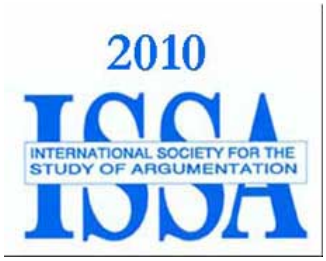
ISSA Proceedings 2010 – Nobel Diplomacy: The Rhetoric Of The Obama Administration



1. Introduction

When the Norwegian Nobel Committee awarded US President Barack Obama the Nobel Peace Prize in October 2009, it declared that Obama had *"created a new climate in international politics*" (Norwegian Nobel Committee 2009). In his acceptance speech, Obama said, *"my administration has worked to establish a new era of engagement in which all nations must take responsibility for the world we seek"* (Obama 2009). This paper analyzes the National Security Strategy (NSS) released by the Obama administration on May 27, 2010, to evaluate the rhetorical constructs, assumptions, and arguments that define this *"new era of engagement."*

Since 1986, every US president has been required to present Congress with an annual strategic plan. The NSS issued by Obama in May 2010 is the first strategy statement prepared for Congress during Obama's presidency. The Obama administration is not unusual in its lax adherence to the law; President George. W. Bush released only two national security strategies (in 2002 and 2006) during his administration. The purpose of the national security strategy is "to set administration priorities inside the government and communicate them to Congress, the American people and the world" (DeYoung 2010). The Obama administration also included an introductory letter authored by the president as part of the NSS.

2. The rhetoric of imperial righteousness

The NSS is a crucial rhetorical text of the Obama administration. In it, the president frames the purposes and strategies of American foreign policy. Therefore, it is important to analyze the rhetoric of the NSS. Because the US president is the most significant rhetorical figure in American political discourse, the language that the president uses to characterize foreign policy strongly influences the terms of the debate on American foreign policy (Tulis 1987; Dow 1989; Stuckey 1995; Cole 1996; Zarefsky 2004; Edwards 2009). Edwards and

Valenzano (2007) contend that a president's foreign policy rhetoric "supplies American foreign policy with a distinct direction in international affairs" (p. 303). As Drinan (1972) notes, "Language is not merely the way we express our foreign policy; language is our foreign policy" (p. 279).

Burnette and Kraemer (2007), in their analysis of the war discourse of George W. Bush, identify the rhetorical construct of "imperial righteousness" that characterizes American foreign policy rhetoric. The rhetoric of imperial righteousness is an extension of the rhetoric of "militant decency" described by Friedenberg (1990). The rhetoric of militant decency, used by early 20th century presidents to justify war, is based on themes of US power, US character, and American assumption of social responsibility (Friedeberg 1990). George W. Bush defined the US role in international conflict as preemptive by adopting a rhetoric of imperial righteousness (Burnette & Kraemer 2007). The rhetoric of imperial righteousness features four themes: national security, the nature of the enemy, democracy and freedom, and American morality (Burnette & Kraemer 2007). This rhetoric is "imperial" because it advances the interests of what many scholars have characterized as American imperialism. Bacevich noted, "Those who chart America's course do so with a clearly defined purpose in mind. That purpose is to preserve and, where feasible and conducive to US interests, to expand an American imperium" (2002, p. 3). This rhetoric also expresses an assumption of American righteousness that is based on several premises. These include the assumptions that the US is motivated by good will, that the US is reluctant to become entangled in international affairs, and that the US wields superior military power. A final assumption is that Americans have a unique role "not simply to discern but to direct history" (Bacevich 2002, p. 33).

This paper examines the arguments in the NSS expressing the four themes of imperial righteousness: national security, the nature of the enemy, democracy and freedom, and American morality. We argue that the rhetorical framework of American imperial righteousness is not unique to the Bush administration but is and will continue to be the definitional framework of American foreign policy.

3. National security

The first theme of imperial righteousness, national security, suffuses the NSS. Obama discussed the domestic and international dimensions of national security. Early in the NSS, Obama made the point that national security is based on

pragmatism rather than ideology. He stated, “To succeed, we must face the world as it is” (Obama 2010b, p. 1). The report and the president’s introductory letter also admonished Americans to take a realistic look at their options and strategies. The emphasis on pragmatism and clarity represent an attempt to shift the definition of national security away from ideological objectives.

The NSS posited that in order to strengthen its national security, the United States must be willing to admit mistakes, vulnerabilities, and imperfections. In reviewing American military capabilities, Obama observed that the US had maintained its military advantage but overall American competitiveness had not kept pace. The act of admitting these shortcomings enables Americans to demonstrate their mettle and work toward a more sound and secure future for themselves and for all citizens of the world. The NSS said, “at each juncture that history has called upon us to rise to the occasion, we have advanced our own security, while contributing to the cause of human progress” (Obama 2010b, p. 6). While Obama acknowledged American imperfections, his conclusion was that the US has a unique capacity to advance its interests consistent with imperial righteousness.

According to Obama, national security starts with domestic strength. In his letter, Obama noted, “Our strategy starts by recognizing that our strength and influence abroad begins with the steps we take at home” (2010a). These steps include bolstering the US economy, reducing the national deficit, guaranteeing opportunities for education to all American children, developing clean energy, and pursuing scientific advances. In the area of homeland security specifically, the US must also effectively manage emergencies, empower American communities to resist radicalized terrorists, and strengthen aviation security (Obama 2010b, pp. 18-19).

While domestic strength is crucial, US national security also depends on international engagement. The NSS set the tone early when Obama noted, “The lives of our citizens – their safety and prosperity – are more bound than ever to events beyond our borders” (Obama 2010b, p. 7). This message is significant, and large sections of the report are dedicated to this argument. This concentration on international engagement even affects the notion of homeland security. As the report indicated, “We are now moving beyond traditional distinctions between homeland and national security” (Obama 2010b, p. 10). Even issues that are often construed as domestic ones, such as homeland security, necessitate international

engagement.

The NSS described several strategies the US should follow to implement appropriate and effective international engagement. The US must defeat al-Qa'ida, respond to networks of violent extremism, seek to secure, reduce, or eliminate nuclear weapons, counter biological threats, address climate change, respond to global disease and epidemics (Obama 2010b, p. 11), and do its part to shore up the global economy (Obama 2010b, p. 4). This list reflects the diffuse and varied nature of international initiatives that the US must monitor in the interest of national security. This monitoring also furthers the cause of imperial righteousness.

In dealing with hostile or uncooperative countries, the US must present them with a clear choice between cooperation with and inclusion in the international community or exclusion from the community if a nation violates international norms. Obama cited Iran and North Korea as two examples of countries that face international sanctions because of their behavior. Obama warned, "if they ignore their international obligations, we will pursue multiple means to increase their isolation and bring them into compliance with international nonproliferation norms" (Obama 2010b, p. 24). Obama used Iraq as an example of the converse of this strategy: constructive engagement. He argued that the US must end the war in Iraq by enabling the Iraqis to assume full responsibility for their government. According to Obama, this outcome "will allow America to leverage our engagement abroad on behalf of a world in which individuals enjoy more freedom and opportunity, and nations have incentives to act responsibly, while facing consequences when they do not" (Obama 2010b, p. 2). In this way, the strategy expands imperial righteousness: nations who do not toe the American line will be sanctioned, while those who cooperate with the US will receive the support of the US and its international allies.

One of the premises of imperial righteousness is the historical role that the US has assumed on the world stage. The NSS referred to world events throughout history during which the US has asserted its leadership, such as the US response to the attacks of September 11, 2001. According to the NSS, those attacks "put into sharp focus America's position as the sole global superpower" (Obama 2010b, p. 8). The report also used historical examples when it described American responses to the industrial revolution, the global spread of communism, and the aftermath of World War II. In each case Obama argued that the US demonstrated

global leadership that contributed to greater American security. He noted, “In the past, the United States has thrived when both our nation and our national security policy have adapted to shape change instead of being shaped by it” (Obama 2010b, p. 9). The rhetoric of imperial righteousness presumes that America has the ability and even the responsibility to influence world events rather than merely react to them.

While the US must demonstrate strength, purpose, and agency in influencing world events, Obama also argued that the burdens of global security cannot fall solely on the United States. He explained three reasons that the US must expect and accept the cooperation of other countries in maintaining the global security that will enhance US national security. First, the US must rely on its allies because otherwise the division of labor is inequitable. Second, as we have seen, the list of global initiatives that must be implemented and monitored is too long and varied for one country – even a superpower – to manage effectively. The US cannot police the world by itself. And, finally, if the US attempts to do so, it will put its own security at risk. As Obama explained, “our adversaries would like to see America sap its strength by overextending our power” (Obama 2010a). A lack of international engagement and cooperation will therefore threaten American security.

Obama made it clear that while the US will work with other nations to realize greater international security, it will still retain its military strength. As Burnette and Kraemer (2007) noted, “The rhetoric of imperial righteousness validates the American prerogative to utilize military power in the cause of right” (p. 193). Obama argued in the NSS that the US will seek many opportunities for non-military engagements with other international actors and states, but it will not relinquish its military superiority. Obama stated, “Our military must maintain its conventional superiority, and, as long as nuclear weapons exist, our nuclear deterrent capability” (Obama 2010b, p. 14). There must also be a balance between the need to appear strong and the effective use of military might. While American military strength is a cornerstone of US security, the US must not assume that it will automatically be an appropriate response to many of the challenges facing the world. Finally, the US must guard against having its military prowess used to hurt American interests. Nevertheless, the superiority of American military might, a fundamental precept of imperial righteousness, is beyond dispute.

Finally, the report argued that while the US will maintain its military strength, it will not use this strength to force its values on other countries. Obama observed, "In keeping with the focus on the foundation of our strength and influence, we are promoting universal values abroad by living them at home and will not seek to impose those values through force" (Obama 2010b, p. 5). The NSS thus disclaimed an explicit imposition of imperial righteousness, although the US will still seek to export its values worldwide.

4. The nature of the enemy

The second major theme of the rhetoric of imperial righteousness is the nature of the enemy that the US faces. Edelman (1988) argued that enemies in political rhetoric can "give the political spectacle its power to arouse passions, fears, and hope" in audiences (p. 66). Leaders, particularly during wartime, have capitalized on the rhetorical power of enemies to motivate their citizens. George W. Bush's challenge in creating a rhetorical enemy was that the enemy he defined – terrorism – was an impersonal and multi-faceted phenomenon. Moreover, Bush sought to ensure that the enemy "terrorism" was not conflated with nationalities (such as "Afghans") or religions (such as "Islam"). In this theme Obama departs dramatically from his predecessor. Rather than seeking to personalize an enemy, Obama expands the notion of "enemy" to include impersonal natural and economic forces in addition to groups or individuals. In doing so, Obama dilutes the rhetorical force of the enemy.

Although most rhetors work to personalize an enemy, the NSS enacted the opposite strategy. The report identified both "conventional and asymmetric threats" (Obama 2010b, p. 14) as enemies that the US must face. Particularly when describing the "asymmetric threats," the report constructed an enemy or enemies that are diffuse, systematic, and impersonal. The threats that the US faces include a "far-reaching network of violence and hatred" (Obama 2010a), "violent extremism" (Obama 2010b, p. 3), the spread of nuclear weapons, dangers stemming from our reliance on technology, poverty, inequality, economic insecurity, food insecurity, pandemic disease, oppression, climate change, dependence on fossil fuels, the vulnerability of global financial systems, transnational criminal threats and illicit trafficking networks. From a rhetorical standpoint, it is difficult to arouse fear or passion in response to these impersonal enemies.

While fear appeals are one of the strategies that rhetors often use to generate

emotion and response to the rhetorical construction of an enemy, Obama characterized fear in a different way. In an echo of Franklin Roosevelt, fear is another threat that must be resisted. The NSS discussed fear in order to minimize its effects. Noting that one of the goals of terrorist attacks is to create fear, Obama warned that responding with fear could "undercut our leadership and make us less safe" (2010b, p. 21). Rather than channeling fear, Obama sought to minimize it.

The enemies that have the most personal qualities are al-Qa'ida, violent extremists, and certain nation states. While the NSS named concrete, personified enemies, it did not give them qualities such as agency or emotion. Even in this identification of an enemy that most Americans would be familiar with, the language stressed the impersonal, systemic nature of the threat. The report did not mention specific measures that the US should take to defeat al-Qa'ida. Instead, Obama stated generally that the US would strengthen its own networks, break up terrorist operations as early as possible, and deny terrorists safe havens. The report was very clear in spelling out the importance of due process, accountability, and the prohibition of torture in delivering "swift and sure justice" (Obama 2010b, p. 21). The report also named "violent extremists" both domestic and foreign, as enemies. Again, Obama spent little time on describing the motivations of these extremists or the extent of the danger they pose. The report recommended that, in the case of domestic extremists, Americans could counteract the danger they pose by making families, communities and institutions better informed. The way to meet this enemy is pragmatic and systematic rather than personal. The third enemy that takes a more personal form is states that behave in a way that threatens US national security. Obama noted, "From Latin America to Africa to the Pacific, new and emerging powers hold out opportunities for partnership, even as a handful of states endanger regional and global security by flouting international norms" (Obama 2010b, p. 8). As he did with al-Qa'ida and extremists, Obama dispatched these threatening states quickly and clinically.

5. Democracy and freedom

While the NSS may try to re-shape and re-define strategic initiatives of the US under the Obama Administration one thing remains constant and clear – America will continue to take a strong and vibrant leadership position in advancing freedom and democracy throughout the world. Obama claimed that American leadership has historically succeeded in steering the currents of international

cooperation in the direction of liberty and justice. Indeed, he argued that this advocacy of universal rights "is both fundamental to American leadership and a source of our strength in the world" (Obama 2010a). Staunchly supporting democracy abroad has been a continuing theme for American presidents. George W. Bush noted that the future security of America depends on a commitment to "an historic long-term goal – we seek the end of tyranny in our world" (Bush 2006). Obama continued that quest.

Grounded in American leadership the NSS reaffirmed America's commitment to pursue its interests within an international system defined by nations' rights and responsibilities. Obama proposed that America should engage "abroad on behalf of a world in which individuals enjoy more freedom and opportunity, and nations have incentives to act responsibly, while facing consequences when they do not" (Obama 2010b, p. 2). In creating a cooperative venture with other nations in the advancement of liberty Obama issued a subtle ultimatum to the countries of the world – join with us, or choose a separate path that leads to isolation. This ultimatum is bolstered by Obama's belief that "Nations that respect human rights and democratic values are more successful and stronger partners" (Obama 2010b, p. 5).

America should be a leader in fostering "peaceful democratic movements" and facilitating the "freedom to access information" throughout the world while engaging "nations, institutions, and peoples around the world on the basis of mutual respect" (Obama 2010b, p. 11). In discussing this engagement, the NSS continually employed themes of American leadership and multinational cooperation. Obama believes that the universal aspiration for freedom and dignity must contend with new obstacles and confirms that the United States will take leadership in that pursuit, but America cannot and should not have to do it alone. Therefore, the NSS beckons other nations to follow American leadership in the quest for universal rights. The rhetoric of imperial righteousness extends the idea of empire by creating a community of nations united in the goal of spreading democracy, freedom, and human rights. The US supports countries that support freedom, as defined by America, thus making the world more American.

Obama's effort to secure a peaceful world through leadership and cooperation can best be described as "enlightened self-interest" (Obama 2010b, p. 3). If other nations enable their citizens to live in freedom and prosperity, Americans will benefit. The Obama administration believes the US can achieve this enlightened

self-interest by engaging other nations. He argued, “Our diplomacy and development capabilities must… strengthen institutions of democratic governance” and promote a just and sustainable international order (Obama 2010b, p. 11). US engagement will succeed because it “advances mutual interests, protects the rights of all, and holds accountable those who refuse to meet their responsibilities” (Obama 2010b, p. 12). This is a veiled threat of isolation. Nations must either engage and promote freedom or be isolated.

One area where the threat is not so veiled is the Middle East. The Middle East provides a clear example of the dichotomy of freedom and engagement (Iraq) versus the threat of isolation (Iran). The United States has important interests in this region including the rebuilding of a secure, democratic Iraq. Obama pledged that the US wants a “sovereign, stable, and self-reliant” Iraq and that the US “will keep our commitments to Iraq’s democratically elected government” (Obama 2010b, p. 25). Conversely, Obama chastised Iran for failing to live up to its international responsibilities and refusing to engage. He described an Iran that can take its “rightful place in the community of nations” and enjoy political freedom for its people (Obama 2010b, p. 26). If Iran refuses, the NSS threatened even “greater isolation” (Obama 2010b, p. 26).

Democracy, not political viewpoint, becomes the basis for US support. As Obama noted, “America respects the right of all peaceful, law-abiding, and non-violent voices to be heard around the world, even if we disagree with them” (Obama 2010b, p. 38). Obama stated that support for democracy is not about candidates, but about the process and the rightful use of the power that comes from the process. Again, Obama cautioned that legitimate, peaceful governments that govern with respect will gain America’s friendship, but governments that use democracy as a means to ruthlessly obtain and wield power will “forfeit the support of the United States” (Obama 2010b, p. 38).

Part of the rationale for the NSS is Obama’s conclusion that “democratic development has stalled in recent years” and “authoritarian rulers have undermined the electoral processes” resulting in impeding free assembly and the right to access information (Obama 2010b, p. 35). Obama again invoked the concept of “enlightened self-interest” by arguing that the US supports the expansion of democracy and human rights because those governments’ “success abroad fosters an environment that supports America’s national interest” (Obama 2010b, p. 37). For Obama, supporting democracy is clearly tied to economic

development. As he said, they are “mutually reinforcing” (Obama 2010b, p. 37). A broadened view of democracy that includes the promotion of economic schemes designed to bring about prosperity is a unique concept to Obama’s NSS. American leadership engages countries to implement sustainable growth that will in turn help the American economy.

Unlike previous presidents, Obama has a much broader view of democracy and freedom. The idea of democracy still comes with a political and moral imperative to act in the cause of right and to champion fledgling governments, but this is now coupled with an incentive to enhance the economies of these nations so that the American economy can grow as well. And while American rhetoric that challenges non-democratic processes or human rights violations will continue, the United States should not and cannot continue to be the only actor on the stage. It is expected that other democratic nations shall also take up the gauntlet of democracy promotion. While the wars in Iraq and on terror were the clear kingpins in Bush’s security strategy, Obama has a more restrained view that seeks to envision a world of the future beyond the battlefields of war where freedom and democracy, in the American image, reign supreme.

The rhetoric of imperial righteousness seeks to create a world-view that promotes democracy and freedom for America’s benefit. When democracy supports economic sustainability, America benefits. When freedom spurs the spread of American values abroad, America benefits. And when the world is made a safer place by becoming more democratic and civil, America benefits. Obama’s criterion of “enlightened self-interest” is able to mask the selfish nature of democracy promotion in the service of imperial righteousness. We argue that Obama uses the concepts of democracy and freedom to philosophically advance the American empire and that the rhetoric is righteous in its skillful advocacy of human rights and human values—values that are at the core of what it means to be American.

