ISSA Proceedings 2010 – Argumentative Topoi For Refutation And Confirmation

Long lists of *topoi* fill the manuals of classical rhetorical theory. There are *topoi* for the person and *topoi* for the act. There are *topoi* for encomia and *topoi* for the defence. Such lists are teaching devices designed to teach students particular aspects of the art of rhetoric. The lists are numerous, each author producing his own list. Within the realm of rhetoric *topoi* are a repeated theme, and the discussion usually concerns which *topoi* best suit each particular circumstance. The *topoi* for argumentation are taught in the two rhetorical exercises called "refutation" and "confirmation". This paper will focus on six *topoi* from these rhetorical exercises suggesting that they are better for teaching argumentation to students than some modern approaches to argumentation.

First the term *topos* and its relationship to argumentation theory should be explained. A *topos* in Greek is literally a *"place"* for finding arguments. The "place" is often understood metaphorically as a "place" in the mind, and *topoi* can refer to many different kinds of mental places. Sara Rubinelli has made a distinction among the different kinds of strategies in classical rhetoric covered by the term *topos*. The term can be an indicator of the subject matter the orators might take into consideration for pleading their causes. *Topos* can also designate a certain argument scheme that focuses on the process of inference, such as the argument from the contrary. According to Latin rhetoricians, *locus communis* designates a ready-made argument that can be re-used by other speakers (2006, pp. 253-272).

Michael Leff looks back at his forty years of studying rhetorical invention in a recent article where he concludes that the *topoi* are an ambiguous and multi-faceted concept, sometimes referring to modes of inference, sometimes to aspects of the subject, sometimes to the attitudes of an audience, sometimes to types of issues and sometimes to headings for rhetorical material. Leff points to Boethius and the difference between the dialectical and the rhetorical tradition as an

explanation for the many meanings of *topos*. The subject matter of dialectics is theses, i.e., an abstract question without connection to any particular circumstance. The subject matter of rhetoric is hypotheses, questions concerning particular circumstances. Dialectic is interested in argumentation as such; rhetorical theory is concerned with arguments on specific topics for specific audiences (2006, p. 205).

Modern approaches to argumentation usually follow the dialectic tradition and study argumentation divorced from the context. In Garssen's view, the classical concept of *topos* in rhetoric and dialectic corresponds to argument schemes. The function of argument schemes is to designate different principles of support that link the argument to the standpoint. Pragma-dialectical argumentation theory classifies argument schemes in three main categories: *symptomatic argumentation* of the "token" type, *comparison argumentation* of the "resemblance" type and *instrumental argumentation* of the "consequence" type (2001, p. 82, 91). Critical discourse analysis also views *topos* as argument schemes. Wodak has, for example, a table of strategies of justification and relativisation with lists of argumentation schemes including topos of ignorance, topos of comparison, topos of difference, and topos of illustrative example. (Wodak, 1999, pp. 36-42). It should be pointed out that the argument schemes in these modern approaches to argumentation are analytic results from argumentative texts. They were not designed for teaching argumentation. It is questionable whether learning long lists of argumentative nomenclature do actually help students develop their own argumentation.

One difference between the dialectical tradition, including the above mentioned modern approaches, and the rhetorical tradition, is that the former tends to view the argumentative *topoi* as a product of an analytical examination, while the latter views them as a process for finding arguments in particular contexts. The Italian humanist Giambattista Vico lamented already three hundred years ago that:
"In our days .... Philosophical criticism alone is honoured. The art of 'topics' is utterly disregarded ... This is harmful, since the invention of arguments is by nature prior to the judgment of their validity ... so in teaching, invention should be given priority over philosophical criticism" (Vico, 1709/1990, p. 14). Crosswhite laments that what was true in 1709 is still true today. Criticism and analysis are usually treated as the whole of invention. "Invention is rarely explored as being in some way prior to analysis and criticism" (Crosswhite, 2008,

p. 176).

This problem is well known to Quintilian. When he comes to the "places" of arguments, he corrects other rhetoricians: "I do not use this term in its usual acceptance, namely commonplaces, directed against luxury, adultery and the like, but in the sense of the secret places where arguments reside, and from which they must be drawn forth. For just as all kinds of produce are not provided by every country, and as you will not succeed in finding a particular bird or beast, if you are ignorant of the localities where it has its usual haunts or birthplace, ... so not every kind of argument can be derived from every circumstance, and consequently our search requires discrimination" (*Inst.* V.10.21). Leff comments that from Quintilian's perspective, topics are not theoretical principles. "They are precepts that have potential application to accrual cases, and their most important function is as a training device." Proper use of the topics helps to develop a capacity for arguing in precisely those situations where theory offers the least guidance. The theoretical tradition therefore does not help if one wants to find the function of *topoi*. In recent years Leff consequently has paid more attention to the rhetorical handbook tradition, such as the *progymnasmata* (2006, pp. 208-209).

1. The Progymnasmata
The *progymnasmata* are a set of preliminary rhetorical exercises designed to teach students the art of rhetoric. A *gymnasma* is an exercise and the word refers to physical exercises as well as mental exercises, the plural *gymnasmata* refers to a set of exercises. Isocrates comments that just as we need exercises to train the body, we also need exercises to train the mind, *Antidosis* 180-185. The *progymnasmata* originated in Hellenistic times and came to dominate the early stages of Roman rhetorical training and had a tremendous influence on rhetorical teaching in the renaissance. The main versions of *progymnasmata* come from Theon (first century CE), Hermogenes (second century CE) and Aphthonius (fourth century CE), see the translations by Kennedy (2003). The progymnasmata have been used throughout the schools of western civilisation and Gert Ueding even calls them the "Lehrplan Europas".

The Aphthonian set of fourteen exercises has had the most influence. Manfred Kraus has found more than 400 different editions of Aphthonius in European renaissance. The set starts with easy exercises like retelling a fable and telling a story. Next come the chreia and maxim which develop a theme with a set of *topoi*.

More advanced exercises are the encomion, comparison, characterization, description and thesis, which all prepare the students for the declamation at which the students take a stand on particular argumentative issues. The teaching idea behind the *progymnasmata* is described by Fleming (2003, pp. 105-120).

Progression in learning through the use of *topoi* is the central ideas behind the *progymnasmata*. The students are taught a topical way of thinking about rhetoric. The *topoi* come in many forms in the *progymnasmata*. When composing narratives, students should consider the six attributes of narrative; the person who acted, the thing done, the time at which, the place in which, the manner how and the cause for which it was done (Aphthonius 2.23-3.2). Theon (78.16) calls them the *stoicheia* or basic elements of the narrative. To learn how to compose a narrative the student should make sure that all these attributes were covered. When he would write a *chreia* he would have to develop the meaning of an utterance or action with a set of topoi; first, a praise of the person who uttered the saying or performed the action, then a paraphrase of the meaning in his own words, then a reason, an argument from the contrary, a comparison, an example, a testimony from reputable people and a brief conclusion. These *topoi* are called *kefalaia*, "headings" for developing a subject.

The basic training in argumentation occurs in the combined exercises "refutation" and "confirmation", number five and six in the series. The exercises presuppose that the students know how to tell a story from different perspectives and how to use *topoi* like the contrary, example, analogy and witness from other persons. Students typically refute and confirm the meaning of a narrative. This means that the students first must interpret the meaning of the narrative, typically a mythological story, analyze it and then write a small text as the basis for an oral performance in the class room. The process is hence both analysis and composition. To accomplish this task the students are given a set of six *topoi* that will guide them through the learning process. These *topoi* are 'the clear', 'the persuasive', 'the possible', 'the logical', 'the appropriate' and 'the advantageous'. Each of these *topoi* is accompanied by its opposite so that the student will look both for the clear and the unclear, for the persuasive and the unpersuasive, for the possible and the impossible, the logical and the illogical, the appropriate and the inappropriate, the advantageous and the disadvantageous. This way the students are taught the practise of two-sided arguments.

