conduct, such as the *Hippocratic Oath* and the *Declaration of Geneva*, provide for them. The doctor's professional status, thus, generally provides him with existing ethos. Nevertheless, in case 2, the patient complaints about doctors, which leads the doctor to assure that there is no need for distrusting them (turn 1).**[ii]**

3. *Acquired ethos*
For the analysis of a discussion party's ethos, it is necessary to distinguish between the ethos that the party possesses at the start of the argumentative discourse and the ethos that he acquires during this discourse. A discussion party can acquire ethos during the discourse by demonstrating his authority, expertise, knowledge, professionalism, status or trustworthiness ("I was just advising a colleague on how he could better consult his client when it occurred to me that …"). The persuasiveness of the party's ethos then depends on the manner in which he builds ethos in the discussion, not simply on the ethos that is already in place.

As these ways in which a discussion party can come to possess ethos affect the discourse differently, I shall make the analytical distinction between 'acquired ethos' (built in the discourse) and 'existing ethos' (already in place at the start of the discourse). This distinction is similar to Aristotle's ideas on persuasive means

in oratory. He distinguishes between artistic proofs (*entechnoi pisteis*; sometimes also translated as 'intrinsic proofs' or 'technical proofs') and inartistic ones (*atechnoi pisteis*; also 'extrinsic proofs' or 'non-technical proofs'). The artistic proofs are the verbal persuasive means that the speaker uses within the discourse, while the inartistic proofs are the persuasive means that exist independently of the speaker. So, acquired ethos corresponds with Aristotle's concept of artistic proofs, while existing ethos with his concept of inartistic proofs.

Case 3 illustrates how a doctor can acquire ethos in a medical consultation. The example consists of a fragment of a Dutch paediatric consult in which the paediatrician is in the process of diagnosing a toddler with behavioural and developmental problems.

Case 3
Excerpt of an argumentative discussion between a doctor (D), who is a paediatrician, and the mother (M) of a toddler with behavioural and developmental problems

1. D: There's, yeah, there's a very small indication [that there is an anomaly] in that [the child's] digestion, but they [the lab] say we can only determine or see that if we do an additional blood test.
2. M: But that, that it wouldn't function well or, or, how do I erm…
3. D: Roughly speaking, erm, you have to think about that. That there's a small mistake somewhere there in the digestion which, erm, could explain the problems. But, I've got to say, I think it's but a tiny indication. I don't think like "Oh, now, that's fantastic; we've found something and, erm, we can work with that". I'm like "Well, yeah, it's an indication" and I'm like, well, god, if you do such a test and so you've already done those steps, and if they [the lab] advise that – it's a good bunch that checks that – then I'd be tempted to do that in any case.

In case 3, the doctor implicitly puts forward the standpoint that the mother should let her daughter undergo an additional blood test: in turn 1, she asserts "They [the lab] say we can only determine or see that if we do an additional blood test" and she subsequently agrees with this by stating "I'd be tempted to do that in any case" in turn 3. From the reasons that the doctor provides for this advice in turn 3 ("If you get such a test, and so you already did those steps, and if they advise that

– and it's a good bunch of people that checks that"), it appears that the doctor assumes the mother is hesitant to adopt her advice – otherwise there would be no need for the presented argumentation.

In this consultation, the doctor acquires ethos by showing that she is knowledgeable about problems in the digestive system. After the mother indicates that she does not fully understand what it means for her daughter to have an anomaly in her digestion ("But that, that it wouldn't function well or, or, how do I erm", in turn 2), the doctor explains what such an anomaly could amount to ("there's a small mistake somewhere there in the digestion which, erm, could explain the problems", in turn 3) and tells the mother with how much certainty she can say the daughter suffers from this anomaly ("I think it's but a tiny indication", in turn 3).

The doctor, of course, also possesses existing ethos because of her medical knowledge. She, in fact, 'acquires' ethos in the consultation by making explicit that she possesses existing ethos. However, for the analysis, I shall consider making explicit existing ethos – or reinforcing existing ethos – as a way of acquiring ethos. Determining whether the acquired ethos is indeed grounded in a discussion party's existing ethos is namely a matter for the evaluation, not the analysis – in fact, the evaluation needs to be conducted based on the analysis. As it is possible that the discussion party's acquired ethos is not grounded in his actual existing ethos (for instance, because he is boasting), the ethos that he claims to have should not automatically be taken for granted in the analysis.

Furthermore, the doctor also acquires ethos by demonstrating that she is considerate in providing her advice ("I'm like "Well, yeah, it's an indication" and I'm like, well, god, if you do such a test and so you've already done those steps, and if they [the lab] advise that – it's a good bunch that checks that – then I'd be tempted to do that in any case", in turn 3). By emphasising that, given the circumstances, it makes sense to let the child patient undergo an additional blood test, she demonstrates her practical wisdom – and appeals to that of the mother.

Additionally, by saying "I'd be tempted to do that in any case" (turn 3) the doctor makes explicit that she has the patient's best interests at heart. If she herself would be tempted to let her own child undergo the additional test if she were in the mother's position, then surely it is best to let the child patient undergo this test. The doctor's earlier remark that "there's a very small indication [that there

is an anomaly] in that [the child's] digestion, but they [the lab] say we can only determine or see that if we do an additional blood test" (turn 1) functions in the same way. It implies that the doctor has done everything in her power to examine whether there is an anomaly in the patient's digestion, but the only way in which this can be determined for sure is by letting the patient undergo an additional blood test. In these contributions, the doctor can be said to build ethos by stressing her goodwill.