6. American morality

Burnette and Kraemer (2007) contend that American morality is a key component of the rhetoric of imperial righteousness. They argue, “the rhetoric . . . suggests that we look to what is good and socially responsible as an obligation of empire” (Burnette & Kraemer 2007, p. 197). In the NSS Obama utilized leadership and multinational involvement to make the case for the advancement of American morality. Moreover, American moral leadership will help guarantee global

security. American moral leadership is crucial because it is through American leadership that the US can advance its own interests in the 21st century. According to the NSS this work begins at home by recognizing that Americans most effectively promote their moral values by living them at home. Obama noted, "America has always been a beacon to the peoples of the world when we ensure that the light of America's example burns bright" (Obama 2010b, p. 2). Americans promote the values of democracy, human rights, and the rule of law. According to Obama, the American people can set an example of moral leadership because of their dynamism, drive, and diversity. The idea of supporting the development of universal rights around the world is a key factor in the rhetoric of imperial righteousness. However, the American example does not always stand up to scrutiny and Obama wisely admitted, "America's influence comes not from perfection, but from our striving to overcome imperfection" (Obama 2010b, p. 36). He described Americans' ongoing effort to perfect the union as inspirational. The persuasive nature of American morality allows the US to admit its problems but revel in the ability of the American people to rise above those problems.

Obama, like all US presidents, praised the American servicemen and women who demonstrate "their extraordinary service, making great sacrifices in a time of danger" (Obama 2010b, p. 4). According to Obama, the American military is the embodiment of American morality. Specifically, American soldiers put their lives on the line to preserve the American way of life. Obama recognized that by saying that he sees the qualities of service and sacrifice "particularly in our young men and women in uniform who have served tour after tour of duty to defend our nation in harm's way" (Obama 2010b, p. 52). The power of the American military becomes a clear indication of morality in that the US protects and defends democracy and freedom at home and abroad. Indeed, Obama claimed that America is the "sole global superpower" and with that power comes great responsibility (Obama 2010b, p. 8).

"Enlightened self-interest" is also critical to defining American morality under the Obama version of imperial righteousness. Engagement with other countries bolsters "our commitment to an international order based upon rights and responsibilities" (Obama 2010b, p. 3), according to Obama. But the NSS does not elucidate what rights and responsibilities the American example is supposed to support.

Inherent in any discussion of the rights and responsibilities that shape American morality is the interplay of American values with the broader concepts of democracy and freedom discussed earlier. For example, Obama supported protection of civil liberties and privacy, which is critically linked to democracy and freedom. He also highlighted the rule of law and the US capacity to enforce it, which strengthens American leadership. Finally, Obama said, "the United States has benefitted throughout our history when we have drawn strength from our diversity," demonstrating that "people from different backgrounds can be united through their commitment to shared values" (Obama 2010b, p. 37). These values become the glue that binds the American people together. Obama described this relationship in his address to cadets at West Point, cited in the NSS, when he said, "our values are not simply words written into parchment. They are a creed that calls us together and that has carried us through the darkest of storms as one nation, as one people" (as cited in Obama 2010b, p. 51).

A final characteristic of American morality is resolve. American self-interest and resolve are strong. The NSS quoted Obama's Inaugrual Address when he said, "We will not apologize for our way of life, nor will we waiver in its defense," adding that "our spirit is stronger and cannot be broken – you cannot outlast us, and we will defeat you" (as cited in Obama 2010b, p. 17). The NSS also praised American resilience as having always been at the heart of American spirit, creativity, and invention. As the world changes, new and different actions need to be utilized to solve complex problems. Obama posited that Americans are up to that challenge. Throughout the NSS, Obama's language portrayed the American character positively. Obama described Americans as, among other things, disciplined, determined, hardened by wars, inspired, dynamic, driven, and diverse. Americans find opportunities, fight injustice, support international efforts, underwrite global security, engage others, and support just peace. Finally, Americans' leadership and ingenuity enable them to adapt to the sweeping changes of globalization.

The discussion of American morality under the Obama administration does not veer far from the vision that previous presidents have articulated. Obama argued that the core of American morality is inherently just. The US leads by example to promote universal rights and freedoms at home and America stands as a rightful steward and guardian of those freedoms on the world stage. Obama said that "no threat is bigger than the American peoples' capacity to meet it, and no

opportunity exceeds our reach" (Obama 2010b, p. 52).

7. Conclusion

The rhetoric of imperial righteousness enables Obama to justify actions that may seem incongruous as the US moves from expression to action. America advances itself as the world's only super power, but demands multinational action in combating global issues. America says it is the world leader in promoting human rights, but solicits international assistance in achieving this goal. America wants democracy and freedom abroad, but only insofar as it benefits the US economically or politically. America seeks to constructively engage but reserves the right to intervene militarily in international affairs. America disclaims imperialism but continues to promote American values and goals. America supports the sovereignty of other nations but threatens to isolate nations that do not adopt American values and goals. While the language of imperial righteousness appears socially responsible, it actually promotes the self-interest of America, euphemistically proclaimed as "enlightened-self interest."

The NSS frequently highlights the concept of leadership. The premise is a simple one: America leads by example by invoking either past or current instances of leadership, and its partners and allies follow the lead. While that argument provides interesting and inspiring rhetoric, the fallacy constructed in the message is apparent. Obama wants to paint a picture of a future world where multiple nations, acting in concert, achieve the political and economic objectives that the US deems appropriate, just, and worthy. That is a lofty goal for any administration to achieve and Obama does not have a record of success to support that rhetorical aspiration.

Analysis of the NSS indicates that employing the rhetoric of imperial righteousness is a necessary tool to articulate American foreign policy. While Bush and Obama are decidedly different in political philosophy, their utilization of the rhetoric of imperial righteousness demonstrates that this rhetoric is fundamental to American foreign policy in the post-9/11 world. The US still advances democracy and freedom, ensures national security, and upholds American morality. The NSS still discusses the enemy, but Obama's description of the nature of the enemy includes other threats to American security, such as economic and political threats. The basic argument is still valid. Foreign policy objectives cannot be advanced without creating an enemy to that objective – whether it is economic, political, or environmental. However, the fear that the

enemy creates must be perceived as real and imminent for the strategy to have true rhetorical force.

Finally, we argue that the rhetoric of imperial righteousness adapts to the contemporary global climate. The multiple issues listed as threats to American national security require a paradigm that adapts to international necessity. Imperial righteousness is broad enough to allow inclusion of multiple issues while still being strict in form and function. As the Obama administration works to establish a new era of engagement in which all nations must take responsibility for the world America seeks, we argue that the rhetoric of imperial righteousness continues to define the rhetoric of America's foreign policy.

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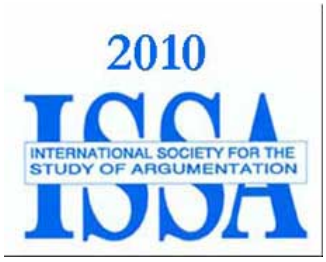
ISSA Proceedings 2010 – The Argument From Legislative

Silence



1. Inferring the Intention

According to the argument from legislative intention, a judicial decision is justified if it is based on the law-maker's intention. In particular, on the basis of this argument, the interpretation of a statute should express the law that the legislature intended to make. But what if the legislature is silent on a certain matter or case? What can be inferred from the silence of the legislature? Are there any intentions that can be inferred from it? As we will show, the argument from legislative silence is ambiguous and we need to specify the conditions under which its different uses are justified. Before doing this, however, we need to recall some features of the more general argument from legislative intention.

Inferring the legislative intent is considered a reasonable and politically sound requirement on judicial interpretation and decision-making, especially in the systems governed by the principles of separation of powers and legislative supremacy (Goldsworthy 2005; Naffine, Owens & Williams 2001). Politically speaking, it is required by the democratic principle. More in general, it can be derived from the reasons to comply with legal authorities and from the very idea of legislative power (Raz 1996, p. 258; Marmor 2001, p. 90). However, the argument from legislative intention faces several theoretical and practical problems.

Firstly, the notion of legislative intention gives rise to what we might call the *Ontological Problem*: What is the entity we are talking about? Many legal writers claim that, on the one hand, the intention of the legislature as a collective body does not exist, and that, on the other, the intentions of the individual legislators are practically undiscoverable and, in any case, irrelevant (Radin 1930; Greenawalt 2000).

Secondly, such notion faces an *Epistemic Problem*: How are we to know the legislature's intention once we assume that something of this kind exists? Apart from the cases in which it is clearly expressed in legislative texts and provisions, the legislature's intention is not easily discoverable, in particular when we deal with old statutes and constitutions (Marmor 2005, chaps. 8-9; MacPherson 2010).

The so-called *travaux préparatoires* often provide insufficient evidence to this effect, especially when various documents, subjects and institutional bodies are concerned (cf. Pino 2008, pp. 401-403).

Thirdly, if we assume that the intention of the legislature exists and can be discovered, we might face an *Abstraction Problem*: What is the relevant level of abstraction in singling out the legislative intent? Should we seek for the abstract legislative intent or rather for its details? Sometimes this issue is addressed in terms of the distinction between enactment intentions and application intentions (Stoljar 1998, p. 36). In any case, we need criteria guiding us to more or less abstract answers (Moreso 2005, p. 136).

Fourthly, in those systems where legislative decisions are *de facto* in the hands of the executive, we face a *Political Problem* (see Bernatchez 2007 on this problem in the Canadian legal system): What is the relevant intent? The legislature's or the executive's?

Finally, as far as legal argumentation theory is concerned, the so-called *Autonomy Problem* can be raised: Is the argument from intention an autonomous or a transcategorical argument? MacCormick and Summers (1991, p. 522) claim it is transcategorical, because in their view the appeal to legislative intent can range over all possible contents of each of the other kinds of legal argumentation **[i].**

Notwithstanding these problems, the argument from intention is widely used by courts and deserves therefore our understanding and discussion**[ii]**. In this paper, in particular, we will focus on those versions of the argument in which the intentions underlying a legal ruling are inferred from the *silence of the legislature*. These "hypothetical" or "counterfactual" intentions are inferred indeed from the fact that the legislature has *not* explicitly ruled the case at hand, and thus are beyond what has been literally stated by the law. This topic, which is relatively neglected in the scholarly literature, is in our opinion an interesting and challenging feature of this argumentative technique. On the one hand, the appeal to hypothetical or counterfactual intentions is frequent in legal practice and argumentation; on the other hand, such an appeal is hard to justify although it is rhetorically effective.

We hope that throwing some light on the uses of this argument will help us understand what its structure is and what its justification conditions are. The

theoretical perspective from which we will try to analyze such uses is an inferentialist one, namely a perspective where the justification conditions of the argument are conceived of in terms of the rules of inference governing an exchange of reasons in the legal domain. These rules, in turn, are expressed in terms of the normative statuses (commitments and entitlements) attributed and assumed by the participants in a legal dispute by means of their linguistic contributions to the discussion.

2. On Silent Legislatures

What can be inferred from the silence of the legislature about a certain case that might *fall under the law*, although it is not explicitly ruled? Compliance with existing legislation? Acquiescence with recent adjudication? Desire to leave the problem fluid? What kind of intention, if any, can be attributed to the silent legislature? And what does the legislature's silence say, if anything, about a case that might constitute an *exception to the law*, although it is not explicitly treated as such? Different answers are plausible (Levi 1948, pp. 538-539). We will try to show that even contradictory rulings can be inferred from the silence of the legislature, depending on the assumptions that one uses as major premises of the argument.

An important presupposition of the argument is that the legislature can be considered as silent on the basis of the wording of a legal text. So, the argument from silence is in a sense parasitic on the argument from literal meaning: it presupposes that a certain case does or does not *prima facie* fall under a rule according to the literal meaning of the relevant text.

Now consider, first of all, the cases that *prima facie* fall under a rule but might constitute an *exception to it* (according to some argument other than the argument from literal meaning, for instance an argument from purpose). Suppose that the legislature is silent on case C_1: one could infer that C_1 is not a relevant exception, since the legislature would have mentioned it if it had the intention to treat it as such. But one could also draw the opposite conclusion, namely that C_1 is a relevant exception, since the legislature would have treated it as such if it had the opportunity to take it into consideration. The two versions of the argument can be schematized as follows:

(*a*) If the legislature had the intention to treat the case as an exception to the rule, it would have done it; but it did not. Therefore, the case falls under the rule.

(*b*) If the legislature had the opportunity to take the case into consideration, it would have treated it as an exception to the rule. Therefore, the case does not fall under the rule.

Similar considerations can be made about the cases that do not *prima facie* fall under a rule but might *fall under it* (according to some argument other than the argument from literal meaning). Suppose that the legislature is silent on case C_2: on the one hand, one might infer that if the legislature had the intention to treat C_2 as such, it would have mentioned it. On the other, one might claim that if the legislature had the opportunity to take it into consideration, it would have included C_2 within the cases so ruled. The two versions of the argument can be schematized as follows:
(*c*) If the legislature had the intention to rule the case, it would have done it; but it did not. Therefore, the case does not fall under the rule.
(*d*) If the legislature had the opportunity to take the case into consideration, it would have included it within the regulation. Therefore, the case falls under the rule.

In all these situations we deal with unexpressed intentions inferred from the legislature's silence. The difference lays in the fact that the argument is used, in versions (*a*) and (*d*), to include a case within the scope of a rule and, in versions (*b*) and (*c*), to exclude a case from it. The first kind of inferred intentions can be labeled *Inclusive Unexpressed Intentions*: they refer to the cases taken to fall under a rule either because, in version (*a*), the legislature did not treat a certain case as an exception or because, in version (*d*), it would have included it within the regulation if it had the opportunity to do that. Instead, we will call the second kind of inferred intentions *Exclusive Unexpressed Intentions*: they refer to the cases taken *not* to fall under a rule either because, in version (*b*), if the legislature had the opportunity to take a certain case into consideration it would have treated it as an exception or because, in version (*c*), the legislature did not explicitly rule it.

What we have been considering so far shows that Fuller (1969, p. 231) was right in claiming that "deciding what the legislature would have said if it had been able to express its intention more precisely, or if it had not overlooked the interaction of its statute with other laws already on the books, or if it had realized that the supreme court was about to reverse a relevant precedent – these and other like

questions can remind us that there is something more to the task of interpreting statutes than simply 'carrying out the intention of the legislature'".

We will try to point out on what inferential conditions such diverse and even opposite uses of the argument from legislative silence are justified in the domain of legal interpretation and argumentation. Even if contradictory rulings can be inferred from the fact that the legislature is silent on a certain case or matter, once a certain premise is included in the argument reconstructing legislative intention the path of justification is bound to a set of pragmatic constraints, which need to be specified and taken into consideration. Here these constraints will be conceived of in terms of *commitments* and *entitlements* to a certain claim (Brandom 1994). The first kind of constraints, or deontic statuses in an argumentative practice, amounts to the situations in which an interpreter is assumed, by the participants in the practice, to have a *duty* that she can be asked to fulfill. The second kind of constraints amounts to the situations in which an interpreter is assumed to be *authorized* to perform a certain claim, on the basis of what the participants have been previously claiming and acknowledging. The analysis of the interplay between pragmatic commitments and entitlements in an argumentative practice permits to figure out what rules of inference govern the uses of this argument in a given legal context, and thus the conditions under which these uses are sound.

3. Is Exchanging a Firearm for Narcotics "Using a Firearm"?
Let us give an example of the argument we are dealing with. In *Smith v. United States* (508 U.S. 223, 1993) the U.S. Supreme Court had to decide whether exchanging a firearm for narcotics is "using a firearm", since the legislature did not explicitly regulate such a case.

The facts were as follows. After petitioner Smith offered to trade an automatic weapon to an undercover officer for cocaine, he was charged with numerous firearm and drug trafficking offenses. Title 18 U.S.C. 924(c)(1) required the imposition of specified penalties if the defendant, "during and in relation to" a drug trafficking crime, "uses a firearm". In affirming Smith's conviction and sentence, the Court of Appeals held that 924(c)(1)'s plain language imposed no requirement that a firearm be "used" as a weapon, but applied to any use of a gun that facilitates in any manner the commission of a drug offense.

So, the issue was whether "using a firearm" covered *any use* of a firearm in

relation to a drug trafficking crime or just the uses of a firearm *as a weapon*. The Supreme Court affirmed the judgment of the Court of Appeals against the narrow interpretation of the statute. To this effect, some crucial passages of the decision refer to unexpressed legislative intentions. Consider the following: "Section 924's language and structure establish that exchanging a firearm for drugs may constitute 'use' within 924(c)(1)'s meaning. Smith's handling of his gun falls squarely within the everyday meaning and dictionary definitions of 'use'. *Had Congress intended 924(c)(1) to require proof that the defendant not only used his firearm but used it in a specific manner – as a weapon – it could have so indicated in the statute*. However, Congress did not" (point (a) of the decision; our emphasis).

This passage contains two arguments: an argument from literal meaning ("the everyday meaning and dictionary definitions of 'use'") and an argument from legislative silence. According to the second, since the legislature was silent on the circumstance of exchanging a firearm for narcotics, the Court argues that such a case does not constitute an exception to the rule, for, had Congress intended to treat it as an exception, "it could have so indicated" (or, better, it would have so indicated). Congress did not, and, continues the Court, there is no reason to suppose that it had a different intent. "There is no reason why Congress would not have wanted its language to cover this situation, since the introduction of guns into drug transactions dramatically heightens the danger to society, whether the guns are used as a medium of exchange or as protection for the transactions or dealers" (point (b) of the decision).

In the opinion of the Court, written by Justice O'Connor, it is also said the following: "*Had Congress intended the narrow construction petitioner urges, it could have so indicated*. It did not, and we decline to introduce that additional requirement on our own" (part II.A of the opinion; our emphasis). Moreover: "We […] see no reason why Congress would have intended courts and juries applying 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity" (part II.C of the opinion).

Therefore, according to the opinion, exchanging a firearm for narcotics is "using a firearm" within the meaning of the statute. Now the Court used version (*a*) of the argument: Had Congress intended that the statute should be given a narrow meaning, it would have so indicated; but it did not, so the statute should not be

given a narrow meaning. However, is this the only conclusion justified by the argument from legislative silence?

The Court could have used other versions of the argument as well. It could have used version (*b*), arguing as follows: If Congress had considered the case of using a firearm as a means of barter, it would have treated it as an exception to Section 924; therefore, the case is not ruled by this Section **[iii]**.

The Court could have also used version (*c*) of the argument, claiming this: Assuming that the case is *not* ruled by Section 924, if Congress had the intention to rule it, it would have done it; but it did not; therefore, the case is not ruled. This was in fact Justice Scalia's argument in his dissenting opinion in *Smith*. He contended that "using a firearm" ordinarily means *using it for its intended purpose*. If we construct the legislative provision according to this, we should conclude that it does not cover all possible uses of a firearm in relation to a drug trafficking crime, but restricts to the uses of it *as a weapon*.

"To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?', he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon" (from Scalia's dissenting opinion).

Scalia claims that the words "as a weapon" are *implicit* in the statute. From this, we can draw an inference to the effect that the legislature had an *exclusive* unexpressed intention with regard to such uses of a firearm as exchanging it for narcotics. This can be put in counterfactuals terms: Had Congress the intention of including such uses within the meaning of the statute, it would have so stated; but Congress did not. Or, had it intended that the statute should be given a less narrow meaning, it would have so indicated; but it did not. This is version (*c*) of the argument**[iv]**.