2. The clear

The first *topos* is 'the clear' and 'the unclear'. Using this *topos* the students start their interpretative process by clarifying the issue. If the subject studied was a narrative, maybe a mythological story, the interpretation of the meaning of the story would be the first part of the process. In the rhetorical perspective, stories are ways of describing human activity from a certain perspective. To analyse the perspective chosen by the narrator, the student could use the *topoi* from the previous exercise 'narrative': the person, the act, the time, the place, the means and the reason for the human activity. Such *topoi* would be pertinent in juridical cases where the background of the proposed crime would be given in the *narratio* of the speech. If these narrative *topoi* were used as questions to the text and the answer was satisfactory, then the narrative could be described as clear. Theon comments that the narration becomes clear from two sources: from the subjects that are described and from the style of the description of the subjects (2003, pp.29-30). Lack of clarity comes in many forms. A statement would be unclear if the wording does not express the meaning behind the words. In rhetorical theory clarity is a virtue of style as well as a topos for argumentation. In the rhetorical view of argumentation the linguistic expression is intimately connected with the argumentative content. So for example, Kraus argues that the rhetorical figure *contrarium* is also an argument (2007, pp. 3-19). Form and content cannot be separated. Muddled thinking cannot be expressed in a clear style.

When a student would use the *topos* 'the clear' he would try to determine the argumentative content behind the linguistic expression. The interpretation of arguments and the reconstruction of argumentation is a complicated process, some of the problems involved are described by van Rees (2001, pp. 165- 199). Under this topos, could also be listed such sub-*topoi* as the determination of the actual wording of the source criticised. Was the source quoted correctly? Was the translation correct from the original language? Under "clarity" we could also include interpretations of words and definition of terms.

The *topos* also has its opposite 'the unclear'. Expressions that are ambiguous and obscure are a sign of unclear thoughts. Looking for unclearness in the linguistic form teaches the students the need for a good language, as to spelling, choice of words and stylistic level.

3. The persuasive
The second *topos* is 'the persuasive' and 'the unpersuasive'. There is an analytical move from text to context in this process. Once the student has made a

preliminary interpretation of the meaning of the statement, customarily contained in a story, he is advised to consider the audience for whom this statement would be persuasive. For whom would this be credible? Who would believe this story? The Greek term *to pithanon,* used by Aphthonius, is the same word as Aristotle uses in his famous definition of rhetoric, "Let rhetoric be defined as an ability in each particular case to see the available means of persuasion" (*Rhet.* 1.2.1). Aristotle also comments that "the persuasive is persuasive in reference to someone" (*Rhet.* 1.2.11). The argument is not a good argument unless it persuades the intended audience.

The centrality of the audience is also emphasized in modern versions of argumentation. In the New Rhetoric by Perelman and Olbrechts-Tyteca the premises of the audience are the starting point for argumentation. The pragma-dialectical understanding of argumentation also includes a reference to an audience when it defines argumentation as "convincing a reasonable critic of the acceptability of a standpoint" (van Eemeren, 2004, p. 1).

Subtopics to the *topos* 'the persuasive' would be different kinds of analysis of the audience. Perelman and Olbrechts-Tyteca call the premises held by the universal audience premises relating to reality and divide them into facts, truths and presumptions. The premises relating to that which is preferable to particular audiences can be divided into values, value hierarchies and *loci*, a preference for one abstraction rather than another. Other kinds of analyses of the audience would be opinion polls, interviews and surveys.

This emphasis on the audience in rhetorical theory draws a line between what is true and what is persuasive. Quintilian comments that some people criticise him for suggesting "that a statement which is wholly in our favour should be plausible, when as a matter of fact it is true". It is not enough that a statement is true, it must also be credible since "There are many things which are true, but scarcely credible, just as there are many things which are plausible though false" (*Inst.* IV.2.34). To make sure that the narrative will be credible to the audience he recommends that the speaker should: 1) take care to say nothing contrary to nature; 2) assign reasons and motives for the facts on which the inquiry turns; 3) make the characters of the actors in keeping with the facts we desire to be believed; 4) do the same with place and time and the like (*Inst.* IV.2.52). These points could serve as subtopics to determine whether a narrative is credible or incredible.

Form and content cannot be separated in rhetorical theory. *Res* and *verba* are intimately connected. As students are looking for what is persuasive in the narrative analysed they should also remember that credibility or persuasiveness is the third virtue of style for the narration. And they are well advised to remember this lesson when they prepare their own composition.

As noted above, the point with the *topos* 'persuasive' is not the factual veracity of the statement; correspondence with extra-linguistic reality is beyond the purview of most rhetorical theories. This second *topos* is also not the same as the probable; probability theory belongs to the field of statistics. But that which happens often is likely to happen again. People are often the same in different circumstances. History tends to repeat itself. Looking for that which is common, usual, customary is therefore one way of finding that which is persuasive. It is reasonable to look for similarities in behaviour patterns.

4. The possible
The third topos is 'the possible' and 'the impossible'. The previous *topos* 'the persuasive' emphasised the audience and their frames of reference; now 'the possible' emphasises the physical world and its limitations. In Greek the *topos* is *to dynaton*, that which can be done. Using this *topos* the student asks whether the statement is possible. Can it be done? Are there obstacles that would make the proposed action impossible to accomplish in the future or to have been performed in the past? In a juridical context, where so much of classical rhetorical theory comes from, the prosecutor and the defence would argue whether the action could have been done considering the circumstances of the persons involved, the time, the place, the manner and the reason for the action, usually called the motive.

When the action proposed is in the future, a political issue in rhetorical theory, the deliberation would consider different obstacles to the proposal. Are there sufficient resources, economic or material? Are there other factors at work that would hinder the accomplishment? Are there legal complications? Quintilian remarks that the third consideration for deliberative oratory [besides honour and expediency] is *to dynaton* or *possible*. "The practicality of the matter under discussion is either certain or uncertain. In the latter case this will be the chief, if not the only point for consideration" (*Inst.* III.8.16). The *topos* of the possible could also be used today when teaching students argumentation. Possibility is still an issue and we could use the various connotations of the words "optimist" and

"pessimist". The optimist would see the various possibilities in a case and might see himself as a possibility thinker. The pessimist would see the obstacles and the difficulties, and he would probably call himself a realist.

5. The logical

The fourth topos is the logical and the illogical. Using this pair of *topoi* the student would look at the mode of reasoning in the argumentation. The Greek term for the *topos* is *to anakolouthon* which literally means "that which does not follow". The wording suggests that the parts of the argument should follow from one another, that the reasoning should be coherent. As an argumentative topos "that which does not follow" scrutinizes the relationship between the terms in the reasoning. The focus is especially the implied premises from which the reasoning does not follow. The topos helps to make the implied premises explicit, a basic step in an analysis of argumentation. In formal logic *non sequitur*, the Latin translation of *to anakolouthon,* is an argument in which the conclusion does not follow from the premises. The *non sequitur* concerns the formal validity of the reasoning. In this type of argument the conclusion can be either true or false, but the argument is fallacious because there is a disconnection between the premise and the conclusion. All formal fallacies are special cases of *non sequitur.*

When a student would use this topos he would look for fallacies in the argumentation. The topos can be used both for analysing argumentation from someone else and for preparing the student's own argumentation. When the student has scrutinized the coherence of the argumentation he wishes to put forward, he has probably found some fallacies and some logical inconsistencies. When the student has corrected the fallacious reasoning, he should have a watertight argument. This process of looking for fallacies is the process of using the topos of the logical. Fallacies are central to the pragma-dialectical school. It is interesting to note that formal validity is not the primary concern but comes as number four out of six *topoi* in the *progymnasmata*.