4. *Argument from authority*
Acquired or existing ethos should not be confused with authority argumentation. In authority argumentation, a discussion party presents the opinion of a supposed authority on the issue under discussion as a sign of the acceptability of his standpoint (van Eemeren and Grootendorst, 1992, p.163; and Garssen, 1997, p.11). The idea behind this type of argumentation is that the opinion referred to in the argumentation indicates the acceptability of the standpoint because the opinion shows that an authority on the discussion topic agrees with the standpoint in question. Figure 1 provides a representation of the argument scheme of authority argumentation.

Figure 1
The argument scheme of authority argumentation

1 – X is the case.
1.1 – Authority A is of the opinion that X.
1.1' – A's opinion indicates that X is the case.

In this scheme, the standpoint (1) "X is the case" is supported by the premises "Authority A is of the opinion that X" (the minor premise, 1.1) and "A's opinion indicates that X is acceptable" (the major premise, 1.1'). In this scheme, X could be any proposition (descriptive, evaluative, inciting). An example of an authority argument would be: "I advise you to undergo psychosomatic physiotherapy, as I am sure you'll benefit from it". It should be noted that, in an authority argument, the authority referred to does not have to make explicit his opinion as such; instead, the opinion could be inferred from his behaviour, experiences, preferences, questions, remarks, etcetera. This is the case in the example: "I advise you to undergo psychosomatic physiotherapy, as I have very positive experiences with it".

From a pragma-dialectical perspective, authority argumentation is a subtype of the main type of symptomatic argumentation (van Eemeren & Grootendorst, 1992, p. 163; Garssen, 1997, p. 11). In symptomatic argumentation, a discussion party presents that which is claimed in the argument as a sign of that which is claimed in the standpoint. For authority argumentation, this main scheme can be specified by regarding the authority's opinion as the sign of the acceptability of the standpoint.

By presenting premises 1.1 ("Authority A is of the opinion that X") and 1.1' ("A's opinion indicates that X is the case") of an authority argument, the discussion party performs the speech act of asserting.**[iii]** To felicitously perform this speech act, the discussion party needs to fulfil the sincerity condition that he believes the asserted proposition to be true (Searle, 1969, pp.66-67). A discussion party who presents authority argumentation can, hence, be held accountable for believing that the supposed authority really possesses authority on the subject matter and can be held accountable for viewing this authority's opinion as a sign of the acceptability of the standpoint. He therefore needs to take on the burden of proof for these premises if the antagonist indicates doubt about or opposition to them ("Tell me why you are an authority on this matter" or "But why does this prove your point?").

Herein lies the difference between authority argumentation on the one hand, and acquired and existing ethos on the other. In contrast to an authority argument, a discussion party's ethos does not support a specific (sub-)standpoint. The party's ethos is, in fact, potentially persuasive on all levels of the argumentation, influencing the effectiveness of every proposition that he puts forward. For that reason, a discussion party does not have a burden of proof for the justificatory force of his ethos. After all, he does not claim that his ethos is a sign of the acceptability of the standpoint. This is in stark contrast with the burden of proof that a discussion party has for authority argumentation, since he commits himself to the premise "Authority A's opinion indicates that X is the case" by presenting this argument.

In the extant literature, the authority that a discussion party refers to in an authority argument is typically an external source – such as an expert in the field, a dictionary or an official institution (Walton, 1997, pp. 63-90). The argument takes the form "He should change his diet, because the dietician said so and, if a dietician says so, then that must be the case". In case 3, the doctor presents such

an authority argument. In this consultation, the doctor refers to the advice of the laboratory in support of the standpoint that the child patient should undergo an additional blood test ("They [the lab] advise that – it's a good bunch that checks that" in turn 3). Figure 2 provides a reconstruction of this argument.

Figure 2
Reconstruction of the doctor's argument from authority in case 3

(1) – (You [the mother] should let your daughter undergo an additional blood test.)
(1).1 – They [the lab] advise that.
((1).1') – (If the lab advises you to let your daughter undergo an additional blood test, then you should let your daughter undergo this test.)

Following the pragma-dialectical terminology for authority arguments in which the referred to authority is an external source, I shall call these arguments more specifically 'arguments from authority' (van Eemeren and Grootendorst, 1992, p. 163; Garssen, 1997, p. 11).

5. *Argument by authority*
Instead of referring to an external source in an authority argument, a discussion party can also present himself as the authoritative source in this type of argumentation. For instance, in the authority argument in case 4, the doctor refers to himself as the authority. The example is taken from a consultation about, amongst other things, the patient's atheroma cyst (a slow-growing, non-cancerous tumour or swelling of the skin) in a Dutch general practice.

Case 4
Excerpt of an argumentative discussion between a doctor (D) and a patient (P) about the removal of the patient's atheroma cyst;

1. P: And then I wanted to ask something else right away.
2. D: Yes?
3. P: Is it possible to get a referral note to the hospital for that lump on my head or, ehm, do I just have to let it be done by you here?
4. D: Well, you don't have to do anything, but …
5. P: No, the point is, yeah, my mother had had it removed in the hospital and she says 'Dear, go to the same, it …'
6. D: I think that I can do it just as well as and perhaps even better than those

people at the hospital. It was such a, such a, such an atheroma cyst on your head, wasn't it?
7. P: Yeah, it becomes yes, my mother, she, ehm, she brings it up every day of course…
8. D: Well …
9. P: Yes …
10. D: You don't have to let it be removed by me, but I'm telling you, to be sure, I can do it just as well as someone at the hospital. I've removed a dozen of those things and it's, in itself, a piece of cake.
11 P: Yes.