Finally, it was also possible to use version (*d*) of our argument, making this claim: Although the case is *not* explicitly ruled by Section 924, if Congress had considered it, it would have ruled it according to Section 924; therefore, the case is ruled by this Section**[v].** At the end of the day, both inclusive and exclusive unexpressed intentions can be inferred from the legislature's silence, as the

present example shows.

4. Is the Use of this Argument Arbitrary?

On the basis of the analysis we have been presenting so far, is the use of this argument arbitrary? If we consider the standard approach to the study of legal argumentation, it is. The argument from legislative silence is vague and ambiguous, and simply masks a political choice or preference of the interpreter. But this does not give a perspicuous explanation of the actual uses of the argument. Can we put forward a better explanation of them, showing the constraints put on those who resort to this argumentative technique?

Our aim is to analyze the argument from legislative silence by means of a theoretical framework we have put forward in a number of previous papers (Canale & Tuzet 2007; 2008; 2009; 2010). Our approach might be outlined as follows:

1. the semantic content of a legal text depends on the exchange of reasons among the participants in a legal dispute (judges, lawyers, experts, etc.);
2. this content has an inferential structure (it consists of a set of inferences the text is involved in);
3. this structure can be analyzed from a pragmatic point of view, on the basis of the discursive *commitments* and *entitlements* that the participants undertake and acquire in a legal dispute.

Let us start then our inferential analysis by considering versions (*a*) and (*c*) of the argument with reference to *Smith*. As we will see, these versions do not present the same argumentative problems that the others do.

Versions (*a*) and (*c*) can be considered as (sets of) speech acts performed by a legal interpreter during a trial. By performing them the interpreter is committed to the following claim: "Congress intended to be silent". Silence is here conceived as an *intentional event*; indeed only if this presupposition is accepted the interpreter is justified in claiming either that the case is not an exception to Section 924, or that it is not actually ruled by this Section.

Now the question is: Under what conditions is the interpreter entitled to this claim? An interpreter typically resorts to three kind of *reasons* in order to get entitled to (*a*) or (*c*) by the other participants in the trial:

(1) reasons from legislative history (the enactment process and all the documents

produced in it);
(2) reasons from the assessment of the consequences of statutory construction (if these consequences are taken to be just, fair, right, etc., then the interpreter is entitled to the claim);
(3) reasons from systemic coherence (if the intentional silence of the legislature avoids conflicts between norms, then the interpreter is entitled to the claim).

Notice as an important point that each set of reasons presupposes a *different concept of legislature*. The use of these versions of the argument rests upon an idea of the nature and role of the legislature in general: in (1), it is the historical legislature which originally enacted the statute; in (2), it is the rational legislature (where the relevant concept of rationality is that of instrumental rationality); in (3), finally, it is the idea of a legislature which avoids antinomies among norms.

Thus, being entitled to such a counterfactual claim is not easy. In particular, determining the consequences of statutory construction is a controversial task, which calls for further argumentative resources and cognitive devices. Those who make use of this argument can be requested to give reasons as to the fact that a certain consequence is taken to be reasonable/unreasonable, just/unjust, fair/unfair, acceptable/absurd. This evaluation requires other kinds of arguments in order to be carried on and justified; typically, it requires an argument from purpose or an argument from principle.

According to the former, the consequences of interpretation are valuable as means to achieve a purpose of the law (*ratio legis*). According to the latter, they are valuable on the basis of their coherence with the relevant principles of the legal system. In this last case, it seems correct to argue that what counts as the intention of the legislature is a "question not about meaning […] but about constitutional principles" (Honoré 1987, p. 26).

However, those sets of reasons are not mutually exclusive; in principle one can make appeal to all of them, once the differences among them are pointed out and their tensions are addressed. Let us move now to the other uses of the argument.

Versions (*b*) and (*d*) of the argument are more tricky than the previous ones. Indeed by performing these (sets of) speech acts the interpreter is committed to the following claim: "The legislature did not want to be silent: if it had considered the case, it would have ruled it". Silence is here considered as an *unintentional*

event. Now, under what conditions is the interpreter entitled to this counterfactual claim? Before addressing this question, let us develop some further considerations on the kind of intentions we are dealing with.

The unexpressed legislative intentions we have been focusing on in this paper are sometimes called "hypothetical intentions". They consist in "what the legislator himself would have thought the statute to mean *if* he had more closely considered such cases as the one being decided" (Ekelöf 1958, p. 91); or, more broadly speaking, what the legislature would have intended on certain conditions different from the actual ones (Marmor 2005, p. 130). Sometimes they are called "counterfactual intentions" and are expressed by *counterfactual conditional statements*. This is a proper naming when the issue is not what the legislature actually intended, but what it would have intended had things been different (Stoljar 2001). Indeed in versions (*b*) and (*d*) of the argument from legislative silence the intentions at stake are counterfactual.

Now, from a logical point of view, counterfactual statements are traditionally puzzling. Do they have truth-values, so that they might be considered true or false?

According to Quine (1950, p. 14), they do not. Take his famous example of the Bizet-Verdi case, with the following counterfactual statements: (i) "If Bizet and Verdi had been compatriots, Bizet would have been Italian"; (ii) "If Bizet and Verdi had been compatriots, Verdi would have been French". What are their truth-values? It is hard to say, at least for the reason that both (i) and (ii) seem to be true but they contradict each other (if Bizet had been Italian and Verdi had been French, they would not have been compatriots). According to Lewis and Stalnaker, instead, these and similar conditionals can have determinate truth-values within the framework of possible worlds semantics (Stalnaker 1968; Lewis 1973; Stoljar 2001, pp. 457-458). In particular, a counterfactual conditional is true if and only if in the most similar world to the actual in which the antecedent is true, the consequent is also true.

Obviously the similarity between possible worlds is vague and depends on the context of discussion. Lewis claimed of the counterfactuals (iii) "If Caesar were in command in Korea, he would use catapults" and (iv) "If Caesar were in command in Korea, he would use the atom bomb" that one context might resolve the vagueness of the comparative similarity in a such a way that some worlds with a

modernized Caesar in common come out closer to our world than any with an unmodernized Caesar, while another context might resolve the vagueness in the opposite direction.

Now, if Lewis was right, what are the relevant contexts to be considered in a legal dispute for resolving**[vi]** or at least reducing the vagueness of the counterfactual claim of versions (*b*) and (*d*) of our argument, so that the interpreter gets entitled to it? First of all, the historical context, that is the time of the enactment of the statute and its social and political characteristics. Second, the socio-political context at present time, which might lead the interpreter to resolve the vagueness in a different way. Third, the context of the legal system, which requires coherence and consistency in statutory construction. As far as unintentional silence is concerned, each of these contexts presupposes a *general conception of legal interpretation and argumentation*. Thus being entitled to such counterfactual claim depends on sharing the same conception of interpretation and argumentation. If this is not the case, the use of the argument from unintentional legislative silence is hardly justified.

However, again, these conceptions are not mutually exclusive; in principle one can make appeal to all of them, once the differences among them are pointed out and their tensions are addressed.

5. Conclusions

From what has been shown, it becomes clear that the argument from legislative silence is not a single autonomous argument, but a way of interpreting a legal provision based on and justified by (a combination of) different arguments. So, its justification conditions depend on the justification conditions of other arguments and assumptions. It is important to understand what version of the argument is at stake in a specific dispute and what other arguments and assumptions can justify it.

This is also helpful to settle some of the problems we pointed out at the beginning presenting the more general argument from legislative intention. Recall the Ontological Problem: What kind of entity is the intention of the legislature? On the basis of our analysis, we could argue that this question does not admit a categorical answer but a functional one: such an entity can be identified looking at the functions it fulfills in legal reasoning, that is, at what it serves to do and not at the ontological properties it is supposed to have.

If one adopts this point of view, it follows that the intention of the legislature is a legal device useful for connecting textual and meta-textual arguments in the legal argumentative practice. To put it as MacCormick and Summers do, it has a transcategorical role. On the basis of its transcategorical function, it permits to use a certain set of arguments (textual, systemic, or purposive) as a means to integrate or dismiss the use of a different set of arguments. In this sense, the legislative intention represents a fundamental connection component of legal argumentation, despite the fact that it is not as such an autonomous argument.

An inferential analysis of legal argumentation throws also some light on the Epistemic Problem affecting the idea of legislative intent. In those cases in which such an intent is not explicitly stated, it can be found first by looking at the textual and meta-textual clues that the legislature has let slip in the legal materials; then one has to formulate a hypothesis as to the content of legislative intentions, to infer the norms which could comply with it, and finally to test these norms by means of other textual, systemic and purposive arguments, which help eliminate the hypotheses which are not supported by these arguments. In this sense, the knowledge of legislative intent is always revisable in the face of further argumentative evidence.

As to the Abstraction Problem, we could agree with the criterion suggested by Moreso (2005, p. 136): if the text is detailed, an interpretive doubt must be solved at the same detailed level, looking for the precise legislative intent; if the text has an abstract formulation (as many constitutional provisions have), a doubt must be solved in the abstract, leaving room for contextual considerations from time to time.

However, as we saw, things get harder when what is at stake is not an actual but a counterfactual intention. Then the argument from legislative silence seems to create more problems than it solves.

NOTES

[i] This might find a confirmation in the distinction of various kinds of legislative intentions: for instance, intentions manifest in the language of the law itself, intentions concerning the purposes of the rule enacted, intentions concerning the application of the law (Marmor 2005, pp. 127-132).

[ii] However, we don’t want to say that this argument is *more* important than others. There is a standard distinction between subjective and objective methods

of interpretation: in EU law, for instance, the latter are presently preferred (literal meaning, purposes, principles); but in Italy the law itself (art. 12 of the "Preleggi" to the Civil Code) requires the ascertainment of the law-maker's intention as a canon of interpretation.

[iii] To take another example, consider the following passage from *Riggs v. Palmer* (1889), 115 N.Y. 506, 22 N.E. 188: "It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. *If such a case had been present to their minds*, and it had been supposed necessary to make some provision of law to meet it, *it cannot be doubted that they would have provided for it*" (our emphasis). A similar argument is used in *Holy Trinity Church v. U.S.* (1892), 143 U.S. 457; on this case see Feteris (2008).

[iv] To take another example, in *McBoyle v. United States* (283 U.S. 25, 1931) the Supreme Court had to decide whether the National Motor Vehicle Theft Act applied to aircrafts (which were not explicitly mentioned in the text). The opinion delivered by Justice Holmes stated the following: "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that *if the legislature had thought of it, very likely broader words would have been used*" (our emphasis).

[v] It has to be noticed, however, that this version of the argument would be in tension with the prohibition of reasoning by analogy in criminal law.

[vi] Note that Stoljar (1998, p. 59) is skeptical about this: "the counterfactuals required to be used in intentionalist interpretation are sensitive to context, and hence are vague or indeterminate. If I am right, we cannot have recourse to intentionalism to solve interpretive problems when counterfactuals are required. We must look to some other theory of interpretation".

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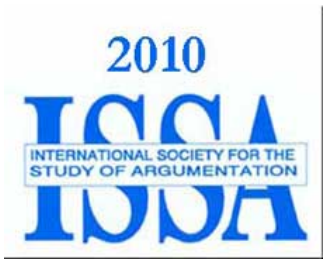
ISSA Proceedings 2010 – Algorithms And Arguments: The Foundational Role Of The ATAI-Question



1. Introduction

Argumentation theory underwent a significant development in the Fifties and Sixties: its revival is usually connected to Perelman's criticism of formal logic and the development of informal logic. Interestingly enough it was during this period that Artificial Intelligence was developed, which defended the following thesis (from now on referred to as the AI-thesis): human reasoning can be emulated by machines. The paper suggests a reconstruction of the opposition between formal and informal logic as a move against a premise of an argument for the AI-thesis, and suggests making a distinction between a broad and a narrow notion of algorithm that might be used to reformulate the question as a foundational problem for argumentation theory.

The paper starts by the analysis of an argument in favor of the AI-thesis (from now on referred to as the AI-argument), distinguishing three premises that support the conclusion (§ 2). We suggest that the interpretation of informal logic as strictly opposed to formal logic might be interestingly analyzed as a move in a

strategy to refute the AI-thesis by attacking a premise of the argument: the possibility of expressing arguments by means of algorithms. We are not thereby suggesting that this move was explicitly made by argumentation theorists; nonetheless this counterfactual reconstruction might shed some light on the reasons that opposed argumentation theorists and AI-scholars. In particular, we suggest that the opposition between a formal and an informal approach need not be interpreted only as a way to deal with the peculiarities of ordinary language (analytic philosophy of language answered a similar need without renouncing formal tools, even if only fragments of the natural languages could be formalized), but might also be considered as a way to distinguish the domain of human argumentative rationality from the domain of mechanical computation.

The mentioned strategy will then be compared with other moves directed at the rebuttal of the conclusion of the argument (§ 3). This will allow to distinguish the criticism of the possibility of expressing arguments by means of algorithms from the criticism of the interpretation of Leibniz's logical calculus as the structure of human reasoning, and from the criticism of the thesis that all computable functions can be calculated by a Turing-machine. The comparison of different strategies to rebut the conclusion of the argument will show that a certain understanding of the notion of algorithm is essential in all three strategies: algorithms are considered as computable functions.

We will afterwards discuss a broader notion of algorithm that is often referred to in the literature either as a more intuitive and primitive notion or as a notion that needs to be developed in order to ground recent developments in computation theory and AI (§ 4). We will interpret the narrow notion of algorithm (algorithms are computable functions) as a formal definition that applies only in certain cases but that can fruitfully contribute to an understanding of the intuitive notion.

We will suggest a general characterization of the broad notion as an enlargement of the narrow notion of algorithm. The latter is based on the definitions given by Markov and Knuth (§ 5). Common features of the two notions are finiteness, generality, conclusiveness, while some relevant differences concern the formulation of effectiveness, which needs to be loosened, definiteness, and determinism, which need to be abandoned if one wants to include non-deterministic algorithms, or indefinite algorithms that need to be interpreted by the receiver in a given context, or more generally algorithms that cannot be computed by a Turing-machine.

We will then consider a distinction between a broad and a narrow notion of argument (§ 6), suggesting that, if one interprets formal logic as a sub-domain of informal logic rather than as a radically incompatible research area, then the broad notion of argument can be considered as more primitive and the narrow notion can be seen as a restriction that is useful to understand the nature of arguments but that is also insufficient for certain purposes of argument analysis.

Given this interpretation of the relations between formal and informal logic, several similarities between the broad notions of argument and algorithm are considered (§ 7): not only the history of the relations between a broad and a narrow notion is similar in the two cases, but the two broad notions can be similarly described by difference with respect to the two narrow notions: the former are informal rather than formal, pragmatic rather than only syntactic, in need of an interpretation rather than unambiguously determined, non-deterministic rather than deterministic. The distinction between a broad and a narrow notion of algorithm will also explain why it was so easy for argumentation theorists to refute the idea that arguments could be expressed by algorithms: they were comparing the broad notion of argument with the narrow notion of algorithm. Once the comparison is made between the two broad notions, certain similarities cannot be ignored, and the fruitfulness of the application of AI to argumentation might be investigated anew.

In the last section of the paper (§ 8) we will go back to the argument sketched out in § 2 in order to claim that the distinction between a broad and a narrow notion of argument, and the developments made by logic, computation theory, AI and argumentation theory in recent years make it easy to rebut the conclusion of the argument. But maybe that is only due to the fact that the idea expressed by it needs to be reformulated in the light of those developments: the question suggested by AI does not concern the emulation of the argumentative reasoning of a single human mind, but rather the emulation of the argumentative practices of several interlocutors interacting with each other in a given context. The question would now be whether a multi-agent system can emulate the interactive reasoning of several human participants in a discussion (from now on referred to as the ATAI-question). This paper does not aim to give a definite answer to the problem, but considers it as a leading idea in the application of AI to argumentation theory and as an open question that is not limited to logic or philosophy of mind but that involves the foundations of argumentation theory

itself, and especially its conception of argumentative rationality.

2. The AI-argument and its criticism by argumentation theorists

Between the end of the Fifties and the beginning of the Sixties research into formal logic and AI were oriented by the idea that

(1) human reasoning can be considered as a mechanical computation (Leibniz's calculemus).

The majority of AI scholars also believed in the so-called Church-Turing thesis, which can be roughly formulated as follows:

(2) any computable function can be computed by a Turing-machine.**[i]**

So, if one accepts the further premise that

(3) arguments can be reconstructed as algorithms,

then one can infer by means of (1), (2) and (3) that

(AI-thesis) human argumentative reasoning can be emulated by a machine.

It is well known that a main reason for the revival and development of argumentation theory in the Fifties and Sixties was the reaction to the neopositivist ideas that there could be no rational discussion on judgements of value and that logic could be conceived as a mathematical calculus rather than as a general theory of human reasoning. We would like to suggest that there was a third element of disagreement between argumentation theorists and formal logicians: it concerned the role attributed to algorithms in the representation and understanding of human reasoning.**[ii]**

AI scholars believed that human reasoning was a mechanical computation (1) and thus aimed at restricting the notion of algorithm so as to identify it with a class of computable functions. According to our interpretation the insistence on the opposition between formal and informal arguments could be seen, in the light of recent developments of AI, and independently from the intentions of the argumentation theory scholars that first defended such an opposition, as a move against the AI-argument. Assuming the Church-Turing thesis (2) to be valid, and assuming that arguments can be reduced to algorithms (3), one could derive the conclusion that human reasoning can be emulated by a machine (AI-thesis). But if this is true, there would be no space left for the specific human "rationality" of argumentation. So, while attacking premise (3), one would at the same time rebut the AI-argument, if not attack the AI-thesis altogether. When arguments are defined as classes of sentences of the natural language that could not be adequately translated into any formal language, then they are defined by

opposition to algorithms. Besides, it is not uncommon in the argumentation theory tradition to strongly criticize the reduction of arguments to deductive inferential schemes. So, even if we are not suggesting that any argumentation scholar has explicitly advocated this strategy, some of them might agree on the premises of the argument and might be satisfied with its conclusion.

The strategy consisting in the denial of the AI-thesis by refuting premise (3) was useful to distinguish argumentation theory from logic, and thus a condition for the existence of argumentation theory itself, given that if human reasoning does not differ substantially from the reasoning of a machine, there would be no need to distinguish the domain of human rationality from the domain of formal logic (Govier 1987, pp. 204-5).

3. Other strategies to attack the conclusion of the AI-argument

Whether all human reasoning could be emulated by a machine, and whether there was nothing in the human mind that could exceed the powers of a calculating machine became main philosophical questions in logic and philosophy of mind. Among those who tried to refute the AI-thesis there were not only argumentation theorists, but also philosophers and logicians. The move made by argumentation theorists was not the only possible one. Other possible moves included the attack on premise (2), i.e. on the Church-Turing thesis, or on premise (1), i.e. on the mechanical conception of logical reasoning.

