ISSA Proceedings 2006 – Grice's Analysis Of Utterance-Meaning And Cicero's Catilinarian Apostrophe

1. *Introduction*

This paper brings a critical analysis of Cicero's *"First Catilinarian"* to bear on issues at the heart of Paul Grice's analysis of utterance-meaning. Grice's analysis affords a powerful model of how communicative norms can be pragmatically generated in human communication. However, the most defensible and, from the point of view of argumentation scholars, most interesting version of Grice's analysis has been widely criticized as implausibly complex. Through study of Cicero's use of apostrophe in his "First Catilinarian," I will argue that the apparent complexity of Grice's analysis lays bear the essential structure of seriously saying and meaning something and affords students of argumentation insight into the pragmatics of the commitments which speakers and addressees undertake. We will start with Grice and move to Cicero.

2. *The complexity of Gricean speaker-intentions*

Properly understood the pragmatics underlying Paul Grice's analysis of utterance-meaning illuminate the strategic roles played by commitments and obligations in human communication, including the genesis and practical value of a speaker's commitment to the truthfulness of what she says and to such probative obligations as she may incur. Introduced almost fifty years ago, Grice's analysis affords insight into the essential components of the communicative act of seriously saying and meaning something.**[i]** Dennis Stampe has identified the practical calculation which speakers typically employ when performing that communicative act. According to Stampe, when a speaker says, e.g., that Uncle Bill has died, she openly and strategically takes responsibility for the veracity of her utterance. Accordingly, she makes herself inescapably vulnerable to criticism and resentment for mendacity should it turn out that she is speaking falsely. The speaker thereby generates a presumption of veracity on behalf of her utterance,

which serves to provide her addressee with assurance that she is speaking truthfully. Given the speaker's openly incurred commitments, her addressee can reason (ceteris paribus) and is intended to reason that the speaker would not be manifestly willing to risk criticism for speaking falsely, were she not in fact speaking truthfully (Kauffeld, 2001; Stampe, 1967; 1975).

This interpretation of the practical design underlying the constituents identified by Grice's analysis is a model of normative pragmatics.**[ii]** It exhibits the genesis of a normative obligation in a familiar communicative practice: in saying that *p*, the speaker openly incurs an obligation to speak truthfully. And it identifies the potential efficacy of that normative obligation, *viz.*, by openly incurring an obligation to speak truthfully, the speaker generates reason to, e. g., believe what she says. Moreover, variants of Stampe's strategy for generating presumptions can be seen to be at work in the genesis of probative obligations in such speech acts as *accusing, proposing, praising,* etc. (Kauffeld, 1998; 2002).

However, Stampe's account relies on a version of Grice's analysis which many regard as implausibly complex. As Grice defended his analysis in the face of counter-examples, the conditions posited as necessary to seriously saying and meaning something grew in complexity. The version which informs Stampe's account holds that it will be true that some speaker (*S*) means something by an utterance (*u*), if and only if *S* produces *u* with the following complex intention.

S's primary sub-intention (I1): *S* intends1 that some addressee (*A*) respond (*r*) that *p* (or at least act as if *S* intends1 that *A r* that *p*);

S's second sub-intention (I2): *S* intends2 that *A* recognize *S's* primary sub-intention (or at least acts as if *S* intends2 that *A* recognize *I1*);

S's third sub-intention (I3): *S* intends3 that *A* recognize *S's* secondary sub-intention (or at least act as if *S* intends3 that *A* recognize *I2*); and

S's fourth sub-intention (I4): *S* intends4 that *A's* complex recognition of *S's* intentions provide *A* with at least part of *A's* reason for ring that *p* (or at least acts as if *S* were speaking with this intention) (Grice, 1969, pp. 154-157; Stampe, 1967; 1975; Strawson, 1964, pp. 439-460).

Accordingly, it will be true that Mary has said that Uncle Bill has died, if she has uttered something *A* is to take as semantically equivalent to 'Uncle Bill has died', and if this utterance is part of a complex effort on her part to get *A* to, e.g., believe that Bill has died, and if that effort includes an attempt to get *A both* to recognize that she is trying to secure this belief and to recognize that Mary wants

A to recognize that she is trying to get him to believe that Uncle Bill has passed on, and if Mary at least acts as if this complex effort is designed to provide *A* with reason to believe that Uncle Bill has. Notice that in implementing *I2, S* deliberately tries to make *I1* apparent to *A*; while in implementing *I3, S* openly gives *A* to believe that *S* is trying to get *A* believe that *p.* Were *S* successful in executing *I2* in the absence of *I3*, then *A* would recognize *I1,* but *A* might well believe that this recognition was something he had arrived at on his own. If *S* successfully executes *I3,* A is given to know that *S* has induced him to recognize *I1.*

To many this claim that seriously saying and meaning something requires that *S* be deliberately open about the primary intention which S is (ostensibly) speaking attributes to speakers a far more complex production than is typically involved in simply saying something (Avramides, 1989, p. 14; Black, 1975, p. 118; Evans & McDowell, 1976, pp. xix-xxiii; Grandy & Warner, 1986, pp. 8-13; Grice, 1986, pp. 80-85; Kemmerling, 2001, p. 74; Loar, 2001, p. 104)**.[iii]** Consequently, many students of Grice's work prefer simpler versions of his analysis in which speakers, relying (tacitly) on the trust of their addressees, need only make it apparent that they want *A* to know that, e.g., *S* wants (intends) *A* to believe that *p* (Kemmerling, 1986, pp. 132 & 142; 2001, pp. 74-76; Loar, 2001, pp. 104-106). However, this retrenchment strips the analysis of the means by which *S* openly takes responsibility for her communicative effort and, thus, eliminates the grounds, which, according to Stampe, *S* provides to assure her addressee of *S's* accountability.

In what follows I try to show that, far from attributing to speakers a hopelessly complicated effort, Grice's analysis helps us to appreciate the complexity of human communication and the practical value of the primary communicative act of saying and meaning something. Attention now turns to Cicero's famous oration.

3. *The apostrophes in Cicero's First Catalinarian*

Consider first the communicative structure of *apostrophe.* Willard Espy, parroting Peacham's *Garden of Eloquence*, explicates this figure of speech as follows.

> Apostrophe, when we suddenly forsake the former frame of our speech and go to another. That is to say, when we have long spoken of some person or thing, we leave speaking of it, and speak unto it, which is no other thing than a sudden removing from the third person to the second (1983, p. 156).

Apostrophe, then, requires at least two addressees (*A1 & A2*), one of whom is

typically present while the other may be actually present or may appear only as a persona imagined by the speaker. In producing an apostrophe, *S* is engaged in speaking to *A1* about *A2*, and *S* turns from addressing A1 to speak to (or as if to speak to) A2, and S casts A1 in the role of an affected listener, who (i) is intended1 to overhear and respond appropriately to what *S* says to *A2* and (ii) is intended2 to recognize that *S* intends1 that *A1* overhear and respond appropriately to what *S* is saying to *A2*. In this scheme, an addressee may play two roles: first as the person spoken to, the addressee, and second as the affected listener. The sequence of roles here is not essential. In his "First Catilinarian" Cicero switches back and forth between two potential addressees – The Roman Senate and the villainous Catiline – both of whom are actually present (Cicero, 1977b).

Successful apostrophe imports content from statements made to one party into a discourse addressed to another party. The material thus transferred occupies a unique status. The imported evidence, arguments, etc. does not enter the dialogue as statements made to the parties who are to assimilate those materials in the capacity of affected listeners. So when Cicero says something to Catiline, while manifestly intending that the Senate follow his statements and find them relevant to the arguments he is presenting to the Senate, he does not actually say those things to Senate; accordingly, he does not openly take responsibility for the truthfulness and rational adequacy of the imported utterances. Consequently, the speaker does not openly incur a burden of proof with respect to those materials. This possibility of importing into a discourse argumentation for which one does not *openly* commit oneself to a corresponding burden of proof was of considerable strategic importance to Cicero on the occasion of his First Catilinarian.

To appreciate that importance, recall the situation Cicero confronted on the occasion of this address. Nearing the end of his term as Consul in 63 BC, Cicero was confronted with a potentially broad popular uprising growing out the economic conditions of the time and led by dissolute and debt-ridden members of the Senatorial class, particularly by Catiline. Fortunately, Cicero had an informer in his enemies' camp, and on November 6, he was informed that the insurrection was coming to a head with plans to assassinate Cicero and to initiate an insurrection in the city of Rome, accompanied by armed uprisings in the countryside. Cicero thwarted the attempted assassination and called a meeting of the Senate to announce his latest intelligence regarding Catiline's intrigues. Upon

his arrival at the meeting, Cicero found Catiline brazenly in attendance, seated in isolation from the other Senators. Cicero then faced a situation which called for a careful and moderate response. Operating under what we would describe as a declared state of emergency, he had, at least arguably, broad powers to take action against Catiline, but of necessity Cicero pursued a cautious strategy and was unwilling to act without full Senatorial approval. As a recent biographer observes:

[E]vidence for a conspiracy in Rome still consisted only of rumor and unverifiable reports from unauthoritative sources. He [Cicero] was aware of broad skepticism, real or pretended, about Catiline's revolutionary intent and the danger from it, and, sensitive to the volatility of public opinion and the political hazards of any drastic response to unproven charges or of seemingly tyrannical tactics against a man who commanded the sympathy of a constituency as broad as Catiline's, he was determined to let the conspiracy develop until he could convince the public of its scope and purposes, and win from the exposure of the danger and from its suppression the vindication of his beliefs. . . . (Mitchell, 1979, p. 235)

Were Cicero to decisively had Catiline executed or banished, he would have risked charges of overstepping his authority with potentially grave consequences for his career and his life. On the other hand, Cicero could ill afford not to act: Catiline's presence in the city posed the immediate danger of fire and murder and, also, presented a grave challenge to Cicero's authority. In these circumstances Cicero had three fundamental purposes with three corresponding and interlocking lines of argument:

(1) *The first purpose* was to drive Catiline from the city, i.e., to give Catiline sufficient reason to obey the imperative, "Leave the city!" This objective Cicero openly avowed repeatedly. By getting Catiline out of Rome, Cicero would reduce the immediate threat, and Catiline would, by his very action of joining the insurrectionary forces gathered in Etruria (Tuscany) around Catiline's co-conspirator, Manilius, add substance to charges Cicero expected to eventually bring against him and his cohort.

First line of argument. Responsive to this purpose, Cicero explicitly argued that Catiline must leave the city. This argument was openly addressed to Catiline (Cicero, 1977b, 10, 17, 18, 20, 23, 33). It occupies the bulk of Cicero's discourse on this occasion.

(2) *Cicero's second purpose*, openly pursued throughout his address, was to

justify to the Senate the course of action, or what might appear to some as inaction, which Cicero was pursuing. Cicero had been given emergency powers to deal with the threat posed by Cataline, yet Cicero had not acted to banish or execute the villain. Was this inaction acceptable (1977b, 3-4, 27-29)?

Second line of argument. In treating that question, Cicero explicitly advanced three arguments. First, he maintained that the danger posed by Catiline's actions warranted the accusation that his failure to have Cataline executed or banished was negligent and imprudent (1977b, 27-29). Second, as part of his answer to this self-accusation, Cicero maintained that he had not been negligent, since he knew of and managed to frustrate Catiline's maneuvers (1977b, 8, 31-32). And, thirdly, Cicero maintained that soon Catiline would be recognized by all as an enemy of the state and could then be executed without risk of appearing cruel and merciless (1977b 6, 29-30).

(3) *The third purpose*, as described by Ann Vasaly, ". . . was to induce his audience to see Catiline not only as a pernicious citizen – a traitor deserving of exile – but as a hostis whose plans and action had thrust him outside the pale of citizenship and the legal protection that accompanied that status"(1993). The status of *hostis* was not well defined in Roman law. Under a declared state of emergency, such as was in effect at the time of Cicero's address, parties recognized as "hostis" were regarded as enemies of the state, outside the protection of Roman law, and liable to execution. Were the Senate unanimously to recognize Catiline as a hostis, then Cicero could secure his execution with relative impunity. Roman law was not similarly clear about what must be shown to convict a patrician Roman as an enemy of the state. Precedents were available, but their application by Cicero, a new man from outside patrician ranks, required clear and certain evidence of guilt – evidence which Cicero did not have (Cicero, 1977a, pp. 570-571).

Third line of argument. Corresponding to Cicero's third purpose, he manifestly developed what can be described as a proto-argument, i.e., an argument which addressed the key issues involved in the question of Catiline's guilt, but waited for its completion on further evidence which, Cicero maintained, would predictably be forthcoming as Catiline continued on his reckless course (1977b, 5-6, 29-30). This line of argument was set out manifestly, with Cicero deliberately making it apparent that he intended to show the Senate that Cataline is a hostis, but he did not openly advance that argument.

These lines of argument are interlocking in that the success of each depends on the success of the others, and they are cumulative in that reason and evidence introduced in the first is manifestly designed to provide, by means of apostrophe, argumentation essential to the support of the second; while argument structures imported from both the first and the second manifestly compose the third.

Consider first the interdependence of these arguments. Were Cicero to succeed, as indeed he did, in driving Catiline from the Senate and from the City, then Catiline's conduct would show Cicero's mastery of the situation as claimed by his second line of argument and, more importantly, would provide evidence clinching Catiline's guilt as predicted by Cicero. So success in the first line of argument provided support designed to carry the second. But both the first and the second depend fundamentally on the proto-argument that Catiline is a hostis. In order to convince Catiline to leave, Cicero argued that Catiline had no remaining support in the Senate; he could not hope to gain legitimacy for his action (1977b, 16-17, 20-21). In this connection, Cicero made use of the silence of the Senators in response to his attack upon Catiline.

Leave the city, Catiline, free the commonwealth from fear. . . . Well, Catiline? What are you waiting for? Do you not notice the Senate's silence? They accept it [Cicero's injunction], they are silent. Why are you waiting for them to voice their decision, when you see clearly their wish expressed by their silence. . . . Catiline, their inaction signifies approval, their acquiescence a decision and their silence applause (1977b, 20-21).

In order to generate this evidence, important to the success of his first line of argument, Cicero needed to provide enough support for his proto-argument to convince Catline's potential supporters to at least remain silent. The importance of the proto-argument in silencing Catiline's sympathizers is confirmed by subsequent events. Immediately following Cicero's invective, Catiline rose to respond but was shouted down by the Senators. He thereupon fulfilled Cicero's injunction by storming out of the forum. So, the success of the first line of argument depended on the success of the proto-argument. Likewise the second line of argument held that Cicero's inaction was warranted because the case against Catiline was so powerful that it was foreseeable that Catiline's behavior would betray his guilt even to those inclined to support him. But this supposition required that the proto-argument establish a persuasive presumption of Catiline's guilt. In brief, the proto-argument was the fundamental argument of the discourse.

These lines of argument were also cumulative in ways which involved the principle of apostrophe. The argument addressed to Catiline was manifestly designed to provide the Senate with much of the reasoning and evidence needed to support the self-accusation and defense Cicero offered in his second line of argument. That accusation was first introduced in remarks addressed to Catiline: "It is not the deliberations and decisions of this body that the Republic lacks. It is we, – I say it openly – we consuls, who are lacking [are wanting in our duty]" (1977b, 3-4). Cicero then immediately raised this same accusation in statements addressed to the Senate: "It is my wish, gentlemen, to be a man of compassion, it is my wish not to seem easygoing at a time of serious danger for the Republic, but now I condemn myself for my inaction and my negligence" (Cicero, 1977b, 4). By raising this charge first in his address to Catiline and, subsequently, in his address to the Senate, the primary audience for the accusation, Cicero initiated a frame which enabled him to import argumentation addressed to Catiline into the arguments addressed to the Senate. Within that frame, Cicero implicitly transferred from arguments addressed to Catline the supporting precedents, legislation, and evidentiary details needed to support the accusation and defense he offered to the Senate (1977b, 4-10 & 30).

The third line of argument was not openly addressed or explicitly supported in Cicero's remarks to the Senate. In his address to Catiline, Cicero did call his villain an enemy of the state: "I achieved this much when I kept you from the consulship, that you would only be able attack the State as an exile and not harry it as a consul, and that this criminal attack upon which you have embarked would go under the name of banditry not war" (Cicero, 1977b, 27-28; also see: Cicero, 1977a, p. 573), but in statements address to the Senate, Cicero explicitly refused to say that Catiline is a hostis (1977b, 9, 19, 29-30). Nevertheless, the basic structure of Cicero's proto-argument can be reconstructed from statements openly addressed to Catiline and to the Senate.