In case 4, the doctor implicitly advises the patient to let the atheroma cyst on his head be removed by the doctor himself, rather than at the hospital. Even though the doctor does not present his advice explicitly – he, in fact, emphasises that it is up to the patient to decide by whom to let the cyst be removed (turn 4) – the doctor's advice can be inferred from his reactions to the patient's request for a referral note (turn 3). The doctor points out that there is no need for such a referral: he could perform the surgery "just as well as and perhaps even better than" they could do at the hospital (turn 6). The doctor indeed argues that he has a lot of experience with removing atheroma cysts (turn 10).

The doctor's argument that he could remove the atheroma cyst just as well as and perhaps even better than the people at the hospital constitutes an authority argument. The doctor namely explicitly emphasises his expertise in removing the atheroma cyst in support of the advice that the patient should let him remove the cyst, thereby presenting his authority on this matter as an indication of the acceptability of his advice.**[iv]** The argument can be reconstructed as follows (figure 3).

Figure 3
Reconstruction of the doctor's argument by authority in *case 4*

(1) – (It is advisable to let me [the general practitioner] remove the patient's atheroma cyst.)
(1).1 – I can remove an atheroma cyst just as well as, and perhaps even better than, people at the hospital.
((1).1') – (If I can remove an atheroma cyst just as well as, and perhaps even better than, people at the hospital, then the patient should let me remove his

atheroma cyst.)

The authority argument in case 4 differs from the argument from authority in case 3. In case 4, the doctor refers to his own authority, whereas, in case 3, she refers to the authority of an external source ("the lab"). In order to accurately analyse these different forms of authority argumentation, I shall distinguish between them by using the term 'argument by authority' exclusively for the kind of authority argumentation in which the authority referred to is the discussion party that presents the argumentation (as in case 4) and 'argument from authority' exclusively for the kind in which the authority referred to is a source outside of the discussion (as in case 3).

6. *Authority in practice*
The distinction between existing ethos, acquired ethos, the argument from authority and the argument by authority is an analytical one, meaning that it is necessary for an adequate analysis of (the use of) authority in argumentative discourse: by using this distinction, it can be analysed how the authority of a particular source influences the discussion outcome. In turn, this analysis provides the basis for the soundness evaluation of (the use of) authority. For example, analysing a discussion contribution as an argument by authority means that the discussion party can be held accountable for claiming that his authority indicates the acceptability of his standpoint. As a consequence, evading the burden of proof for this claim should be evaluated as fallacious.

In practice, the analytically distinct ways in which authority can influence the outcome of an argumentative discussion might coincide. For example, in case 1b, which is a continuation of the argumentative discussion between the doctor and patient from case 1a, the doctor acquires ethos by affirming part of the existing ethos that the patient ascribes to him.

Case 1b
Excerpt of an argumentative discussion between a doctor (D) and a patient (P) about the patient's possible inguinal rupture

4. P: No, no, but I thought that doctors could feel that [an inguinal hernia] just like that.
5. D: If it really is a big fracture, then you can see it just like that.
6. P: Yeah.

7. D: I mean, then, then I can do it with my eyes closed.
8. P: Oh.
9. A: But if something is really small, then you sometimes just miss it. So it's a doubtful case then. But okay, so you keep having problems with it and we don't actually know what it is, because I haven't felt that it was a fracture for sure. If it were a clear fracture, then I'd have felt it. True.

In case 1b, the patient makes clear that he expected doctors to be able to simply feel an inguinal hernia by means of a physical examination in the consultation (turn 4). So, he believes the doctor's existing ethos to consist of the expertise to constitute whether a patient suffers from an inguinal rupture. In reaction to this, the doctor plays down the extent to which doctors possess expertise on this issue: they cannot always diagnose such a rupture with certainty ("But if something is really small, then you sometimes just miss it. So it's a doubtful case then", turn 9). The doctor nonetheless affirms that, in case of a big fracture, they can "see it just like that" (turn 5) or, at least, he can ("I mean, then, then I can do it with my eyes closed", turn 7). The doctor, thereby, reinforces the idea that he is competent on diagnosing inguinal hernias. This reinforcement can be analysed as a way of acquiring ethos; after all, the doctor does not simply depend on his existing ethos, but feels the need to stress this ethos by stating he can diagnose a big inguinal rupture with closed eyes. Thus, the doctor's existing ethos and acquired ethos coincide. In fact, for acquired ethos (and also for an argument by authority), it is imperative that the discussion party possesses the authority that he claims to have in the discourse. Since this authority can be reconstructed as his existing ethos, the party needs to possess the acclaimed existing ethos for convincingly arguing by authority and using acquired ethos.

The analytical distinction between the ways in which authority can influence discussion outcomes can, in practice, also be blurred because a discussion party can acquire ethos by presenting an argument by authority or an argument from authority. In case of an argument by authority, the discussion party's authority as referred to in the argument could influence the acceptability of his later contributions to the discourse, even though the discussion party does not specifically present his authority in support of them. The doctor's argument "I advise you to undergo psychosomatic physiotherapy, as I have very positive experiences with it" could, for instance, function in this way. Before the doctor presents this argument, the patient might not be aware of his experience with

psychosomatic physiotherapy. In such a situation, the argument brings the doctor's experience to light, which can positively affect the doctor's subsequent contributions ("With all his experience, he must know what he's talking about").