Kurt Gödel for example criticized the Church-Turing thesis in a remark on undecidability results, where he reacted to the following version of the thesis: Turing machines can compute any function "calculable by finite means" (Turing 1937, p. 250). There is a huge body of literature discussing the meaning of Gödel's remark although in this paper we will not go into details. What is relevant here is the generally accepted fact that Gödel intended to suggest counterarguments to the idea that the generalized undecidability results might establish bounds for the powers of human reason (Gödel 1986, p. 370). Furthermore, it is relevant that he considered Turing's argument "which is supposed to show that mental procedures cannot go beyond mechanical procedures", as not yet conclusive, because "what Turing disregards completely is the fact that mind, in its use, is not static, but constantly developing, i.e. that we understand abstract terms more and more precisely as we go on using them, and that more and more abstract terms enter the sphere of our understanding. […] This process, however, today is far from being sufficiently understood to form

a well-defined procedure." (Gödel 1972a, p. 306). Even if we admit premise (1), i.e. that human reasoning is a mechanical procedure, its calculations cannot yet be expressed by well-defined procedures.

Another possible strategy to refute the AI-thesis consisted in the attack on premise (1). A similar move had been done already at the end of the 19th century by J. Venn, who argued that even if human reasoning were based on algorithms, it could not be considered as a mechanical computation: "There is, first, the statement of our data in accurate logical language. […] Then secondly, we have to throw these statements into a form fit for the engine to work with–in this case the reduction of each proposition to its elementary denials. […] Thirdly, there is the combination or further treatment of our premises after such reduction. Finally, the results have to be interpreted or read off. This last generally gives rise to much opening for skill and sagacity; [..] I cannot see that any machine can hope to help us except in the third of these steps; so that it seems very doubtful whether any thing of this sort really deserves the name of a logical engine" (Venn 1881, pp. 120-121).

In his 1972 article on the extension of finitary mathematics Gödel interestingly remarked upon a difference between the definition of algorithm occurring in the formulation of Turing's thesis and the intuitive notion of a well-defined procedure or algorithm: the latter is a primitive notion. Although he considers it as adequately expressed by Turing's notion of a mechanically computable function, Gödel adds that "the phrase 'well-defined mathematical procedure' is to be accepted as having a clear meaning without any further explanation." (Gödel 1972, p. 275).

It is interesting to remark that all three strategies are based on the common implicit premise that the conception of algorithms can be adequately described by the notion of computable functions. As Gödel somehow suggested, the notion of algorithm is nonetheless antecedent to Turing's definition and further developments of AI and computation theory have shown that the former might be broader than the latter. In the next section (§ 4) we will thus consider a different understanding of the notion of algorithm that will require a new evaluation of similarities and differences between algorithms and arguments (§ 7). This will also imply that the attack of premise (3) in order to rebut the AI-thesis might not be easily made nowadays.

4. A broad and a narrow notion of algorithm

Recent developments of computation theory and AI suggest that the intuitive notion of algorithm might be broader than the notion of a Turing-machine computable function.

Firstly, there are some procedures that cannot be computed by a Turing-machine. Some of them can nonetheless be computed by other kinds of machines (Gurevich 2000, p. 77 ff.). If an algorithm could be defined as a function that can be computed by a broader class of machines, including the Turing-machine as a particular case, then this notion would be broader than the one given by Turing.

Secondly, there are several notions of a computable function (lambda-computable, general recursive, primitive recursive, partial functions, ….), and there is no definite evidence that the notion of algorithm should be adequately and uniquely expressed by one of them. As Gödel himself noted in the previously mentioned passages, an intuitive notion of algorithm precedes the notion of a computable function. Blass and Gurevich are even more radical: "it is often assumed that the Church-Turing thesis settled the problem of what an algorithm is. That isn't so. The thesis clarifies the notion of computable function. And there is more, much more to an algorithm than the function it computes. The thesis was a great step toward understanding algorithms, but it did not solve the problem what an algorithm is" (Blass and Gurevich 2003, p. 197).

Thirdly, the definition of algorithm as a computable function was the result of efforts to formulate algorithms that can be computed in a reasonably short time and in a reliable way by machines, but the notion of algorithm historically preceded both the notion of function and the invention of calculating machines. As an example, one could mention the nine chapters on mathematical procedures by Liu Hui written at the beginning of the third century (Chemla 2005, p. 125). Similarly, in the common understanding of algorithms as recipes or procedures to carry out some task (Sipser 2006, p. 142), algorithms are sets of instructions written for human receivers. Unlike Turing-machines, the instructions given to a human receiver need not be completely unambiguous. The context of the algorithm and other pragmatic elements might help the receiver to interpret the instructions of the procedure. So conceived, algorithms might contain procedures that cannot be computed by a Turing-machine.

Finally, the development of multi-agent systems in AI has favoured the investigation of interactive algorithms, that can be implemented on a network of

machines: multi-agent systems that can learn from experience and interact in a network. The class of interactive algorithms is so broad as to include randomized algorithms, asynchronous algorithms, and non-deterministic algorithms as well. In other words it includes algorithms that "are not covered by Turing's analysis" (Blass and Gurevich 2003, p. 203).

The analysis of the developments of mathematics, computation theory, and AI shows that a broader notion of algorithm not only preceded the formalized definition given in the 20th century, but has also been the object of research in computation theory. The need for a more precise notion of algorithm induced a narrowing of the notion in order to define it as a Turing-machine computable function. Later on some computation theorists and AI researchers discovered that this definition might be too narrow to be applied to some interesting examples, and started to progressively broaden the notion of algorithm. We suggest that the narrow notion of algorithm might be conceived as a temporary restriction of a more intuitive and broader notion–a restriction that was particularly useful to understand and formalize certain aspects of the broader notion, but that does not pretend to include all kinds of algorithms.

Rather than broadening the notion of an algorithm by enlarging the class of computable functions or the class of machines to which algorithms correspond – a strategy that has been followed for example by Gurevich – we want to develop here a conceptual analysis of the conditions that the narrow notion usually satisfies and that the broader notion might fail to satisfy. We will claim that a provisionary understanding of the broader notion of algorithm that is at stake in AI and in computation theory could be obtained from the narrow notion if one abandons the conditions of definiteness and determinism, and if one does not formulate effectiveness in a very strict way. If the broader notion of algorithm can be obtained by a modification of the definition of the narrow notion, this does not mean, as we have already suggested in the previous paragraphs, that the narrower notion should be more primitive: on the contrary, the broader notion precedes both historically and conceptually the narrower notion. The latter, though, is easier to formalize, and can thus be used as a starting point for the analysis of the former.

5. A conceptual analysis of the differences

Our suggestion for a characterization of the narrow notion of algorithm is derived, with some modifications and integrations, from the definitions given by Markov

and Knuth between the Fifties and the Sixties (Markov 1961 and Knuth 1997). An algorithm is a set of instructions determining a procedure that satisfies the six following conditions: finiteness, generality, conclusiveness, effectiveness, definiteness, and determinism.

Finiteness expresses the fact that the procedure allows, given certain inputs, to reach the goal (decision, computation, problem solving), i.e. provide the desired output in a finite number of steps. Generality guarantees the possibility of starting out with initial data, which may vary within given limits (e.g. certain general classes of inputs are admitted). Conclusiveness expresses the fact that the algorithm is oriented towards some desired result which is indeed obtained in the end if proper initial data are given. Effectiveness requires that the operations to be performed are sufficiently basic that they can in principle be done exactly and in a finite length of time by the executer (e.g. a man using a paper and a pencil). Definiteness requires that the prescription should be universally comprehensible and precise, leaving no place for arbitrariness. Determinism guarantees that, given a particular input, the procedure will always produce the same output, and will consist in the same sequence of steps.**[iii]**

The mentioned characterization determines a class of definitions of algorithms rather than being itself a definition of algorithm: differences might derive from specific or detailed formulations of each condition. Effectiveness might be for example intended as strongly or weakly polynomial-time complexity; generality might be specified as the requirement that all inputs belong to the class of natural numbers or to the class of real numbers, and so on.

In the light of the brief survey of some occurrences of a broader notion of algorithm given in § 4, we suggest that the broad notion should maintain some features of the narrow notion, allowing other features to be formulated in a more liberal way or abandoned altogether. In particular, the narrow notion of algorithm should be better characterized by finiteness, generality, conclusiveness, and by a 'liberal' formulation of effectiveness. This condition has nonetheless to be at least partially maintained if one wants the algorithm to be concretely computable by some kind of physical machine. The conditions of definiteness and determinism might be abandoned, so as to include non-deterministic algorithms, indefinite algorithms that need some interpretation by the receiver, and algorithms that cannot be computed by a Turing-machine. Abandoning these conditions need not mean of course that all parts of an algorithm would be non-definite or non-

deterministic: in order to preserve some kind of effectiveness, considerable portions of the algorithm might have to be definite and deterministic.

6. A narrow and a broad notion of argument

After having introduced a distinction between a narrow and a broad notion of algorithm, we would now like to go back to the definition of argument. This will help a further understanding of premise (3), because in order to discuss if arguments can be expressed as algorithms one should consider which notion of algorithm and which notion of argument is at stake.

In the history of argumentation theory several definitions of an argument have been given. A detailed list of different definitions cannot be presented here, but two main classes of definitions can be distinguished. The first class contains the definitions of what we will call the narrow notion of an argument, including the Aristotelian scientific syllogisms and formal representations of deductive inferences such as Lorenzen's dialogical moves. Common characteristics of this narrow notion of argument are the formal representation, the central role played by deduction as a core inference, and the context-independent definition of validity. The second class contains several definitions that express a broader notion of argument, including for example the pragmatic conception developed by van Eemeren and Grootendorst (2004), and the informal notion of argumentative schemes developed by Perelman. The definitions that belong to this class are usually informal, context-dependent and based on a diversification of the kinds of relations that can occur between premises and conclusions in order for the argument to be valid: deductive and inductive inferences, but also other schemes, such as analogy or causal relation, are admitted as valid.

The relation between the two classes of definitions can be conceived differently (Johnson & Blair 2002, p. 357 and D'Agostini 2010, p. 35). Some authors consider them as two complementary classes: the informal definition of argument is opposed to the formal notion, as if the two concepts were radically different and applied to different domains (Scriven 1980). Other authors conceive the broad notion as an enlargement of the narrow notion that might be partially or wholly formalized by means of more sophisticated logical tools (non-monotonic logic, dialogue logic, default logic, defeasibility, and so on) (Woods et al. 2002). Following this second interpretation of the relations between the two notions, we have elsewhere argued (Cantù & Testa 2006, pp. 18-21) that the narrow notion might be considered as a temporary restriction of the broader notion that is

useful to better understand the notion of inference, rather than as a concept that is radically opposed to it.

In our reading, the opposites informal/formal, syntax/pragmatics, and deductive/non-deductive can be read as relations of subordination rather than as relations of contrariety, and informal logic is considered as an enlargement or liberalization of formal logic. Arguments expressed in the natural language are thus informal not in the sense that they cannot be formal, but rather in the sense that they are "only partially formalizable" by means of the logical tools at our disposal.

The narrow notion is in fact useful to formalize certain arguments that fall under the broader notion, or at least certain parts of them (Woods & Walton 1982), as well as the formal notion of argument can be used to better understand an argumentation that can never be fully articulated in the natural language, or at least not in the same way.

7. Similarities between arguments and algorithms

Given this interpretation of the relations between formal and informal logic, the history of the relations between the notions of argument is partly similar to the history of the relations between the notions of algorithm. An intuitive broad notion is reduced to a narrow notion in order to be treated formally, but after some time the limitations induced by the narrow notion appear as too restrictive and scholars start considering the possibility of broadening it, even if the broader notion can only be partially formalized or cannot be made as precise as the narrow notion.

The distinction between a narrow and a broad notion that has been presented in the case of algorithms has thus an analogy in the case of arguments. Firstly, the development of argumentation theory, and especially of informal logic as a reaction to the reduction of the notion of argument to logical consequence is similar to the criticism of the reduction of the notion of algorithm to the notion of a computable function. Secondly, several formal definitions of argument were developed in order to make the broader intuitive notion more precise, but after some time they were judged as insufficient to express human reasoning; analogously the notion of a function that is computable by a Turing machine has been recently perceived as too restrictive to express all the possibilities of human computation, although still considered as a good way to make the notion of

algorithm precise. Thirdly, as in the case of algorithms, the broad notion precedes the narrow notion both historically and conceptually, even if the latter can be obtained by the definition of the former, if certain conditions are modified or abandoned.

The similarities between algorithms and arguments do not concern only the history of their definitions. If one considers the relation between the two narrow notions of argument and algorithm and the relation between the two broad notions respectively, one might remark certain similarities. The attack made by argumentation theorists on premise (3), i.e. to the claim that arguments can be expressed as algorithms, was based on a comparison of the broader notion of argument with the narrow notion of algorithm. But if one now compares the broad notion of argument with the broad notion of algorithm, some similarities might need further investigation.
Firstly, the broader notion of argument is not incompatible with a representation by means of diagrams, graphs, procedural forms, and other inferential schemes that can be expressed by algorithms. This is proved by the number of articles and results produced in AI by scholars who developed Toulmin's interpretation of an argument as a procedural form.

Secondly, the attention devoted to pragmatics in argumentation theory is now emerging in computation theory too, especially in the development of algorithms that need to be interpreted by multi-agent systems, whose resources and background knowledge depend on the amount of interaction between the system and the environment and between the agents themselves.

Finally, the interest for the interpretation of the assertions of the interlocutor in the argumentative practice might be fruitfully compared to the interpretation of the information received from an agent in a complex system. The non-deterministic and indefinite aspects of the broader notion of algorithm might usefully be applied to the reconstruction of certain aspects of human argumentative practices.

A deeper investigation of these and maybe other similarities between the broad notion of algorithm and the broad notion of argument might shed some light on a strictly foundational question that will be developed in the next paragraph: are there some specific features of human rationality that explain our argumentative practices and that cannot be reproduced by the mechanical computation of a

multi-agent system?

8. Conclusion

Argumentation theory was partly developed in the belief that there is much more to an argument than there is to an algorithm, but the broad notion of argument was compared with the narrow notion of algorithm. Along these lines one could develop a strategy to refute the AI-thesis, i.e. the claim that the argumentative reasoning of the human mind could be emulated by the computation of a machine. But if one considers a broader notion of algorithm, the AI-thesis might be raised anew: is there something in the broader notion of argument that cannot be captured by the broader notion of algorithm?

This question might get a different answer based on recent developments in logic (non-monotonic logic, default logic, …), in AI (multi-agent systems) and in computation theory (non-deterministic indefinite algorithms). If premise (3) of the argument introduced in § 2 cannot be easily refuted, one might ask oneself if the alternative strategies to refute the conclusion are still viable, after one has abandoned the implicit premise that an algorithm is a Turing-machine computable function.

The claim that the argumentative reasoning of the mind can be emulated by a single machine was mainly a question concerning logic and the philosophy of mind, and not a question concerning argumentation theory, because the reasoning that was at stake there was neither dialectical nor dialogic, but rather a merely monologic calculus. Therefore it is possible to accept premise (3) and still deny the AI-thesis in its original formulation. In the Introduction to *Argumentation in Artificial Intelligence*, J. van Benthem apparently adopts this strategy when he reassures logicians, philosophers and argumentation theorists by saying that no AI theorist believes anymore that machines can emulate humans. Machines are rather useful to improve the understanding of human capacities: "Original visions of AI tended to emphasize hugely uninspiring, if terrifying, goals like machines emulating humans. […] Understanding argumentation means understanding a crucial feature of ourselves, perhaps using machines to improve our performance, helping us humans be better at what we are" (Rahwan and Simari, 2009, p. viii).

This is an easy move, but maybe not too convincing, for even if no AI scholar would claim anymore that a single machine could emulate the reasoning of a single human mind, she could still defend a variant of the AI-thesis reformulated

in the light of recent developments of logic, computation theory, artificial intelligence, and argumentation theory:
(ATAI-thesis) a multi-agent system can emulate the interactive reasoning of several human beings.

Recent developments of the applications of AI to argumentation theory suggest that several inter-subjective aspects of human argumentative interactions can be simulated by complex algorithms functioning on systems of interacting machines. It is no longer a question of how far the activities of the brain can be simulated by some physical device, but rather the question is why the application of AI to argumentation theory is so fruitful. For example, there is research on algorithms that produce new arguments, and successful implementations of argument-based machine learning.

This paper does not aim to give a definite answer to the ATAI-question, but rather to show that the question is still open and cannot be easily liquidated as an obsolete or untenable claim. Once reformulated, the analysis of the ATAI-thesis (i.e. AI-thesis revisited in the light of Argumentation Theory) might have some effects on the foundation of argumentation theory itself, as we will claim in the following, after briefly mentioning what we mean here by foundational questions. According to our understanding, foundational problems in argumentation theory concern the creation of an adequate model that can be used to analyze argumentation practices: according to the reconstruction that we suggested elsewhere (Cantù & Testa 2006), such a foundational role might be played by the notions of dialectics, dialogue, intersubjectivity, pragmatics, but also by some ideal of argumentative rationality. Another relevant foundational issue might concern the bridging of the gap between different traditions (including formal and informal approaches to the reconstruction and evaluation of arguments) in order to provide a general framework for the development of argumentation studies.

Now, the interaction between multi-agent systems is based on communication procedures that have strong similarities with the dialectical and dialogic interactions studied in argumentation theory, inasmuch as it is based on distributive cognition and on pragmatic elements as well as on syntactic and semantic aspects. So, the notions of dialectics, dialogue, intersubjectivity, and pragmatics play a major role also in the applications of artificial intelligence to argumentation theory. The ATAI-question asks if there are grounds for this similarity and implies that, if there are, then one should take the results of

artificial intelligence into account when defining such concepts.

Secondly, if mechanical computing can be considered as strictly argumentative, then the relevant features of argumentative rationality might already be captured by the algorithms of a multi-agent system: so, if one wants to claim that human argumentative practices contain some specificity ("the" rationality of argumentation), then one should exhibit some features (other than pragmatics and interaction) that could not be captured by the activity of some multi-agent system, and this, we believe, is a foundational task.

Thirdly, the ATAI-thesis in connection with the distinction we suggested between a broad and a narrow notion of algorithm might suggest a new and fruitful way to bridge the gap between formal and informal approaches to argumentation theories, providing a new framework that could include both without misrepresenting their differences and peculiarities.

NOTES

i The notion of a Turing-machine was first introduced by Alan Turing in 1937 in order to analyze the notion of computability. It is an ideal state machine made of an infinite one-dimensional tape divided into cells, each one able to contain one symbol, either '0' or '1'. The machine has a read-write head, which scans a single cell on the tape at a time, moving left and right along the tape to scan successive cells. The machine actions are completely determined by the initial state of the machine, the symbols scanned by the head in the cells, and a list of instructions of the kind "if the machine is in the Initial State S_0 and the current cell contains the Symbol y, then move into the Next State S_1 taking Action z".

ii Cf. for example Toulmin 2001, p. 96, where the search for algorithms is criticized as a correlate of the search to ground objectivity in a unique methodological standpoint: "These arguments may leave mathematically-minded readers with a sense of loss. The dream of formal "algorithms" for guiding scientific procedures has a charm that will not quickly dissipate. For those who value mathematical exactitude above all other kinds of precision as the model for scientific inquiry, the alternative message of "different methods for different topics" will be a disappointment. Yet, over the centuries, we have been obliged to recognize a spectrum of different kinds of methods (in the plural) for sciences ranging from Newton's Planetary Theory—strictly factual and value-free, and in a style close to that of Euclid's Geometry—by way of empirical or functional

sciences like geology, chemistry, physiology, and organic evolution, to those human sciences in which attempts to maintain value-neutrality finally proved vain."

iii The notion of conclusiveness, taken from Markov 1961, is similar to the notion of determinism, but might be fruitfully distinguished from the latter if one accepts Gurevich's characterization of non-deterministic algorithms as a special class of interactive arguments. "Imagine that you execute a non-deterministic algorithm A. In a given state, you may haperlve several alternatives for your action and you have to choose one of the available alternatives. The program of A tells you to make a choice but gives no instructions how to make the choice. […] Whatever you do, you bring something external to the algorithm. In other words, it is the active environment that makes the choices." (Gurevich 2000, p. 25.) Gurevich's algorithm might be conclusive, because once the choice is made, the desired output might indeed be obtained, but it is non-deterministic, because depending on the choice there might be more than one sequence of steps leading from the input to the output. Besides, the algorithm might still be definite, at least in the sense that the arbitrariness does not depend on an ambiguous formulation of the algorithm, which allows for different interpretations, but rather on the introduction in the algorithm of something external to it.