Premise one: Cicero ought to have Catiline executed, when incontrovertible evidence that he is a hostis has emerged [transposed from statements addressed to Catiline (1977b, 2-3)].
Premise two: There is compelling evidence that Catiline is a hostis [transposed from statements addressed to Catiline and supported at length by arguments addressed to that culprit (Cicero, 1977b, 17-19, 27)].
Premise three: However, some of Catiline's supporters in the Senate are not yet

convinced of Catiline's guilt [transposed from statements addressed to the Senate in response to Cicero's self-accusation (1977b, 5-6, 29-30)].
Internal conclusion: Therefore, in the interest of appearing merciful, Catiline should not be executed until further uncontestable evidence firmly establishes his guilt [transposed from statements addressed to the Senate in response to Cicero's self accusation (1977b, 6, 29-30)].
Premise four: However, given what is known about Catiline's plots, it is likely that incontrovertible evidence will soon emerge firmly establishing his guilt [transposed from and supported by Cicero's recounting to Catiline of what he knows about the latter's plan to join his band of traitors in Eutria and further reinforced by the force of Cicero's urging Catiline to leave (1977b, 5, 10)].
Conclusion: Therefore, it will soon be apparent to all that Catiline is a hostis, and Cicero will then be free to do what he ought to do, i.e., have Catiline executed [transposed from Cicero's concluding remarks to the Senate (1977b, 30)].

Although Cicero did not openly address this proto-argument to the Senators, he manifestly intended that they follow its development as embedded in remarks addressed to Catiline and to the Senate. What, then, enables us (and presumably the Senators) to recognize Cicero's apparent intention that they find in his remarks a compelling argument for Catiline's guilt?
First, we can be reasonably certain that Cicero did have some such primary intention, i.e., he did intend that his fellow Senators find in his remarks compelling reason to believe that Catiline is a hostis. Demonstrating that to the Senate was one of Cicero's ultimate goals in this whole affair – one he attained when Catiline's presence in Manilus' camp provided confirmatory evidence, as Cicero had predicted in this address. Moreover, we can suppose that Cicero intended his audience to find such an argument in his remarks because, as noted above, getting the Senate to recognize and be moved by his proto-argument was practically essential to the success of the other two lines of argument developed in this address.
The fact that Cicero probably held such a primary communicative intention lends plausibility to the claim that Cicero deliberately gave the Senators to believe that he was speaking with that intention. First off, it shows us an intention Cicero had which, with a little prompting on his part, he might reasonably have expected others to recognize. Second, if his auditors recognized that intention, then they would have a guide to interpreting his remarks which would make apparent the direction and force of his proto-argument. So we have reason to believe that

Cicero had both the opportunity and the motive to make this argument apparent. The text of Cicero's address presents us with at least three cues which would have served to induce attention to Cicero's intention to secure audience acceptance of his proto-argument.

First, in urging Catiline to leave the city, Cicero elaborated his argumentation well beyond the reasons and evidence needed to support the claims he advanced to Catiline and beyond the material needed to uphold the claims he presented in consideration of his self-accusation. Ostensibly to show Catiline that staying in the Senate and in Rome would be futile, Cicero detailed three past episodes in which Cicero exposed and frustrated Castiline's designs (1977b, 7-8). Cicero, then, recounted in extravagant detail his knowledge of Catiline's current plot including: the site at which the conspirators met, their division of labor, how they planned to divide up the city of Rome and the rest of Italy, and details of the plot to assassinate Cicero (1977b, 8-10). Presumably, Catiline could have discerned that Cicero had intimate knowledge of the conspiracy from far less detail than Cicero provided. Similarly, this part of Cicero's apostrophe provided the Senate with more data than they would need to grasp the point that Cicero knew what Catiline was plotting. But this extended and detailed narrative did provide Cicero with a vehicle for bringing before the Senate an extended inventory of the evidence for Catiline's guilt. Given the surfeit of argumentation Cicero provided, the intention to do that could hardly be ignored by his audience.
Second, Cicero framed his narrative of Catiline's plot so as to generate confirmation of Catiline's guilt. Cicero was not content simply to recount his knowledge of these episodes; instead he presented his narrative as a series of questions addressed to Catiline; he then interpreted Catiline's silence as confirmation of Cicero's account.

You are trapped on every side; all your plans are as clear as daylight to us. Let us go through them together. Do you remember that I said in the Senate on the 21st of October that Gaius Manlius, your tool and lackey in your wild scheme, would take up arms on a certain day and that the day would the 27th of October? Was I not right, Catiline, both in the seriousness of the plot . . . and – a much more remarkable feat – in the date? I said also. . . . You cannot deny that, can you? . . . . You confidently expected to take Praeneste in a night assault on the 1st of November, but were you aware that the defenses of that colony had been set on my orders with my garrison, my guard-post, and my sentinels? . . . . You do not

have the effrontery to deny it, do you? Why are you silent then? If you deny, I shall prove it (1977b, 6-7).

The confirmation Cicero demanded from Catiline surely was not needed to show Catiline that Cicero knew what Catiline was up to. While Catiline's silence did provide the Senate with confirmation relevant to Cicero's apostophic representation of his mastery of the situation, still that demonstration hardly required point by point demands that Catiline try to deny Cicero's allegations. But Cicero's repeated calls for denial and his accompanying interpretation of silence as indication of guilt did provide some evidence supporting the proto-argument's claim that Catiline was an enemy of the state.

Third, in meta-comments on his own discourse, Cicero problematized the intentions with which he purported to speak, suggesting both the futility of belaboring these matters to Catiline and the lack of need to elaborate them to the Senate. Cicero conspicuously failed to give a coherent account of why he was speaking to Catiline. He begins by advising Catiline to leave, explicitly speaking out of what Cicero described as undeserved pity (1977b, 6-16). Well into the oration, Cicero changed his mode of address and ordered Catiline to leave (1977b, 10), but as that would amount to banishing Catiline, an act Cicero was not prepared to justify, Cicero openly backed away from his command and returned to advising Catiline (1977b, 12-13). But, then, as he neared the conclusion to his address, Cicero expressed puzzlement about his avowed purpose in speaking to Catiline. Why, Cicero asked, bother to advise Cateline to do what he is already intent on doing, what his corrupt nature compels him to do? (1977b, 22). Nor did Cicero present a coherent view of why he was addressing the Senate. On the one hand he argued at length that he could justifiably be charged with negligence; while on the other, he purported to believe that many Senators were already prepared to negatively judge his inaction. If the latter were true, then there would be no need for extended argument to establish the former. As for Catiline's sympathizers, Cicero openly admitted that he did not have the evidence needed to convince them. So, what, one may ask, was the point to the remarks Cicero openly addressed to the Senate? By thus problematizing the intentions with which he openly addressed Catiline and the Senate, Cicero invited his fellow Senators to look beneath the ostensible surface of his communicative efforts to find a deeper intention animating his oration. When they looked, they could hardly help but recognize the design of his proto-argument aimed at establishing that Cateline is a hostis.

We have seen that Cicero used a combination of apostrophes to induce one audience to cognitively appropriate reason and evidence from a discourse addressed to another audience. In doing so Cicero strategically managed his probative commitments – his burdens of proof – so as to present to the Senate a body of reason and evidence tending to show that Catiline was an enemy of the State, while evading the obligation to answer objections and demands for conclusive proof from that audience, which he admittedly could not have satisfied at that time (for a discussion of managing burdens of proof, see: Tseronis, 2006). Of course, Cicero did incur probative obligations with respect to both Catiline and the Senate, but he exercised careful stewardship of these openly incurred duties. Thus he managed to provide Catiline with reason to leave the Senate and the City, thereby (arguably) discharging his immediate duties as Counsel; at the same time, he managed to lay before the Senate a case for Catiline's guilt, which ultimately proved to be persuasive, and he achieved all this under circumstances in which he did not have in hand the hard evidence needed to show that Catiline was an enemy of the state. This achievement poses complex historical and moral questions (not to mention questions as to what we regard as fallacious argumentation), but our immediate concern is with the insight which a Gricean perspective affords into Cicero's management of this affair.

4. *Cicero's apostrophes and the complexity of Gricean reflexive speaker intentions*
Earlier we noted that the reflexive speaker-intentions posited by Strawson's and Stampe's version of Grice's analysis of utterance-meaning have been criticized as implausibly complex. In response to this influential complaint, we can now observe:
(i) that far from being dubiously complicated, the distinctions marked by that analysis, together with their concomitant pragmatics, afford insight into an accomplished advocate's stewardship of probative obligations in a "real life situation," and
(ii) that the suspect third level of speaker-intentions posited by this analysis is indeed essential to our conception of seriously saying and meaning something.

The version of Grice's analysis in question here invites us to distinguish between a speaker's deliberately giving it to be believed that she is speaking with a certain primary intention versus her both deliberately and *openly* making it apparent that she is so speaking. The pragmatic importance of this distinction, as explicated by Stampe, is that by openly manifesting her primary communicative intention, the

speaker patently incurs an obligation to speak truthfully which, I have noted, in the appropriate circumstances may ramify into an accompanying burden of proof. These analytically motivated distinctions are mirrored in Cicero's management of his probative obligations.

A key factor in Cicero's strategy consisted in his refusal to say and to openly argue to the Senate that Catiline is a *hostis*, while at the same time manifestly presenting persuasive arguments to that effect. Here we see clear and intelligible exemplification of the resources of serious utterance as explicated by our preferred version of Grice's analysis. Cicero was able to present his proto-argument to the Senate without incurring a concomitant burden of proof by relying upon his manifest intentions to guide the Senators in their appropriation of arguments which he openly addressed to Catiline. At the same time his repeated refusal to openly say to the Senate that Catiline is an enemy of the state is intelligible in light of the probative commitments Cicero would have incurred had he advanced that charge. In these circumstances, had Cicero said to the Senate that Catiline is a *hostis,* he would have *accused* the alleged villain of being an enemy of the state. Given the dynamics of that speech act, he would have committed himself to accepting the burden of showing convincingly that Catiline was indeed guilty, a burden which, as we have seen, Cicero was not in a position to discharge (Kauffeld, 1994; 1998). From these considerations it should be apparent that, far from being implausibly complex, our preferred version of Grice's analysis, marks distinctions important to understanding the complexities of real world argumentation.

Insight into Cicero's management of his probative obligations also clarifies the conceptual requirements for an analysis of seriously saying and meaning something. As noted earlier, dismay over the apparent complexity of the Strawson/Stampe version of Grice's analysis has led scholars to retreat to simpler renditions of the analysis which omit the requirement that in seriously saying and meaning that *p*, speakers *openly* manifest their primary communicative intentions. This move allows that *S* will have said that *p*, if she merely manifests her primary communicative intention, while (ostensibly) intending that *A* therein find reason to respond as she primary intends. We have seen that in his "First Catilinarian," Cicero both produced an utterance (addressed to Catiline) semantically equivalent to "Catiline is a *hostis*," and he manifestly intended that the Senate believe that this villain was indeed an enemy of the state, but that he resolutely *refused* to say to the Senate that Catiline is a *hostis.* These facts

powerfully argue that simpler versions of Grice's analysis, which require only that S deliberately manifest her primary speaker-intention, cannot suffice to explicate the conditions essential to seriously saying and meaning something. In order to have said that *p, S* must have *openly* given it to be believed that she is speaking with the primary intention that *A* respond with, e. g., belief that *p*. This conclusion tends to confirm Stampe's account of the pragmatics of serious utterance as discussed above.

5. *Matters for further thought and investigation*

The strategies Cicero employed to manage his probative obligations have great contemporary relevance. The genius of Cicero's message-design resides in his exploitation of potentials inherent in concurrently addressing two audiences on related topics, where each audience could be cast in the role of interested spectator for the discourse addressed to the other. The resources available in this type of situation enabled Cicero to induce the audience he was primarily addressing at any given moment to import into their consideration reasons, evidence, conclusions, etc. from discourses openly addressed to another audience, while avoiding the practical necessity of openly incurring responsibility for the truth and rational adequacy of the imported utterances. In our media rich age, much public discourse is targeted to multiple audiences, often under circumstances in which a primary audience can be induced take the role of interested observer of remarks addressed to a secondary audience. Attention should be given to the ways in which speakers are able, for better or for worse, to manage their probative obligations in such cases. What are the practical and probative gains in these situations versus what are the temptations to abuse?

NOTES

[i] Grice offers an analysis of "utterance-meaning," an artificial term embracing verbal utterances, gestures and other symbolic means of expression. I focus on the elementary communicative act of seriously saying and meaning something and rely on the ordinary sense of 'saying' as it is employed in indirect speech reports of the form 'S said that p'. If Grice's analysis of the meaning utterances have on the specific occasion of their use has any purchase in the world, it must at least capture what is essential to the communicative act of seriously saying that p.

[ii] Addressees do not need to reason out a speaker's commitment to truthfulness in each and every instance of serious communication. Persons acquire a

repertoire of communicative acts, including the act of seriously saying things, and they can rely on that inherited practical knowledge without puzzling out the internal calculation of each and every communicative act.

[iii] In addition, positing a second level reflexive intention (I3) has been criticized on the grounds that it seems to open the possibility of a debilitating regress of reflexive speaker-intentions, and it seems to some that I3 imports into the analysis an intention which is of no practical value (Avramides, 1989, p. 148; MacKay, 1972, p. 60). Stampe's account of the pragmatic value of I3 demonstrates, as I have argued elsewhere, the practical importance of this second level reflexive intention and, by the same stroke, closes the door to potential regresses (Kauffeld, 2001).

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ISSA Proceedings 2006 – Visual Schematization: Advertising And Gender In Mexico

Abstract:
The theoretical topic developed in this paper is the schematization of a visual object as a cultural and semiotic micro-universe, an ideological construction of a class of objects oriented towards a social representation. The analytical topic is gender ideology and its rhetorical functioning in Mexico. The genre studied is advertising of women's underwear.

We have developed a model based on an adaptation and change of the simplest proposal put forth by the Neuchâtel School (Grize 1974). Consequently, we have studied five basic visual logical operations:
1) "Introduction" (Finnegan 2002).
2) The object's visual "determination" (Groupe μ 1992).
3) "Enunciation" (Fontanille 1991).
4) "Involvement " (Fontanille 1991).
5) Visual taxis (Thürlemann 1982, Everaert-Desmedt 2003).

Main words: visual object, visual schematization, visual logical operation, point of view, identification.

In this paper, the premise we take for granted is that we argue by means of images and visual constructions. We consider argumentation models can be adapted to visual arguments (Finnegan, Fontanille, Lisacattani, etc.). Groarke (OSSA 2005) has tried to use the Toulmin model to study visual arguments in its dialectical dimension. Now we are trying to develop the Neûchatel School's model (Grize 1974) to study visual logic and rhetoric, adopting a more dynamic and dialogical point of view than the original Swiss perspective, and simpler than the current complex Swiss model.
The paper is divided into two main sections: In the first one, we develop the definition of a visual schematization and each of the five basic visual logical operations we propose; in the second section, we apply the model to an

advertising campaign launched by Vicky Form, a women's underwear firm. The selection of the corpus is because of its importance for the emergence of a new and popular gender paradigm in Mexico as reflected by the Advertising Discursive Formation.

1. *Schematization of visual objects*

The schematization of a visual object is a cultural and semiotic micro-universe, an ideological construction and reconstruction of a class of visual objects oriented towards the social and dialogistic dispute for a point of view, according to certain conditions of production, circulation and interpretation. It indicates how large groups of individuals use the same set and group of arguments (what we may call an "argumentative script"), the same Discursive Formation, the same Ideological Formation, and/or the same historical and cultural horizon of interpretation. Visual objects are schematized in order to persuade, convince or win the other, modifying his state of certainty, belief, emotion, perception or action.

Underlying the dynamic production and interpretation of visual arguments is a logical visual functioning, a sign organization which enables the sense to emerge by means of different possible operations. We will try to define these operations with the help of some semiotic and argumentative theories.

(1) The cultural *introduction* or how the object is anchored in the cultural field and ground.
(2) The object's visual *determination*, the ascription of properties, ingredients and relations to the objects.
(3) The *enunciation* anchoring the visual to the situation.
(4) The *involvement* or how the object is considered by the subject of the semiotic production, and/or interpretation in order to make it receivable, plausible and acceptable in accordance with a certain modality.
(5) The visual configuration or visual *taxis* organizing the visual elements.