In case of an argument from authority, the fact that the discussion party refers to the authority of an external source could acquire ethos in a similar manner. The party can show that he is knowledgeable ("I'm familiar with the work of Aristotle") or that he is well connected ("I know these experts") by presenting an argument from authority ("The practice of medicine should be regarded as a practical art, since Aristotle considered it as such" or "The bird flu virus can cause a worldwide pandemic, as my colleagues from virology showed at our research colloquium").

Although the ways in which authority can influence a discussion outcome can overlap in practice, it is necessary to analytically separate them. Each way provides the discussion party with distinct possibilities for strategic manoeuvring, due to differences in directness and the burden of proof it places on the party. These differences should be made clear to adequately evaluate the soundness of (the use of) authority in argumentative discourse.

7. *Conclusion*
In this chapter, I proposed a fourfold analytical distinction between the ways in which authority can influence the outcome of an argumentative discussion. These ways are outlined in figure 4.

Figure 4
Four ways in which authority can influence the outcome of an argumentative discussion:

Existing ethos: The discussion party's authority that is in place at the start of the argumentative discussion.

Acquired ethos: The discussion party's authority that he constructs during the argumentative discussion, but that he does not present in support of a specific (sub-)standpoint.

Argument from authority: The argument in which a discussion party refers to an external source's authority to support a specific (sub-)standpoint.

Authority in practice: The argument in which a discussion party refers to his own authority to support a specific (sub-)standpoint.

Based on this fourfold distinction, the doctor's authority on medical matters can be expected to influence the outcome of an argumentative discussion in medical consultation in the following ways. First of all, the doctor's existing ethos can positively influence the patient's evaluation of his argumentation about the health problem at issue. After all, the patient regards the doctor as an authority on health problems – otherwise he would not have requested a consultation by the doctor. Additionally, the patient might ascribe existing ethos to the doctor because of the doctor's status as a medical professional. Secondly, the doctor can acquire ethos during the medical consultation. By his discussion contributions, he might, for instance, demonstrate that he is trustworthy or that he possesses the necessary medical knowledge and expertise to deal with the patient's health problem. Thirdly, the doctor can refer to his authority to make a medical advice (or parts thereof) acceptable by means of an argument by authority. The doctor then presents his authority as an indication of the acceptability of the medical advice or parts thereof.

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NOTES

i. The examples in this contribution are obtained from the database compiled by the Netherlands Institute for Health Services Research (transcriptions and translations from Dutch, RP).

ii. The doctor's assurance can, therefore, be reconstructed as an attempt to (re-)establish her ethos. In the next section, I shall analyse (re-)established ethos as 'acquired ethos'.

iii. In practice, a discussion party does not always make both premises explicit. If one of them is left implicit, it can be made explicit based on the concept of logical validity and pragmatic principles (van Eemeren & Grootendorst, 1992, pp.60-72). The unexpressed element is, then, reconstructed as an indirect assertion, to which the discussion party can be held committed.

vi. The doctor also draws a comparison between the medical professionals at the

hospital and himself ("just as well as and perhaps even better than"). As the comparison is part of the authority argument and I focus on the way in which the authority argument supports the standpoint, I shall refrain from analysing this comparison.

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ISSA Proceedings 2014 – “Death Penalty For The Down’s Syndrome” – Polish Cultural Symbols In Discussion About IVF And Abortion

Abstract: A basic unit of analysis of ideological systems is a generalized axiological proposition, in which as arguments serve cultural and ideological objects, which have a culturally developed interpretation and convey the subsets of assigned values. The objective of this paper is to present how such objects constitute the base of the discourse. Analysis of chosen texts reveals, how at every stage of argumentation arguers create ideological systems by adopting different ascriptions to cultural objects.

Keywords: abortion, axiological argumentation, collective symbols, cultural objects, ideology, IVF.

1. *Introduction*
The discussion concerning IVF and abortion has lasted in Poland for over 20 years and it still occupies the first pages and covers of many periodicals. Both adherents of these procedures and their opponents are swing from one extreme to the other using fallacious arguments which explore collective symbols that allow the arguers to play on audience’s emotions. The stimulus for the following paper was an article under the meaningful title: “Death penalty for the Down’s syndrome” (Dueholm, 2013). The following is an excerpt of the aforementioned article:

The war against people with the Down’s syndrome (…) just because they look differently, they score lower on the IQ tests, and sometimes they have different diseases, has begun long time ago. The twentieth century has been defiled by their institutionalized extermination on a vast scale, initiated by the action of

eugenicists in such ‘enlightened countries’ as the United Kingdom, the Scandinavian countries, the United States, and the most well-known and effective one – Germany.

The 1933 law of the Third Reich allowed for the sterilization of mentally disabled people of German nationality, including those with Down syndrome. Later, in the period from 1939 to 1944, disabled people were killed as part of T4. The process of their elimination began precisely from killing children. Some of them were typed ‘for termination’ by midwives, soon after their birth. Some disabled people died killed by injection, others poisoned with gas, and still others were starved to death (…)”.

Hence the number of discussions on the subject is increasing. Conservative arguments of the IVF and abortion opponents radicalized to the extent that most of the protagonists forgot for what they are really aiming. What counts for them is just the victory, not the satisfying solution of this complex problem. Therefore, Polish discussion on IVF can be described as an axiological debate, in which the participants seek to aim different directions of attributions: pro-life or pro-choice (Walton 1999, p. 118).

Works on the bioethics law in Poland were first initiated in 2007, but until now Polish parliament was not able to adopt any conclusive regulations. In result, Poland is the sole country in Europe where this problem is not regulated. On July 1st, 2013, however, the Government launched a program of refunding IVF from the State budget.