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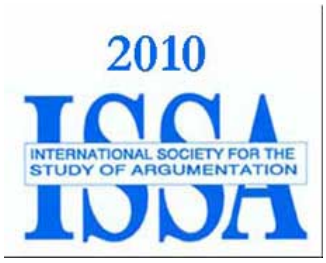
ISSA Proceedings 2010 – Emotional Arguments, Personality Theory, And Conflict Resolution



1. Introduction

In The Emotional mode of argumentation: descriptive, people-centered, and process-oriented I compile and discuss different types of emotional arguments that have been introduced in existing literature and demonstrate how they contribute to the overall goals of various argumentative dialogues. Following Hample, a fundamental belief which grounds this work is that, "people cannot reason without emotion and rarely experience emotion without reason. They are partners, not competitors" (2005, p. 127). I do this in an effort to push the argumentation community to acknowledge that emotional arguments can be credible sources of argument, and more importantly that they can help argumentation practitioners better understand, facilitate, or assess emotional arguments. Whether practitioners are analysts performing empirical studies of emotional arguments, professionals who deal with arguments continually as part and parcel to their work, or individuals confronting emotional arguments, that project is aimed chiefly at providing theoretical insights. It also begins to introduce practical tools that can help us with emotional arguments. In this paper, I summarize parts of a chapter on emotion, to demonstrate what is encapsulated by my notion of an emotional argument. This is entirely descriptive, and thus has no elements of normative analysis. Then, I discuss personality theories and connect them with emotional arguments. Finally, I introduce a family mediation case scenario, articulate some of its emotional arguments and discuss how the input of personality theory can help facilitate resolution of those arguments present.

2. Definition of emotional argument

I concentrate on arguments that have some sort of interaction where there is disagreement between parties, with a key element being that arguments require

more than one individual, as there needs to be dissent. An emotional argument occurs when the dissent between interlocutors is of an emotional nature. Gilbert states that even though an emotional argument can be paraphrased into a logical argument, "its force and persuasive power come almost entirely from its emotional aspect" (1997, p. 83). Ekman's view on emotions supports this notion of emotional argumentation. He writes that, "we can have emotional reactions to thunder, music, loss of physical support, auto-erotic activity, etc. Yet . . . the primary function of emotion is to mobilize the organism to deal quickly with important interpersonal encounters, prepared to do so by what types of activity have been adaptive in the past" (Ekman 1999, p. 2). An emotional argument is a common occurrence. As humans, we are susceptible to feeling and intuiting our way, as well as disagreeing and arguing with each other. When a disagreement occurs between parties, emotions can be involved in a number of ways. For an argument to be emotional, it can contribute to the argumentative dialogue in any one of the five ways summarized below.

3. Types of emotional arguments summarized

The list below is a compilation of what other argumentation authors have already put forward with respect to emotion in argument. It is not an exhaustive list, and it should be further developed with the help of empirical research. I consider this a solid starting point for thinking about how emotions play a role in argumentation:

(i) Emotions can be used by an arguer to express an argument (Gilbert 1997).
(ii) Emotions can be used by an arguer as grounds for a claim (Ben-Ze'ev 1995; Gilbert 1997).
(iii) Emotions can make up an arguer's claim (Plantin 1999).
(iv) Emotions of a listener can be elicited in the context of an argument:
– empathic emotions of the audience can be appealed to (Walton 1992);
– emotions of fear in an audience can be evoked (Walton 1992)

In my dissertation I demonstrate ways that these emotional types of argument can be a part of a particular argumentation dialogue. For this, I concentrate on Walton's six dialogues (1998). By connecting the different types of emotional argument with the goals of each of Walton's dialogues, one can better envision some ways that emotions play out in argumentation. Sometimes emotions do not enter into a critical discussion or a negotiation that turns to bargaining for the right "price," but sometimes they are important to the arguers and the context.

When this occurs, we need to understand their effects on the argument process, not to consider the emotion as extraneous to the dialogue.

4. Temperament Theory and Application

Personality Dimensions® (henceforth referred to as PD) is a personality assessment instrument that measures temperament. Temperament is defined as "an innate pattern or system of how a human being is organized psychologically that is revealed through characteristic behaviours, talents, values, and psychological needs" (Campbell 2002, p. 1). PD is based on ancient as well as modern research. It characterizes different personalities in a manner that can assist interlocutors or an impartial third party who is meant to aid interlocutors. Before summarizing some of the theoretical basis for PD, I want to emphasize – more for the skeptic of personality theory than anything – that PD is about preferences. While it categorizes personalities into four main temperaments, it does not pigeonhole an individual. We each have preferences for certain actions, thoughts, relationships, and so on; however, it does not follow that we cannot be successful at things outside of our preferences, or even that we always excel at something within our preference range. An awareness of PD theory and application can be used as a practical tool for negotiating understanding or agreement within argumentative spaces.

Theoretical background of PD

McKim (2003) draws connections and similarities among a number of theories from 400 BC to present day – theories about body fluids, societal roles, sources of happiness, personality types, to temperament types. These comparisons have been loosely articulated as backing for PD. Even though the theorists themselves studied different aspects of four main modes, and the relationships among the theories are not precise, there is substantial enough overlap to suggest PD is supported by research over the centuries (McKim 2003, p. 6). As Maddron writes.

Over the centuries, these four elements of personality have interested people for the same reason that they interest us today. The four temperaments shed light on certain natural differences among people that make sense, differences that help us understand and relate to ourselves and the people around us. (2002, p. 10)

Greek physician Hippocrates (460 – 377 BC) theorized that human temperament was controlled by levels of body fluid (Garrison 1966). For example, an excess of phlegm resulted in a calmer temperament, while an excess of blood was

synonymous with a more cheery temperament (Ibid.). In The Republic Plato (428 – 347 BC) discussed societal roles in an ideal society. The social roles he defined are: the rationals, the guardians, the idealists, and the artisans (Plato 1993). Aristotle (384 – 322 BC) looked at human temperament in terms of sources of happiness, which he categorized as: dialectical types, proprietary types, ethical types, and hedonic types (1947). In the 1920s Jung (1875 – 1961) worked on psychological types. His research is the basis of several works on personality assessment that followed, including the well known and comprehensive Myers-Briggs Type Indicator®. Jung introduced the following four types: intellect-directed, body-directed, feeling-directed, and intuition-directed (Jung and Baynes 1921). Each of these authors presents a theory that relates to human temperament. Rather than connect the elements of each theory in any great detail, I refer you to McKim (2003).

Application of PD

Myers and Briggs, Lowry, and McKim each develop application practices stemming from their own research and partly from the theories skimmed above. Myers and Briggs were the first to bring personality types from the theoretical realm to the layperson (McKim 2003, p. 4). While they address sixteen different types, they categorize them into four temperaments: intuitive thinking, sensory judging, intuitive feeling, and sensory perceptive. Stationed in California, Lowry developed the True Colours ® temperament tool, and here in Canada McKim founded PD with the help of others' research. PD breaks down to the following four temperament types: Inquiring Greens – the Theorists, Organized Golds – the Stabilizers, Authentic Blues – the Catalysts, and Resourceful Oranges – the Improvisers. According to PD literature, we each have a preferred temperament style, though we often find ourselves functioning within all the temperament styles. This is an important point as it demonstrates that we each have a unique combination of the four temperaments, and none of us is relegated to a single category – that is, we all demonstrate aspects of all four types as required by our particular circumstances. In fact, "the four Colors, and the temperaments they represent, should be seen as a set of lenses for looking at the world. This is a very old set of lenses that has survived for thousands of years in more than one culture" (Ibid., p. 8).

Berens (2006) describes characteristics of the temperaments visually via temperament rings in Understanding Yourself and Others. At the core of a

temperament ring are needs, followed by values, talents, and the outermost ring exemplifies behaviours. Berens writes: "the needs represent the basic psychological needs of the temperament, the driving force. Individuals, unconsciously and consciously seek every avenue to have these needs met" (2006, p. 24). When an individual does not have her needs met, she may be dissatisfied or experience feelings of stress. I focus mainly on the core needs of each temperament.

Conflict management with PD

Conflict, and arguments that arise from it, can oftentimes be a product of personality differences (Neault & Pickerell 2007, p. 11). Knowledge of personality types and how they orient generally (this is something I'm currently researching and working on aside from this paper), in conflict, and with each other can help solve disagreements or even avoid conflict and arguments altogether. Berens writes, "People with different talents tend to take different approaches to the same situation, frequently resulting in conflict. This conflict can be productive and beneficial to a relationship, a family, or an organization. It can also be destructive" (2006, p. 28). The same goes for argumentation: people will obviously vary among their views on certain issues – this is nothing new in the discussion of arguments, but with different dispositions, or temperaments, they will likely take different approaches in communicating arguments too. This, on the other hand, is newer territory in argumentation, as it implies that there could be various argumentative methods, and thus a single theory of argumentation may not truly capture or understand some argumentative dynamics. When these differences come together in argumentation, the dialogues can be productive and beneficial to the relationships between interlocutors, as it can result in learning about issues, and more importantly about oneself and others with whom she argues. These differences in argumentation can be destructive too though, when interlocutors are at a crossroads, unable to resolve or even communicate effectively with each other because they have different preferences and are unable to coalesce these differences. This includes different views, different notions of a situation in which a view may stem, different feelings towards issues, and different manners in dealing with issues.

Understanding temperament theory, which PD explains and categorizes, offers knowledge about human nature, at the level of the interlocutor as opposed to the argument. This might not directly shed light on the analysis of arguments, for example it may not assist in determining whether premises strongly support their

conclusions, however, it can facilitate communication so that arguments can be made in different manners, resulting in them being understandable to more than just the utterer of the argument, or just palatable even, to different temperament types. Divorce mediators or lawyers, teachers dealing with schoolyard disagreements, managers at the workplace, customer service representatives, friends, family members, and neighbours can benefit in argumentative interactions from understanding temperaments. Even if an interlocutor is unaware of another individual's preferences, at the very least knowledge of one's own preferences, and the strengths and weaknesses that accompany them, can facilitate better argumentative communication.

I suggest that PD is a helpful tool for arguers and/or their third party practitioners. PD puts the focus on arguers, validating that they are the makers of arguments, and arguments are simply by-products of their communication, as well as focusing on the audiences. PD recognizes that there is something unique about an interlocutor's communication of and understanding of arguments; for the field this prompts the question: how can we have universal notions of good reasoning when we do not all approach the practice of reasoning in the same manner? The addition of PD as a tool and the corresponding criticism it elicits of the tradition allows for a more inclusive approach to arguments, open-minded enough to accept the ambiguous argumentative map that results.

Some argumentation scholars have posited models or theories of argumentation that inadvertently support the use of PD. Gilbert's multi-modal approach overlaps with the temperaments. For instance, the theorists would be more inclined to argue using the logical mode, while the catalysts prefer to make arguments that stem from how they are feeling about an issue. Willard's theory on argument fields denotes a picture of arguments in which the diversity of arguers actually steers arguments. From this perspective, taking a look at arguers from the stance of PD is plausible, and likely helpful in understanding an argument's social dynamic.

I have already mentioned that PD should not be taken as a rigorous, universal tool that labels arguers, but that the temperaments can function as one of the lenses we have at our disposal to navigate through argumentative discourse. Obviously, it is within the spirit of this approach that other tools can be introduced and used, especially because we may not all connect with PD. I end this section on PD with an extensive quotation from Maddron, who I think captures the essence of PD in a

productive manner:
These lenses demonstrate certain natural differences among people. These natural differences can be appreciated and accepted. And as we all know only too well, these differences can also be argued about, rejected, and fought over.

The good news is that when we decide to appreciate and accept these natural differences, much of the trouble seems to go out of life. New understanding and new acceptance of others follow closely on the heels of a new attitude about the self – new pictures and stories. New pathways open up. Strengths are discovered. Limitations are accepted. Cooperation is improved. We move from conflict to an appreciation of our natural differences. (2002, p. 8)

1. Case Scenario
A mother and her son were diverted to mediation after the mother pressed threat of assault charges on her 17 year old son. The two had been having family disagreements over an extended period of time. One particular evening, a disagreement about household chores led to the son becoming quite angry; enraged, he picked up a broom stick and held it. Mom, becoming fearful of her son's capabilities, locked the door and called the police as soon as her son left the house to "cool off."

During mediation Mom's main concerns were her son's education, as his grades were slipping, his lack of interest in piano (he started playing piano before he could read music), and the fact that her son did not always listen to and obey her. The main concerns the son shared were his lack of privacy in their home, and his mother's favoritism of his younger sister, who still played piano.

The threat of assault, the reason the mediation was taking place, was hardly mentioned, nor was it a real concern for any of the parties. The only time either of them addressed the event that led to the son's charge was when the mediators tried to discuss the charge (a main goal of the crown-recommended mediation). The son had no intention of actually touching his mother, and the mother was not in fear of being hurt by her son.

Domestic squabbles were discussed, in an effort to reach a resolution, get the son back into the family home and back to his classes, but when the son felt like his mother just wanted to control him, he said that he would rather go to a court and judge, and risk a possible charge, than work anything out with his mother in

mediation. What led to the son's (temporary) departure from the mediation was his mother's implicit threats that he had to promise to behave in certain ways for his mother to consider a resolution.

While the mediation took several meetings and has been significantly shortened from the actual dialogues that occurred, it is hopefully easy to acknowledge the presence of the emotional mode that can take over such an interaction. The mediation fluctuated mainly between persuasive dialogues (parties trying to convince the mediators of their stories) and eristic dialogues (between the parties). Each of the parties present arguments that try to elicit empathy in the mediators. When the mother implicitly threatened her son's freedom from a criminal charge in exchange for promising to attend college and drop his passion for visual arts, an appeal to fear became present. This almost ended the mediation early, without any settlement. In response, the son wanted to end the mediation prematurely, an emotional reaction/argument, and evoked the same type of fear in the mother. I focus on these ad baculums to make my point in this paper. Neither mother nor son really intended or wanted for their implicit threats to actually occur. That is, mom wanted her son's criminal record to be cleared, so he could start fresh, and eventually gain employment without any hitches related to his criminal past. The son in this case shared with the mediators (only) that he wanted to move back home and finish high school. He was stressed living across town with a family member. He wanted to finish high school and have the option of studying Law & Society as back-up, in case his career as an artist did not prove financially fruitful. Their actual goals were not so conflictual.

The mediators, noting the ad baculums, articulated the core needs of each party. It was obvious that the son needed a sense of freedom from his mother. He felt stifled. This need for freedom to make decisions can be a core need for some. In terms of PD, when this need is threatened, an individual is "stressed" and may respond in a manner that is hasty and/or aggressive. Noting this, the mediators refocused discussion on the son's need for personal space and decision-making – neither of which were directly related to the charge that had to be resolved.

The mother in this case appeared as if she was just trying to gain control of her son. Deeper questions and discussions in caucus, however, revealed that she needed her son on an emotional level. She wanted him to accept her decisions about her personal life (i.e. her current relationship). She also wanted him to stay connected to his sister and herself, which she felt was not present. Her reaction

to getting these needs of acceptance and connection fulfilled was to force him to stay at the home and do as she said. Noting this, the mediators also facilitated a discussion that revealed this to the son. I cannot stress that neither party was aware of the other's needs. The ad baculums presented catalysts towards a resolution that seemed impossible at one point. Without recognizing them, the dialogue was falling apart rapidly. Why is this connected to personality theory at all? We do not all respond to the same situation or relationship in the same manner – being able to note and work through core needs allows for a better understanding of each other, and in this case, reframing arguments so that they did not scare and/or threaten the parties. I go further and argue that dismissing ad baculums as bad (or irrational arguments), instead of emotional ones, dismisses these arguers' means of communicating their dissent.

6. Conclusion

When arguments become primarily emotional, as they were in this case, productive dialogue necessitates acknowledging and working with emotional arguments, if for no other reason than for the parties' satisfaction. I maintain that using PD as a tool for emotional argumentative discourse, particularly argumentative dialogues that need resolutions, should be given consideration, as it can help argument practitioners navigate their paths through contentious emotional territory.

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ISSA Proceedings 2010 – The Latin Cross As War Memorial And The Genesis Of Legal Argument: Interpreting Commemorative Symbolism In Salazar V. Buono

In 1934, the Veterans of Foreign Wars (VFW), a private organization, erected a Latin cross**[i]** on federal land in the Mojave Desert to memorialize the veterans of World War I.**[ii]** The Mojave Cross is located in the *Mojave National Preserve*, on land known as Sunrise Rock.**[iii]** The presence of the cross first became an issue in 1999, when the Park Service denied a request from a Utah man to add a Buddhist shrine to the land near the cross. Subsequently, in 2001, Frank Buono, a former Park Service employee, filed suit against the Park Service alleging the cross violates the Establishment Clause of the First Amendment to the United States Constitution, which sets parameters regarding the relationship between government and

religion.**[iv]**

In 2002, the lower (trial) court found for Buono and ordered the Park Service to remove the Mojave Cross. On appeal, the Ninth Circuit Court of Appeals (Ninth Circuit) agreed with the lower court, affirming the conclusion that "the presence of the cross on federal land conveys a message of endorsement of religion," and permanently enjoined the government from maintaining the cross on federal land (*Buono v. Norton*, 2004). The Park Service prepared to remove it. Meanwhile, in 2001, the U.S. Congress prohibited the use of federal funds to remove the cross (Consolidated Appropriations Act, 2001). Then, in 2002, the Mojave Cross was designated a national memorial (Department of Defense Appropriations Act, 2002).**[v]** Congress again prohibited the use of federal funds to remove the cross (Department of Defense Appropriations Act, 2003). And, finally, Congress transferred one acre of land, on which the Mojave Cross sits, to the Veterans of Foreign Wars with the requirement that if it ceased to be a war memorial the land would revert to the federal government (Pub. L. No. 108-87, 2003).**[vi]** The Ninth Circuit concluded that this last move was merely an attempt to circumvent the constitutional violation and thus stopped the transfer (*Buono v. Kempthorne*, 2007). The Department of Justice appealed this latter decision to the U.S. Supreme Court, arguing that the government would have to tear down a "memorial."**[vii]** The VFW filed an *amicus* brief arguing that if the Ninth Circuit's opinion were to be affirmed, memorials in national cemeteries would have to be removed, including the Argonne Cross and the Canadian Cross of Sacrifice at the Arlington National Cemetery (Veterans of Foreign Wars *et al.,* 2009). In contrast, the Jewish War Veterans of the United States filed an *amicus* brief arguing that the Mojave Cross is "a profoundly religious Christian symbol," rather than a universal commemorative symbol of war dead, and that the federal government's actions toward the cross and adjoining land underscores, rather than remedies, its endorsement of that religious symbol (2009, p. 5).