Based on the description of the Visual Natural Logic operations, we then evaluate the visual arguments exposed. But please consider that the operations are just analytic, the whole effect is crucial and different, and there are some overlapping operations, specially in the case of (4) and (5), because both are a matter of enunciation.

Anchoring the visual to its cultural field. To be acceptable, every image must first

be understood. We do not learn to see as we learn to talk. There is a strictly perceptual and neurophysiologic aspect in a visual identification (Magariños, in Gimate Welsh 2000, p. 1051). But we also recognize and identify objects culturally and, based on that recognition, we interpret images to make the visual correspond to a certain model, a certain idea or a certain affect. In this sense, visual "pre-constructions" (both neural and cultural) determine the arguments, situating us in the realm of certain prejudices, stereotypes, cultural-ideological emotions, identity factors, narratives, values and thoughts that allow us to interpret images in a peculiar way.

We practice an *introduction operation* the very moment we have a visual object. We understand the visual by means of "image vernaculars" (Finnegan 2002), of our culturalhistorical horizon (Gadamer), our Ideological and Discursive Formation (Pêcheux) and the "argumentative script" (Plantin) or the chain of arguments in which the dispute for and against a point of view has been framed with respect to a certain *quaestio* in a specific moment.
To sum up, there is a well established *visual doxa* behind visual creation (adapted from Vignaux, in Plantin 1993, p. 442-456): the *generic image* of Marilyn Monroe as "the" woman, the *occasional image* of a cow skeleton as an index of starvation, the *archetype* of the Twin Towers as a symbol of New York before September 2001, the *image type* of a flag as a symbol of identity, the *image figure* of a posture as an allusion to sexual invitation; the *accidental figure* of a dead rat's beauty, etcetera. To begin a process of visual argumentative schematization, we do a *selection operation A*, which determines what to show and how to do it.
The *enunciation*. The visual iconic *enunciation* immediately establishes a visual situation or scenario, according to each genre and dialogistic context. In iconic images, the *enunciation operation B* is linked to a twofold *énonciateur*: the one who sees (the point of view organizing the scene) and the one who is the image's protagonist (*the casting operation B1.1*). They are associated with the one who takes the responsibility for what is seen (for example a mark or an author), or what is said or written in an audiovisual or visual-written sign (The responsibility operation B1.2). The "here" is the visual space as a totality (*the spatiality operation B2*). And the now is the moment captured, a highly aesthetic and ideological operation in the case of visual signs (*the localization operation B3*).

The "I", the "here" and the "now" may be multiple in the visual case, because it is simultaneous and not linear, as our languages. And this *ego-hic-nunc* is related to

the narrative operation allowing us access to the reasons of the enunciation.

The *visual determination*. Vision is a discovery process, based on visual objects, what is present in the world and where it is. The visual is made precise by various means of interpretation, due to its own nature and the type of effects the visual produce in a *determination operation C*: the salient features determining its sense (*the forming operation C1*: shape, volume, texture, frame); the main oppositions and differences (*the contrast operation C.2*: big/little, color/black and white, bright/dark, figure/ground, etc.); and the semiotic-discursive functioning in general. And, in this discovery process, determination and involvement cannot be strictly divorced. We can only partially separate the more general mental-perceptual identification and recognition. And we recognize in a dynamic way, we have an ecological perception, because our sensory systems are systems of perception-action. There are no visual objects if there is no visual subject looking at them in a certain way.

The involvement. Every image is by definition imagination, emotion and subjectivity. The subject's involvement with the image is studied in three main ways: the *narrative operation D1* organizing the image according to one or various points of view and one or more perspectives and narrators; *the identification operation D2* constituting a process of ideological recognition of visual arguments (Fontanille, 1991); and *the figurative operation D3* as a kind of visual modality (an operation we include here, deferring from Grize and his discursive model). These operations are the basis for reaching an argument.
The point of view from which every thing is observed organizes and constitutes what is shown; it is the visual axis (Casetti 1989, p. 43). A vision constructs a visual narrator, more or less objective or subjective. The visual situation is captured in a certain moment and place, linking involvement, anchorage to the cultural field, and enunciation.
The visual operations of modality or *modalization* (and here we speak semiotically, not in Toulmin's restrictive sense of modals) indicate the argumentative relevance scales, and what is outstanding. This *modalization* is the indicator of our subjectivity, of how it is inscribed in the visual production and/or interpretation.

The clue to really initiate an argument as a visual interpreter is the identification: I assume (or not) the role proposed. When this happens: "adherence is implied in the very conditions of reading (sic) and the "enunciataire" is conquered from the

very moment in which he (or she) begins to construct the discourse's significance." (Fontanille 1991, p. 125). We identify with the point of view or with the iconic protagonist, according to a certain cultural and historical horizon, and a certain ideology. Only then (adapting Anscombre and Ducrot 1986) is the image used to make the point of view acceptable. The visual argumentation is a result of the trajectories we have developed, according to how each culture, time and ideology have "individuated" us (Marcellesi and Gardin 1979, meaning there are signs that identify each group, visual signs in our case).

The visual taxis. Visual objects are organized in a *dispositional operation E.* A formal artifact may be applied to images in order to know with sufficient neutrality its elements' disposition. The instrument to do so is Thürlemann's (1982) dispositional net (grille). It consists of applying the aural proportion net to an image, and then moving it to adjust the net to the visual product's specificities, dividing it into nine subspaces in a *configurative operation E1.*

In combination with the dispositional net, we must determine two more things:
(1) The possible trajectories of seeing, because of the salient conspicuous figures, the oppositions and the cultural and ideological anchorage and starting point (by analogy with the language, we talk about trajectories of interpreting – some reject this analogy, I consider it fruitful – in a *seeing operation E2.* This operation is logical, not temporal, and it is closely related to the spatiality operation.
(2) The conjunctive relations of judgment supporting the argumentative point of view: the *justification operation.* This last operation may be considered crucial and independent of the disposition. Here we link the visual and the discursive arguments. And we also relate justification or even explanation, narrative and figurativeness, to arrive at the abstract visual argument.

We do not dissociate production and interpretation. There is a continuous chain of the visual operations of production and the visual operations of interpretation. Nonetheless, the identification and justification operations are particularly correspondent to the reception process.

Figure 1: The argumentative schematization of a visual object

Selection operation A

Enunciation operation B:
Casting operation B1.1; responsibility operation B1.2

Spatiality operation B2
Localization operation B3

Determination operation C:
Forming operation C1
Contrast operation C.2

The involvement operation D:
Narrative operation D1
Identification operation D2
Figurative operation D3

Disposition operation E:
Configurative operation E1
Seeing operation E2
Justification operation E3

2. *The Vicky Form campaign*

We will apply the model we have presented to a single image (see Figure 1), and then we will make some generalizations associated to Vicky Form underwear's entire advertising campaign.

2. 1. *The visual and cultural introduction*

a) *Vernaculars and stereotypes*. The argument is read by means of two vernacular expressions: 1) the discursive use of the lexeme "ligas", associated to different lexicon entries: elastic bands¸ garters, and the verb "ligar", meaning "flirting"; and 2) the visual stereotypes. The text uses the ambiguity and develops the typical dual structure of some advertisements: the figure associated to the verb "ligar" (flirting) and the argument's foreground and main object (to sell garters). The underwear stereotype leads us toward the narratives of a wedding, a situation in which women may use the white garters and the white shoes. The woman's stereotype is the typical blonde, contrasting with the rest of Vicky Form`s campaign, centered on popular brunette Mexican models. And the color stereotype leads us toward femininity, but also, in association to the posture stereotype, to sex and passion.

b) *Horizon*. The historical and cultural horizon in which the image is produced is one in which morality, women, and weddings are changing in Mexico. We cannot imagine this text decades ago: a bride overtly showing her underwear and sexy

shape.
c) *Ideological Formation.* The ideology producing the advertissement still exhibits a typical gender situation, but it shows a shift from women's passivity to women's assertiveness and affirmation of their sexuality and initiative. Ideology postulates the link with the purity of white, and with the passion and feminine character of the pink-reddish color.
d) *Discursive Formation.* The image is understood in the frame of the gender formation, but also in the frame of advertisements: eulogy of the product, "essentialization" and repetitions of the product and the trade mark.
e) *The argumentative script*. The argument emerges from the stereotype of seduction, blondeness, white purity and slim figure as the necessary properties of a woman who is getting married.

2.2 *The visual enunciation*
a) I. The I looking at the advertisement is a voyeur. The protagonist is the model. She is showing herself. It is unclear, though, who is asking: "¿Ligas?" The viewer, the voyeur, or the model?
b) Here. The space is ethereal, indefinite, but may be identified with a studio.
c) Now. The time has no other marks other than the hair style and the underwear, placing the girl in contemporary age.

2. 3. *The visual determination.*
a) *Oustanding features.* The color of passion in the logo (the butterfly), and the underlining of "Ligueros" and the pink background are salient and emphatic. The white is also prominent in the question, the underwear and the information at the bottom. Three elements of the model are salient: posture, face and gaze. And the underlining and the question in the center of the image also stand out.
b) *Oppositions and differences*. Contrasting with the salient features we have the Internet address and the logo at a second level. There is a contrast between the pink-reddish color and the white bride's situation: passion and purity; sex and marriage. The shining of the white stocking against the average light. And, finally, there is the flat position vs. the underwear decoration (the only relief).

2. 4. *The visual involvement*
a) The point of view. It is the point of view of someone looking at the eyes of the model. And there is a clear gaze-contract, capturing the pose, the moment when the girl lifts her bottom. The model looks at the "you" of the interpreter.
b) The identification. If we identify ourselves with the model as an iconic

protagonist, then this means we are a possible buyer of Vicky Form's garters and we may desire the same trajectory suggested by the advertisement: passion and wedding for exhibiting our beauty.
c) *Modalization* and figures. We have already talked about the importance of the different figures of repetition: repetition and variation of expressions linked to the garters, emphatic underlining, emphatic repetition of the color shared with the butterfly in the trademark logo. Indeed, these are also forms of the visual taxis and the argumentation.

2. 5. *The visual taxis*
a) *Configuration*. If we divide the advertisement with two vertical and two horizontal lines, we have three horizontal boxes, going from top to bottom:
(1) the proposition of the *quaestio ¿Ligas?* (Do you flirt?);
(2) the visual product: the model's body with the underwear; and
(3) the lower part of the arms, the hands, the buttocks, the shoe, the discursive product (Nuevos ligueros: new garters) and the black rectangle with the company information.

We also have three vertical boxes:
(1) The face and the arms with the opening question mark;
(2) The body and the center of the logo at the bottom; and
(3) the closing question mark with the legs and the white shoe.

The nine spaces created are in order from left to right and top to bottom:
(1) The face with an opening question mark;
(2) the main expression "Ligas";
(3) the closing question mark;
(4) the falling hair and the arms;
(5) the body with the underwear, making a V figure;
(6) the crossed white legs;
(7) the hands and the beginning of the letters;
(8) the buttocks and the main part of the logo;
(9) the end of the title *Nuevos ligueros* (New garters), the shoe and the end of the logo's letters.

We could also create two zones from the beginning: the black one with the company's information; and the image zone. If we do so, then we need to reconfigure the horizontal zones:

(1) the question;
(2) the upper body:) face, breasts, and part of the legs;
(3) the lower body: the hands, the buttocks, the *Nuevos ligueros* title and the shoe.
The net's upper focal points lead us toward the model's gaze trajectory, and an indifferent point in the background. The lower focal points mark the armpit and the legs' point of inflection, establishing the swing of the buttocks.

b) *Visual ideological trajectories.* The seeing trajectory is quite clear in the text: it is like a circle going from the question to the model's face, to the underwear, to the title Nuevos ligueros, and again back to the question. But there is a second dimension going from the model's face and gaze to the spectator: it is an appeal.
c) *The conjunctive relations of judgment*.

To the question *¿Ligas?* ("Do you flirt?"), we may respond: "yes" or "no". If the interpreter responds "no", argumentation is suspended. If she responds "yes", there is an identification process, and then, the argumentative interpretation begins.

Indeed, the gaze route stops for a while in the question and in the top part of the photo, before beginning the hermeneutic and argumentative process. Then, the visual ground is established: "Ligas" (You flirt), through the assumption of the girl's seductive image. And the construction of Toulmin's scheme begins in his rhetorical and visual operation, by means of the procedure of paronomasia (association of the senses through the similarity of sounds).

The gaze route, sometimes after a considerable lapse, takes us to the second step in the "visual argumentative reconstruction". The warrant is established when the attention is fixed on the "ligas" (garter) of the girl dressing. This means: "if you want to flirt, use garters" (*si quieres ligar, usa ligas*).

The claim is: "ligueros" (garters), appearing again in a verbal fashion and with an underlined term, linking the word "ligueros" to the trademark, through the pink-reddish color of the underlining. It is similar to that of the background and the butterfly that makes up part of the company logo. Thus, the claim is "use Vicky Form's garters".

In conclusion, the argumentation by paronomasia works like this:
1. Verbal question: "¿ligas?" (Do you flirt?).

2. Visual Ground: “ligas” (You flirt).
3. Visual Warrant: “ligas” (garters) with all the “force” of what is concrete and present.
4. Verbal-visual Claim: Vicky Form “ligueros” (Vicky Form garters), strongly emphasized. Then, the eyes read at the bottom the trademark’s phone number and e-mail address.
From the cultural semiotics of Mexican weddings, the white shoes and the white woman’s stocking are an identity element. So we are not dealing with a liberal or a “femme fatale”. There is a second level of the argumentation, a debate with the doxa:

– The question: “¿Ligas?” (Do you flirt?).
– A (the doxa): Morality says “no”, because it is a fortuitous love, not a serious one.
– B: the visual text says “yes”, because it can lead you to the altar.
– CLAIM: if you flirt (ligas), then you need garters (ligas).

There is a double sense in the text, playing with the forbidden object, like the passage to the pristine or a move toward the sacred – the white lingerie and the shoes presupposing the church wedding. The implicit drives us from the above scheme to the “body offer”. Of course, we may consider that not every woman has the same seductive body, even with the same lingerie. We can criticize the link between flirting and lingerie or criticize the fallacy of equivocation. But, finally, this argumentation is only a paralipsis: it skips over the matter (sex), yet manages to reveal it.

3. *Conclusion*
An expansion of Grize’s theory helps us understand the ideological and cultural functioning of schematizations that form part of every visual argument: image vernaculars, visual disposition, visual determinations of an object and subjective engagement through stereotypes and modality. Toulmin’s layout of arguments as a conjunctive operation enables us to combine schemes and schematization, the discourse and the visual sign.
As we can see, there is a crucial link between the notions of “point of view”, “modality” and “identification” and visual argumentation (Fontanille 1991). For Anscombre and Ducrot (1983) there is an argumentation act whenever a speaker identifies himself as an enunciator, arguing and presenting one or many utterances (E1) addressed to make admissible other utterances or set of

utterances (E2). Ducrot's formula is translatable to visual language.
When we are dealing with "visual argumentation" there is need of a clear subjective approach. If I identify myself with the visual point of view, I may begin or simulate an argumentative process. Otherwise, I will construct another interpretation route or, maybe, I will not understand the discourse.

In our example, the one who utters the phrase identifies with the girl (the iconic protagonist) and the argumentative process begins. This happens when the interpreter identifying herself with the protagonist gives an ideological horizon to interpretation. There is an "individuation" process (Marcellesi and Gardin 1979) in the image's production and interpretation, singling out the social groups of codifiers and interpreters.
Images are "visual vernaculars". We can consider them as symbolic entities that have history, culture and memory. We are trained in their interpretation, according to each socio-cultural and semiotic-discursive field.

The visual identification process drives us to the deontological modality: "I must be her"; this means: "I must flirt" ("I must get married"), obviously, an ideological option. If I want to get someone, I must use garters (ligas). It may seem that we are dealing with the traditional role. But the discursive object of women flirting, at least in Mexico, is anchored in an emergent ideology of a more active and assertive woman.
Identification shows us how the emotional mode is relevant in the visual arguments. And the kisceral mode (the mode of belief) is also important, providing a broad space for interpretation. We cannot evade a persuasive visual force, which is immediate, energetic and concrete. Finally, we must remark that the visual "point of view" is directly related to outstanding features: mainly light, color, texture, volumes and position. These elements are related to perspective and space construction.
Figurative salient elements remark on many important and collateral aspects: lips of the same color as the background, the underlining of *ligueros*, the whitening of the background where the "bride" stands, the girl's suggestive position, etcetera. Finally, we show how the visual arguments may have several different interpretations, like in our example, arguing at the same time about garters, flirting, sex, morality and weddings.