The coherence in thought corresponds to coherence in style. An *anacoluthon* is a grammatical term for when a sentence abruptly changes from one structure to another. The sentence is not completed as it started when the introductory elements of a sentence lack a proper object or complement. This is a grammatical error and should usually be avoided, but since rhetorical style is adapted to the particular situation, strict adherence to rules is not always recommended. In rhetoric an *anacolouthon* is therefore regarded as a conscious choice of style, a

rhetorical figure that shows excitement, confusion, or laziness.

6. The appropriate

The fifth topos is 'the appropriate' and 'the inappropriate'. These terms emphasize the importance of the rhetorical situation. Behind these terms we find the Greek *to prepon* "that which is fitting". Lausberg comments that *to prepon* relates both to outward circumstances and moral fitness (1998, p. 1055). It is the virtue of the parts in fitting themselves harmoniously together as a whole. The verb is used for what seems right to the eye in the situation. In Latin the corresponding terms are *aptum* and *decorum*. Other English translations would be 'the suitable', 'the seemly', 'the proper', or 'the decent'. The form and the content are two sides of the coin in rhetorical theory and therefore the rhetorical concept of *prepon* has an inner dimension relating to the components of the speech that should be in accordance with one another and an external *prepon* which concerns the relationship between the speech and the social circumstances of the speech. Quintilian treats both levels of *aptum* extensively (*Inst* XI.1.1-93)*.* "For all ornament derives its effect not from its own qualities so much as from the circumstances in which it is applied, and the occasion chosen for saying anything is at least as important a consideration as what is actually said (*Inst*. XI.1.7).

Considerations of *aptum* lead the student to consider social and cultural conventions. In rhetorical theory considerations of the rhetorical situation have been a major point of interest since Bitzer's groundbreaking article (Bitzer, 1968). Does the context of the argument have a place in a modern theory of argumentation? On this issue it is interesting to note that the definition of a fallacy has changed in the pragma-dialectical school. According to the standard definition of a fallacy, accepted until recently, a fallacy was considered to be "an argument that seems valid but is not". This classic definition restricts the concept of fallaciousness to patterns of reasoning and formal validity, and neglects the fact that many fallacies are not included. Therefore a broader definition was adopted: "deficient moves in argumentative discourse," (van Eemeren, 2001, p. 135). In his more recent writings van Eemeren, together with Houtlosser, has attempted to bridge the gap between dialectical and rhetorical views on argumentation by the concept of strategic manoeuvring, which is an attempt to find the most expedient choice of arguments to seek successful persuasion (van Eemeren, 1999). Strategic manoeuvring also leads him to redefine fallacies as "violations of critical discussion rules that come about as derailments of strategic

manoeuvring" (van Eemeren, 2006, p. 387). This is a clear example of taking the rhetorical situation into consideration in argumentation.

Quintilian comments on speakers who break the social and cultural conventions of *aptum*. They use offensive and distasteful language, upset the hearers by the wrong level of style and use the wrong type of emotions. "An impudent, disorderly or angry tone is always unseemly, no matter whom it is who assumes it". Vices of a meaner type are "grovelling flattery, affected buffoonery, immodesty in dealing with things or words that are unseemly or obscene, and disregard of authority on all and every occasion" (*Inst*. XI. 1.29-30).

Are considerations of social and cultural conventions legitimate concerns in a theory of argumentation? For a rhetorical theory of argumentation, which is concerned, not with abstract argumentation schemes, but with specific argumentation addressed to particular audiences, the rhetorical situation is the central concern. Politeness and offensiveness therefore should be concerns for a rhetorical theory of argumentation.

Students using the *topos* "the appropriate" would look for aspects of the case they are analysing that would be in accordance with social and cultural norms. The *topos* would also help the student to find elements in the analysed story, or in the position put forward by the other side, that would be inappropriate or offensive. Having analysed the rhetorical situation of someone else, the student would be ready to consider his own rhetorical situation as he performs the analysis he has prepared. What are the expectations in the class room? What norms apply? And what norms are governing the public discourse outside the class room? Political correctness is a prevailing issue even today and should therefore be taken into account in a theory of argumentation..

7. The advantageous
The sixth *topos* is 'the advantageous' and 'the disadvantageous'. Using this *topos* the student asks who benefits from the proposed action. The Greek *to sympheron* refers to the goal of the argumentation in deliberative rhetoric. The political speaker seeks to present his proposal as advantageous to the audience. This advantage could be long or short range, and could concern a particular group or the common good. The advantage could be material or concerned with honour and prestige. Aristotle comments that "the end of the deliberative speaker is the expedient, *to sympheron*, or the harmful". The political speaker recommends the

expedient and dissuades the audience from doing what is harmful. "All other considerations, such as justice, and injustice, honour and disgrace, are included as accessory in reference to this" (*Rhet* 1.3.5).

The Latin translation of the term is *utilitas*. The term 'utility' in English, together with words like 'expedience', 'interest', 'benefit', 'gain' and 'profit', would be variations of this *topos*. When a student would use this *topos,* he would engage in a simple form of what we would call ideological critique. Behind every story and statement we can suspect that there is some kind of interest hidden. Using the *topos* 'advantage' the student would ask for the real motive and who would gain by the suggested action.

8. Hermogenes' example
Hermogenes gives an example of how a student could use the six *topoi* in refutation:
"You will refute by argument from what is unclear, implausible, impossible; from the inconsistent, also called the contrary; from what is inappropriate, and from what is not advantageous. From what is unclear; for example, "The time when Narcissus lived is unclear." From the implausible, "It was implausible that Arion would have wanted to sing when in trouble." From the impossible; for example, "It was impossible for Arion to have been saved by a dolphin." From the inconsistent, also called the contrary, "To want to destroy the democracy would be contrary to wanting to save it." From the inappropriate, "It was inappropriate for Apollo, a god, to have sexual intercourse with a mortal woman." From what is not advantageous, when we say that nothing is gained from hearing these things," (2003, p. 179).

9. Argumentation with the topoi
Hermogenes' example shows how the argumentative *topoi* can function like an argument machine. The student could always say that the position he would refute is unclear, unpersuasive, impossible, illogical, inappropriate and disadvantageous. And when he would confirm his own position, he could always say that it is clear, persuasive, possible, logical, appropriate and advantageous. The problem for such a simplistic view of these *topoi* is that the rhetorical situation of the *progymnasmata* is not taken into account. Refutation and confirmation are class room exercises designed to teach two sided arguments. In the class room there would be other students prepared to speak on the same issue, but from the opposing point of view. In such a circumstance it is not enough

to state that the issue is clear to yourself, you have to convince the opposing party of the clarity of your position. It is not enough to blame the other side for muddled thinking, you must also on the spur of the moment, in the class room, with the other students as a critical audience show the lack of clarity you claim to be able to find in the argumentation from the opposing side.

This is a sophistic approach to argumentation known to the ancient Greeks as antilogic and to Romans as *controversia*. The most influential representative of Sophistic education was Protagoras, who began his textbook *Antilogiae* with the famous dictum that "on every issue there are two arguments (*logoi*) opposed to each other on everything" (Sprague, 1972, p.4). This concept was the core of Sophistic pedagogy, and Marrou notes that it was "astonishing in its practical effectiveness" (1956, p. 51). Cicero summarizes the use of *controversia* in the Hellenistic Academy as follows: "...the only object of the Academics' discussions is by arguing both sides of a question to draw out and fashion something which is either true or which comes as close as possible to the truth," *Academica* 2.8. Mendelson has shown how Quintilian makes this form of argumentation his own pedagogy of argument. Quintilian exemplifies the method in his own writing when he constantly brings in opposing viewpoints and weighs pro's and con's against each other on every issue (2001, pp. 279-282.) The purpose of the rhetorical training was *facilitas*, the resourcefulness and spontaneity acquired from continual interaction with other discourse. To be able to speak on both sides of the issue, *in utramque partem,* is at the heart of rhetorical education. This is where the *progymnasmata* come in. The learning outcome for these exercises is that the students would be able to perform speeches and argumentation on the spot. They should have acquired this ability so that they had the competence ingrained in them.