The Supreme Court decision in *Salazar v. Buono* was announced April 28, 2010. The Court chose to narrow its consideration to the validity of the land transfer, ruling 5-4 that the transfer did not constitute a violation of the original injunction. The Court also remanded the case back to the lower court to decide whether or not the land transfer constituted an "illicit governmental purpose" (*Salazar v. Buono,* 2010*,* pp. 1819-21). In narrowing the grounds for the decision in this way the Court left unresolved many of the questions that are raised by the presence of

any cross on federal land, no matter how remote. Nevertheless, the written opinions of the Justices strayed far beyond the narrow confines of the decision itself, addressing many of the arguments used for and against the land transfer, the significance of the memorial, and its propriety.

This paper will examine the Mojave Cross case to explore the argumentative connection between religious symbols and public memorials. Our argument is that war memorials, such as the Mojave Cross, constitute a classical enthymematic (visual) argument that the U.S. Supreme Court attempted to silence by altering the space containing the memorial (or argument), thereby secularizing the memorial and stripping it of its (religious) meaning. We begin with histories of the legal precursors to the case and the generic evolution of war memorials, illuminating the contested nature of memorializing. Next, we use the Mojave Cross case to examine how monuments function as arguments, articulating three premises: that physical space is a key argumentative factor in memorializing; that placement in and ownership of the space serve as the memorial's "voice" or marker of intent; and that this spatial context aids in negotiating the secular/religious dichotomy. The policy implications raised by this case are significant, for both past and future memorializations and for legal arguments that can be made regarding the relationship of the individual to the state in matters of religious observance. What appears to be a relatively simple case on its face opens up a broad range of significant theoretical issues fraught with complicated legal and commemorative significance.

1. Background

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (U.S. Const. amend. I.). These prohibitions are referred to, respectively, as the Establishment Clause and the Free Exercise Clause.

Specifically, the Establishment Clause prevents the government from promoting or affiliating itself with any religious doctrine or organization (*County of Allegheny v. American Civil Liberties Union,* 1989, pp. 590-91), or from having an official preference for one religious denomination over another. "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice" (*Larson v. Valente*, 1982, p. 244). The Establishment Clause has been used to challenge religious prayer in public schools and Christmas displays on government property, among other issues.

Supreme Court jurisprudence has fluctuated on whether the Establishment Clause demands complete separation of religion and government or, alternatively, whether it simply commands non-preferential accommodation of religious speech and symbols. This ambivalence has resulted in a number of legal tests that are used to determine whether a specific government symbol violates the Establishment Clause. Among the criteria are whether the symbol advances or inhibits religion, whether a reasonable observer of the display would perceive a message of governmental endorsement or sponsorship of religion, and whether there is a perceived coercive effect. Recently, the Supreme Court employed a "passive monument" test, which inquired whether a plainly religious display conveyed a historical or secular message, as opposed to a religious message, in a specific non-religious context (*Van Orden v. Perry*, 2005).

The identity of the speaker matters tremendously under First Amendment jurisprudence. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (*Santa Fe Indep. Sch. Dist. v. Doe*, 2000, p. 302).

In *Pleasant Grove City v. Summum*, the Court addressed the speech of government owned monuments in particular: "government-commissioned and government-financed monuments speak for the government" because "persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the property owner's behalf." Whether the government commissions, finances, or displays a memorial on its own land, "there is little chance that observers will fail to appreciate the identity of the speaker" (2009, p.1133). Similarly, Justice Stevens, dissenting in *Capitol Square Review & Advisory Bd. v. Pinette*, observed, "[T]he location of the sign is a significant component of the message it conveys" (1995, p. 800).

These two cases not only instantiate the notion of monuments in general as government speech, they also serve as precedent for the Mojave Cross case, illustrating that, even as a national monument, the cross engaged in a form of government speech. The question then should be the propriety of using a universally Christian symbol to "speak" for the government on behalf of all veterans of World War I.

2. A Brief History of War Memorials Prior to WWII

The sponsorship of war memorials has been a major area of controversy, involving veterans groups, state and federal organizations, and most recently, public insistence on private donations. However, according to architectural historian Teresa B. Lachin, "between 1880 and 1915, veterans groups and patriotic organizations were among the most active sponsors of monument crusades," when newly established groups such as the American Legion and the Veterans of Foreign Wars became effective lobbyists for state and local projects (pp. 21, 44). In 1923, the U.S. Congress created the American Battle Monuments Commission, which "established official commemorative standards for military monuments built on battle sites and federally-owned property" (Lachin, p. 32). Differences in opinions over the appropriate design of the war memorials arose as the result of a general shift in architectural style away from a legacy of Civil War memorializing, conflicted feelings over U.S. participation in World War I, and a focus on overseas memorializing at notable battlefield sites. "Religious images and Christian symbols were…commonly used to express the ideals of 'sacrifice,' collective heroism, and the 'sacred vocation' of military service, themes which had emerged in Europe and America in the early twentieth century," and these spiritual dimensions of military service were embraced strongly by sponsoring veterans groups (Lachin, p. 32).

The lack of symbolic universality implied by the cross was a consideration during World War I. Sectarian, yet inclusive, forms of religious symbolism occurred in gravesites of American war dead across Europe, which employed "spacious fields of uniformly lined American crosses" along with "intermittent Stars of David headboards [which] marked the dead of the Jewish faith" (Budreau, p. 120). Even then, the aesthetics of different sectarian grave markers led U.S. Army Chaplain Charles C. Pierce to recommend in July 1919 a standardized grave marker, similar to U.S. battlefield cemeteries and devoid of religious symbolism (Budreau, p. 122).

At the end of World War I, returning veterans, as well as the U.S. government, were initially more concerned with overseas memorializing. They wanted to make certain battlefields and cemeteries were properly marked and commemorated; stateside commemoration of World War I veterans was left largely to state and local organizations. Thus it is not surprising that veterans organizations and local community leaders "preferred traditional designs because they were familiar and even reassuring symbols of 'sacrifice' and fraternal or civic duty" as well as the

fact that “vernacular designs…were among the most affordable and readily available monument types” (Lachin, p. 45). Moreover, “local and community groups were more limited in their economic resources and generally used traditional and vernacular designs to honor their ‘World War’ veterans” (Lachin, p. 42).

King argues in his book about World War I memorials in Britain that, “the common purpose amongst all who commemorated the dead was…expressed in their recognition of the sanctity of memorials”; and the most straightforward artistic convention to mark the memorial as sacred “was the use of the cross, recognizable both as the sacred symbol of Christianity and as, by the early twentieth century, a common form of grave marker, more especially the typical marker used during the war to identify the graves of soldiers” (1998, pp. 230, 231). King also notes that “the process of transformation through which traditional forms acquired connotations relating them specifically to the recent war [World War I] was most conspicuous in the case of the cross” (p. 129). In 1921, Charles Jagger, a British sculptor and World War I veteran, proclaimed that the cross “has been, and probably always will be the symbol of the Great War” (in King, p. 129).

Indeed, the VFW members who erected a memorial in the Mojave Desert employed exactly this symbol. And it is the presence of the cross specifically that drives this case, complicated by the National Park Service’s refusal to allow a Buddhist shrine to share space with the cross. This raises the question of what it is the cross represents – a war memorial or something more (or less)? There is no question it was originally intended to be a memorial to dead comrades-in-arms at the time that it was erected by returning war veterans.**[viii]** Yet the Mojave Cross was erected on federally owned land, without the express permission of the government. By declaring the Mojave Cross a national memorial (while the appeal was pending), Congress further complicated the case, thereby raising the question of whether one can nationally memorialize private speech without endorsing the message.

The identity of the speaker is also tied to space when the issue is a religious artifact on federal land. How is space negotiated in memorializing? What is being memorialized; is it the event or the war dead? Public memorializing such as the Vietnam Veterans and World War II Memorials undergo complex vetting processes that explicitly consider First Amendment issues and multiple audiences.

Privately created shrines such as the Mojave Cross are personal, driven by grief and an immediate connection with the dead, and while they may hold symbolic meaning to a wider audience, they are not necessarily created for that audience, nor are they beholden to the religious neutrality that the federal government is expected to undertake.

Thus, when the Mojave Cross was declared a national memorial in 2002, its religious symbolism became a significant problem with regard to public memorializing. Classical commemorative architecture, used for many memorials, embraced signs which are "self-referential and limited to a closed system of legitimate signifiers" (Blair *et al*., 1991, p. 266) and which can consistently be decoded by audiences familiar with both the sign and signifier [*e.g.*, the cross]. Yet the reliable interpretation of a sign is tied to the viewer's understanding of its conventions – or "agreement about how we should respond to a sign" (Crow, 2003, p. 58) – and "habits and conventions may of course change over time" (Kurzon, 2008, p. 288-289). As social symbols, "war memorials are not endlessly rigid and stable. Their significance has to be continually defined and affirmed by manifestation of the relevant sentiments" (Barber, 1949, p. 66). Such reaffirmation is made difficult in this case since there is no longer a plaque to identify the cross as a war memorial. When the signifiers change in meaning, or when the linguistic community changes, then war memorials, like other symbolic forms, change or lose their meaning: "[T]here are a large number of memorials from previous wars which have lost their meaning for the present generation" argues Barber (p. 66). Especially when considering the relationship between the symbolic and the aesthetic, "the aesthetic aspect of the memorial place or object must not offend those who want their sentiments symbolized" (Barber, p. 67). In the increasing religious pluralism of late-20th to early-21st century America, a symbol with such religious specificity as a Latin cross violates this commemorative expectation when declared a national symbol of the war dead.

We contend that the message conveyed by war memorials in general, and the Mojave Cross in particular, is not only government speech, but an argumentative claim about how to view both the war and the war dead. Recent Supreme Court precedent supports this view (see *Capitol Square Review and Advisory Bd. V. Pinette*, 1995, and *Pleasant Grove City v. Summum*, 2009). Indeed, the recognition that monuments make an argumentative claim is the underlying assumption of the rulings on government speech. The essence of the

Establishment Clause is to preclude the argumentative nature of government speech surrounding religious symbols on government property. If the symbol is not argumentative, there can be no violation of the Establishment Clause.

Smith (2007) explains how monuments and other visual symbols work argumentatively, once Aristotle's notion of the enthymeme is understood in its classical sense of a "syllogism based on probabilities or signs" (p. 121). Smith notes, "Enthymemes consist not only of logical propositions, expressed or implied, but also of appeals to emotions and character. For Aristotle, these modes of appeal are very closely related because even an emotional response requires reasoned judgment…" (p. 120).

Successful enthymemes identify with the "common opinions of their intended audiences" (Smith, p. 120). Those who create visual enthymemes [*e.g.,* war memorials and monuments] discover these common opinions in the culture and in the immediate context of the memorial, "incorporating them into their messages" (Smith, p. 120). Birdsell and Groarke (1996) contend that commonplaces – culture-specific grounds of potential agreement between speakers and audiences – are not limited to verbal arguments; rather, visual commonplaces argue just as verbal ones do. Thus, according to Smith, a 'speaker' – whether government or private citizen – who "creates images that identify with an audience's common opinions can be said to be arguing" (Smith, p. 121).

However, these "common opinions" take many forms and have more than one side, which, in a visual argument, are not presented. The inability of visual arguments to depict multiple sides of an argument does not mean these opposing sides do not exist; they are simply not articulated (Blair, 1996; Smith, 2007). The Supreme Court explicitly acknowledged this argumentative characteristic of memorials when it rejected the idea that "a monument can convey only one 'message'"; indeed, a public memorial "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways" (*Pleasant Grove City v. Summum*, 2009, pp. 1135, 1136).

Thus, the argument occurs enthymematically through the form and placement of the memorial. Foss (1986) elaborates this notion in her essay on persuasive facets of the Vietnam Veteran's Memorial, arguing that the number of messages a memorial can convey is limited by the creator's intent and the material features of the display, thereby diminishing or eliminating any interpretive ambiguity. The

form of this particular memorial – the Latin cross – significantly lessens the variety of ways it may be interpreted, adding to its argumentative power. Similarly, the placement of the cross on federal land (or surrounded by federal land) shapes the viewers' understanding of the speaker in this instance.

The Supreme Court has acknowledged the relationship between form and surroundings when determining an Establishment Clause violation. In a case questioning the display of the Ten Commandments on the grounds of a local courthouse, Justice Scalia argued that, in combination with other symbols, a statue in the form of a tablet depicting the commandments would be interpreted as a religious icon, but would be read in conjunction with the other legal images present so that the viewer would understand the symbol's "argument" – namely that Judeo-Christian commandments undergird American law (*McCreary County v. American Civil Liberties Union of Ky.*, 2005). However, as noted above, no contextual or supporting visual cues exist with the Mojave Cross. Indeed, the sign that originally identified the cross as a war memorial was lost over time and was never replaced. Thus, it is unreasonable to expect an observer to "read" the enthymematic argument in the way the Court describes; it is just as likely to be read as government endorsement of a particular reading of a religious artifact.

Writing the plurality opinion in *Salazar*, Justice Kennedy asserts that the observer should consider the intent of those who placed the cross on Sunrise Rock to "honor fallen soldiers," rather than "concentrat[ing] solely on the religious aspects of the cross, divorced from its background and context" (p. 1820). Yet Kennedy's assertion is problematic, when considered against standards of visual argument. Foss (1986) argues that a signifier cannot be devoid of material meaning – its form suggests meaning – and is central to the viewer's understanding of the meaning of the artifact, through the enthymematic process. The iconic form of the Latin cross enthymematically reflects both the Christian attitudes of the VFW members who placed it, as well as the shared attitude of the people who took active steps to save it – namely, Congress. Thus, we argue, the Christian message is in large part *their* story, not simply the local VFW's story. Justice Stevens made this point in his dissent when he suggested that, post-transfer, the message is even clearer, because after being enjoined from displaying it, Congress transferred the land specifically for the purpose of preserving the display (*Salazar*, p. 1832-33).

Such confusion of meaning stems from the duality of voice that comes from

commemorative sites in general. Such sites put forth two dramas: "One story… is 'its manifest narrative – the event or person heralded in its text or artwork.' The second is 'the story of its erection or preservation'" (Balthrop, Blair, and Michel, p. 171). Part of the dispute over the meaning of the Mojave Cross comes from the duality of its voice, as the plurality and dissenting opinions in *Salazar* diverge along the lines of these narratives. The plurality opinion, written by Justice Kennedy, asserts that the proper way to read the Mojave Cross is to consider its manifest narrative, spoken in the voice of the veterans who constructed it. Seen this way, the cross was placed with the intent to "honor fallen soldiers," and "although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message" (*Salazar*, 2010, p. 1816). Using this reading of the Mojave Cross, Kennedy asserted that Congress was only attempting to preserve the manifest narrative of the commemorative site by transferring the land into private ownership. Now that the Mojave Cross is in private hands, concurred Justice Scalia, the only question that matters is whether that manifest narrative is legal.

Justice Stevens considers the second story – the story of the site's preservation – in his dissent in *Salazar*. Stevens argues that when "Congress passed legislation officially designating the 'five-foot-tall white cross'…'as a national memorial commemorating United States participation in WWI and honoring the American veterans of that war,'… the cross was no longer just a local artifact; it acquired a formal national status of the highest order" (*Salazar,* 2010, p. 1834). This means that, for Stevens, changing the scene of the Mojave Cross does not change the voice: "Once that momentous step was taken, changing the identity of the owner of the underlying land could no longer change the public or private character of the cross. The Government has expressly adopted the cross as its own" (*Salazar*, 2010, p. 1834). In focusing on the first story, the Court attempts both to freeze contemporary readings of the Cross in the [interpreted] voice of the original authors, "made whole" in the plurality's mind when the land was transferred to private ownership, and to ignore the changes to the symbol made by the second story – the one of its preservation.

Palczewski and McGeough (2010) argue persuasively, however, that "public memorializing is not a simple process of fixing history. What is memorialized is not a given, and in the process of memorializing particular public arguments are advanced. This explains why 'public memorials become sites of ideological

struggle whenever they seek to shape and direct the past, present, and future in the presence of competing articulations'" (p. 33). Congress had several options in dealing with the Mojave Cross controversy: it could have allowed other religious symbols to be added; it could have changed the memorial to more clearly reflect the stated message or to avoid the sectarian message; or it could have allowed the cross to be removed, as was Park Service policy. Instead, the actions performed by the federal government in relation to the Mojave Cross included: denying a petition to place a Buddhist shrine next to it; passing an act to declare it a national memorial; passing a separate act to forbid the removal of national memorials commemorating World War I (of which there is only one – the Mojave Cross); and, finally, transferring the land to private owners under the condition that they keep the land as a war memorial or else forego their property rights. This story of preservation is not only remarkably active – it also highlights the significance and strategic use of space in defining the "voice" of the memorial.

3. The Role of Space in Visual Argument

Key to the Mojave Cross case, and to memorializing in general, is the sense of space. Unlike other war memorials employing religious symbolism, the Mojave Cross sits on land that holds neither spatial or historical connection to the war, nor to the soldiers that its builders commemorated. The only significance provided by the space, then, is its ownership. This fact renders the space surrounding the cross fungible, a feature that has been key to this controversy. We argue here in support of the following observations: first, that physical space is a key element of memorializing; second, that the secular/religious dichotomy is negotiated by the symbol's spatial context; and finally, that the "voice" or intent of the symbol is tied to the geography and ownership of that space.

The lack of physical space memorializing World War I veterans was significant, because, as we note above, post-war memorials either focused on overseas battlefields or on utilitarian "living memorials," usually in the form of named highways or auditoriums. The functional, living memorials of the post-World War I era United States "could not fulfill the human desire for monumentality and 'the need of the people to create symbols which reveal their inner life, their actions and their social conceptions'" (Lachin, p. 47). Furthermore, "physical objects and places are almost always required for the localization of the memorial symbol…[and] most war memorials implicitly recognize this social function of physical space" (Barber, p. 65).

Thus, during oral arguments for *Salazar v. Buono* in the U.S. Supreme Court, Justice Scalia asserted that the cross is "erected as a war memorial…in honor of all the dead," and that "the cross is the most common symbol of…the resting place of the dead" (transcript, 2009, pp. 38-39). The above-mentioned history of war memorializing indicates that the latter part of Scalia's observation is true; yet there are no war dead in the Mojave Desert. Scalia's point of view comes from battlefields and cemeteries, where religious symbols have been used throughout the 20th century, although they were not exclusively crosses. The scene is different, and the "sacred" ethos of the memorial comes from the interment, not from the symbol. Even then, many of these memorials used various [*e.g.,* non-Latin] crosses such as the Celtic Cross and the Cross of Sacrifice (or War Cross), which was specifically designed by the Imperial War Graves commission in World War I to differentiate it from more general Christian iconography.**[ix]**

The presence of crosses marking war dead also changes the argument made by a memorial. In the context of a military cemetery – rows and rows of markers on a battlefield – the cross becomes secularized, marking sacred space sanctified by the blood of the fallen. The cross as gravestone marks an already sacred space, and serves as a sign for the site of a dead soldier. The cross-as-grave-marker is not generally interpreted as intending to promote Christianity to the viewer; rather, it serves as an indicator of the place of rest for an individual's remains, and potentially of that person's religious belief – just as Stars of David adorn the gravesites of Jewish war veterans.