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ISSA Proceedings 2006 – The A Contrario Argument: A Scorekeeping Model

1. *Is There a Gap in the Law?*
Traditionally, the legal literature describes the *A Contrario* argument as an ambiguous technique of justification. On the one hand, the *A Contrario* argument can be used to justify a creative interpretation of a normative sentence, namely the interpretation that produces a norm that is implicit in the sentence, although it does not correspond to its literal formulation. In this sense the *A Contrario* argument is used to claim that the case is regulated by the law: there is no gap in the law relatively to the case. On the other hand, it can be used to justify a literal interpretation of a normative sentence, so as to exclude from the application of the norm the cases that do not correspond to its formulation. In this sense the *A Contrario* argument is used to claim that the case is not regulated by the law: there is a gap in the law relatively to the case.

It is possible to give an example of this ambiguity drawn from the Italian Constitution (see Guastini 1998, pp. 265-267)**[i]**. Article 18 of the Italian Constitution states: 'Citizens have the right to form associations freely'. Now, can foreigners and stateless persons claim they have the same right? Two different

answers can be justified by means of the A Contrario argument. The first is: according to the Constitution, only citizens have the right to form associations freely, so foreigners and stateless persons do not have such a right. The second is: the Constitution does not regulate the position of foreigners and stateless persons in this respect.
In order to clarify the ambiguous character of the A Contrario argument, first in this paper we consider some interesting logical features of it, then we propose an inferential analysis thereof based on the scorekeeping practice as described by Robert Brandom. Our aim is not to justify one use of the argument over another, but to clarify the pragmatic structure of the ways it is used. What is at stake is not only a more rigorous use of the argument, but also a better understanding of what the argument depends on.

2. *Strong and Weak Pragmatic Negation*
The A Contrario argument is also traditionally called *A Silenti*o argument (cf. Jansen 2003b, p. 44 ff.). The subject of this argumentative technique is what a text does not say, not what a text says. It aims at discovering what the silence of the law means for the law, and for the legal regulation of a case in particular.

In this sense, the A Contrario argument is a general practical inference that we often use in our everyday life. In particular, such an inference is used when silence seems to signify, for what is not said, the contrary of what is said. From the normative sentence 'No smoking in the public area' we usually infer that smoking is allowed at home; from the normative sentence 'Driving is permitted at 18' we infer that driving is not permitted to those who are not in the majority age; etc. The description of the standard use of this inference seems to be the following (where 'p' and 'q' stand for propositional contents and 'P' is the deontic operator for permission**[ii]**):

If p then Pq
———————
If r then ~Pq.

It is easy to show that this use is logically incorrect. First, at least a further premise is necessary to draw the conclusion: a premise excluding other cases from the regulation stated by the legal sentence. In particular, if the conditional is intended as a material implication, the inference is an instance of the fallacy called "denying the antecedent" (cf. Henket 1992, Kaptein 1993 and 2005, Jansen

2003a). To avoid the fallacy, one should point out that there are no other legal grounds on which the consequence should follow. Second, the A Contrario argument is a *de dicto* argument and not a *de re* argument: it concerns what is (not) said by the text, not what is the case as a matter of fact**[iii]**. A description of a logically correct use of it could be the following:

(1) The text T states 'if p then Pq'
(2) 'If p then Pq' means that iff p then Pq
————————————————————
(3) If ~p then ~Pq.

Premise (2) is normally the conclusion of other inferences, whose premises are legal norms or practical principles of communication**[iv]**. In the first case, such premises are contingent: they depend on the legal system the argument is referring to. In the second case, such premises are not contingent: they do not depend on the considered legal system. In both cases, however, the normative text is interpreted as stating that iff p then Pq.

But one may challenge such a use, claiming that the A Contrario argument could justify a different interpretation of the text, namely the interpretation that excludes from the application of the norm the cases that do not correspond to its literal formulation**[v]**. In this sense, 'if p then Pq' is taken to mean that if p then Pq (and nothing else). If ~p is the case, therefore, the conclusion will be that it is not determined whether q is permitted, because the circumstance is not regulated by the interpreted legal sentence. This different use of the argument could be described as follows:

(1) The text T states 'if p then Pq'
(2′) 'If p then Pq' means that if p then Pq
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(3′) ~ (if ~p then Pq)**[vi]**.

So, assuming that r is ~p, the two uses of the argument bring to the following normative conclusions:

(3) If r then ~Pq,
(3′) ~ (if r then Pq).

On the one hand, (3) and (3′) might seem to be logically equivalent and to have

the same semantic content**[vii]**. On the other, the pragmatic content of (3) and (3′) is quite different. If the conclusion is (3), the A Contrario argument justifies the claim that r is regulated by the law. In this case, the regulation of r (i.e. ~Pq) will be opposite to the regulation of p (i.e. Pq). If the conclusion is (3′) the A Contrario argument justifies indeed the claim that r is not regulated by the law. There is a gap in the law, which has to be filled by means of analogy.

To resume, the A Contrario argument is an interpretive argument (see Alexy 1978, p. 342). It justifies the semantic content of a legal sentence relatively to the case in hand. But the semantic content of the legal sentence depends on the use we make of the argument in the context of our legal practice, namely on the speech acts performed by the speakers in order to justify their interpretation of the sentence.

The different speech acts performed by uttering (3) and (3′) can be clarified by means of the distinction between strong pragmatic negation and weak pragmatic negation. Speech act (3) is an instance of *strong pragmatic negation*. When a judge performs (3) in a trial, he determines not only the semantic content of T (i.e. if r then ~Pq), but he also decides that the case is regulated by the norm so stated. When a judge performs (3′), on the contrary, he determines the semantic content of T (i.e. ~ (if r then Pq)), but in such a way he decides that the case is not regulated by the law. This is an instance of *weak pragmatic negation*, a negation which does not determine the legal regulation of the case: it determines that the case has no regulation according to the law**[viii]**.

3. *A Scorekeeping Model of Legal Argumentation*

What we have observed so far about the A Contrario argument suggests to overcome the standard description of the argument adopting a different style of analysis in order to clarify its ambiguous character. The different uses of the argument and their justification depend on some pragmatic conditions governing the interaction of the speakers in a legal context. In this sense, it is useful to consider this argument as a standard model of pragmatic interaction, which aims at determining and justifying what a legal sentence means, or does not mean, for the case in hand.

Robert Brandom has recently set out a theoretical framework permitting an analysis of this kind (cf. Brandom 1994, 2000, 2002, 2006). This framework is based on an inferentialist theory of meaning, which explains the semantic content of a sentence in a genuine pragmatic way. In Brandom’s picture, the conceptual

content of a sentence is its inferential role as premise or conclusion within an exchange of reasons. The rules governing an exchange of reasons are not a priori determined. Their determination is a result of the exchange of reasons itself. And a genuine pragmatic explanation of inferential roles is possible if we consider the steps of the argumentation, i.e. the speech acts it is composed of, moving from the normative attitudes of the speakers. From the inferentialist point of view, to be a participant within an argumentative practice is to be responsible for the claims one makes. And to be responsible is *to be taken* to be responsible by the other participants within the practice. In the context of legal argumentation, for example, to take another's utterance as a claim about the facts, or as a prescription drawn from a legal text, is to attribute inferential *commitments* and *entitlements* to the speaker: the duty to accept the consequences one is committed to, and the authority to claim the consequences one is entitled to.
Saying or thinking *that* things are thus-and-so is undertaking a distinctive kind of *inferentially* articulated commitment: putting it forward as a fit premise for further inferences, that is, *authorizing* its use as such a premise, and undertaking *responsibility* to entitle oneself to that commitment, to vindicate one's authority, under suitable circumstances, paradigmatically exhibiting it as the conclusion of an inference from other such commitments to which one is or can become entitled (Brandom 2000, p. 11).

By virtue of this theoretical approach, the meaning of a sentence, that is the set of the correct inferences it can be involved in, is instituted by the practice consisting in *keeping score* of discursive duties (commitments) and authorities (entitlements) of the participants within the practice. Furthermore, the use of a standard set of inferences, such as the A Contrario argument, and the legal conclusions it justifies, depends on the normative attitudes of the speakers. On the basis of considerations such as these, Brandom identifies three fundamental structures of commitment and entitlement that explain, from a pragmatic point of view, how an argument is inferentially articulated (Brandom 2002, pp. 7-8):
1. *Commitment-preserving relations*. These are a pragmatic description of standard deductive relations. For example, since the Italian Constitution states that citizens have the right to form associations freely, anyone who is committed to the claim that Theodore is an Italian citizen is also committed to the claim that Theodore has such a right. This kind of relation can be schematized as follows: if S is committed to p, then S is committed to q.
2. *Entitlement-preserving relations.* These are pragmatic generalizations of

standard inductive (or abductive) relations. For instance, since the legal position of stateless persons is normally not regulated by the state law, anyone who is entitled to the claim that Anastasia is a stateless person has a reason *prima facie* entitling him to the claim that the Italian Constitution does not state if Anastasia has the right to form associations freely. This kind of relation can be schematized as follows: if S is entitled to p, then S is *prima facie* entitled to q.
3. *Incompatibility relations.* These are a generalization of "modally robust relations" (Brandom 2002, p. 8)**[ix]**. Two claims are incompatible if commitment to the one precludes entitlement to the other. For instance, as far as everything incompatible with being a citizen is incompatible with having a citizen's right, anyone who is committed to the claim that Anastasia is not a citizen is not entitled to the claim that she has the right to form associations freely. This kind of relation can be schematized as follows: if S is committed to p, then S is not entitled to q.

To clarify whether the conclusion of the A Contrario argument instantiates a strong or a weak pragmatic negation, we have to analyze which normative attitudes the speakers undertake and attribute using this argumentative technique. In particular, we shall try to answer the following question: What kind of inference leads to conclusion (3) and what kind to (3′)? A commitment-preserving, an entitlement-preserving, or an incompatibility relation? In order to answer this question, we propose in the next section an example of exchange of reasons within legal argumentation, focusing on the different uses of the A Contrario argument considered above.

4. *The A Contrario Argument in the Exchange of Reasons*
We sketch in this section the pragmatic interaction between lawyer L and lawyer M within an exchange of reasons concerning the right of Anastasia to form associations freely**[x]**. As we said, the structure of the interaction attributing commitments and entitlements is described by Brandom through a deontic scorekeeping model of semantic determination. Competent practitioners keep track of their own and each other's linguistic actions: they "keep score" of commitments and entitlements by attributing those deontic statuses to others and undertaking them themselves. The score is fixed from the point of view of each of the participants, and not from outside the practice. In our example, each speaker uses the A Contrario argument but draws a different normative conclusion from the same legal sentence. Through the linguistic interaction between L and M, it is also possible to make explicit the pragmatic structure of these different uses of

the argument at stake.
At the beginning of the exchange of reasons, imagine that lawyer L performs the following speech act:

(L1) Since the Italian Constitution states ‘citizens have the right to form associations freely’, then the Italian Constitution states that only the citizens have such a right, and then Anastasia does not have it.

L1 is an example of application of the A Contrario argument whose conclusion instantiates a strong negation. Through speech act L1, L undertakes in particular the following inferential commitments (c) from the point of view of M:

(c1) the Italian Constitution states ‘citizens have the right to form associations freely’;
(c2) only citizens have the right to form associations freely;
(c3) Anastasia has not the right to form associations freely.

In countering L, M might say:

(M1) Since the Italian Constitution states ‘citizens have the right to form associations freely’, and the Italian Constitution does not regulate the position of foreigners and stateless persons in this respect, then the Italian Constitution does not regulate the position of Anastasia in this respect.

M1 is an example of application of the A Contrario argument whose conclusion instantiates a weak negation. Performing M1, in an inferentialist picture, M attributes one entitlement (e) to L:

(e1) the Italian Constitution states ‘citizen have the right to form associations freely’.

This means that L assumes the authority to perform c1, because M treats such a commitment as fulfilled assuming it himself: this claim of L is justified from the point of view of M. But, from the point of view of L, M undertakes two further commitments which are in conflict with c2 and c3:

(c4) the Italian Constitution does not regulate the position of foreigners and stateless persons in this respect;
(c5) the sentence ‘citizens have the right to form associations freely’ does not regulate Anastasia’s position.

Because of this conflict, L and M are requested to give further reasons in order to justify their different conclusions. L might add:

(L2) Since stateless persons do not have citizen's rights, then Anastasia does not have the right to form associations freely.

Performing L2, L undertakes a new commitment within the argumentative practice here considered:

(c6) stateless persons do not have citizen's rights.

This is an important step in the argumentation of L, because it shows that the inference to (3) has, from his point of view, the structure of the *incompatibility relation* described by Brandom. On the basis of c6, the property of being a stateless person is claimed to be incompatible with the property of having the citizen's rights. Those who have the former cannot have the latter and the other way round. But if being a stateless person is incompatible (in Brandom's sense) with having the citizen's rights, it follows that anyone who is committed to the claim that Anastasia is a stateless person is not entitled to the claim that she has the right to form associations freely. Then the legal sentence 'citizens have the right to form associations freely' regulates the case through a norm which does not correspond to the literal formulation of the text, but which is implicit in the sentence by virtue of the incompatibility relation between the property of being a stateless person and the property of having the citizen's rights. From the point of view of L, therefore, if M is committed to the claim that Anastasia is a stateless person, he cannot be entitled to c4 and c5, i.e. to the conclusion that the legal sentence does not regulate Anastasia's position. Since Anastasia is a stateless person and the right at stake is a citizen's right, the law regulates the case and Anastasia does not have such a right. We can thus remark that a strong negation instance is the pragmatic consequence of an incompatibility relation: if the inference from the premises to the conclusion is an incompatibility relation, such as the inferential relation to (3), the A Contrario argument leads to a strong negation instance**[xi]**.

But imagine that M, at this point of the argumentation, performs a further speech act:
(M2) Since being a stateless person implies *prima facie* not being subjected to the state law, and also to the sentence 'citizens have the right to form associations

freely', then this sentence does not regulate Anastasia's position.

The new relevant commitment undertaken by M is the following:
(c7) being a stateless person implies *prima facie* not being subjected to the state law.

This new commitment makes explicit the pragmatic structure of the A Contrario argument whose conclusion is a weak negation instance. In M2 the inference from the premises to the conclusion has the structure of an *entitlement-preserving relation*. If one is entitled to the claim that citizens have the right to form associations freely, one is also prima facie entitled to the claim that such a norm applies only to citizens: now, since Anastasia is not a citizen, she seems not to be subjected to the state law. What does 'prima facie entitled' mean here? The conclusion of M is not a necessary one, i.e. it is not resulting from a deductive relation (a commitment-preserving relation, using Brandom's vocabulary). It is a hypothetical claim, which produces two different pragmatic consequences: on the one hand, M claims that the normative sentence does not regulate Anastasia's position; on the other, he claims that there could be another norm regulating the case within the considered legal system. Using this version of the A Contrario argument, therefore, M discovers the existence of a gap in the law, but he also opens the possibility to fill such a gap by means of analogy.

In this sense, we can point out that a weak negation instance is the pragmatic conclusion of an entitlement-preserving relation: if the inference from the premises to the conclusion is an entitlement-preserving relation, such as the inference to (3′), the A Contrario argument leads to a weak negation instance.
There is one more question to be answered at the conclusion of our imaginary exchange of reasons between L and M. Which conclusion of the scorekeeping practice is the right one? Is it the strong negation of L or the weak negation of M? The answer to this question depends on the context, i.e. on the other reasons the speakers are giving and asking for within the argumentation (cf. Jansen 2003b and 2005). Apart from the contextual background of the argumentation, anyway, our point here is that a strong use of the A Contrario argument is inferentially justified if and only if the properties qualifying the regulated subject are modally incompatible. On the other hand, a weak use of the A Contrario argument is inferentially justified if and only if such an incompatibility does not hold. There could be a legally relevant relation between the regulated subject and the present case; if so, there is a gap in the law to be filled by means of analogical reasoning.

Considered in his weak form, the A Contrario argument is not an autonomous argument. It is only the first step of the *A Simili* argument.
To conclude, it is possible to point out that what justifies the claim that there is a gap in the law is not the literal formulation of a normative sentence, but rather the deontic commitments and entitlements undertaken by the speakers. Gaps are not properties of texts. They depend on the interpretation of texts and on the different normative attitudes one attributes and assumes within the argumentative practice.