10. A good topical system
Karl Wallace, nestor in the Speech community, in an important article published in 1972 pondered the problem of *topoi* and rhetorical invention. Wallace comments that Perelman's work has limited application if we aim to construct a system of topics that is teachable to unsophisticated learners. He specifies certain parameters for a good topical system. Such a system of *topoi* should be both inventive and analytic. It should aid the communicator to find materials and arguments as well as helping the listener and critic to understand and evaluate messages. It should serve as an instrument of recall and recollection as well as

stimulate inquiry by revealing sources of ignorance. It should prompt ideas by appealing to meanings that have become symbolized in the language of speaker, writer, and audience. A good topical system should have the power to call up appropriate linguistic structures, as well as subject matter. How broad should such a topical system be? Wallace concludes that it must be sufficiently general to cut across a number of subject matters. Members of the national committee on the nature of rhetorical invention wanted something truly "generative", something that would be so powerful and far-reaching that it would breed not one system of topics, but many: Something that would have the power of modifying and correcting topics from one generation to another.

The simple proposal of this paper is that the six argumentative *topoi* in the *progymnasmata,* the clear, the persuasive, the possible, the logical, the appropriate and the advantageous, fulfil these requirements for a good topical system. The list is relatively short and it cuts across a number of subject matters. The list is truly generative and breeds many systems of topics. The six *topoi* combine stylistic form and argumentative content. There is a progression in the series that concerns the inventive process of gathering content. The six *topoi* can also function as the basic outline for the disposition for a short argumentative text. And they also teach the students the art of arguing on both sides of an issue, *in utramque partem*. Therefore the argumentative *topoi* for refutation and confirmation are better for teaching argumentation to students than the modern approaches to argumentation.

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ISSA Proceedings 2010 – Practical Reasoning In Political Discourse: Moral And Prudential Arguments In The Debate Over Bankers' Bonuses In The British Press

This paper makes a proposal about the structure and representation of practical reasoning in political discourse. We provide an overview of the arguments that were used in a particular public debate on the fairness of bankers claiming and receiving bonuses in the present context of economic crisis and discuss the structure of those arguments. We adopt an instrumentalist approach to practical reasoning, which regards all reasons for action as means-end reasons. We argue that an instrumentalist approach is supported by the particular logic of political discourse: various types of action that are defended in political discourse are supposed to be means towards the realization of political goals, seen as states of affairs or modes of social organization informed by a normative commitment to

various moral-political values (justice, equality, freedom).

We start from a distinction made in philosophy between two types of practical reasoning, *"prudential"* and *"moral"* (Gauthier 1963). Prudential arguments take the agent's desires (wants, needs, interests) as premises: if the agent desires a certain outcome, then a certain course of action is recommended; if he doesn't desire the outcome, the he has no reason to do the action. Moral arguments do not seem to have this conditional (hypothetical) structure, they present an action as necessary in itself, regardless of the agent's desires or interests, regardless of any further goal that is desired, regardless of circumstances. Prudential reasoning corresponds to Kant's hypothetical imperative, while moral reasoning corresponds to his categorical imperative. This might suggest that the structure of moral arguments is significantly different from that of prudential arguments.

The view we will defend here is that the two types of arguments have the same means-goal underlying structure, involving the same type of premises, but with significant differences in the agent's relationship towards the goal (which he may or may not desire) and in the nature of the reasons that support or inform the goal (internal or external reasons). We suggest that, together with an adequate understanding of the Speaker-oriented (as opposed to Subject or Agent-oriented) nature of deontic modality, the distinction between internal (motivating) and external (normative) reasons for action is crucial to understanding the structure of practical reasoning, including practical reasoning in the political field. Our more general concern is to arrive at a conception of practical reasoning that can be used in the analysis and evaluation of political discourse and its characteristic genres (deliberation, debate) – see Fairclough and Fairclough (forthcoming) – within a version of Critical Discourse Analysis (Fairclough 2003, 2010).

1. Practical reasoning: a cognitive-motivational account
According to Audi's (2006) cognitive-motivational account, practical reasoning is a process by which agents infer judgments favouring action from premises expressing motivation and (instrumental) cognition (Audi 2006, p. 104). Audi's account is Kantian in that practical reasoning can take duties (principles, norms), not only desires, as major premises. Thus, judgments of duty (i.e. reason) can also motivate action, not just desires. By contrast, on a Humean view of practical reasoning, defended by Blackburn (1998), all action is motivated by a combination of belief and desire, but desires are ultimately basic. It is our beliefs and our concerns (our emotional, evaluative attitudes towards those things we care about)

that together issue in action, and everything we do can be traced back to some concern we have. For the Humean, it is concerns (or desires) that are the ultimate motivators of action, while reason is merely instrumental to desire and cannot motivate by itself.

Walton's (2007) account distinguishes between instrumental and normative (value-based) practical reasoning; the latter involves arguing in favour of a certain action from a desirable goal (major premise), supported by a value premise, and from a means-goal (minor) premise. Values support goals by showing why goals are desirable. Walton's discussion brings in the concept of goal into focus: the major, motivational premise ("I want φ", in Audi's account) is represented as "My goal is to bring about A" by Walton (2007, p. 32). In saying that "friendship requires that I see my friend before he leaves London", I am indicating which value ("friendship") informs my goal of seeing him before he leaves London and makes this goal desirable (Walton 2007, p. 34). Walton's treatment of value-based practical reasoning as means-goal reasoning seems to encompass both prudential and moral reasoning, and this is a line we want to adopt and develop here. However, it seems (as in the example above) that goals are always viewed as desirable from the viewpoint of the agent, which is a position we will try to argue against.

2. Internal and external reasons
Walton's structure of practical reasoning can account very well for prudential reasoning: given what I want (based on my values) and given that doing A will help me achieve what I want, I should do A. But it does not seem to account equally well for moral reasoning, as moral reasoning makes no reference to what the agent wants, or to ends in which his wants are fulfilled. To put it differently, while in prudential arguments the major premise makes reference to the agent's desires, wants, interests, to what, following Searle (2010), we will call "desire-dependent reasons", in moral arguments the major premise makes reference to moral values, duties, obligations, norms, to "desire-independent reasons". An obligation I am under or a promise I made can be in conflict with my current desires and inclinations. In moral reasoning we say in fact this: whether you want to or not, you ought to do A. Walton's example above, involving what friendship requires, is in fact a moral argument, in which the goal is not as much desired as recognized as something the agent has to do, whatever his present inclinations.

For a Humean, all reasons are "desire-dependent" and, to a large extent, we do

follow Blackburn's (1998) Humean account, which sees the variety of reasons that motivate action as concerns, as things we care about. In other words, unless something matters to us, we will not be moved to action by our beliefs alone. Along the same lines, we suggest, a sense of duty or a promise could not motivate us to act unless doing our duty or fulfilling a promise were something that we were concerned about. If they are to effectively motivate an agent's action, all "external" reasons should ultimately give rise to a desire or concern to act on that reason.