In Poland, IVF as a method of treating infertility has been used with great success for the past 27 years. For the first 20 years this method was accepted by society. However, when the draft bill was debated in 2007, there was a sudden, unexpected shift in public opinion that favored the drastic reduction or elimination of IVF.

2. *Axiological argumentation*

Axiological argumentation refers to issues which usually concern matters of ethics, politics, or aesthetics. Aristotle in “Topics” identifies reasonable beliefs called *endoxa*, “accepted things”, “accepted opinions”. These opinions are formed on the basis of the general axiological dogmas Q (X), which evaluate real objects (X) by assigning them a value (Q) in a way acceptable for specific social group as

a product of their culture.

Ideology is understood as a relatively ordered collection of generalized axiological dogmas recognized as legitimate by a social group. These beliefs have a predicative internal structure, that is to say, the subject of arguments are cultural objects (X), which are different phenomena in the cultural space (i.e. persons, institutions, actions, events, processes, etc.), whereas values and commitments (Q) assigned to the objects serve for predicates (Awdiejew 2008, p. 130). The entire set of generalized axiological dogmas can be written as an ordered list of accepted evaluations and in such way it represents ideology. For example, in the Christian system of values, such cultural objects as: LIFE, CHILD, and HUMAN BEING occur as arguments in the beliefs:

The most valuable thing is life.

ALUE: *IT IS GOOD (LIFE)*
COMMITMENT: PROTECT (LIFE)

Children are persons, not subpersons, and are entitled to all human rights that are necessary to protect them from the beginning of their existence.

VALUE: TO BE (X1: A CHILD, X2: PERSON)
COMMITMENT: RECEIVE ETHICAL TREATMENT (CHILD)

The beliefs establishing such a collection are considered by speakers as a set of axioms which do not require any proof. Ideology, in opposition to theory, does not have a strict internal logical order, and it creates a modular system, in which the relationships between modules are not clearly defined. Therefore, it is possible to ascribe to it any desirable subset of values (*dissoi logoi*).

Since there are no ethical universals, the concepts of good and evil are quite relative, and they depend on the implemented system of values. According to Aleksy Awdiejew, the basis of axiological argumentation is formed by generalized axiological beliefs, which are universal reference values in the process of dialectical reasoning. Procedure of such argumentation consists of three stages (Awdiejew 2008, pp. 132-133):

a. Establishing of a general axiological base, which serves as a general rule of inference. Such a database is represented by a generalized belief.

b. The application of qualifying statement linking up an individual object (x) with the universal class (X).
c. Transfer of the values assigned to X to the individual object x – the conclusion.

While the arguments of the generalized axiological dogmas are cultural objects, the arguments of the individual statements (xn) are real existing things. As a result of such reference the universal values Q are transferred to the real object x, in other words, its social evaluation occurs.

According to Michael Fleischer, the cultural objects are universals operating in a particular culture. That culture extracts and evaluates them as representations of beliefs. This types of objects are the carriers of conceptualizations of the cultural reality and interpreters that allow to understand it. Michael Fleischer assigns to such objects the role of collective symbols, which he defines as follows:

"Collective symbol" is a set of signs with intricate and fully developed interpretant. For this reason they manifest the cultural meanings, depending on the particular manifestation of the culture, as well as strong positive or negative values shared by the entire given culture, hence they give a frame of reference for differentiation of values. In order to properly interpret a collective symbol, the interpreter needs to have a particular knowledge regarding the semiotic and (most importantly) the signifying aspects of the interpretant. This knowledge is acquired both through culturally-influenced process of socialization, as well as by means of communication within the culture's discourse, which allows the participant to adequately communicate in his interdiscourse. The cultural meaning is most often quite different from the lexical, linguistic one. The collective symbols are the most important elements of interdiscourse. (Fleischer 2002, p. 43)

Collective symbols are internally differentiated and they consist of three counterparts:

a. kernel, very stable, functionally responsible for consistency of the symbol and its anchoring in a given culture;
b. up-to-date area, responsible for the particular meaning in the society of a given culture;
c. connotative area, responsible for the dependency of the symbol on the natural language and lexical meanings. (Fleischer 2007, pp. 256-257)

There is also a subclass of the cultural objects, which we will call ideological objects. They differ from the general cultural objects because even within the same culture they can adopt different ascriptions, creating competing ideological systems, in which they are evaluated differently. In pro-life vs. pro-choice polemics, such ideological objects as CONCEIVED CHILD, HUMAN DIGNITY, and CONSCIENCE CLAUSE have acquired completely new attributions.

Typically any real, individual object has an unlimited number of parameters, and for this reason, the crux of the argument lays in a particular reduction of these parameters and their subsequent evaluation. Biased selection of parameters can entirely change the reference to the ideological space.

3. *Collective symbols in axiological argumentation*

In the following section, I will demonstrate how the previously mentioned ideological objects are being transformed into collective symbols, which play the role of quasi-arguments in the public discourse.

3.1 *Symbol #1: CONCEIVED BABY/ CHILD*

The core of the symbol's function lays in the transfer of the axiology attributed to a child perceived as a fully shaped human being to the pre-implantation forms, such as zygote, morula, and blastula. A child is most definitely entitled to all the human rights, both religious and civil, but the controversy arises when the same rights are sought for a ball of cells.