NOTES
[i] In Guastini's account the A Contrario argument always deals with a gap: either, as a productive argument, it fills a gap or, as an interpretive argument, it remarks a gap to be filled. Contra, see García Amado (2001). For a more detailed analysis of the relation between the problem of gap-filling and the use of the A Contrario argument, see Carcaterra (1994). Note however, for the sake of the example here considered, that it is conceptually incorrect to qualify a constitutional right or a liberty as a simple permission (Mazzarese 2000, pp. 123-124).
[ii] But note that what we sketch is a general description of the A Contrario argument considering its different uses, not a particular description applying uniquely to permissions.
[iii] This use of de dicto and de re specifications is somewhat different from the standard use in modal logic. Cf. Carcaterra (1994, p. 180 ff.). On de dicto and de re modalities in deontic logic, see Rossetti (1999).
[iv] Cf. Carcaterra (1994, pp. 222-230), referring to the cooperation principle formulated by Grice (1975).
[v] Two types of A Contrario reasoning are also distinguished in Jansen (2003a) and (2003b).
[vi] And logically, since it is not determined whether q is permitted, ~ (if ~p then ~Pq).
[vii] They are not logically equivalent if one assumes a verifunctional point of view; cf. von Wright (1959).
[viii] Note that the notions of strong and weak negation have been used, for different purposes, by von Wright (1959) (cf. Mazzarese 2000, p. 115). Furthermore, they are used in contemporary nonmonotonic logic: strong negation captures the presence of explicit negative information, weak negation captures the absence of positive information.

[ix] Brandom points out that incompatibility is a modal notion which makes explicit some important relations between properties: "To say that one way things could be entails another is to say that it is not possible that the first obtain and the second not – that if the first obtains, then the second necessarily does. And to say that one way things could be is incompatible with another is to say that it is not possible that the second obtain if the first does – that if the first does, it is necessary that the second does not" (Brandom 2006, p. 11). For instance, 'Charlie is a donkey' entails 'Charlie is a mammal', for everything incompatible with Charlie's being a mammal (Charlie's being an invertebrate, an electronic apparatus, a prime number…) is incompatible with Charlie's being a donkey. However, one might reply that every kind of inferential relation involves some modal relation (think of the standard definitions of deduction, for instance, as the inference drawing necessary conclusions).

[x] For a more detailed example, see Canale and Tuzet (2005).

[xi]. From a logical point of view, however, one might claim that the inference to (3) is a deductive inference, that is to say, using Brandom's vocabulary, that the incompatibility relations are not something separate from deductive relations.

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ISSA Proceedings 2006 – Displaying Reasonableness: Developmental Changes In Two Argument Practices

Introduction

Democratic theorists hold that the ability to engage in deliberation is a political virtue (Bohman, 2000; Elster, 1998; Fishkin & Laslett, 2003; Gutmann & Thompson, 1996; Macedo, 1999). Being able to deliberate over problems and differences to emerge with a consensus about how to live presumably involves a range of rhetorical understandings and skills. However, such rhetorical knowledge and skills have only been given lip service by deliberation theorists. As James Bohman puts it, "For all the talk of deliberation among democratic theorists, few tell us what it actually is" (2000, p. 24).

The purpose of this essay is to begin to address this need in deliberation scholarship by examining two argument practices and capabilities that deliberators use to display their reasonableness in social interactions: (a) the capacity to elaborate a basis for one's standpoint, and (b) the capacity to align one's own argument with others' expressed views. After developing a rationale for these two ways of displaying reasonableness, two studies are reported which test the claim that there are developmentally-related differences in each way of displaying reasonableness.

Displaying Reasonableness in Deliberative Discourse

Dialogical Mechanisms in Deliberation

Bohman (2000) has proposed an account of the "actual processes" of public deliberation, which he defines as dialogue that attempts to overcome a problematic situation by solving problems or resolving conflicts. To be convincing deliberators engage in interaction in ways that secure "uptake" and produce "practical effects" on interaction participants (Bohman, 2000, p. 34). Bohman proposes five specific dialogic mechanisms that he believes promote deliberation in social interaction. A first dialogue mechanism is for speakers to "make explicit

what is latent" in their common understandings and joint activities. By providing explicit justifications for ongoing practices and interpretations, speakers provide clarity to their "shared" ideas and principles (2000, pp. 59-60). Speakers also benefit from engaging in back and forth exchanges about their biographical experiences. The outcome of this second dialogue mechanism is not mere listening, but making accessible life histories so they can be incorporated into the ongoing joint framework of understanding and norms.

Another dialogical mechanism concerns the use of "discourses of application," as speakers make explicit how they are applying a given norm to the concrete and immediate situation. Deliberation benefits from speakers' providing detailed descriptions of the situation that help make particular norms appear relevant and applicable. Deliberation also benefits from a "discourse of articulation," as speakers propose concrete ideas that integrate their viewpoints. Articulation creates a framework in which social norms grow more complex over time as speakers modify their beliefs or goals to integrate competing values.

A final dialogue mechanism is the use of perspective-taking and role-taking. Considering alternative perspectives as well as different moral vocabularies and visions can broaden the perspectives that are built in deliberative discourse. Capacities for role-taking and perspective-taking are called upon as individuals with different perspectives take turns being addressed to and answerable to others.

In sum, while there are probably a variety of dialogue mechanisms involved in deliberative interactions, Bohman believes that these five are used to facilitate thorough deliberation.

Argument Practice #1: Expressing an Elaborated Basis for one's Standpoint

Common to Bohman's dialogic mechanisms is the need for deliberators to display their reasonableness as they interact with each other. By displaying reasonableness, arguers manage the interpretations of evidence and reasoning that are constructed in deliberative discourse, which can facilitate their mutual understandings (Taylor, 1992). One type of reasonableness appears to involve speakers making transparent their desires, values and reasoning and articulating what norms and principles are considered relevant in the situation. One general argument capability may simply be the ability of arguers to make explicit their reasons and reasoning in such a way that an elaborated perspective of each participant's standpoint is presented, sufficient for the purposes at hand.

Two lines of research provide empirical support for the expectation that providing an elaborated basis for one's standpoint is a developmental achievement. One line of research comes from constructivist communication theory (O'Keefe & Delia, 1982, 1988). As children mature their persuasive arguments become more differentiated and listener-adapted, in ways that parallel children's developing ability to engage in social perspective-taking (e.g., Clark & Delia, 1976, 1977; Delia & Clark, 1977; Delia, Kline & Burleson, 1979; Kline & Clinton, 1998; Kline & Oseroff-Varnell, 1993). Within the same age group persons with more complex social cognitive systems also produce persuasive arguments that are more differentiated and listener-adapted (e.g., Delia et al., 1979; Kline, 1988, 1991; see the reviews of Kline & Delia, 1990, and Burleson & Caplan, 1998). While the coding systems that measure listener-adaptedness and person-centeredness do not assess the precise feature of elaborating the speaker's argumentative basis, the coding systems do differentiate between those speakers who use unelaborated reasons and those who employ elaborated code assumptions and broader perspectives in their arguments (Bernstein, 1974; Mead, 1934). Hence, based on constructivist communication research one would expect age-related increases in the ability to provide an elaborated basis for one's standpoint.

A second line of research which supports the view that providing an elaborated basis for one's standpoint in argument is a developmental achievement comes from science education. These researchers are pinpointing the discourse features of classroom environments that facilitate conceptual change in students' scientific knowledge. Engle and Conant (2002), for instance, have documented the discourse features that foster "productive disciplinary engagement." By encouraging and giving students the authority to take on intellectual problems, and by insisting that students' intellectual work be accountable to disciplinary norms, fifth graders' interest and mastery of scientific concepts is nurtured. Engle and Conant (2002) consider student accountability to mean that students are engaged in a number of argument practices in their classroom discussions, such as including evidence to justify their claims, explicitly connecting evidence to their claims, and explicitly referring to the concept of evidence. When fifth graders were given the resources to solve an interesting controversy, their discourse displayed a beginning use of evidence in scholarly ways, with over half the discussion turns containing some form of evidence. Yet only 19% of their turns used evidence-claim connectors, and only 27% referred to the concept of evidence (Engle & Conant, 2002).

In sum, following Bohman's ideas and these empirical lines of research, we might

expect that providing an elaborated basis for one's standpoint in a controversy is a developmental achievement. Given the developmental trends in perspective-taking in persuasive as well as negotiation situations (e.g., Clark & Delia, 1977), the hypothesis advanced here is simply that there are age-related increases in providing an elaborated basis for one's standpoint (called here elaborated argument basis, or perspective-giving). The aim of the first study is to test this hypothesis, with children of three different age groups in the context of behavioral disputes:

H1: There is an age-related increase in children's ability to provide an elaborated basis for their standpoints in behavioral disputes.

Argument Practice #2: Aligning One's Argument with Others' Views

Besides expressing an elaborated basis for one's standpoint, a second argument practice that may also be a developmental achievement is that of aligning one's argument with others' views. Argument alignment utilizes the coordination communication process to display the way participants' views can be integrated together and fitted to the interactional situation. Bohman (2000) points out that a discourse of articulation in deliberation involves making one's position detailed in ways that incorporate others' viewpoints. The ability to propose integrative solutions to social conflicts develops only gradually; Robert Selman's (e.g., 1981; Selman, Beardsleee, Schultz, Krupa, & Podorefsky, 1986) extensive research on social negotiation shows that the ability to take a societal perspective is associated with the use of integrative negotiation strategies, and occurs typically after the use of appeasement, simple bargaining and compromising strategies.

Several other lines of research support the claim that aligning one's argument with others' viewpoints is a developmental achievement. Argumentative discussion has been examined by Berkowitz and his colleagues in analyses of moral development (Berkowitz & Gibbs, 1983, 1985). Berkowitz regards the ability to engage in moral discussion important for developing democratic skills and that moral discussions can be analyzed for discussants' attempts to compare, contrast, contradict, or integrate their standpoints with others' views. "Transacts" are statements that involve reasoning about another's reasoning as one attempts to understand or resolve differences in standpoints. Berkowitz and Gibbs (1985) identified 19 types of transacts in college student moral discussions, with some transacts summarizing or clarifying viewpoints, and other transacts extending, refining, critiquing, or integrating each other's reasoning (called operational transacts). Their work shows that the incidence of transacts in peer discussions

over moral issues increases with age during adolescence, and that the use of operational transacts is associated with greater sophistication in discussion partners' level of moral reasoning (Berkowitz & Gibbs, 1985; Berkowitz, Oser, & Althof, 1987). However, age-related increases in transacts have not be consistently reported (Kruger, 1992; Santolupo & Pratt, 1994), and in longitudinal work Walker and Taylor (1991) found that children's moral reasoning development was not facilitated by adults' use of critical challenging operational transacts, but by a parental discussion style that is supportive and collaborative (also see Santolupo and Pratt, 1994).

The conflicting findings on transacts in moral discussion can be reconciled with constructivist communication theory (O'Keefe & Delia, 1982, 1988), which would hold that transacts do not have to be challenging and hostile if supplemented, integrated, or enacted in ways that preserve positive relationships and confer positive images on discussants. Given that transacts are also communicative acts, they necessarily create relationships and identities, too (Kline, 1987). Hence one aspect of argument alignment is the identity and relationships that are created by the reasoning enacted in one's arguments. Constructivist research findings suggest that this and other types of argument alignment might be a developmental achievement. For instance, as children mature they become better able to identify objections to their viewpoints and come up with refutations to those objections (Delia et al., 1979). Moreover, those with higher levels of interpersonal cognitive complexity are also more likely to produce messages in behavioral regulation situations that explicitly coordinate the message recipient's views with the speaker's view (Kline, 1991).

The other line of research that would support the claim of developmental change in argument alignment comes from the research on science education practices. Engle and Conant (2002) discovered that one important aspect of helping students be accountable to each other in science discussions is for them to directly associate their views with others' views, and for them to evaluate the credibility of others' views. Similarly, a series of qualitative case studies by Emily van Zee, James Minstrell and their colleagues (e.g., van Zee, 2000; van Zee, Hammer, Bell, Roy, & Peter, 2005; van Zee & Minstrell, 1997) show that inquiry teaching and learning in physics classrooms is characterized by a number of practices called "reflective discourse," some of which can be seen as attempts to align student discussants' views with argument. Van Zee et al. (2005) contend

that concept learning in physics occurs by setting up an intriguing science problem, and then facilitating discussion with explicit displays of questioning, scientific thinking, and collaborative sense-making. Questions facilitate conceptual change when they are used to explore various points of view in a respectful manner. Scientific thinking occurs as students identify different ideas, posit "foot hold" ideas, do "what if" thinking, reason by analogy, and compare proposed explanations. Collaborative sense-making occurs as students refer explicitly to previous speakers, relate to previous utterances or as they use reasoning to advance new ideas. Set in interactional contexts, these practices could be considered as kinds of alignment practices.

In sum, given the research on transacts, social negotiation strategies, and reflective dialogue practices in science classrooms, there appears to be a basis for clustering together reasoning practices that explicitly attempt to align the views of arguers. Argument alignment may occur when arguers propose standpoints that integrate multiple views, use collaborative moves to relate to others' views or utterances, or attempts to reason explicitly about the others' reasoning. Given developmental changes in the specific ability to coordinate perspectives (Feffer, 1971), there is a basis for expecting that argument alignment is a developmental achievement, too. The aim of Study 1 is to test this hypothesis, examining children's ability to manage peer disputes:
H2: There are age-related changes in children's ability to use argument alignment acts in behavioral disputes.

Study 1 – *Method*

Participants. Participants in Study I were 44 third, fifth, and seventh graders enrolled in a parochial elementary school located in a large city in the U.S. Northwest. Twenty boys and 24 girls participated, with mean ages nine years, five months (n = 16), eleven years, two months (n = 13), and thirteen years, one month (n = 15), respectively, for the three age groups. The children were Caucasian and came from upper middle class homes. They were interviewed on school premises by a member of an interviewing team composed of four graduate students and their professor. The graduate students completed a training program, were provided an interview script, and practiced before completing their audio-taped interviews, which were later transcribed for coding purposes. The children completed several tasks during the interviews; however only one task is analyzed and presented in this report.

Behavioral dispute task. Three scenarios were developed to measure children's propensity to use persuasive arguments to manage disputes. Each scenario featured a dispute between three or four children (see the Appendix for the scenarios). The structure of these scenarios was similar to scenarios developed by Selman (1980) to measure developmental changes in social understanding. One scenario involved several children putting on a puppet show; another had children playing kickball on a school playground; while the third scenario had a group of children deal with a lost watch. In each scenario the characters expressed different viewpoints on the issue; the child was asked to give his or her view on what should be said and done by a leader-character in the scenario to manage the situation. After the child said what should be said and done by the lead character, the interviewer assumed the role of one of the characters who espoused a different view, and repeated that view. The interviewer then probed the child for how he/she would respond to the different view. Finally, the interviewer asked why the child thought the lead character should respond the way the child advocated.

Argument coding. Responses to each scenario were analyzed for two phenomena;
(a) the extent to which the child's arguments and responses created a basis for and situated the child's standpoints, and
(b) the extent to which the child's responses handled the other's reasoning while forwarding a mutually desirable line of action. Responses were first examined for which they displayed a basis for reasonableness, either by (a) providing a broad evidentiary basis for understanding how the speaker's reasons or standpoint were adapted to the immediate circumstances, (b) providing normative clarity through articulating relevant maxims, norms, or values applied to the present circumstances, or by
(c) articulating the conditions that would lead to particular consequences. Hence the first coding dimension identified the extent to which the child's reasoning provided an elaborated basis for his/her standpoint. The second coding dimension operationalized argument alignment; responses were examined for whether (a) integrative proposals were advocated, (b) mutual discussion was encouraged, (c) there were explicit attempts to reason about others' reasoning or use reasoning to build an integrative standpoint, or
(d) reasoning which cast the other into a desirable identity. The specific coding systems are presented in Table 1.

The children's responses were unitized into thought units and categorized into larger idea units based upon their semantic similarities or functional moves (e.g., Saeki & O'Keefe, 1994). Idea units were analyzed for their relevance to each of the two coding dimensions. Only those ideas or acts were counted if they were relevant to either of the two coding dimensions. Twenty percent of the responses were double coded for reliability purposes; Cohen *kappas* were an acceptable .80 for argument basis, and .83 for argument alignment.