From this point onwards, however, we part company with the Humeans and follow Searle's (2010, p. 128) account of how human institutional reality (e.g., promises, laws, norms, etc.) "locks into human rationality" by providing external reasons for action. Although these external reasons must be internalized in order to motivate action, it is recognition of such external reasons as facts that may subsequently become the ground of a concern or desire to act accordingly. Thus, the desire derives from the recognition of the external reason and is therefore not basic. We often recognize the binding force of a duty or a promise and either internalize it as motivation to act or fail to do so. We may fail to be motivated by our duties or promises, even while continuing to recognize that we have a reason to act in the prescribed way.

3. Our proposal for the structure and representation of practical reasoning
Practical arguments take premises expressing goals, values, means-goal relations and, we suggest, circumstances, i.e. the context of action. Our proposal is to view goals as (possible) future states of affairs (a variation on the semantic concept of possible worlds), which the agent may or may not desire. In the latter case, the goal is generated by reasons independent of the agent's desires, "external" or normative reasons such as duties, obligations, moral values, norms. The agent may not actually desire the goal but, in the arguer's view, he ought to desire it. Similarly, the agent may not actually care about a particular value or duty but, in the arguer's view, he ought to care. Because what the agent desires may be different from what the arguer thinks he ought to desire, we suggest looking at practical argument as a speech act involving three participants: a Speaker (Arguer), an Audience and an Agent.

On the one hand, we are trying to capture the fundamental Humean insight that all action is underlain by what we care about ('concerns'). This is why we see both goals and circumstances as being informed by our concerns: the goals we set

ourselves are underlain by what we value or care about, but the circumstances (facts) that we reason from are also selected as relevant to the claim and presented under a certain value-laden description in relation to our concerns. This is most obvious in the case where we are arguing from a description of the relevant facts which we see as a 'problem', and arguing for a course of action as 'solution' to that problem. Something may be a problem for one agent but not for another, whose concerns are different.

On the other hand, we want to incorporate Searle's externalism regarding reasons such as promises, which we also extend to duties, norms and moral values. We are of course acknowledging that only internal reasons such as desires, or external reasons that we internalize, and want to act in accordance with, can effectively motivate intentional action. But human social, institutional reality provides people with "desire-independent" reasons for action and people therefore have a reason to act accordingly even when they do not want to act on them or choose to ignore them. This is the gist of Searle's critique of the internalist (Millgram 2001, Williams 2001) position that sees all human motivation as underlain by desire (Searle 2010, pp. 127-132). Recognizing the specificity of the social world as a world of man-made institutions (commitments, contracts, laws, norms) that one is bound by even when one chooses to act otherwise underlies in fact the very possibility of normative critique.

The gist of our proposal is the following. We are detaching the Goal premise from any necessary connection with actual desire or concern: goals are states of affairs that we can actually desire but they can also be normative states of affairs that we ought to bring about even if we don't particularly desire them. Judgments that an agent ought to do something are based either on what the Speaker believes the Agent to desire or value, on motivating reasons, or on what the Speaker believes the Agent ought to desire or value, on normative reasons (or on both). The structure is the same for both prudential and moral reasoning, involving goal and value premises which, in the Speaker's view, actually do or ought to motivate the Agent, as well as means-goal relations and circumstantial premises informed by relevant desire-dependent or desire-independent reasons. In our view, moral reasoning is also of an instrumental (means-goal) type, but the goal is not just some desired state of affairs, but a normative goal that the Agent ought to desire, even if he does not, such as a state of affairs in which promises are kept or obligations are fulfilled. Such a goal would be generated by a Value premise that

the Agent ought to be concerned about, in the Speaker's view. If the Agent comes to internalize this concern as motivation to act, then he will act to bring about the goal, but even if he doesn't, it would be still possible to say that he had a reason (an external reason) to act in that way, although he chose not to. The difference between the two types of argument is captured in the following two diagrams (Figure 1 and Figure 2), where arrows indicate a relation of support or justification:
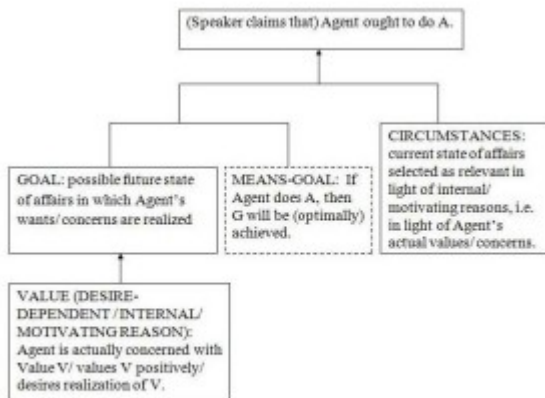

Figure 1. Arguing from desire-dependent reasons

In our view, the specificity of moral reasoning (including moral-political argumentation) derives from the recognition of external reasons for action as basic. External reasons in the political field vary from promises made by politicians in electoral campaigns, which they are then expected to act upon, to moral-political values (justice, equality, freedom) recognized as legitimate and binding and enshrined in laws. But they may also be constraints on agents' action in the sense of power or coercion – obviously, not all external reasons are moral. Recognition of the power of the state or the law, or simply of the authority or power of some individual agent, as external reasons, together with instrumental beliefs (if I fail to obey the law, unpleasant consequences might follow for me), are reasons that shape agents' action. As we argue in Fairclough and Fairclough (forthcoming), these reasons lie at the interface between agents and structures and show how agency and structure interact and shape each other.
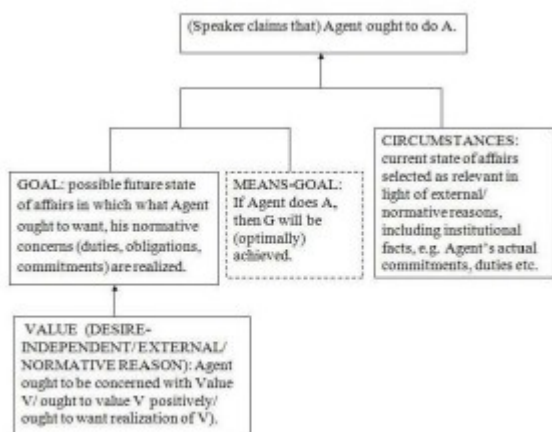
Figure 2. Arguing from desire-independent reasons

We also suggest placing such external reasons (institutional facts such as promises or norms) in the Circumstantial premise in the second diagram: they are facts that speakers argue from in saying that agents ought to be concerned with their realization. In the case of promises or norms and laws, the fact that the agent made a promise or is bound by a law or moral norm typically override any other possible consideration of what the context is or might require. When we say, for instance that, regardless of circumstances, the Agent ought to do A because he promised, we regard the fact that the Agent made a promise as the only relevant fact.

4. A moral justification of inequality: trickle-down economics and the common good

In what follows we will look at a public debate organized by St Paul's Institute and hosted by St Paul's Cathedral (2009) in London on October 20, 2009 (transcript available at http://www.stpauls.co.uk/Learning-Education/St-Pauls-Institute/2009-Programme-Money-Integrity-and-Wellbeing). The discussion focused on the responsibility of banks in the current crisis. Among the panellists were Vince Cable, then Liberal-Democrat Deputy Leader; Brian Griffith, Vice-Chairman of Goldman Sachs International, and Adair Turner, Chair of the Financial Services Authority. One of the questions was: should bankers be made to pay for the bailout, rather than keeping their profits and bonuses? This is how the Vice-Chairman of Goldman Sachs answered this question:

"When it comes to the question of bankers paying for the bailout, I think at a personal level some have paid very expensively.... I think it is very easy to construct a short-term perception of what the common good is. Let's assume, for example, we all said we're not going to have big bonuses... I believe you would

then find that leading City firms could easily hive off operations to Switzerland, to the Far East.... I believe that we should be thinking about the medium term common good, not the short-term common good, and in thinking about the medium-term common good... at least one cluster of industries we have is the financial sector. We should be proud of that in London, and we should not therefore be ashamed of offering compensation in an internationally competitive market which ensures the business is here and employs British people."