3.1.1 *The kernel*

The kernel of the discussion is derived primarily from the teachings of the Catholic Church. It focuses on the question whether embryo is a person or not. Undeniably a child is a person. The problem is that in the Bible it is said that the human fetus is not only a biological, but also a spiritual being from the early phases of its existence. However, it never explicitly resolves if it is so from the very conception. The "Dignitas Personae" of the Church also did not decide conclusively whether an embryo is a person or not, but requests for its treating as a person entitled to human rights. Catholic bioethics say that if we are not able to exclude the possibility that from the very beginning of the conception an embryo is a human, we cannot risk its existence. Since we cannot prove it to be otherwise, we shall assume that this premise is genuinely true. If so, we cannot act for the harm of the life from its very conception. The further argument can be built as follows: as long as every human is entitled to preservation of his own dignity,

already the first human cells should be entitled to it as well, because the dignity is not gradable – it either exists or not.

The foundation of Church's standpoint might be found in the frequent use of the phrase "she conceived and bore" in the Bible, which allows to combine these two acts into a single continuum, and therefore, to acknowledge humanness from the very moment of conception:

So Sarah conceived and bore a son to Abraham in his old age (Genesis 21:2)
So she conceived and bore a son and said, "God has taken away my reproach." (Genesis 30:23)

3.1.2 *The up-to-date area*
The result of such kernel is that the contemporary Catholic theology advocates simultaneous animation. For that fact, according to Catholic theology, there are 4 evidences confirming the humanity of the embryo / fetus:

a. *The genetic criterion* – it has all the information needed for the further growth and development;
b. *The criterion of continuity of growth* – development of the human embryo demonstrates continuity where none of the steps can be confronted with the previous one and it is not possible to set any threshold to when a fetus would become a human being. The basis of continuity is founded on genotype;
c. *The criterion of identity* – at any stage: zygote – embryo – fetus – child – adult, a human being is the same individual creature and form of entity distinct from other ones;
d. *The criterion of potentiality* – from the very beginning children develop the qualities that they will reveal in adulthood.

For the reasons stated above, further argumentation is formed on the following premises:

P1: The zygotes contain all of the genetic potential of human being from the very beginning.
P2: Thus, from the very beginning they must already be "spiritual" (animated) beings.
C: As such, they are entitled to all the attributes of humanity – including personal dignity and moral integrity. In other words, setting up a moral sense of humanity is synonymous with the act of conception of the human being.

However, these premises constitute an incongruent combination of clearly separate threads of argument: biological and philosophical. Biology (genetics) can only analyze the cell as an elementary particle that is subjected to mechanisms of creation and development of human ‘physis’, but assertions on human ‘psyche’ are not within the competence of this scientific field. The matter of integral relationship of mental factor (human soul) and the substrate material (human body) belongs to fields of philosophy and theology.

Some data from the genetics undermines the idea of simultaneous animation. On the one hand, the percentage of natural miscarriages is high enough to consider that the nature itself (or the Creator) approves this mechanism, because the percentage of both re-implantation miscarriage as well as post-implantation miscarriage is extremely high. Since the woman is not even aware that she is pregnant, the current state of knowledge is impossible to determine, how often does the insemination of oocyte, followed by its defective implantation in the uterus, occur. In case of post-implantation miscarriage, research results indicate that on average 1 out of 5 inseminated cells is subject to loss after the implementation without any noticeable symptoms for the woman.

On the other hand, in genetics laboratories it has been observed that after the fertilization two or even more organisms can emerge from a zygote (e.g. monozygotic twins), or vice versa – two zygotes can be joined into one body.

The reasonable solution of that problem could be the idea of post-implantation animation. According to its followers, a human being in its proper sense arises only after the implantation of the zygote in the uterus. Pre-implantation forms of human life, namely zygote, morula and blastula, are not entitled to the name of ‘person’. If we assume that the main subject of protection is maternity, then the moment of nesting shall be considered as its beginning. A mother’s body can give no warranties to a fertilized cell before its nesting, therefore separation between the act of human conception and the moment of implantation is more precise and methodically better.

From the philosophical and theological point of view, the most important is the problem of the soul. The Church teaches that each soul is spiritual and it is directly created by God. The soul is not a ‘product’ of parents – and it is immortal, it does not die, so after its separation from the body at the time of one’s death, it is meant to reconnect again with it at the time of the final resurrection.

Thomas Aquinas argued in the "*Summa Theologica*" (Aquinas 1947, I, q. 90, aa. 2-3), that the soul cannot be created from a previously existing material substances; it cannot be derived from spiritual substances existing formerly because spiritual substances are simple and they never transform from one to another. Therefore, the only logical conclusion is that the soul is a direct creation of God (*the soul is of the Divine substance* – Aquinas 1947, I, q. 90, a. 1) — hence, since IVF children have received life, they also have received souls, that is, they became the children of God, in other words, if the IVF method brings the desired grace, it must be the will of God.

3.1.3 *The connotative area*

Taking for granted the personality of embryo, the pro-life protagonists have created a newspeak which transformed cultural object CONCEIVED CHILD into biased, loaded term evaluating proponents and opponents in public debate. Creating such a facility is the base of ideological discussion. The names of different pro-life associations and movements show the variants of the basic symbol:

Polish Association of Defenders of Human Life;
Crusade of Prayer for Defense of Conceived Children;
Spiritual Adoption of a Conceived Children Endangered by Extinction.

Use of the object CONCEIVED CHILD as a discursive symbol creates new kind of newspeak that implies phrases and metaphors making any argumentation pointless, i.e.: gynecologists performing IVF are called "the Nazis" and "murderers"; women who decide for IVF "kill their children", they are "murderers of the unborn children"; abortion is "killing a defenseless, unborn children", and children themselves are "breaking out of the mother's womb" or "murdered before their birth", and "they beget the army of martyrs". Other peculiar metaphors that appear in Polish bishops' sermons: "to conceive a child by IVF causes the death of his brothers and sisters in an embryonic state" (bishop Kazimierz Górny); IVF is "shadow of Herod" (bishop Piotr Libera), "conception in a test tube means implementing the idea of Frankenstein" (bishop Tadeusz Pieronek).