Results and Discussion

A repeated measures ANOVA was conducted to assess each hypothesis. Grade level (3) was the between groups factor and scenario type (3) was the repeated measure factor in each analysis. *H1* was supported, as there was a significant effect for grade level on argument basis, F (2, 41) = 12.47, $p < .001$. There were no other significant effects. Post hoc tests showed significant increases in the proportion of argument basis acts between each of the three age groups (third graders, $M = .10$, fifth graders, $M = .54$, and seventh graders, $M = .98$).

The repeated measures ANOVA on the proportion of argument alignment acts was also significant, F (2, 41) = 6.09, $p < .01$, indicating support for *H2*. There were no other significant effects in this analysis. Post hoc tests showed significant increases in the proportion and frequency of argument alignment acts between seventh graders ($Ms = .31$ for proportion, 1.73 frequency) and the other two age groups (fifth graders, $Ms = .18$ for proportion, .95 for frequency, and third graders, $Ms = .10$ proportion, .50 frequency). A final repeated measures ANOVA detected no significant differences in the total number of thought units produced across the three grade levels, $F(2,41) = 1.09$, *ns.*

Consistent with expectations, there was a significant increase in children's ability to construct an elaborated basis for their expressed standpoints, by articulating an evidentiary basis, normative basis, or consequential basis. There was also a significant increase in the ability to engage in argument alignment, for seventh graders were more likely to promote understanding with questions, and use transacts, altercasting, and integrative proposals to dynamically display potential connections between participants' views. These two argument features appear to be active ingredients of rhetorical competence in behavioral disputes.

While these findings are promising, they are based on a relatively small sample. So the purpose of the second study was to examine the hypotheses with a larger adult sample. Instead of examining age-related differences on these two argument

dimensions, the purpose of Study 2 was to determine if use of the two argument dimensions differs as a function of a different indicator of developmental level, that of interpersonal cognitive complexity. Cognitive complexity has been linked with a variety of functional message features and outcomes, including person-centeredness and listener-adaptation (see the review of Burleson & Caplan, 1998). Based on this research literature and the findings of Study 1:
H3 and *H4*: Persons with high levels of interpersonal cognitive complexity will employ significantly more (*H3*) elaborated bases for their arguments and (*H4*) more argument alignment acts than persons with low levels of interpersonal cognitive complexity.

Study 2 – Method

Participants. Participants in Study 2 were 115 undergraduates (67 male, 48 female) enrolled in communication classes at a moderate sized southern university in the U.S. Most were Caucasian and from middle and upper middle class backgrounds. Their ages ranged from 18 to 33 years (M = 22).

Tasks and measures. Participants completed a questionnaire for extra credit that contained a number of tasks. They first completed two regulative communication tasks, the apartment situation (Applegate, 1978), and the small group project task (Clark, 1979). Students wrote out what they would say to their roommate to clean up their shared apartment, or what they would say to convince a group member to complete their share of the project. Participants were asked to write down everything they would say, "just as though they were engaged in actual conversation." This hypothetical message methodology and specific regulative message tasks have been routinely used by those interested in persuasive and compliance- gaining message features (e.g., Wilson, 2002).
The messages were unitized for thought and idea units and then categorized with the two coding dimensions developed for Study 1. The particular categories that resulted for each of the two coding dimensions are presented in Table 2. Unitizing and categorizing reliabilities were conducted on 20% of the protocols, which were acceptable (Cohen *kappas* = .85 and .81, respectively). The proportion of thought units for each coding dimension relative to the total number of thought units produced was taken to be measures of argument basis and argument alignment.
Participants also completed Crockett's Role Category Questionnaire, which involved describing two people the participants knew well, one whom they liked and one whom they disliked. These descriptions were scored for the number of

interpersonal constructs they contained, following Crockett's procedures (Burleson & Waltman, 1988). Reliability on 20% of the responses was acceptable (r = .95). The number of interpersonal constructs was taken to be the measure of cognitive complexity; based on frequency data, three groups were formed, low, medium, and high level complexity groups (low group, M = 13.89, SD = 2.56; middle group, M = 20.46, SD = 2.26; high group, M = 31.86, SD = 8.11).

Results and Discussion

The hypotheses were assessed with repeated measures ANOVAS, with scenario type (2) the repeated measures factor and interpersonal complexity (three groups) the between groups factor. H3 on argument basis was supported, for there was an effect for complexity on the provision of an elaborated argument basis, F (2, 112) = 3.51, p < .05. Post hoc analyses showed that the high complexity group (M = .24) provided a more elaborate argument basis than those with a medium level of cognitive complexity (M = .14), but not more than those with low levels of cognitive complexity (M = .18). There was also a significant effect for scenario type, F (1,112) = 5.75, p < .05; more elaborate argument bases occurred in the group project situation (M = .22) than in the apartment cleaning situation (M = .15). There were no other significant effects in the analysis.

A secondary repeated measures ANOVA was conducted on the total number of thought units produced in the regulative messages. The only significant effect was for cognitive complexity, F (2, 112) = 21.58, p < .001. The high complexity group (M = 6.84) produced regulative messages with significantly more thought units than the medium complexity level (M = 4.58) or the low complexity level groups did (M = 3.64). A repeated measures ANOVA was conducted on the frequency of argument basis acts. The only significant effect in this ANOVA was for cognitive complexity, F (2, 112) = 12.96, p < .001, with the high complexity group producing significantly more argument basis moves (M = 1.68) than those with moderate levels (M = .68) or low levels of cognitive complexity (M = .80). Hence it appears that the frequency measure of elaborated argument basis obtained stronger effects for cognitive complexity than did the proportion measure of elaborated argument basis.

A repeated measures ANOVA on the proportion of argument alignment acts provided support for H4, the last hypothesis. The only significant effect was for cognitive complexity, F (2, 112) = 8.54, p < .001. Post hoc tests showed that the high complexity group employed significantly more argument alignment acts (M

= .29) than the moderate level (M = .17) or low level cognitive complexity groups (M = .11).

Thus, both hypotheses were confirmed. Those with higher levels of cognitive complexity were more likely to use an elaborated argument basis in behavioral disputes than those with lower levels of cognitive complexity, by either articulating an evidentiary basis, normative basis, or consequential basis. Those with higher levels of cognitive complexity were also more likely to use argument alignment acts than those with lower levels of cognitive complexity, with a greater use of questions, transacts, altercasting, and integrative proposals to display connections between the discussants' views.

Conclusion

Together, the two studies show that there are developmentally-related differences in both ways of displaying reasonableness in behavioral disputes. There were age-related changes in providing an elaborated basis for one's standpoint, and in aligning one's standpoint with others' views. Both practices also varied as a function of the speaker's level of interpersonal cognitive complexity; more cognitively complex arguers were more likely to provide an elaborated basis and align their standpoints with other's viewpoints than less cognitively complex arguers. The findings give credence to seeing Bohman's dialogical mechanisms as involving argument practices that differ as a function of age and social knowledge.

Because these findings were obtained with hypothetical role-play scenarios, they need to be replicated with tasks calling for actual interaction. These findings also could be replicated with a wider age range. The coding systems used described the two argument practices in reference to the particular tasks used, and so may be limited by those tasks. Different tasks and a wider age range would likely reveal an ever wider variety of specific argument practices that enact argument elaboration and argument alignment.

The open-ended argument tasks did permit the discovery of specific argument practices, which could be examined further. More empirical work could be conducted on perspective-giving, or elaborating an argument basis. For instance, the way in which arguers articulate their feelings as a basis for their arguments could be studied further; future research could also examine how arguers utilize norms and values in integrating their standpoints, and how arguments can articulate the desirability of consequences.

Research could also focus on argument alignment practices. The work by science

education researchers suggests a number of avenues for study. Practices such as asking questions to explore standpoints, making inferences from foothold ideas, and using analogies to bridge known and new concepts are reasoning practices that may provide insight into how arguments work to create new mutual understandings. Science discussion may also be an excellent context for studying how arguments work not just to resolve conflict, but also to create new knowledge and understandings about controversial issues.

Future research could also unravel the ways in which transacts can work positively to enhance deliberative discourse. The role of transacts or reasoning about another's reasoning in moral reasoning development has a mixed history; unraveling the relational communication practices involved in reasoning about others' reasoning would help pinpoint the relevant communication or argument skills involved in using transacts effectively in deliberative discourse.

Finally, arguments advance or create positive or negative identities at the same time as they forward a substantive standpoint. Yet the interactional construction of arguments and identities has not yet systematically studied (Kline, 1987). Through such study we could understand why some argument practices might be more successful in resolving differences than other argument practices.

In recent work Kuhn and Weinstock (2002) have proposed that the development of epistemological understanding occurs gradually, toward an "evaluativist" level in which evaluating argument and evidence become the key vehicles in producing conceptual knowledge. Kuhn and Weinstock believe that children and adolescents "need practice in making and defending claims especially in social contexts where claims must be examined and debated in a framework of alternatives and evidence" (2002, p. 139). With future research like the studies reported here, argument teachers and researchers could be in a better position to articulate the particular communication and argument practices that might be taught.

Table 1

Study 1: *Elaborating and Aligning Argument Practices in Children's Behavioral Disputes*

1. *Elaborating a Basis for an Arguer's Standpoint*

The arguer situates his/her standpoint by articulating a(an):

a. evidentiary basis: articulates a broader evidentiary field to support a mutually beneficial standpoint, "Tina couldn't memorize all of Bonnie's role in three days. Bonnie is probably doing well since she has been practicing for a while. Bonnie

will probably do a better job because she knows what is happening. “
b. normative basis: articulates and applies maxims, norms, or values, “Bringing people and good to people are really important to me. So I would say, come on and play… maybe he is a nice guy, give him a chance.”
c. consequential basis: describes how conditions would produce likely consequences, “The best approach is to let him play, because if these friends just turn around and say we are gonna play with someone else, you always have him to fall back on. And you always have more friends to fall back on. And he will always remember what you did for him.”

2. *Aligning the Arguers’ Expressed Standpoints*
The arguer integrates his/her standpoint with others’ standpoints by:
a. proposing an act that incorporates multiple preferences, or proposing specific options or a detailed proposal to achieve all aims: “Well, I can rearrange your part a little bit and make it a little more exciting.”
b. soliciting discussion and clarifying meanings: “Maybe he should ask everybody what they think they should do and then they can all decide;” “Why did you pick your part?”
c. reasoning about the other’s views to note inconsistencies, or to extend, clarify or connect reasoning: “Well, if the situation is that the watch is your watch, you want someone to keep it?”
d. uses altercasting to guide reasoning: “If you find it you can do what you want with it, but we all have found the watch;” “These are good ideas;” “She’ll feel bad.”

Study 2: *Elaborating and Aligning Argument Practices in Young Adult Behavioral Disputes*
1. *Elaborating a Basis for an Arguer’s Expressed Standpoint*
The arguer situates his/her standpoint by articulating a(an):

a. evidentiary basis: articulates a broader evidentiary field that supports a mutually beneficial standpoint
(1) articulates desires, aims: “We don’t want a bad grade.”
(2) articulates importance of aims, actions: “Keeping our home clean is important.”
(3) articulates relevant situational features: “We will meet again in two days.”
(4) articulates feelings: “I really hate living in this mess.”

b. normative basis: articulates and applies maxims, norms, or values
(1) articulates bases for rights and duties: “We had an agreement.”
(2) specifies expectations, obligations: “Everyone else took time to do it.”

c. consequential basis: describes how conditions would produce likely consequences
(1) articulates bridge from action to positive outcomes: “Cleaning up is for your benefit, too. You’ll feel better.”

2. *Aligning the Arguers’ Expressed Standpoints*
The arguer integrates his/her standpoint with others’ standpoints by:

a. proposing an act that incorporates multiple preferences, or proposing specific options or a detailed proposal to achieve all aims:
(1) facilitates request: “Let’s figure out a schedule.”
(2) initiates integrative proposals: “Let’s clean together. I’ll help.”

b. soliciting reflection and/or clarifying meanings:
(1) legitimizing other’s utterances, views: “I’ve been busy at times, too.”
(2) soliciting others’ views: “Don’t you think that’s fair?” “Why?”

c. reasoning about the other’s views to note inconsistencies, or extend, clarify or connect each other’s reasoning: “Maybe I’m wrong, but…”

d. using identities and altercasting to guide reasoning: “The teacher has confidence in you.”

Appendix: Argument Scenarios in Study I

Scenario #1: “Bonnie, Tina, Frank and Tyler are planning to put on a puppet show for their class. At the first rehearsal everybody agrees on who plays what part. Frank is the director. Three days before the show, Tina decides that she doesn’t like her part and she wants to quit the puppet show. She says the only way she will stay is if she gets to do Bonnie’s part since it is the lead role. Bonnie says to Tina, ‘I’m not going to give up my part since I have been practicing from the beginning. You should stay in the part that you were originally given.’ Tyler says, ‘Why don’t Bonnie and Tina share the role?’ Can you think of all the things that Frank should say to the group?”

Example refutation probe: “What if Tina says, ‘I never did like my part. I won’t do

it. Please give me the lead part.' What should Frank say then?"

Rationale probe: "Why do you think Frank should say these things to the group?"

Scenario #2: "Steve, Andy, and Graham are playing kickball on the playground at school. Seth was there, a boy that nobody likes very much. Seth wants to play kickball, too. The boys don't want Seth to play since he always cheats and the game ends up in a big fight. Steve says, 'We should let Sam play since the ball really belongs to the class. It's not just ours.' Andy suggests, 'Why don't we play for 15 minutes and then let Sam have the ball for 15 minutes?' Graham, who is the oldest of the group, feels he should make the decision about what to do. Can you think of all the things that Graham could say to the others?"

Example refutation probe: "What if Andy says, 'You know, Seth is going to cheat. He always cheats. I don't want him to play.' What should Graham say?"

Rationale probe: "Why do you think that Graham should say these things?"

Scenario #3: "Donna, Sandy and Debbie are walking down the hallway in the school. Donna finds a watch on the floor. Sandy says, 'We should keep the watch, cause finders keepers, losers weepers.' Debbie suggests they should turn it in to the principal to see if the person who lost it has claimed it. Can you think of all the things that Donna should say to Sandy and Debbie?"

Example refutation probe: "OK, but what if Sandy says, 'Yeah, but whoever lost it, it is their responsibility. Come on, let's keep it.' What should Donna say?"

Rationale probe: "Why would do think Donna should say those things?"

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ISSA Proceedings 2006 – Justice As Argumentation

"Justice is conflict" (Heraclitus)

In this paper I shall attempt to establish that the idea of Justice- as the ideal regulator or criterium which serves to evaluate positive law critically – has intimate ties with the notion of Argumentation.

How is justice related to legal reasoning? At first sight we can see a relationship
(i) in the method of rational argumentation (the thesis of the unity of practical reason);
(ii) in the object of the Theory of Justice (the first principles of social or distributive justice, and their justification), and
(iii) in the (logical) consequences of the model or rule of justice that we adopt (the positivising and development of principles in Law). A theory of Justice – whether a moral or a political theory – is, like reasoning in law, a part of practical discourse.

Since ancient times the distinction has been drawn between law as it is and law as it should be. The discrepancies, in existing literature, have been rooted in the epistemological feasibility of establishing the second of the terms in the proposition. In my opinion, a democratic system – Politics – demands that the question be admissible, and a rational discussion of what is fair be possible.
On the one hand, the idea of what is fair has been linked to the fulfilling of positive duties; that is to say, duties imposed by the law. According to this point of view the fairness of an act is measured by its conformity with the laws in force. The trouble with this point of view – one which has the advantage of allowing a person to know what is fair, by referring to the laws currently in force – is that it does not allow for guidance over the workings of the legislator or for a critical evaluation of legislation. Dogmatics turn into mere commentator´s work, the judge becomes a blind instrument of the law, and the legislator – the will of the majority – reigns supreme as judge of what is fair. This point of view (Kelsen 1982, for example) gives up any possibility of finding a criterium of fairness beyond positive law, since it considers that project to be irrational. However, it is clear today that Positive Law can be, and must be, evaluated from an external point of view. In fact, judges do get away from the written text on some occasions

(although judges generally see justice as consisting of the application of positive law), and scholarship makes critical analyses of current standard practice. Justice does not always consist of adapting oneself to norms which govern society at one particular moment.