In his closing remarks, on markets and morality, Lord Griffiths also said the following:
"... I grew up in Wales, in a mining community... I can say I really understand inequality personally. If I felt that the present situation of rising unemployment, ... of almost despair ... was a permanent feature of our society, frankly I would find it very difficult to defend the City. But what I've tried to say is ... I think that we have to tolerate the inequality as a way to achieving greater prosperity and opportunity for all".

Lord Griffith's interventions were widely reported in the press. The following day, most major newspapers such as The Guardian carried headlines like the following: "Public must learn to 'tolerate the inequality' of bonuses, says Goldman Sachs vice-chairman..." (Hopkins 2009). Not surprisingly, there was public outrage. Over the next 48 hours, there were 313 comments on the Guardian website alone (see the Comments thread at http://www.guardian.co.uk/business/2009/oct/21/executive-pay-bonuses-goldmans achs with a record number (48) being deleted by moderators for offensive language. What did Guardian readers think about the views of the Vice-Chairman of Goldman Sachs? Many recognized Griffith's argument as a defence of "trickle-down" economics and "growth", although neither were explicitly mentioned, and argued that "trickle-down" has never worked:
MorrisZap 21 Oct 2009, 2:18PM. Griffiths said the British public should "tolerate the inequality as a way to achieve greater prosperity for all". Trickle-down never worked. It was always a scam for a bunch of (...) greedy, incompetent, lying bastards, to justify their outrageous salaries which they try to avoid paying tax on in any case...

BuddyBaker 21 Oct 2009, 2:26PM. Don't these people ever ask themselves why we need our economies to keep growing? I suppose they think in phrases like "a rising tide lifts all boats" and trickle-down economics. But after all these years of

GDP growth, is the average person in Britain really much better off than 30 years ago? I say thee nay. Instead we've just seen rising inequality, and a few people have become stupidly rich…. You can't have infinite growth. I don't even understand why you'd want infinite growth.

MichaelZ 21 Oct 2009, 3:45PM. So hold on a minute, we have a recession that completely discredits trickle-down economics, and is only averted from getting even worse by granting tax payers' money to the very institutions that caused the crash – and Griffith argues for more trickle-down economics. Just how out-of-touch with reality are these people?… We've "tolerated" inequality for a good few decades now, and is Britain any more prosperous?… The working people saw "wealth" built on debt (effectively Monopoly money) and an utterly insane period of house price inflation…

Several readers were outraged at what they perceived as blackmail and urged each other to call the bankers' bluff, encourage them to move abroad:
Ebert 21 Oct 2009, 2:24PM. Griffiths said that many banks would relocate abroad if the government cracked down on bonus culture… The morality of the blackmailer – so let's call his bluff.

Alebob 21 Oct 2009, 2:17PM. … Let him relocate abroad. In fact let's charter a ship and get rid of them all.

Goto100 21 Oct 2009, 2:39PM. … You organize the ship. I'll organize the submarine and the torpedo.

Let us focus first on the argument in favour of inequality: people should tolerate inequality for the sake of future prosperity and opportunity for all, a goal allegedly underlain by a concern for the "medium-term common good". The common good is offered as a normative premise ("we should be thinking about the medium-term common good, not the short-term common good"), as a concern that agents ought to have. Thus, given what people (as agents) presumably want and ought to want, a future of prosperity and opportunity for all, together with a commitment to the medium-term common good (as external normative reason that ought to motivate action), and given that, in a free market economy, allowing for inequality will help achieve this goal, inequalities in pay ought to be accepted by everyone.
Griffith spoke about "prosperity and opportunity for all". His argument was

apparently motivated by a concern for everyone's interests. Given that the action advocated allegedly benefits everyone, and is thus universalizable, in a Kantian sense, the argument is in fact intended as a moral argument. It says that people ought to be concerned with the medium-term common good and a future that benefits everyone, i.e., they ought to have these concerns even if they didn't particularly want to. The action would be the right one regardless of desires, because of the legitimate underlying value. The argument is therefore presented as a moral justification of inequality: inequality is necessary because it serves the common good, understood as what is good for everyone.

Figure 3 represents Griffith's argument. There are two claims in fact, both underlain by the same value and goal (and for the sake of economy we represent them together): the claim that the right action is to allow for highly unequal pay for bankers (where the implicit Agents are presumably banks and politicians) and the claim that people (as Agents) ought to tolerate this action. The argument is also supported a Cost-Benefit premise: unless the actions in question are performed and accepted, banks will move abroad, will stop producing revenue for Britain, will not employ British people, etc. The Costs will therefore outweigh the Benefits. The circumstances that are selected as relevant for the claim constitute the 'problem' that the action is intended to solve: "rising unemployment", "despair", the broader context of "crisis".
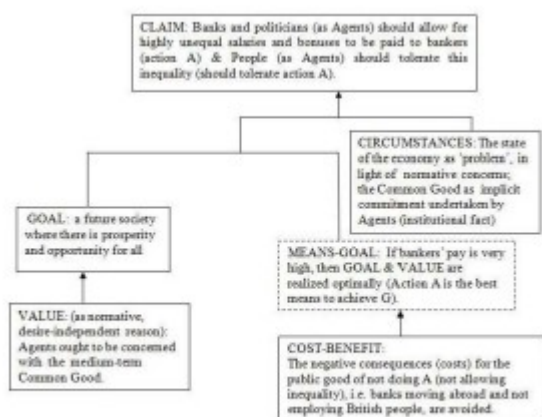

Figure 3

What does "trickle-down" economics say? According to political philosophers, it says that "inequality is justified because it promotes economic growth, thereby benefitting even the poorest members of society". Given that people are motivated by economic incentives, trying to equalize and excessively redistribute resources will cause the most hard-working people to lose the incentives to

produce. A better way of helping the poor is to promote economic growth. "Even if their share of the overall pie remains the same, perhaps even if it gets smaller, the pie will be growing at such a rate that the absolute size of their piece will be growing". Instead of "minding the gap" between the rich and the poor (relative inequality), we should be concerned with improving the position of the worst off members of society in absolute terms (Swift 2006, p. 110). We should therefore be concerned with growth, not (re)distribution, and growth is made possible by inequality.

However, even if it is granted that "trickle-down" might make sense as a description of how people would behave if incentives were removed and everyone were paid the same, it is an incoherent concept when regarded as a justification of inequality (Swift 2006, p. 125). On the one hand, the assumption underlying it is, quite overtly, that people are motivated by selfish interest: if you don't pay me a lot more to do this particular job, I will not do it and the entire system will collapse, thus damaging the interests of the worst off. Yet "trickle-down" is justified by those who advocate it because it allegedly maximizes benefits for the worst off: inequality at the top will allegedly benefit the most disadvantaged members of society. This double motivation (self-interest or other people's interest?) makes "trickle-down" economics ultimately incoherent: I can be perfectly justified in paying a lot of money to those who are holding my child hostage, but it does not mean that the final distribution of money, after I've paid them off, is justified or fair (Swift 2006, p. 125-127). We may say that a good prudential argument (based on everyone's desires and interests and on a cost-benefit analysis) is not necessarily a good moral argument as well: it is not fair that the blackmailers should get the money.

In their comments, Guardian readers rejected the "trickle-down" defence of inequality in several distinct ways. First, they rejected it on the basis of empirical evidence: people have always "tolerated inequality" and this has now resulted in worldwide recession. Secondly, people rejected the concept of growth and the assumption that growth will benefit everyone (Aleksandrow: "Greater prosperity for all??!! All who??!!"). In other words, it is wrong to sacrifice some people's interests to those of others for the sake of an overall increase in prosperity, even if there is such an increase in overall growth. Thirdly, people rejected the concept on various ethical grounds: demanding incentive payments in order to do a job that will benefit the others is a form of "blackmail". Most significantly, they

rejected Griffith's argument by invoking various conceptions of justice: it is not fair that bankers should get these unequal rewards, they certainly do not deserve them, and even if they are entitled to them according to rules they have themselves written, these rules are themselves wrong.