Thus, in most instances when religious symbols are used, they are the symbol of the referent – the "sacred" ground of the battlefield or cemetery, where the blood of the war dead consecrated the space. But in this case, the reverse has occurred – it is only the presence of a commemorative cross that makes this space sacred. The current fight in the Mojave Cross case is over the land, and the only thing that makes this land different than anything around it is the cross: it holds no other commemorative significance. As Donofrio points out in her analysis of the World Trade Center attack site, "contestations over place, memory, and identity give rise to questions over who possesses the authority to direct place-making. When multiple parties claiming place-making authority advance conflicting conceptions of place, space can become a site of protest or campaign advocacy" (p. 153).

Palczewski and McGeough (2010) assert that "the interrelation between… memorials and the sacred deserves special consideration. Within the United States, '[b]y and large, patriotic space is sacred space…' and memorials, in particular, are 'fundamentally rhetorical sacred symbols'" (p. 25). Assuming the intent of the creators posited by the Court, the Veterans of Foreign Wars built the Mojave Cross to sacralize an otherwise unremarkable space, with the goal of commemorating their comrades-in-arms. Maoz Azaryahu, a geography scholar who studies the intersection of urban landscapes and memory, argues that this act, in itself, can render the land sacred: "authentic expression of popular sentiments, …anchored in specific traditions of popular culture," can indeed form a "sacred ground" through "unregulated public participation" (1996, p. 503). A "spontaneously constructed memorial space… exudes the sacredness with which the place is invested by the community of mourners," argues Azaryahu – "as long as it belongs to the local landscape" (p. 503). This only holds true for as long as the public brings meaning to the memorial space through ongoing public participation in the specific traditions, however. When those traditions fade or were nonexistent to begin with, or when the space no longer belongs to the "local landscape," then, "by virtue of their very physical location, those war memorials are unsuited to their essential purpose" (Barber, p. 66).

Implicit in Barber's argument is the assumption that as goes the land, so goes the voice. When the memorial space is cared for privately, the cross is "authentic expression," a commemorative symbol of fallen brethren. However, its location on (or surrounded by) vacant federal property attended to by the National Park Service regulates both the message and the scene of the symbol. It regulates the message because, when land is federal, the religious symbol "speaks" with a federal voice. Furthermore, Congressional action removed the spontaneity and unregulated public participation crucial to the commemorative meaning of the space, thus replacing any remnant of the public commemorative voice. The subsequent attempt to make the land private was an attempt to return the Mojave Cross to its original meaning. It could not: the meaning had changed because the scene had changed. And without the scenic link to the original meaning, all that remains, symbolically, is a Latin cross, whose Christian exclusivity offends twenty-first century pluralist sensibilities.

Congress attempted to change the status of the space in order to change the voice. Faced with the application of the Establishment Clause, and recognizing

that the cross on federal land was inappropriate whatever its purpose, Congress chose to transfer the land in order to quiet the perception of the federal voice endorsing a religious artifact. Similarly, the Supreme Court limited its decision to the space, namely the land transfer, for the same reason and because space can be controlled, whereas perceptions cannot. While it is true that the appeal challenged the land transfer, the Court was not limited to a narrow judgment on that issue alone. Certainly the government's case was more broadly cast, opening the door for the Court to rule on the propriety of such memorializing, or even on the propriety of religious symbols on federal property. Instead, the Court elected to decide only the narrow question of the propriety of the land transfer as it related to the original injunction. In taking this approach the Court avoided having to rule on the presence of the cross.

Faced with a persuasive argument for an Establishment Clause violation, the Congress and the Supreme Court together created a situation where the only solution they saw was to try to accommodate both sides by making no decision on the propriety of the cross on government land, allowing the land transfer and arguing that, even so, the cross is a permissible symbol of war sacrifice. Thus, they manipulated space to alter voice in order to accommodate – whom? To silence the argument made by the memorial? In the process, they attempted to secularize the cross, removing its religious meaning and substituting a secular, albeit patriotically sacred, message.

4. Where Does This Leave the Establishment Clause?

To argue that something violates the Establishment Clause of the U.S. Constitution would seem to be a fairly straightforward task. The Court has developed a number of tests to determine whether something is a violation. Yet the argument, as it has evolved, is not so simple. Despite its guarantees of religious freedom, the United States essentially sees itself as a Christian nation that accommodates other belief systems. The Court cannot be unmindful of public opinion and it has, in recent years at least, trod carefully the margin between protected speech, government speech, and accommodation of religious symbols.

In this case, the Justices diverged from one another on the question of the cross and the argument(s) it makes. Justice Alito, for example, argued that since the cross is not speaking in a government voice, therefore it is not propositional, thereby vitiating the Establishment claim. Alito ignores Court precedent in making what is, essentially, a circular argument. Justice Stevens, on the other

hand, argued that Congress gave the cross a federal voice by making it a national monument, using federal money to maintain it, then prohibiting the use of federal money to remove it. Such actions would seem to support the claim of a violation of the Establishment Clause. In the end, though, the Court's plurality opinion narrowly circumscribed the grounds for the debate to technical issues, without addressing the propriety of turning the Mojave Cross into a national war memorial and then ensuring its continued existence in private hands.

5. Conclusion

Less than two weeks after the Supreme Court issued its decision, the Mojave Cross – which had been covered by pieces of plywood during the litigation proceedings – was stolen from its place on Sunrise Rock. On May 11, 2010, the Barstow *Desert Dispatch*, a local newspaper, posted an article describing correspondence they had received about the cross. The author claimed to know the thief, and explained that the cross was "moved…lovingly and with great care…[and] has been carefully preserved" (2010, online). The author claimed that the person who removed it was a veteran who intended to replace it with a non-sectarian monument because both the "favoritism and exclusion" of the cross and the governments efforts to keep it in place violate the Establishment Clause. More specifically, the thief was offended by Justice Kennedy's assertion that the Latin cross represented all World War I veterans, an argument which "desecrated and marginalized the memory and sacrifice of all those non-Christians that died in WWI" (*Desert Dispatch*, 2010). "We as a nation need to change the dialogue and stop pretending that this is about a war memorial," argued the writer: "If it is a memorial, then we need to …place a proper memorial on that site,…one that is actually recognizable as a war memorial" (*Desert Dispatch*, 2010*)*. Local commentators blamed atheist activists. Then, on May 20, a new Latin cross was placed on Sunrise Rock – which the Park Service promptly took down, as it violated the ongoing injunction. Most of the coverage of these events came from either Christian or atheist newspapers and websites, revealing a continuing focus on the religious, not the commemorative, symbolism of the Mojave Cross.

Separated from a battlefield or military cemetery, the Latin cross loses its contextual referent to wartime. In order for a war memorial to have meaning to an audience other than the ones who created it, it "'must simply, and powerfully, crystallize the loss of life and urge us to remember the dead'" (Balthrop *et al.*, p. 176). To do otherwise renders the memorial's symbolism "culturally illegible as a

marker of the event it commemorates" (Balthrop *et al*., p. 176). All that the "reasonable observer," to borrow the Court's parlance, is left with is a Latin cross, the conventional meaning of which is a sign of Christianity. And because it has been declared a national memorial, the conclusion of the enthymeme is that the federal government endorses and protects the Latin cross as a national symbol. Moreover, the symbolic force and conventional stability of the cross cannot be overridden by verbal claims to the contrary: "The cross cannot take on a nonsectarian character by congressional (or judicial) fiat," argued Justice Stevens in the dissent. "Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian" (*Salazar*, 2010, p. 1835).

NOTES

[i] A Latin cross consists of a vertical bar and a shorter horizontal bar at right angles to each other. The Mojave Cross is between five and eight feet tall and is made of four-inch diameter pipes painted white.

[ii] The Mojave National Preserve, operated by the National Park Service, is located in southeastern California. It encompasses nearly 1.6 million acres (approximately 640,000 hectares) between the cities of Barstow, California, and Las Vegas, Nevada. The Preserve is primarily federally owned land with approximately 86,600 acres of the land in private hands and another 43,000 acres belonging to the State of California (*Buono v. Norton*, 2002).

[iii] Since 1935, the cross has been a gathering place for Easter Sunrise services; visitors have also used the site to camp *(Buono v. Norton*, 2002).

[iv] The Establishment Clause prevents the government from promoting or affiliating itself with any religious doctrine or organization (*County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 1989), or from having an official preference for one religious denomination over another (*Larson v. Valente*, 1982). To survive an Establishment Clause challenge, a government symbol must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion (*See Lemon v. Kurtzman*, 1971).

[v] Congress designated the cross and its adjoining land "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." (Department of Defense Appropriations Act, 2002). The Secretary of the Interior was directed to expend up to $10,000 to acquire a replica of the original cross and its memorial plaque and to install the

plaque at a suitable nearby location. §8137(c). After it was declared a national memorial, the Mojave Cross became the only national memorial specifically dedicated to World War I.

[vi] The land was transferred to the Veterans Home of California – Barstow, VFW Post 385E, in exchange for a parcel of land elsewhere in the Mojave National Preserve. *See* Pub. L. No. 108-87, (2003).

[vii] The district court stated "Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land." *Buono*, 212 F. Supp. 2d at 1207.

[viii] "The cross was erected in 1934, 60 years before Congress created the Preserve [although it owned the land]. Photos show the presence of wooden signs near the cross stating, "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884." The wooden signs are no longer present, and the original cross, which is no longer standing, has been replaced several times by private parties since 1934" (*Buono v. Norton*, 2002).

[ix] The Cross of Sacrifice, or "War Cross," was developed by Sir Reginald Blomfield of the Imperial War Graves Commission, based on the shape of the Latin cross but including the shape of a bronze sword, turned downward. A Cross of Sacrifice stands in the U.S. Arlington National Cemetery to honor the Canadian war dead of World War I (King, pp. 128-129).

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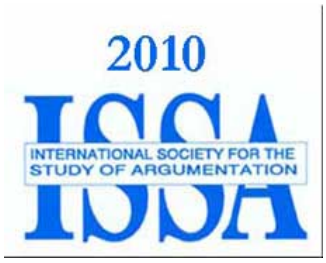
Veterans of Foreign Wars of the United States, the American Legion, Military Order of the Purple Heart, VFW Department of California, American Ex-Prisoners of War, VFW Post 385, and Lieutenant Colonel Allen R. Miliefsky United States Air Force (Retired), as *Amici Curiae* supporting Petitioners. (2009, June 8). Filed in *Salazar v. Buono*, No. 08-472. 2009 WestLaw 1703208

ISSA Proceedings 2010 – Argumentation Schemes In The Process Of Arguing



1. Introduction

A look to the literature of the last years should be enough to realize that argumentation is a very complex phenomenon with many sides and manifestations and that many of the, some times, contradictory considerations about several aspects relative to the matter have their source in this complexity.

The definition of argumentation, provided by van Eemeren (2001, p. 11), constitutes a good place to start our reflection now, i.e *"argumentation is a verbal, social and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by advancing a constellation of propositions justifying or refuting the propositions expressed in the standpoint".*

In this definition van Eemeren stresses the role of the argumentation as an activity, but most of the work done in the field is devoted to the analysis and evaluation of argumentations.

We want to stress here that the expressions "rational activity" or "reasonable critic" are related, most of the time, with probable or defeasible truth (Walton, Reed & Macagno, 2008). As Zarefsky (1996, p. 53) pointed out *"argumentation should be regarded as the practice of justifying decisions under conditions of uncertainty".* The uncertainty may be relative to *the cognitive environment* of the interlocutors, as defined by (Tindale, 1999), or it could be an intrinsic quality of the issue in question, as a consequence of the influence of many unknown or difficult to foresee factors. Even if some times there is enough data to reach an unarguable conclusion, the opposite is much more frequent in everyday situations because ordinary argumentations deal, in most of the cases, with issues in which ethical or aesthetic values, personal tastes and other subjective feelings play a decisive role.

The uncertainty involved in much of the argumentations of real life makes difficult to fulfill the demands of deductive reasoning and, even after a careful reconstruction of the argument, we think that it is problematic to consider most of the ordinary reasoning as deductive, as proposed by the rules for a critical discussion of the pragma-dialectic. We think that in the practice the recourse to inductive inferences and to the use of heuristics, best explanations, analogies and other resources to achieve the resolution of the argumentation is necessary and frequent. The reconstruction of the reasoning done in practical argumentation as deductive, although helpful to assess it, in general does not correspond to what happens in actual practice.

The end of an argumentation may, as well, differ from the resolution defined by the ninth rule of the pragma-dialectic, "resolution, when it occurs at all, is rarely if ever absolute" (Jackson, 2008, p. 217). In negotiations, especially, but in other kind of dialogs also, both parts may reach an agreement considered acceptable for both sides, even if they maintain their initials points of view. But even in more knowledge related environments, as scientific discovery, the selection of the most promising path for an investigation can be provisional, maintaining the parts, in the while, their opposite views.

One of the aspects we should pay more attention to is the substantive differences between argumentation considered as a process and argumentation taken as a product. First of all, we need to note that for 'process' we will take a slightly different meaning from the one used in the literature (Tindale, 1999) and that, for our purposes, we won't be differentiating the dialectical and the rhetorical sides of the argumentation. We will take the word process to include roughly all the aspects to consider when producing an argumentation.

To illustrate the kind of differences we mean, we can mention, for example, that what can be an important step for the analysis and the evaluation of the product of an argumentation, may be unconscious and fully implicit in the process or arguing. For instance, we use fast and incomplete inferences that are the outcome of "intuitive" processes of reasoning and that work efficiently in cognitive familiar settings. These kinds of inferences are different from the "reflective" inferences that deal with unfamiliar or more complex problems. Both terms are proposed by (Mercier & Sperber, in press) as an attempt to clarify the dual system view of reasoning proposed by several researchers in the field of psychology (Evans, 2003). This theory distinguishes two systems of reasoning: the

system 1 processes are taken as automatic, mostly unconscious and heuristic; they work efficiently in ordinary circumstances but are inappropriate to deal with novelty or complexity; the system 2 cognitive processes are slower and require more effort but they are more reliable. The evaluation of the argumentation and the planning of written argumentations, stress the view of argumentation as a product, and help to trigger this kind of conscious processes, while in oral discussions and when we spontaneously recall an argument to justify a claim, the system 1 processes are likely to play a more important role.

It is important, as well, to take care of the particular controversial environments which give rise to different kind of argumentative dialogs as critical discussions, scientific inquiries, negotiations, debates etc. Nowadays it is widely accepted, that each type of argumentative dialog (Walton, 1989; Walton et al., 2008) calls for different requirements and dialectical moves, and that some of these moves would be unacceptable or even fallacious in one type of dialog but would be acceptable in another context. Even in scientific practice, in which we work under high logical standards and methodological constrains, we find examples of the powerful influence of contextual factors. Take for instance the logical form of what is generally known as an abductive argumentative scheme and that the philosopher of science Marcello Pera (1994) puts in the class of the inductive arguments:
"an argument with this form: ((p → q) & q) → p. Should we say it is deductive and invalid according to deductive logic, or that it is inductive and correct according to inductive logic? Only the context provides an answer. If it is used to prove a proposition p, then the argument is deductive and deductive logic is pertinent to it. If it is used to confirm a hypothesis p, then it is inductive and falls within the legislation of inductive logic. Thus the very same argument with the very same form is potentially fallacious if it is used for one purpose and potentially good if used for another". (Pera, 1994, p. 109).

We have to take into account also the noticeable differences that arise in everyday argumentations due to epistemological attitudes and motivations. For example, Schwarz and Glassner (2003) prove that students in ordinary contexts of argumentation do have better dialectical skills than the finished products they present; the contrary happens in scientific domains.

"...in every day issues we are generally highly skilful in challenging, counterchallenging, justifying or agreeing during conversation but the argument

we hold are mediocre according to analytical criteria…We know "to move forward" but we don't know very well "where to go", …

… In contrast, in scientific domains we are used to accept well-made arguments, but generally do not use them in further activities to convince, challenge or justify our view points. We "see the point" but "cannot move forward";" (Schwarz and Glassner, 2003, p. 232).

Besides, there are important differences between oral and written argumentation. To cite some of the more compelling, we note that in oral argumentation the statements are generally shorter; we have an immediate feedback from the opponent that helps us to find the path to retrieve the necessary information from our long term memory and also to decide the next move; it is almost always possible to give some kind of answer to the objections the opponent raises, often weakening or negotiating our point to accommodate the challenges, and to facilitate the communication and build consensus; and finally, our performance has to take into account both, the objections that make shift the burden of the proof back and forth between the two parts in the dialog, and the conversational turns of it; In written argumentation, the opponent is not present and the abstraction to represent him/her makes more difficult the articulation of the arguments. The physical absence of the audience is one of the most salient characteristics of written argumentations (Bereiter & Scardamalia, 1987; Kellogg, 1994); and it is also well known that writing arguments becomes a difficult cognitive activity appearing many years after the children are able to defend their own points of view on oral discussions (Golder & Coirier, 1994, Golder & Puit, 1999). We also need to use more stylistic resources to make our point, because we have no access to non-verbal communication; and finally, the ordering and linearization of the text has to make sense, because there is no chances to improve it with the immediate feed-back of the opponent.

Furthermore, it is necessary to consider that these different factors interact among themselves in different ways and also with other elements of the social context, as, for instance, the status of the participants and their interest in maintaining the quality of the relationship between the interlocutors. Arguing is an interaction in which a person tries to persuade someone of something, but, on the other hand, the interlocutors are simultaneously strengthening or weakening the bonds between them. In many everyday discussions the two components are of similar importance and, so, we can't improve adequately our argumentative

skills looking only to the cognitive side of the activity.

Pragma-dialectic provides a good framework for critical discussions that explains much of the complexities of argumentation, especially with the progressive inclusion of strategic maneuvering in the theory (van Eemeren & Houtlosser, 2002, 2009). Nevertheless it seems necessary some kind of expansion of this theory for practical or didactical purposes, namely, considering adaptations for types of argumentative dialogs different from critical discussion and including some more specific steps that those they already consider, to account for the differences between written and oral argumentations and also for those found between the production and the analysis of argumentation.

Furthermore, it would be useful, as well, to explore the integration of psychological frameworks and problem solving strategies used in the argumentative process with the more philosophical oriented, pragmatic and dialectical approaches to argumentation. These interdisciplinary frameworks should inspire the design of protocols and other tools for the different tasks involved in the practice of argumentation.

2. Argumentation as process

Considering the argumentative process as explained above, we think that it can't be understood if we don't consider its rhetorical perspective. The evaluation of argumentation is often approached from a logical, formal or informal, perspective that usually presupposes a schematization of the argument that eliminates all the "rhetorical" elements of it, sketching mostly its dialectical skeleton. The role of the context is almost reduced to help to fulfill the implicit premises necessary to complete (mostly in a deductive sense) the inferences. Nevertheless, the study of argumentative processes is not possible without the integration of the arguer, the audience, the uttered arguments and the cognitive and social environment.