Kelsen himself was conscious that a relativist theory of knowledge is exposed to two dangers:
(1) a paradoxical solipsism, since if one´s ego is the only reality which exists, it must then be an absolute reality (which entails an egotistical negation of the you); and
(2) a pluralism which is also paradoxical: if we have to admit the existence of many egos, it seems inevitable that there will be as many worlds as there are subjects to be known. To avoid these problems, Kelsen considered as true knowledge the one resulting from the mutual relationship between different subjects to be known. It is supposed that the subjects to be known are equal, and that the processes of rational knowledge are equal, in contrast to emotional reactions. This enables one to presuppose that the subjects to be known, as a result of these processes, are in conformity with each other. Moreover, a restriction of liberty is needed under which all the subjects are equal (Kelsen 1982, pp. 113-125).

It is possible – or, at least, we must act as if it were – to deal rationally with the term justice, and elaborate rigorous conceptual constructions, in order better to understand the set of problems of justice. Justice, then, exists prior to Law and it operates as the legislator´s goal. Only in line with this second point of view can we speak of a Law – Nazi Law, for example – as being unjust. The trouble lies in deciding what is fair and what basic criterium will sustain a theory of justice.
Once the attempts at a substantial definition have been abandoned (justice is not just something available over there, among the universe´s furniture, registered in nature, and attainable by the senses), a rational approximation to the problem of justice is still feasible. What is fair is what derives from a particular procedure of rational debate, where the participants see each other as free and equal. It is not enough that the precept should be a reflection of the will of the majority, because the majority may cease to be such, and its laws may be repealed. What is required is a procedure which ensures the truth of the norm – at least, a truth arrived at by consensus.
The main contribution of theories like those of John Rawls or Jürgen Habermas is

the possibility of positively evaluating our institutions. The question they try to answer is this: How to have at one´s disposal a common rational basis for our institutions without betraying their diversity? The answer is the argumentation model underlying a Theory of Justice. In other words, a Theory of Justice must be based on a methodological construction – a theory of argumentation – that recognizes and channels the opposition which is essential to politics.
To this effect, we understand argumentation as an act of complex language which it is only appropriate to practice in a dialogue (whether real or ideal) when a declaration (or something which presumes to be the truth) runs into problems, and we accept that the problem must be solved by discussing it, without resorting to physical force (Atienza 1996, p. 235).

In this line of thought there is a close relationship between justice and argumentation, since the problem of justice is always worked out in a situation of dialogue, in which the parties solve their conflicts and balance their interests, using criteria which must be justified and not coerced.
Rawls (1985) works out a method of "pure procedural justice", where there is no previous criterium of justice, but where what is just is determined by the procedure itself (in other words, a normative statement is correct if it can be obtained by applying the procedure).

Starting from the idealization of the conditions under which moral and political discourse is developed ("the original position" plus "the veil of ignorance") he attempts to derive principles of justice applicable to the organization and distribution of political power ("the basic structure of society"), with the aim that such a public conception of justice be acceptable for all reasonable comprehensive doctrines currently in force in society ("overlapping cosensus"). The method goes from critical to positive morality and vice versa, from principles thus reached to our most deeply rooted moral intuition, continually being adjusted ("reflexive equilibrium") and eluding metaphysical questions ("method of avoidance"). Rawls thus places argumentation right in the centre of his Theory of Justice.
The nucleus of one of Rawls` theories is an argumentation model which combines the idea of "rational" with that of "reasonable". The rational means directed action – the choice of means – for the satisfaction of the desires or ends of the agent (the good); while the reasonable consists of coordinating one´s actions with those of others, starting from a principle of impartiality from which the agent and

the others can reason together. The key – shades of Kant´s influence here – lies in the priority of what is right over what is good, of what is reasonable over what is rational (Rawls 2003, pp. 67 et seq.).

Communicative rationality, in turn, expands the possibility of coordinating actions without resorting to coercion, and of resolving conflicts of action by consensus. Communicative practice refers to "the practice of argumentation as an instance of appeal which allows communicative action to go ahead with other means when disagreement arises which can no longer be absorbed by daily routines, and which, however, can not either be decided without employing power directly or strategically" (Habermas 2002, p. 36).

At this point there arises the tension between two models of Rationality, one understood as "reconciliation" through the public use of reason, and the other as a choice between alternatives put to debate, in which a one and only correct answer is not necessarily expected to be reached (a deliberative conception of democracy, which leaves open important questions – or which, at least, leaves open more important elements than the first one – and which submits the choice of alternatives put to debate to nothing more than "the coercion of the best argument").

Aristotle – heir to the tradition of the sophists – understood that conflict is the force generated by politics, and the phenomenon that needs to be regulated by Law. It is the potentiality of conflict that makes social power necessary, together with and a set of norms which put society "in order", coordinating the action of individuals and groups (Aristotle, 2000).

For Habermas the Rule of Law makes it possible to extend the principle of discussion to the field of human action governed by law. "Valid norms, in conditions which neutralize any motive other than that of the cooperative search for the truth, in principle have also to be able to gain the rationally motivated assent of all those affected" (Habermas 2002, p.38). In virtue of their susceptibility to criticism, rational declarations are prone to correction (and for that reason the concept of a rational basis is closely related to that of learning). The democratic nature of the norms acts as an assumption (prima facie) in favour of the morally justified character of the same. But it is always possible to convert once again a problem into a proposition, and pass a law with a different content, following the same procedure.

Thus Habermas turns on its head the categorical imperative of Kant, saying that those norms are justified whose consequences can be accepted by all those

affected given ideal conditions of dialogue. In other words, the right path is to act in accordance with a maxim that all, in a situation of freedom and equality, and respecting the rules of rational argument, can agree to as a universal norm. In Habermas the individualistic model is replaced by discourse or dialogue (Atienza 2003, pp. 203-204).

Communicative reason (action orientated towards agreement) is upheld, according to Habermas, by four idealizing presuppositions (suppositions that the actors must adopt when they enter this practice with no reservations):
(1) the supposition of a world of objects which exists independently;
(2) the reciprocal supposition of rationality or "responsibility";
(3) the inconditional validity of the pretensions of validity which, like truth or moral rectitude, go beyond any particular context; and
(4) the necessary dependence on discursive justification: rational discourse as the final and inexhaustible form of all possible justification (Habermas, 2003).

In order to advance in the successive and, it seems, irreversible adjustments towards a "Social and Democratic Rule of Law", it is necessary to emphasize the contractualist aspects of Rawls' theory and the procedural and communicative aspects of that of Habermas. The source of democratic legitimacy of the norms, as opposed to retreating authority and tradition, is real participation – their consent – on the part of the people affected.

So what is fair is reached by following a particular procedure of rational dialogue. Following in the steps of Alexy (1985), in a legal theory the ways of presenting the procedure depend
(1) on the individuals who take part in the procedure;
(2) on the exigencies imposed on the procedure, and
(3) on the particular nature of the process of decision.

In this last respect, the rules of discourse and the process of decision may or may not include the possibility of modifying the normative convictions of the individuals which exist at the beginning of the procedure (the starting point of the discussion). This possibility does not appear to be open in Rawls´ model regarding the choice of the principles of justice individuals make in their original native position (ideal individuals who must comply with the demands of the "veil of ignorance"). On the other hand, a theory of discourse like that of Alexy, which is inserted in the very tradition of Habermas, has these precise characteristics

because
(a) “an unlimited number of individuals can take part in the procedure, in the situation in which they really exist”, and
(b) “the real and normative convictions of the individuals can be modified in virtue of the arguments presented in the course of the procedure” (Alexy 1985, pp. 46-47).

The aim of the Law is to resolve conflicts between people, and conflicts of rights (which already appear in the Greek tragedies) have much to do with the equitable distribution of benefits and burdens. In this case, what is equitable has to do with a rational and reasonable justification. We, human beings (logikon zoon kai politikon) can, by our arguments, reach agreements to regulate our rights.

What are the possible criteria of what is fair as a result of the procedure of rational and democratic debate?
(a) Since Aristotle the idea of justice pays tribute to the idea of equality. Commutative justice seeks to establish or ensure the position of equality between people. Distributive justice is that which guides the action of the state so as to ensure rights, benefits and burdens. The former is proper to private law, the latter to public law. In order that equality should operate in the private sphere, a precise act of distributive justice is needed, which recognizes the rights of people as equals.

In the public sphere justice likewise presumes to recognize the other person as an equal (Kant, 1973). In a democracy everyone is recognized as having the same capacity to take part in the process of forming the basic political-juridical system. Equality is a basic condition of society (Rawls 1985, Dworkin 1984). If an act or an institution harms the principle of equality, then it is not just.

(b) Justice, as Aristotle also said, is common usefulness. An act is just, not according to how much it benefits the author of it (or the title-holder of a right), but rather in the measure of its favouring or increasing common welfare. If it harms public welfare, then it is not just.

The primary version of common welfare is social peace (or the idea of order, of society as a cooperative enterprise), the eradication of violence, the solution of conflict through agreement or the decision of a third party – after hearing the arguments of both parties – based on proofs whose acceptability points towards

the universal auditorium (of that particular community).

(c) Another attempt, on the part of Aristotle, is the distinction between the general and the particular dimensions of justice: justice as fairness. Justice sometimes obliges one to get away from the general mandate contained in the norm in order to attend to particular features of the particular case (and then it is the judge who is creating law). What is fair, being just, is not just according to the law, but a correction of legal justice. The reason for this is that the law is always something general, and there are cases of such a nature that it is not possible to formulate a general proposition for them which can be applied with certainty (Aristotle 1970, pp. 86-87).

What is just is what is foreseen by the legislator, but where the foresight of the legislator does not reach, it is the judge who is called upon to hand down a just solution. That is why positivism has recognized the judge's margin of discretion: "The Law (or the Constitution) is what the courts say it is" (Hart 1994, pp. 141-147). All the same, it is still possible to control the judge's decision rationally, incorporating the principles into the concept of law as guide and limit of the judicial use of discretion.

In any case, a private Justice would be a contradiction of terms; every legal solution should be universalizable; this is one of the criteria – the first one – of rational argumentation in MacCormick. In a few words, the requisite of universality is implicit in deductive justification. This demands that, in order to justify a normative decision, one must at least have a premise which may be a general norm or a principle (MacCormick, 1978).

Dworkin, as is well known, has centred his criticism of positivism (as far as a model referred to rules) in that it does not mention the fact that, frequently, jurists and judges – when they have to justify their decision or reasoning in difficult cases (cases which can not be subsumed, that is, cases where the solution is not to be found in the rules) – resort to standards or principles which one supposes derive, or are inferred, from the system; that is to say standards or principles which are not the product of the mere discretion of the judge or jurist. According to Dworkin the judges can, and indeed do, take decisions based on three kinds of standards, which it is convenient to distinguish suitably: "policies", "principles" and "rules". "I call a policy the sort of standard which proposes an aim which must be achieved: generally an improvement in some economic,

political or social feature of the community (although some aims are negative, for example when they stipulate that some existing feature has to be protected from contrary changes). I call a "principle" a standard which has to be maintained, not because it favours or ensures an economic, political or social situation which is considered desirable, but because justice, fairness or some other dimension of morality demands it. Thus the proposition that traffic accidents must be reduced is a policy, and the proposition that no man may benefit from his own injustice is a principle" (Dworkin 1984, pp. 72-73). Principles and policies cannot be identified by their origin (or pedigree) like norms; but rather by their contents and argumentative force.

Regarding the argumentative use of principles and policies – the nucleus of the argumentation in hard cases – most authors think the fundamental issue is the greater importance of the reasons for correctness over the reasons of an instrumental or strategic nature. Alexy expresses it thus: "the result of a rational discourse would be a system of fundamental rights which includes a prima facie preference for individual rights over collective welfare"(Alexy 1994).

The first step in legal argumentation consists of putting into their corresponding relationship the hypothesis and the norms: of identifying and relating the contents of the legal norms in force which regulate the situation concerned. The next step is to examine the hypothesis compared with the text of the norms and with the help of the tools of legal method. This implies tackling the problem of the meaning of the normative propositions (with the eventual problems derived from the vagueness, ambiguity and open texture of legal language), and then to resolve eventual contradictions and "lagoons" that may appear.

Now, as is well known, even if we are to assign the words the usual meaning with which they are used in a linguistic community, we still have to resort to consideration of value or pragmatism (one can refuse to follow the meaning commonly attributed to a term if that leads to a result at variance with the values which justify the norm or which underlie the system). On the other hand, traditional methods of interpretation are not axiologically neuter, nor do they serve to ensure univocal results (legal discourse, backed by the rules of traditional method, on occasions tends to reproduce the vision of a dominant world, and therefore it is sometimes necessary to make an additional effort not to get carried away by the "siren songs"). Besides, conflicts at the level of principles – like those that confront equality with efficiency – can not be resolved according to the three classic criteria for solving normative contradictions (the principles of "lex superior", "lex specialis" and "lex posterior"). This is so because, generally,

tension is produced at the constitutional level, within the constitution itself (and therefore of similar rank and of period of coming into force); because we do not have principles in dictionary order; and because, since we have an atmosphere of open application, principles do not lend themselves to being catalogued a priori as general or special.

So we have to resort to techniques of interpretation and reconstruction of the system, techniques which operate on the basis of norms (in a wide sense) which are officially recognized and which can be considered rational, in the context of and in accordance with the demands of the democratic and constitutional Rule of Law.
On one hand, as Alexy has observed, the understanding of a norm supposes the understanding of the system to which it belongs. On the other hand, it is not possible to understand a system of norms without understanding the particular norms that form part of it. This leads us to the problem of establishing unity and coherence (Alexy 2004, p. 42).
Coherence is one of the basic criteria for interpretation and argumentation in law; it has to do with the ideas of systematic unity, order and absence of contradiction. The idea of coherence constitutes, from the point of view of dogmatic labour, the purpose of building the system of legal order and the foundation of criticism of it. Alexy and Peczenik have attempted to come up with a concept of coherence and the criteria to measure it with: "The more the statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory" (Alexy & Peczenik 1990, pp. 130-147).

One of the tasks of dogmatics consists, then, of contributing to overcoming the deficit of coherence which the legal systems displays, invoking principles to justify or reformulate particular norms which induce inconsistent results. It is, then, a matter of "coming and going" from rules to principles and from principles to rules, with the aim of;
(a) deriving from the set of existing rules, the principles which underlie them and which justify them, with a reach that goes far beyond the set of rules in itself: that is to say,
(b) in a way that such principles serve as a method of interpretation of the said rules, but allow us (in future) to orientate their interpretation, and to infer other rules too.

The idea of justice which one thus obtains is a formal concept; that means that it

only determines the need for equal treatment and the general form of the law (Perelman, 1964). It does not tell us, most of the time, what content the law must have: the criteria of equality and how those defined as equal should be treated.

In any case, this does not imply an absolute relativism since from that formal notion of justice are derived absolute demands for the Law. Thus the Law, while it cannot impose or demand the fulfilling of certain ethical duties, can indeed make the project of life of each person possible, in the sense of ensuring such a margin of exterior freedom as will make people´s moral freedom possible. In this way Human Rights arise as principles with a general value.

Certain basic principles of general application also emerge, which arise from the formal idea of justice, such as the independence of the judges, due process, and the presumption of innocence. In the same order we can place the principles that demand that the norms should be general, clear and not retroactive (Fuller, 1969).

Society is thus conceived as a contractual relationship, and the community (together with the law which regulates it) as a building being built (Atienza 2006, p.33).

To sum up, in order to be just, a positive norm must contribute to common welfare, respect the principle of equality, and be derived from a determined procedure of rational discussion. If a normative act damages common welfare, if it treats people as unequal or if it is not justified – in the sense of not being a product of a procedure of rational dialogue – then it is unjust.

In consequence Law – and the idea of justice which underlies it – is being built and created anew constantly, through practices of public discussion aimed to configure and give meaning to principles and norms which are socially relevant, in order to find a correct solution for each case. Thus the right of might, and the right of cunning (to which the Iliad and the Odyssey are dedicated) give way progressively to the idea of justice; and the sovereignty of will opens the way to the rule of reason.

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ISSA Proceedings 2006 – Undoing Premises. The Interrelation Of

Argumentation And Narration In Criminal Proceedings

1. *Introduction*

Criminal proceedings produce facts about an instance that is often controversial. These facts are employed in argumentative practices during the entire course of the proceeding and function as premises. In this paper I will describe and analyze a production process of such facts, following Prior's (2005) request for an ethnography of argumentation that moves to the study of the production of grounds for argument (see p. 133). I suggest that the interaction of narrating and arguing in criminal trials offers a lens through which this process can be viewed beneficially. Hence, this paper will address the questions: What relation do narration and argumentation as persuasive means entertain? How distinct are they and how do they interact? What does their relation say about the production of facts in criminal proceedings?