However, Griffith's argument was clearly advanced as a moral argument, underlain by a normative concern for the common good, which supposedly will generate a future of prosperity and opportunity for all involved. Yet why, we may ask, is there a need to "tolerate" an arrangement which is right anyway because it serves the common good? A closer look at the structure of Griffith's argument will show why exactly the "trickle-down" defence of inequality is incoherent and could never serve as a justification of inequality. This is because, we argue, the argument, as stated, is a rationalization: the reasons that are being offered are not the real reasons. The common good is not in fact the underlying value, although it claims to be, and the goal is not that of prosperity and opportunity for each and every citizen. The real, unstated value that underlies the argument is self-interest and it is related to the unstated goal of economic growth. Given what is in the bankers' interests and given that in the process of serving those interests some positive side-effects will "trickle down" as by-products (benefits) of the logic of perpetual growth, and given the costs to the system of refusing to pay them, they ought to be paid a huge amount. The argument cannot be a moral argument but at most a prudential one analogous to an argument which says: it is in your interest (because of the potential costs) to pay off the blackmailers. Then it will make sense to also say that you have to "tolerate" this arrangement in order to avoid undesirable costs. But it will also be obvious that the interests of the two parties involved do not really have much in common, there is no "common good" that they both share.

To conclude, there could be a justification of inequality (inequality is functionally necessary, a necessary evil), but it cannot be a moral justification. Its best approximation is the argument from blackmail, which is in fact how many Guardian readers interpreted it. As for the "common good", it is in fact represented by an aggregate conception of growth and some "trickle-down" of wealth as an alleged benefit of inequality. We represent this structure as follows (Figure 4):
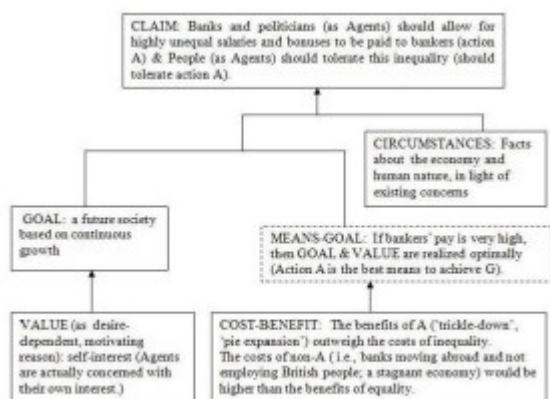
Figure 4

5. Justice as fairness, justice as desert. Political values as desire-independent, external reasons for action

We have argued that Lord Griffith's argument is not a moral argument although it is dressed up as one, as it invokes the common good as an alleged value premise. The comments thread however involved genuine moral argumentation: people did not argue from their own desirable goals but from moral-political values they thought everyone ought to be concerned with. Many posts focused on the idea that bankers do not deserve the high pay they get: they do not produce anything useful, their so-called talents are worthless and they are being rewarded for failure:

LeavesNoWitnesses 21 Oct 2009, 2:38PM. What an arrogant swine! Can he please explain how do banks serve the economy by sucking money out of it when most of the economy is in ruins? Why should we reward these idiots in charge of financial institutions that do not produce anything of value to the society? I'm really lost here. Furious, just furious.

AlanMoore 21 Oct 2009, 2:16PM. Idiot. It might be considered an investment to the general good if these bastards actually generated any wealth – or did anything useful. But they don't, all they do is distort markets for short-term benefit…

Samboy 21 Oct 2009, 2:21PM. What these greedy snout-in-the-trough bankers utterly fail to grasp is that the obscene bonus culture which was in place before the collapse of the financial sector rewarded long term failure not success. Where's my f*cking bonus for being part of the investment group which provided 1 trillion pounds worth of capital to ensure that Goldman Sachs could continue to trade?

Another conception of justice that was implicit in many of the posts was "justice

as fairness", with particular emphasis on equality as political value:

deano30 21 Oct 2009, 2:36PM. Foolish tosser – a society is never the richer if its good fortune is based on rampant inequality. It is a flawed and fractured place which is just about to fall apart at the seams.

Harrymanback 21 Oct 2009, 2:15PM. ... [O]ne rather large hole in his argument... is the mountain of evidence that shows that happy societies are those that have low inequality, not those that are rich.

Equality and fairness were also defended in the sense of equal treatment of similar situations. If the bankers want to keep the profits, they must swallow up the losses and repay their debts first. In other words you cannot demand one rule for yourself and another one for everyone else.

farandolae 21 Oct 2009, 2:38PM ... so we face unemployment, massively reduced pensions, big cuts in public services and some of the people who put us in this mess get an average of GBP 450,000+ on top of their salary. Seems fair.

The Paladin 21 Oct 2009, 9:39PM. That's fine... You want to keep paying, I'll let you collapse when you don't bloody listen. Fair dos.

jacko121 21 Oct 2009, 11:40PM. ... if you are not ashamed at paying your staff then you should not be ashamed at repaying your debt to the tax payers first.

Several comments addressed justice in the sense of equal treatment by means of analogies:

patelvijay 21 Oct 2009, 2:14PM. Banks must learn to "tolerate the fairness" of collapse when they mess up.

2LSE 22 Oct 2009, 9:22AM. Err ... didn't the French aristocracy also think that the peasants should tolerate inequality???

Here, we shall draw on political philosophy in order to clarify an important distinction. It is a distinction between a concept of justice and various conceptions of justice (Swift 2006, pp. 11-12). The concept of justice means giving people what is due to them (thus, justice is tied to duty and to rights, not to what is "desirable"). There are however various particular conceptions of justice, different ways of filling out the basic logic of the concept: Rawls's conception of justice as fairness, Nozick's conception of justice as entitlement and the popular conception of justice as desert.

In this thread, people argued from a conception of justice which rules out privileging certain people at the expense of others, or putting some alleged aggregate conception of growth above the rights and interests of individual people. The allegedly desirable goal of "growth" was challenged from the perspective of the goal of a just or fair society. Basically, people argued against Griffith's allegedly moral argument by constructing their own moral arguments with similar structure but different underlying values and goals. Instead of the goal of growth, people argued from the normative goal of a just of fair society (in Swift's terms, from a concept of justice, as a state of affairs in which everyone gets what is due to them, whether according to desert or a more egalitarian conception, such as Rawls's "justice as fairness" – Rawls 1971, 1993, 2001). The popular conception of justice as desert, for example, says that talented, hard-working or successful individuals deserve more rewards than untalented, idle or unsuccessful ones. We can represent the arguments from justice-as-fairness and justice-as-desert as follows, in Figure 5:
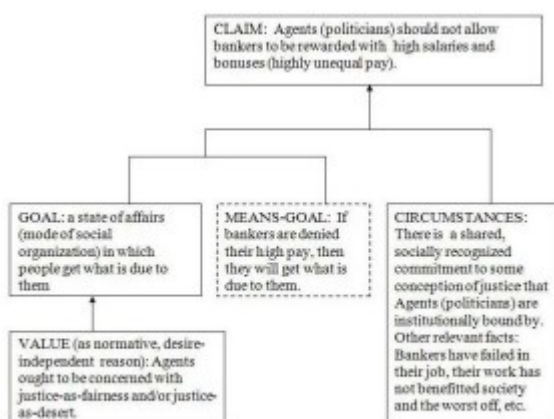

Figure 5. Arguing from justice-as-fairness/ justice-as-desert

If we argue from the goal of justice and the specific value of desert, coupled with the factual premises that bankers have in fact failed, that their work involves no special talent or difficulty, as well as the institutional fact of a conception of justice-as-desert as a socially recognized, normatively binding commitment, we are led to the claim that they should not receive bonuses. The reasoning is analogous for justice as fairness (which we discuss in detail in our forthcoming book). The moral claim that is made is based on goal, means-goal, value and circumstantial premises, like any prudential claim, only differently understood. The goal is not one that some people happen to desire because it satisfies their own concerns, but one in which nobody's particular desires or concerns are privileged over anyone else's, i.e. a society that gives everyone what is due to

them. Likewise, the value premise says that agents ought to be concerned with justice-as-desert or justice-as-fairness, while some conception of justice is viewed as a publicly recognized and normatively binding commitment, part of an explicit or tacit contract with the citizens, as an institutional fact that politicians and the state are expected to act upon even when there seems to be little political will to do so.