In order to persuade the audience, many strategic decisions have to be made about the selection of the arguments, their order, the choice of the words and the amount of information that will remain implicit, and these choices depend on broader contextual elements: *"Naturally occurring arguments are subsumed by and subsume other contexts of action and belief".* (Jackson, 2008, p. 217).

Data and other kind of information about the topic available to the arguer and the intended audience are the first constituents of the context; the second and not

less important element refers to the audience's views about the issue because, as we acknowledged, the difference of opinion that triggers the argumentation has its source in the existence of different points of view about an issue or even in a conflict of interests. Even in this last situation, when the parts agree to resolve their differences by argumentative means, they implicitly accept some rules and boundaries of reasonableness in which the dialog should take place.

The monitoring of the process can be better understood in a problem solving framework that integrates different levels of cognitive processing. Much of the work is made more or less automatically using competences mastered in the past, as consequence of maturing or learning processes. Other work has to be done consciously and requires careful planning, monitoring and revising. These processes change in function of the type of argumentative task: it is different to participate in a face to face debate, in a forum in the Internet, to write an argumentative essay, or to simply read an argumentative text.

In the next passages we will stress some differences between the processes of reading and analyzing a text, and that of writing one, before we focus in the role of the argumentative schemes in the process of writing.

The processes of reading and writing argumentative texts have some cognitive activities in common. The contrary would be uneconomical *"and it seems highly implausible that language users would not have recourse to the same or similar levels, units, categories, rules and strategies in both the productive and the receptive processing of discourse"* (van Dijk & Kintsch, 1983, p. 262) and the advances as critical reader and as argumentative writer interact with each other in a complex way, making their combination a good pedagogical strategy (Hatcher, 1999).

Nevertheless, even if we accept the fact that the writer or the speaker follows pragmatic rules, as, for instance, Grice's conversational rules to make communication possible, and that the reader uses those same rules to interpret the intentions of the writer, it doesn't mean we are dealing with the same task.

If, for example, we attempt to design a protocol putting forward the steps necessary to analyze an argumentative essay, and another one suggesting a procedure to write an argumentative text, the differences soon arise, and in our opinion, both processes have remarkable differences that difficult their reduction.

In fact, the suggestions to direct the production of written argumentations inspired in analytical procedures, as in the critical thinking approaches, go usually far away from the previous model of analysis, and introduce the inputs relative to other specific aspects of argumentative writing that are usually considered as rhetoric.

To review an argumentation is a better-defined task than to write an argumentative text. Even if analyzing a text requires always some grade of interpretation of the sentences, and delicate decisions about which implicit premises need to be made explicit before checking the relevance, the sufficiency and the acceptability of the premises, the existence of fallacies, or the soundness of the inference, writing is a far more open-ended task. There are many different ways to write an argumentation that would reach successfully the intended goal of gaining the audience's adherence, and the writer has to choose among these different possibilities. When we analyze a text, these choices are done and the task of the reader is reduced to check the reasonableness of the argumentation in order to accept or not its claim.

Second, before we accept or not the standpoint of an argumentation, weighing the strength of the given arguments, we bring together the relevant information from the text (or the conversational context) in order to decide if it convinces us. But as writers we need also to keep in mind all the communicational and stylistic and rhetorical elements useful to maintain the attention of the reader, to keep a positive atmosphere in the relationship, to allow the reader to negotiate the outcome, etc. All these ingredients are necessary to allow the flow of the communication, and to reach the persuasive goal of the text. Certainly, the reader will focus his/her attention into the claim and into the strength of the reasons to defend it, and he/she will be less conscious of the role of those other elements, especially if the communicative quality of the text is adequate. Nevertheless, these elements are very important in the production and subsequent manipulation as a writer, of the text. A writer reviewing her/his argumentation needs to consider carefully not only the epistemological quality of the reasons and the soundness or reasonableness of his/her reasoning, but a much broader set of elements which are necessary to achieve her/his communicative purpose.
Briefly, the analysis and evaluation or the argumentation deals with the argumentation as a product, but writing a persuasive text is by itself a process open to a rich variety of possible outcomes that could match the goals and

intentions of the writer. Therefore, the procedures to deal with one of the tasks or with the other have to show substantial differences.

3. Argumentive schemes

It is not necessary to tell that when we argue to defend or to rebut a definite standpoint, the arguments we provide have to be somehow linked to the standpoint. This link, which is currently known as the argumentative core of the argumentation, if adequate, assures the arguer that the acceptability of the arguments is transferred to the standpoint.

The consideration of argumentative schemes as an input in the process of elaboration of argumentations has its grounds in the venerable tradition of classical rhetoric (Tindale, 2004; Walton et al., 2008; Rubinelli, 2009). The Aristotelian notion of *topoi* and its correlative notion of *loci* in the roman rhetorical tradition, as in the influential work of Cicero, were purported as tools to help the future orators to find arguments for different kinds of dialectical discussions or rhetorical settings. It was, then, a system of invention intended to provide guidelines for finding and selecting the proper arguments to support a claim. The actual term "argument scheme" was first used by Perelman and Olbrechts-Tyteca in French, but, by then, several other authors used this ancient notion with different names (Garssen 2001, p. 82)

Garssen (2001) gives an overview to the most important, classical and modern, approaches to this subject. He explains that the argumentative schemes can be used also as tools for the evaluation of argumentation and as a starting point for the description of argumentative competence in a certain language.

Several works on argument schemes as (Hastings, 1963), (Kienpointner, 1992), (van Eemeren and Grootendorst, 2004), (Walton, 1996), (Walton et al., 2008), among several others, have tried to put some order in the field, proposing different criteria to assure their cogency and to classify them. Nevertheless, both the criteria and also the amount of schemes taken into account vary largely, considering among them, for instance, from deductive patterns as *modus ponens,* to, in some cases, some of the classical rhetorical figures.

Presumptive argumentative schemes (Walton 1996; Walton et al. 2008) have their source in actual examples of commonly used patterns of reasoning. They correspond to defeasible reasoning and although they can be sufficiently strong to

support a claim depending on the argumentative situation, the claim they support can be defeated if the circumstances change.

In the pragma-dialectical typology three main categories are considered, symptomatic argumentation, comparison argumentation and instrumental argumentation. Following (Hastings, 1963), each scheme comes together with a set of critical questions that helps to guarantee the correct application of the scheme. The questions are to be used by the antagonist in the dialectical process in case of doubt, and if asked, they automatically shift the burden of the proof from the antagonist to the protagonist. The pragma-dialectical classification is coherent, easy to grasp and fulfills its main function, i.e., help the user to assure the transference of the acceptability of the premises to the standpoint and, generally speaking, it can be sufficient to apply to the evaluation of arguments. Nevertheless this typology becomes clearly insufficient if we try to use it in the process of generating new arguments.

If we take into account the number of schemes proposed, we could put (Walton, 1996) and (Walton et al., 2008) proposals on the other side of the balance. Following Aristotle's idea of rhetorical topics and also most of the works above cited, they gather an extended list of argument schemes (around 60 in the last typology), each of what comes together with its corresponding set of critical questions; these questions are to be used in the same way as in the pragma-dialectic approach. In (Walton et al., 2008) they also attempt to provide a more systematic, if tentative, classification of the schemes, and to explore the use of them in artificial intelligence settings. Although, they also say, that much more work should be done to improve the proposals in this field, they mention the progress made in the use of the schemes and their critical questions in software designed to help arguers to analyze and to write new argumentations, and in multi-agent systems and automated reasoning.

Tindale (2004) thinks that argumentation is essentially rhetorical and, following Perelman's constructive conception of the argumentation, he considers it as a kind of communicative practice that helps us to change our point of view and directs our actions. He maintains that "elements of argumentative speech must have occurred as long as language has been in use" (Tindale 2004 p. 32) Argumentation as a form of communication invites collaboration; the arguer and the audience interact in a way that makes them coauthors of the argumentation. Tindale's rhetorical view extends the typology of schemes to some of the rhetoric

figures that appear in the work of the sophists as set of strategies or types of arguments. For example he includes figures like the *peritrope*, which involves the reversal of positions that can be traced "in the writings of current argumentation theorists who advocate the importance and value of considering all sides of an issue, including that of ones opponent" (Tindale, 2004, p. 46).

For Garssen (2001; 2009) figures have probative force but they are not real schemes: figures have no associated critical questions, and the schemes don't posses the changes of language use that characterize rhetorical figures. Kraus (2007) analyzes in detail one rhetorical figure (*contrarium*) and shows that in general they are poorly warranted and based on defeasible commonsense arguments, but that they exert enough psychological or moral pressure on the audience to make them accept the implicit warrants without any protest or further request for argumentative backing, and so, becoming then, in some cases actual fallacies.

In his book *Fallacies and argument appraisal*, (Tindale, 2007) considers the relationship between argumentative schemes and fallacies, and stresses, as some other authors also do, that the deceptive nature of some fallacies comes from the illegitimate use of an argumentative scheme that is in principle acceptable in other circumstances. Nevertheless, he also says that there are fallacies, as the *straw man*, which does not correspond with legitimate argumentative schemes. In any case, the criteria of appraisal call for a careful analysis of the rich and varied contexts in which they occur. The strategy to help arguers dealing with fallacies follows the critical questions procedure proposed by many other researchers for the evaluation of argumentative schemes.

Coming back to the beginning of this work, and without any doubts of the interest of the use of the schemes and critical questions to appraise the cogency of the argumentations, in the following section, we will be concerned mostly with the use of them in the first sense, i.e. as argument generators.

4. The role of the argumentative schemes in the process of writing.

In order to study the role of the argumentative schemes in the process of writing we need to overview the process as a whole. As we have seen, the process is the result of the interaction of multiple factors that have a different weigh in the various stages of the writing process. The relative importance of these factors depends, as well, of contextual circumstances related to the topic, the social

context and the idiosyncratic features of the interlocutors. In consequence, the process of writing argumentation should integrate besides the traditional logical, dialectical and rhetorical elements, also inputs relative to the textual linearization or linguistic coding, the motivation and goals of the arguers and some other psychological and contextual considerations. Nor cognitive psychology not argumentation theory alone have given a satisfactory account of the process of writing argumentative texts. As we have said the motivation of the arguers or the importance the issue at stake has for them is a crucial factor that determines much of the depth of the argumentation. For example (Igland, 2009) shows that adolescent students argue differently according to the challenges they face: arguing about a practical matter, a more abstract point or about a question related to similar controversies and discussions in the social environment. She also shows that they react differently when they think that there is some space for negotiation or that the matter is not negotiable.

In the first place, writing an argumentation requires the monitoring of the different steps needed to reach the goal of the argumentation: planning the general strategy of the argumentation, translating to words, checking for local coherence… and finally reviewing the resultant text using linguistic, epistemological and rhetorical criteria. (Kellogg, 1994).

A second ingredient is the acquisition of the knowledge about the issue and about the concrete argumentative situation in which it occurs: social context, audience's characteristics, time constrains, possible sources of information, means, helps… The more the arguer masters the topic under discussion, the better the product will be.

A third focus of attention should be pointed to the epistemological or dialectical space: from the more automatic reasoning, followed by logic inferences and pragmatic processes, to the more conscious reflection about the global structure, argumentative stages and the adequate and reflexive use of argumentative schemes to support the claim.

And last but no least, the integration of the rhetorical space in order to negotiate with the audience, As (Golder, 1996) says, the negotiation with the addressee is one of the principal constituents of the argumentation, because the argumentative discourse is by itself polyphonic (Anscombre & Ducrot, 1983): even in writing argumentation the voice of the reader or the readers needs to be integrated in the text. The use of communicational and rhetorical devices designated in classical rhetoric as disposition and style, is also needed to make clear the content of the

argumentation, to maintain the attention of the reader, to develop a positive ethos for the writer, and, as a consequence, a receptive attitude in the audience.

There is not a definitive psychological explanation of the way in which our brain or cognitive system realizes ordinary inferences, nevertheless, there are nowadays more and more suggestions to indicate that some of the skills that interact in the argumentative process are unconscious and automatic; others, nevertheless, as the overall planning, for example, require constant attention and monitoring.

Writers most of the times don't need to explicit all the implicit premises to grasp the logic of the inference, that is, the link between the reasons and the conclusion. They do it in an automatic form linking it with common knowledge taken from the actual situation in which they place themselves and the audience; the process occurs fast and unconsciously. (As an example, we think that the premise that states that "smoking is unhealthy" is enough to discourage smoking without any other implicit premise as "anything that is a danger to the health should be avoided"). Besides, even if we try to explicit some of the information needed to strength the inferential nature of the argument, in many cases, it is quite difficult to decide where to stop it.

Some of the argumentative schemes are known and used by very young children in oral discussions with peers. To make the use of them conscious and to learn in a practical way when they lack the strength necessary to support a claim or even when they can become fallacies is important, but, nevertheless, even in Aristotle's pioneering works the knowledge of the schemes, by itself, was not a sufficient help to find the necessary arguments to justify a claim. As Rubinelli (2009) says,
"arguments ultimately derive from premises that put forward specific contents, and it is the ability to find these premises that enables speakers to argue actual cases. Readers can experience this for themselves. Try to use any of the topoi listed in the Topics to discuss a certain subject with someone. If you do not master a body of relevant material on the topic at stake, any topos chosen will be of no use; if you use inadequate material, your efforts will be vain! But if speakers have adequate material at their disposal, knowing the topoi will help them structure this material in an efficient argumentative framework". (Rubinelli 2009, p. 32)

The goal of written argumentation is to produce a meaningful text containing not

only a sequence of ordered arguments but also other communicative elements as explanations, clarifications, etc., directed to persuade the audience of a standpoint supposedly in doubt or in dispute. A minimal argumentation will use a unique scheme, but in an elaborate written argumentation, due to the debatable character of the subject, there are always several arguments, each of them using one or a combination of schemes to justify the claim. There will be also other arguments to answer to presupposed objections and criticisms.

The writer has to cope simultaneously with linguistic requirements and rhetorical strategies that introduce elements of our actual and real world experiences. The dialectical and the rhetorical space can be dissociated for theoretical purposes but as Leff (2002) said, in the practice they have to interact if we want to achieve "effective" persuasion.

The use of the schemes depends on the choice of the arguments. But this task is decided in function of a general strategy that integrates the relevant knowledge about the topic, the appropriate use of the schemes and their rhetorical properties. This, being a challenging cognitive process, could be made easier by the systematic learning of some of the schemes, *topoi* and fallacies with their respective critical questions. If we have a set of critical questions in mind when we plan to write argumentation, our arguments will be stronger and we could be ready to anticipate a rebuttal and to add some additional premises to reinforce or to warrant an argument. Some critical questions appear intuitively in the actual dialectical situation when we argue orally. For example, if we think that an "expert" can't be considered as such and if we are interested in arguing, we will always ask for more information about him/her. But in writing the audience is not present, so it is good to have in mind some of these intuitively natural questions associated to the most used schemes. But once again, the study of the schemes should be integrated in a more general framework and to learn in an effective way it should be completed with intended practice, using debate first to reinforce our arguments and afterwards writing the corresponding argumentative texts.

We also think that a useful list of schemes depends somehow on the field, in which they will be used, be it legal argumentation, software design, education, etc. For pedagogical purposes it would better than the use of a whole list of argumentative schemes, the adaptation of it to the age of the students and the adoption of the pedagogical approach known as constructivism. As much of the mastering of the use of the schemes is grasped simultaneously with the natural

process of learning the language, the teaching of the schemes would be more efficient if we could relate them to the actual abilities of the students, making the topic knowledge affordable to them and arousing their interest and motivation. The new knowledge, as proposed by constructivism teaching, should be built on the actual knowledge of the learner.

As a consequence, the decision of including or not different argumentative schemes among the teaching strategies should be the result of empirical research. A good point to start the selection could be the study of the argumentative schemes used by arguers at different ages in natural environments both in oral and in written argumentations.
Another source to select the schemes and their fallacious counterparts, considered as wrong inferential moves, is a revision of the lists proposed by critical thinking, rhetorical and argumentation courses and textbooks and software tools for argumentation.
For instance, *Rationale* is a software tool, based on research done at the University of Melbourne that helps students grasp the essence of good essay-writing structure. *Rationale*, is designated to facilitate the analysis of argumentations and the production of good reasoning in learning environments, so, there is a simple list of sources for arguments to support a claim (assertions, definitions, common beliefs, data, example, expert opinion, personal experience, publications, web, quote and statistics). Not every source has the same strength supporting a claim, and some of the possible reasons to support it could be presented using more than one of the categories. Nevertheless, the list and the critical questions associated with every item, offers a practical guide for students and people looking for an improvement of their arguing skills. Many critical thinking textbooks offer similar strategies.

The list proposed by *rationale* includes sources that appear in the classifications of argumentative schemes quoted above, as expert opinion and statistics. Other elements they use, as common beliefs or personal experiences, are more related to the topics of classical rhetoric, and finally, others are more linked to common scientific methodology or epistemological approaches.

Summarizing, we consider necessary to link the learning of the argumentative schemes to the progressive acquisition of them when acquiring the different communicative skills of the language. In general, we think that it is better to introduce them after their use and strengthening in oral argumentations, by

means of strategic critical questions prompted in the debate. After being made conscious in these dialectical settings, they should be used for argumentative writing and marked by the teacher with more critical questions, if the arguers themselves have not given enough thought to the most salient of them, in order to reinforce the argumentation.

As an example, we can look at the argument form expert opinion (*ad verecumdiam* in the rhetorical tradition). It is one of the schemes that appear in almost every classification of the different traditions, because it is one of the most used schemes. The argument from expert is presented by Tindale (2007), Walton et al. (2008) and many others as one of the defeasible argumentative schemes that could be a fallacy, if improperly used. The ubiquity of this scheme, even in early stages of the development of oral argumentation, and its persuasive efficacy justify its treatment in a pedagogical program of argumentative writing. First, we should confront the students with good and bad uses of the scheme and facilitate, with the help of critical questions, their thoughts and conscious grasping of it. Then we would have to discuss the relative strength of expert opinion, compared with arguments from other sources, as data or personal experience, considering the adequacy of the choices for the intended audience.

The goal of instruction is then to foster the metacognitive skills of the writer, *"argumentative discourse is one of the most subtle and most elaborate ways to use language. In contrast to narration, in which temporal markers are often sufficient, it is more highly structured, containing many more modal expressions (might, may, sure, seem, likely, certainly, proves), that is, those in which speaker is implicated. In sum, argumentative discourse implies being able to think in both a metacognitive and a metalinguistic framework."* (Kuhn 1991, p. 271)

The argument could be used to justify the claim or to reply to possible objections of the audience, but the argument needs to be integrated in an argumentative essay that has to fulfil all the communicative goals of the writer with respect to an intended audience. The choice of the title, the style, the introductory paragraphs, the length of the text, the use of reiterations, the emphasis, the order of the arguments, the use of metaphors are to be decided to adapt the text to the audience. In sum, all those elements that will be part of the argumentative text need to be considered in the process of writing.

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