First, I shall briefly lay out the different perspectives on criminal trials from the views of narrative and argumentation theory, focusing on works from the rhetorical perspective.

Second, I am going to analyze the development of a theme in an actual criminal case with regard to its narrative and argumentative employment. On the basis of this analysis, I shall then discuss if and how narration and argumentation interact.

In criminal proceedings stories are established as products by transforming them into premises that are used argumentatively (Hannken-Illjes, submitted). In this paper I will follow a case from the verdict through to the appeal hearing and finally the acquittal. My argument is that premises as products of the fact-finding process can be unbuild by re-transforming them into narratives.

2. *Narration and Argumentation in Legal Rhetoric*

In classical legal rhetoric, two parts were central for convincing the addressee or the audience: the narratio and the argumentatio. Roughly 2000 years later, *narration* and *argumentation* are still considered central to the establishment of facts in criminal proceedings. On the one hand, a series of works presumes that criminal proceedings should be understood as stories which are subject to a narrative rationality. On the other hand, acts of reasoning are considered

paradigmatic for the legal procedure.
The basic notion of narration as an essential part of criminal proceedings is probably not controversial. During my fieldwork lawyers would often be skeptical when hearing what my work was about: the development of criminal proceedings, the connection between preparation and performance. However, as soon as I mentioned that one question was how stories developed in the course of the proceeding, there was a lot of nodding going on: Indeed, that could be an interesting topic.
Following Cicero the narratio in legal rhetoric is "the exposition of actual or apparently actual events" (Knape 2003, p. 100, translation mine). As part of a speech that is designed to convince the other, the narratio does not serve as an objective description of the occurrences but is an essentially partial description that should be designed to fit the party's overarching strategy. In that sense, Quintilian describes narratio as fundamentally persuasive: "Narration is the depiction of an actual or apparently actual event useful for persuasion" (1995, p. 449, translation mine).

In the course of the narrative turn, contemporary rhetoric, too, has turned its attention to narrating in legal discourse. White (1987), for instance, argues that the activity of defense lawyers, and moreover that law itself, is by nature narrative: "At its heart it [the law] is a way of telling a story about what has happened in the world and claiming a meaning for it by writing an ending to it". The lawyer is repeatedly saying, or imaging himself or herself saying: 'Here is 'what happened'; here is 'what it means', and here is 'why it means what I claim'. The process is at heart a narrative one because there cannot be a legal case without a real story" (p. 305). Not only does White in this paragraph link storytelling to persuasion but to some extent also to argumentation, even though he does not further elaborate this connection. The history of what has happened is interpreted for the audience and this interpretation is backed up by reasons. This understanding of a narrative rationality underlying all legal discourse is reminiscent of Fisher's concept of the narrative paradigm (1987). Fisher understands narrative rationality as being constituted by coherence and fidelity – that is inner and outer congruence.

But what does it mean to say that law is a form of storytelling and consequently subject to narrative rationality? Exactly where and how does storytelling take place in criminal proceedings? The concept of narration shares its fate with a

multitude of prominent concept: it is in danger of losing significance due to its popularity: everything is narrative and no further insights can be generated by the concept. Prince (1996) sums it up brilliantly: „But if ‚everything' constitutes narrative, doesn't the category ‚narrative' lose (much of) its conceptual content? More pointedly, if, 'Little Red Riding Hood', the Three Musketeers, a supermarket ad, and me wanting to have a drink all constitute narratives, what principles, operations, and features make it possible to consider and to process them as such?" (p. 98).
Many papers about narrativity in legal rhetoric raise the question of what is meant here. At least three different, although not necessarily mutually exclusive notions exist. Bennet (1978/2001), for instance, concentrates on the story the jury has to filter out of the various testimonies and pieces of evidence and on the basis of which it makes its judgment. This understanding of the story in a criminal proceeding is similar to what Lynch/ Bogen (1996) call meta-narrative or master narrative, using both terms as synonyms (see p. 71). In German criminal proceedings, the account discussed by Bennet, which would be labeled a master narrative by Lynch/ Bogen, would most likely be found in the reasons for the judgment.

Jackson (1998) criticizes Bennet's notion of stories in criminal proceedings and points out that not a single, coherent story is told but rather a series of stories that can be contradictory.
„But this [the presumption that different narrators tell one single story] wrongly supposes that one is dealing simply with the telling of one overall story in the trial, rather than a series of interlocking stories, the credibility of each one of which (that of each witness) is assessed as a factor in the credibility of the whole" (p. 66). So according to Jackson, the unit of analysis is not the single, coherent story developing in a trial but rather the multiple, diverse, and contradictory stories being told during that trial. Accordingly, Lynch/ Bogen (1996) in their analysis of the Iran-Contra hearing concentrate on the interaction between master narrative and the individual stories and counter narratives supporting this master narrative.**[i]**

Thirdly, law itself, as depicted by White (1987) above can be viewed as narratively constructed. From this perspective criminal law feeds into the grand narratives of society about occurrences that are labeled unlawful.This of course is quite a rough distinction. I shall, similarly to Bogen/ Lynch (1996) in their analysis of the

Iran-Contra hearings be mainly interested in how the small, “fragile stories” (p. 166) told by different actors contribute to the case. Other than Bogen/ Lynch I am not interested in how a master narrative is constructed but in a broader sense, how these fragile stories are stabilized and rendered factual.

The second central part of legal rhetoric is the argumentatio, the place for presenting and countering arguments. The links between argumentation and legal discourse are considerably closer than those between narrative theory and law. Not only are there specific applications of general argumentation theory for the field of law, but also has modern argumentation theory, at least in its beginnings, been strongly oriented towards the legal paradigm. In the central works of argumentation theory at the end of the 1950s by Perelman/ Olbrechts-Tyteca (1969), Toulmin (1958) and also Viehweg (1953), legal discourse functioned as a blueprint for argumentation, especially for rhetorical conceptions.
This close interrelation between general argumentation theory and legal argumentation may be the reason why questions of general argumentation theory are reflected in the problems and questions of legal argumentation and vice versa. Feteris (1999), for instance, distinguishes rhetorical, dialogical and logical approaches in legal argumentation, grounded in the heuristic distinction between logic, dialectic and rhetoric, which, drawing on Aristotle, has gained considerable prominence in general argumentation theory.
A rhetorical perspective on legal discourse can refer to different approaches. Following Wenzel (1980) it is concerned with the process of argumentation and stresses the orientation towards an audience, thus it is the persuasive element. At the same time, rhetorical approaches in legal argumentation emphasize an approach to legal argumentation through the topic, as for example in the fundamental work of Viehweg (1953) and more recent works by Seibert (1996). Drawing conclusions during the trial is not understood as a logical procedure of subsumtion but as a creative process of finding and using adequate reasons. The system of law is not closed but, although stable, open to the introduction of new topoi. Hence, as Feteris (1997) puts it, it “emphasizes the content of arguments and the context-dependent aspects of acceptability” (p. 359).
Interestingly, there seems to be little literature about the interrelationship of argumentation and narration in the legal field. However, in other areas the relationship between narration and argumentation has enjoyed quite some interest. In linguistics, narration and argumentation are often taken to be distinct text types (see among others Dijk 1980, Gülich/ Hausendorf 2000). When a closer

relationship has been established this was often conceived with either the narrative or the argumentative being dominant. Some works have taken either narrative to be the dominant partner, functioning as framing the argument (see for example Lucatis/ Condit 1985 and Parrett 1987) or arguing as the overarching function of narratives (see for example Korsten 1998). The latter take is also prominent in the notion of narratives as proof by example or as the illustrative function in argumentation. In this sense, several works describe specific kinds of narration that are characterized by having a function in an overarching frame of action. Ryan (in Prince 1996) speaks of instrumental narrativity, Gülich (1980) of functional narratives, where she characterizes functional narratives among others by their truth claim.
Lately, Deppermann/ Lucius-Hoene (2003) have argued that narration and argumentation should not be viewed as distinct text types but as different principles of production, functioning as solutions task (see p. 141). They also describe argumentation in this sense not as a text type that can be distinguished through structural features but rather as a function in discourse (see p. 142). Narrating of personal experience is not only the reconstruction of past events but constitute a process of interpretation by the storyteller (p. 143). Hence, narrations are inextricably linked to the person who tells them and are difficult to counter without countering the ethos of the speaker at the same time (see p. 132). This is reminiscent of Quintilian's definition of the narratio in legal rhetoric.

3. *Data*

Before proceeding to the analysis, some remarks about the data. The data used in this paper are part of a corpus that has been developed during my field work in the project "Comparative Microsociology of Criminal Proceedings" at the Freie Universität Berlin. I accompanied criminal cases while they unfolded and the lawyers at work on them in two five-months field research periods. The data collected during this time consist of field notes, copies of the files, recordings of lawyer-client meetings, ethnographic interviews and protocols of court hearings.

I shall in the following concentrate on the development of narratives and arguments at the example of one case. I will not consider the case in its entirety but pursue the development of the critical question the case depends upon. Let's see what the case of Kai Kuhnau and his scooter can show.

4. *Scooting*

I encountered this case right at the beginning of my second field phase. Kai

Kuhnau**[ii]** was stopped by the police while “driving” a scooter with auxiliary engine on public ground. Kai had no liability insurance for the vehicle, and he would not have been able to get one, since scooters of this type are not licensed in Germany. This was the second time Kai was stopped by the police with his scooter. In the course of the proceeding it became controversial what exactly Kai did with the scooter – did he drive it with the engine running or did he just scoot it, that is: did the engine work or not? From the view of classical status theory this brings us in a situation either between or simultaneously in a *status conjecturalis* and a *status definitivus*: the charges are clearly denied. However, the complete progression of events as described by the police and recorded by the public prosecutor is conceded – with the difference of the defendant claiming he did not *utilize* the scooter (in the legal sense) but only use it. The main hearing was already over, the client had been sentenced to three months of prison without probation. I could observe the preparation of the appeal hearing and the hearing itself.
In an earlier paper I have analyzed the case of Kai and his scooter from the beginning to the verdict. The analysis showed how at specific checkpoints in the procedure narratives were employed as arguments and thereby gained stability. In order to become products of the fact-finding process they needed to make the step from narrative to premise (Hannken-Illjes, submitted). This analysis now starts with the reasons for appeal, written by the lawyer. The verdict stated, put as a reason, that the defendant did drive the motor-scooter – that is, the engine was running – without proof of insurance. It further states, that the court believes the two police officers who testified rather than Kai’s own version of the broken engine. The sentence comes up to three months without probation, which is unusually harsh.

In the reasons for appeal (*Berufungsbegründung*) the lawyer criticizes the verdict on procedural and material grounds. For the latter she returns to the story told by Kai in the court room.

(1) The defendant said that the scooter did not work, as it could not be powered by the engine. Therefore he had left the scooter with a friend. Due to bad weather and a sailing accident the defendant decided to use the scooter at least with muscular power in order to get home, as his friend, who was injured, could not give him a lift. … Mr. Mathias Wartenberg can testify these facts as a witness. … The evaluation of the testimonies is contradictory“

The lawyer takes up the counter narrative that has already been told during the main hearing by the defendant. Thereby the story receives stabilization: obviously the lawyer considers it strong enough to use it**[iii]**. But she does not only tell the story, she also backs it up with a witness and counters at the same time the testimony given by the police officers, devaluing their narrative account of what became later the leading narrative in the verdict. On the same day the lawyer sends a letter to the client, informing him about the reasons for appeal and noting that she named Mr. Wartenberg as a witness.
Three weeks before the appeal hearing lawyer and client meet. Before the conference the lawyer told me that today the client and she would need to agree on why it was that the engine did not work, if it was either the rain entering the engine or the broken piston ring. As it turns out during the meeting it is – according to the client – the combination of the two. A note in the lawyer's file reads:

(2) rain + piston ring, water runs inside = silence
The meeting does not only function to produce a coherent narrative, but also to produce a narrative that the client as well as the lawyer understand and can tell. It is notable, that the reason why the scooter did not work had been omitted in the reasons for the appeal. In the protected space of the defense ensemble the story has become stronger, and someone else has been enabled to tell it.

In the appeal hearing the verdict as well as the reasons for appeal are read out at the beginning. Thereby not only are both stories introduced, the one once told by the prosecution and now by the court of the first instance and the counter narrative told by Kai, but also is their controversial status as to what story can claim validity. The one story, told first, is introduced as a fact: "The defendant drove with the scooter on public ground without having issued a liability insurance …", given as a reason for the verdict, the other one merely as an alternative account.
However, although introduced with differing status and stability, by means of the appeal hearing the entire process of taking evidence has to be repeated. The narrative in the verdict, functioning as a premise, has to be opened up again and becomes subject of contestation. Before the taking of evidence the defendant is asked if he wants to say something about the case. Yes, he does. He gives the following statement.

(3) I went sailing with a friend, got into a storm, we had an accident, my friend

was slightly injured, driving home to friend's place, I took the scooter in order to get home. I had brought the scooter to the friend two weeks earlier, it worked at first, I tried to use it, but the rain finished it off.

Kai Kuhnau retells the story he told in the first instance and his lawyer told in the reasons for appeal. Hence he repeats and therewith stabilizes the story. After this narrative account of what-happened, the judge, and later the prosecutor ask several questions. As central emerges the question why the engine did not work. We know the answer from the lawyer's notes: rain plus piston ring means silence. What the defense ensemble, and I, did expect was that this story would have to win against the story by the two police officers who encountered Kai on the scooter. Frankly that seemed quite unlikely. But the hearing shall develop very differently. The first witness, police officer Krause, is asked about that day and ultimately if he heard the engine running. No, he says.

(4) I could not hear the engine running.
This testimony weakens the strong premise introduced by the verdict considerably. However, Krause was also in the first instance not sure if Kai Kuhnau actually drove or just scooted. Also, he seems less than interested in the case. But he leaves the story vulnerable to counter-accounts. Then, the second police-officer, Meyer, is asked in. He tells the court the story of seeing Kai Kuhnau first on the scooter and then descending when he spotted the police. However, he cannot say if he heard the engine running. German criminal trials rely on the principle of orality. Everything that informs the verdict has to be presented orally in court, even though the file might already provide a testimony. Also, the witness has to actually remember. So saying, it is as I put it down in a file note is not sufficient. This principle is negotiated very differently in different trials, depending mainly on the presiding judge. In this case the judge asked several times if the police officer really could not remember, not accepting the answer, of "if it says so in the file, that's how it was". It all comes down to the fact that today, five months after this small incident, the witness cannot remember if he had heard the engine or not.
Through this testimony the leading narrative is harmed beyond recovery. No actor in the appeal hearing is able to actually tell that story from personal experience. The counter-narrative on the other side was not only told by Kai Kuhnau himself, but also by his friend and is ultimately backed up by the expert witness who states, that everything Kai said could be possible with an engine like

that.
Kai Kuhnau is acquitted on the grounds of in *dubio pro reo*. The judge states that it might have been like the defendant said and even the prosecution moves for an acquittal. None of the stories are and have to be transformed into a premise explicitly, as an acquittal has no reasons attached to it. Both narratives are on equal footing again – as different narrative accounts of an instance. A story that at one possible ending of the procedure had gained the status of a stable premise a verdict could rest upon is opened up again, unbuilt and then just vanishes.

5. *Conclusion*
When asking the question of how facts are produced in criminal proceedings, the notions of narration and argumentation point at interesting findings. The production of facts can be viewed as a process of stabilizing narratives and turning them into premises, that is making them relevant argumentatively. But not only are stories tested, stabilized and attacked on the micro-level, and then turned into products of the investigation by being used as arguments at the proceedings' check points. As the analysis showed these products can be also opened up again, unbuild and thereby facts can be turned fragile.

NOTES
[i] It may seem that the significance of narration as a means of making things plausible and eventually of constituting truth plays a particularly prominent role in the adversarial Anglo-American system. But even if the production of counter-narratives may possibly bear particular significance in adversarial contexts, Danet (1980) rather considers inquisitorial proceedings the home of narrative plausibilazation. She distinguishes two fundamentally different modes of language in legal disputes: the narrative and the questioning mode. „Whereas the modern inquisitorial model combines questioning by the judge with relative freedom of the witness to tell their stories in openended narrative style, the adversary model requires tight control of questioning so that claims are generally expressed only as answers to very specific questions." (514).
[ii] All names, dates, and places have been changed. The reported data has been translated and in the case of my protocols of court-hearings has been edited for readability.
[iii] For the binding force of early statements in criminal proceedings see Scheffer, Hannken-Illjes, Kozin (forthcoming).

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