3.1.4 *Summary*

The collective symbol CONCEIVED CHILD is convenient in argumentation, because it allows for numerous fallacies, such as loaded language and false

analogy. For example, when professor gynecologist Waldemar Kuczyński, argued that the freezing is not harmful for the embryos, his opponent, pro-life journalist Mariusz Dzierżawski, replied using astonishing analogy:

The good ones survive, and the bad ones (those which did not survive the procedure) are simply thrown away. This kind of reasoning can be compared to the logics of slave traffickers. 'The good' black slaves survived the trip across the Atlantic on the slave boats, 'the bad' ones were thrown into the ocean.

Conversely, Professor Krzysztof Łukaszuk, director of Infertility Treatment Clinic in Gdańsk, said in an interview with Michał Wąsowski:

Problem with IVF is that someone came up with the idea that a man is created at the time of his conception. But we should be aware that 3/4 of conceived pregnancies end within the fifth week. From the Church's point of view it means that God forbids 3/4 of the population to go to heaven.

Thus, if the embryo is not a person, contraception, early (pre-implementation) abortion, and the freezing of embryos in IVF process shall not be treated as actions insulting human dignity. The phrase "a man is a person since his inception and therefore he has the right to live" belongs to the pastoral discourse.

3.2 *Symbol #2: DIGNITY*
In general, dignity is a concept used in axiological discussions, both religious and secular, to signify that someone has an innate right to be valued and receive ethical treatment. In European culture, human dignity is inviolable. It must be respected and protected.

The defense of human rights and a justice system, based on the full respect of human dignity, is a key part of our shared European values (Jerzy Buzek, European Parliament President (10 October, 2009).

3.2.1 *The kernel*
Extremely stable, well-anchored in the European culture, supported by quotations from the Bible, international law, and the most prominent philosophers (endoxa). The Catechism of the Catholic Church says:

The dignity of the human person is rooted in his creation in the image and likeness of God (article 1); it is fulfilled in his vocation to divine beatitude (article

2). It is essential to a human being freely to direct himself to this fulfillment (article 3). (Catechism 2003, 1700)

Article 1 of the “Charter of Fundamental Rights of the European Union” affirms the inviolability of the human dignity.

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.

3.2.2 *The up-to-date area*
Although dignity is one of fundamental human rights, the definition of the term is vague, i.e. “The Encyclopedia of Bioethics” defines the primary sense in which human dignity is invoked today as “an attribute of all human beings that establishes their great significance or worth” (Encyclopedia, p. 1193).

Most of discourses left the term undefined, and they do not precise the difference between having dignity, having an awareness of dignity, exhibiting dignity, or being treated with dignity. The Encyclopedia reads:

because human dignity can be invoked on both sides of various issues, there is a pressing need for those who use that term to clarify what they mean by it. At some point they also need to defend the plausibility of the anthropological creed that underlies their view. (Encyclopedia, p. 1198)

In public discourse, dignity is treated as an autotelic value and an indispensable condition for other values, such as freedom and personal autonomy. However, it usually works as an ideological object. Steven Pinker (2008) argues that the concept of dignity is pointless. It is too subjective, and thus it is relative, fungible, and harmful, because people and cultures keep disagreeing on a variety of behaviors, and it is questionable whether those who engage in some of them are acting in a dignified manner, or not. A scheme of the dignity-based argument against IVF:

P1: Human dignity is an intrinsic property possessed by all human beings by nature.
P2: IVF violates dignity of embryo.
C: IVF is immoral.

For example:

IVF does not respect human dignity of embryo – the human being at an early stage of life, because in the act of 'creation' it does not take into account the will of God, who is 'forced' by man to perform the act of giving new life. The man – the physician in the laboratory, puts himself in the position of the life-giver. (Sadowska, 2007, p. 2)

In case of such argument the most important critical question is: is it possible for a man to force God to do anything?

3.2.3 *The connotative area*

The spiritual consequences of neglecting the embryo's humanity and personality in IVF are characterized as a lack of respect of the conceived child's freedom, autonomy, uniqueness, and right to be loved from the moment of conception.

According to the pro-life followers, infertile couples practicing IVF methods do not treat the child as a person, but as an object which can be bought for a sufficiently large sum of money. Archbishop Józef Michalik, in the sermon during the procession of Corpus Christi in 2013, said that IVF experiments are "associated with sin of breaking the laws of nature". The bishops wrote that "the good can never be achieved by dishonorable means". They regard IVF as one of these "dishonorable methods, because under the laboratory conditions of the conception, siblings of an IVF child are killed or frozen". According to the episcopate, IVF crushes human dignity and human rights.

3.2.4 *Summary*

DIGNITY is a convenient ideological object that allows one to justify the desire to act in accordance with concepts, which are widely believed to be morally right. This desire is understood *de dicto* and not *de re,* due to the lack of a precise definition of the term. In our culture, 'argument' from dignity is always valid, yet in fact it is not sound, because one of its premises is constituted by the collective symbol.

3.3 *Symbol #3: CONSCIENCE PROTECTION*

Conscience is an intuitive ability, which allows humans to judge the value of actions/deeds, both past ones, and those yet to come. It is not only the theoretical knowledge about the good and the evil, but also the practical skill to assert that something was, is, or will be, either good, or bad. Conscience of a person might mean an internalized set of norms, values, moral beliefs, and attitudes, which

form that persons' 'moral spine', defining his/her integrity and individuality.

3.3.1 *The kernel*
In Catholic theology, the voice of conscience is God's voice, which manifests God's commandments, and to which one should be absolutely obedient. The Catechism of the Catholic Church says that:

By his deliberate actions (article 4), the human person does, or does not, conform to the good promised by God and attested by moral conscience (article 5). (Catechism, 1700)

Man is obliged to follow the moral law, which urges him "to do what is good and avoid what is evil" (Catechism 2003, 1713). This law makes itself heard in his conscience. The Second Vatican Council, in the constitution "Gaudium et Spes", followed by John Paul II in his "Veritatis Splendor" encyclical, states that "Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths." (Gaudium 1965, 16,9).

3.3.2 *The up-to-date area*
Conscience understood in this way determines moral identity. Often it is also attributed with vital importance expressed through the order to respect someone's conscience. When we say that a certain decision is a question of someone's conscience, we intend to say, it cannot be forced from outside, but it should come from personal moral beliefs of that person. On the grounds of this principle, we can draw the following scheme of argument from the conscience:

P1: Some deeds, intentions, personality traits, rules are good/ just or bad/ unjust.
P2: Person P with particular capabilities Cap, being under certain conditions $Cond$, directly, in a non-inferential way recognizes the moral feature M of the evaluated thing.
C: The recognized value M gives a reason to perform action A or sustain from it.

This attitude is reflected for instance in the Polish law (art. 39 "Act on the Profession of Doctor and Dentist", December 5, 1996) which states that a doctor can withhold from performing a medical practice inconsistent with his conscience.

However, on May 25, 2014, three thousand Polish healthcare workers signed a "Declaration of Faith", in which they have recognized the precedence of divine law over human law, and the necessity to "resist imposed anti-humanitarian

ideologies of modern civilization". By signing it, doctors and medical students stated that they will not perform treatments contrary to their Catholic conscience. The statement that the human body and life are the gifts of God is a key element of the declaration: they are sacred and inviolable and consequently the conception and the descent of human depend only on the decision of God. If such a decision is to be taken by a man by committing acts such as abortion, contraception, euthanasia, or artificial insemination, he violates not only the basic principle of the Decalogue, but also discards the very Creator.

"The Declaration", despite its name of the "Declaration of Faith", essentially refers not as much to the teachings of Christ, as to the doctrine of the Catholic Church. Adversaries of the declaration point out to the fact that out of six points of the document, "five prevents performing the profession of doctor," and they call the document "statement of bigotry". They also underline that the document violates not only the principles of Hippocratic oath, but also the Polish law.

According to the "Family Planning, Protection of Human Fetus, and Conditions of Permissible Abortion Act", abortion is legal in three cases: when the pregnancy threatens life or health of the woman, when it is a consequence of a criminal act, or if the fetus is severely and irreversibly damaged. According to the previously mentioned act, a doctor can withhold from performing a medical procedure being contrary with his/her conscience, though he/she is obliged to indicate a viable possibility to receive the treatment from another practitioner or at another healthcare facility. Moreover, this fact has to be recorded in the medical records. Additionally, every doctor is obliged act in any case in which delay of aid could cause death, severe damage of the body, or any other severe health disorders.

3.3.3 *The connotative area*

Meanwhile, there is an increasing number of cases in which the medical aid is being denied, based on the reference to the conscience protection. These are some of the examples of usage of the ideological object CONSCIENCE PROTECTION, as quasi-arguments:

a. A gynecologist from the hospital in Nisko who claimed that the pregnancy resulting from rape is not a gynecological problem, but rather a psychological one.
b. A doctor from a hospital in Kraków who refused to prescribe "the morning after pill" to a 16 year old rape victim.

c. A gynecologist from another hospital in Kraków who refused to send a 36 year old mother for prenatal tests, despite the mother's concerns of possible genetic defects of her fetus.

3.3.4 *Summary*
Although the autonomy of the conscience is respected in many of the controversial cases, it should not be a universal excuse. The conscience is subjective in its character, and, therefore, it may differ depending on the system of values adopted on the axiological basis. We can thusly assert that the argument from the conscience is an arbitrary derivative of the ideology/philosophy/religion, and not an objectively provable truth.

4. *Conclusion*
The arguer applies the direct axiological definitions, in which individual objects play the role of *definiendum* whereas *definiens* is represented by ideological objects, which are emotionally loaded, often characterized by negative or positive metaphors, depending on the propagandistic direction. The main objective of this type of discourse is not changing beliefs, but generating the excitement of the audience for rudimentary premises that refer to the ideological beliefs shared by the same groups to which the sender belongs.

The ideological object does not serve as the warrant of the argument, but rather as a cliché, to block any argument. Cliché is the kernel of cultural objects, so it does not require justification. It allows arguer to avoid the burden of proof, because it is the opponent that must make an effort to demonstrate that the cliché is idle talk. Therefore, calling dignity or conscience protection a „fundamental value" allows for action/inaction aiming for the axiology of the collective symbol to replace the rational argument. Defined collective symbols are means that allow users to obstruct the argumentation, or permit them to resign from participation. It is difficult, if not impossible, to argue against the collective symbols. They do not allow for the dispute, because they are too comprehensive and they leave no room for the starting point where reasoning could begin. Activists of the pro-life movement have implemented new linguistic rules to the debate on IVF and abortion.

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