6. Conclusion

We have represented arguments focusing on justice issues in a similar way to prudential arguments, as involving the same type of premises, including goal and means-goal premises, i.e. an instrumental structure. An argument in favour of a particular type of political action is intended to contribute to the realization of a particular vision about what society should be like (political goal), grounded in a normative concern for certain moral-political values (rights, obligations, shared norms), regarded as institutional facts.

We agree with the Humean view that what underlies action are beliefs and concerns (Blackburn 1998), e.g., a desire for my wellbeing as well as for the wellbeing of others, and these are internal reasons. Recognition of external reasons has to be accompanied by a desire to act accordingly in order to lead to action, so desire-dependent reasons underlie all action. However, while all action springs from beliefs and desire-dependent reasons, an argument for action can take desire-independent reasons as premises, and these may subsequently be internalized by agents as concerns and motivate action. In acknowledging this, we have moved beyond the Humean conception and adopted Searle's view of the irreducible nature of certain external reasons, such as those we create by entering into contracts with other people, making promises, being part of human society and abiding by its rules, norms and laws. It is recognition of such reasons that can lead to the formation of a desire to observe their binding force, but the concern or desire derives from the reason we recognize, and not vice-versa (Searle 2010, p. 131). In the arguments we looked at, people argued from pre-existing norms and obligations (from an implicit "social contract") whose binding nature ought to be recognized and internalized as motivation by politicians and by the state in deciding on a course of action. Even when politicians apparently fail to care about this social contract, and thus fail to act from a commitment to social justice, they ought to do so: they have a reason to do so, and one that they themselves have created by accepting a mandate of political representation.

Our conclusion is that we can preserve the same schema for both prudential and moral practical reasoning if (a) we understand Goals properly, as states of affairs, thus detaching them from any intrinsic connection with desire; and (b) if we understand the specific nature of the social world, as a world of man-made institutions, which generate external, desire-independent reasons for action. In the moral arguments we have discussed, the goal was a mode of social organization that is just, that gives everyone what is due to them, irrespective of anyone's particular desires. With regard to external reasons, we have seen that they are irreducible to internal reasons but can ground people's internal motivations, such as a desire to act so that a promise made is actually fulfilled, or a socially shared norm or contract is observed and abided by rather than ignored. An institutional obligation to be fair and impartial can only motivate people through the mediation of a concern for or desire to be fair and impartial, but it is recognition of such an independent obligation as an institutional fact that grounds (whenever it does) the concern that can subsequently lead to action. External reasons that ought to motivate but fail to do so (e.g., social contracts that are broken, publicly recognized values and norms that are disregarded) are a good starting point for social critique.

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ISSA Proceedings 2010 – Strategic Manoeuvring In The Case Of The 'Unworthy Spouse'

1. Introduction

In research of legal argumentation different aspects of the process of legal justification have been the object of study. Some researchers consider legal justification as a rational activity and for this reason are interested in the rules that should be observed in rational legal discussions. Others consider legal justification as a rhetorical practice and are interested in the way

in which judges operate in steering the discussion in the direction that is desirable from the perspective of certain legal goals.

That both aspects of the legal 'enterprise', rational dispute resolution and a rhetorical orientation to a particular result through strategic manoeuvring, can also be reconciled is something that has received little attention in research of legal argumentation. The aim of this contribution is to analyse the way in which courts try to reconcile the dialectical goal of resolving the difference of opinion in a rational way with the rhetorical goal of steering the discussion in a particular direction that is desirable from the perspective of a particular development of law.

To this end I shall analyse the strategic manoeuvring in the justification of the Dutch Supreme Court in the famous case of the 'Unworthy Spouse' in which a spouse who had murdered his wife claimed his share in the matrimonial community of property. In this case it had to be established whether and on what grounds an exception to article 1:100 of the Dutch Civil Code, that entitles a spouse to his share in the community of property, can be justified. (For an overview of the relevant legal rules see A at the end of this contribution.) The District Court, the Court of Appeal and the Supreme Court all agreed that an exception should be made and they all justified the exception by referring to certain legal principles that can be summarized as 'crime does not pay'.[i] However, with regard to the exact argumentative role of the legal principles the Supreme Court adopts another position than the other courts but it does not express this position explicitly but presents it in an indirect way as the interpretation of the decision of the Court of Appeal, thereby giving another interpretation of the argumentative role of the legal principles than was originally intended by the Court of Appeal.

In my contribution I shall describe how the Dutch Supreme Court manoeuvres strategically in its role as court of cassation when attributing a different argumentative role to the legal principles than is intended by the Court of Appeal.[ii] I shall explain how the Supreme Court operates strategically in its capacity of court of cassation to promote a particular development of law with respect to the role of legal principles to make an exception to a rule of law.

The central question in the case of the Unworthy Spouse is whether behaviour that can be considered 'unacceptable from the perspective of a sense of justice' or

'repugnant to justice' must also be considered as unacceptable from the perspective of civil law when there are no existing rules on the basis of which this behaviour can be characterized as unacceptable. In this case the question is whether a spouse (in this case L.) who has murdered his 72 year old wife (mrs. Van Wylick) after 5 weeks of marriage and who has been convicted of murder in a criminal procedure, still has a right to his legal share in the marital community property on the basis of article 1:100 clause 1 (old) of the Dutch Civil Code, and if he does not have such a right how the exception should be justified for this case.

In this case the Court of Appeal decides that L. Does not have a right to his legal share in the marital community of property, making an exception to the rule of 1:00 of the Civil code for this case. The Court of Appeal justifies the exception by referring to two legal principles. The first principle is that he, who deliberately causes the death of someone else, who has benefited and favoured him, should not profit from this favour (P1). The second principle is that one should not profit from the deliberately caused death of someone else (P2). Furthermore the Court of Appeal argues as an 'obiter dictum' that also the requirements of reasonableness and fairness would justify making an exception in this particular case. An overview of the main structure of the argumentation of the Court of Appeal is given in scheme 1A.
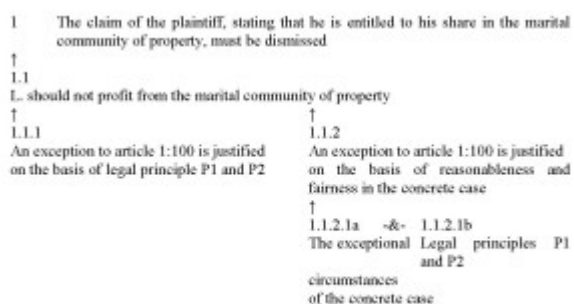
Scheme (1A)   Overview of the main structure of the argumentation of the Court of Appeal

The Supreme Court also answers this question positively. However, the Supreme Court gives another justification of the exception by considering the exception on the basis of reasonableness and fairness as the main argument. An overview of the main structure of the argumentation of the Supreme Court is given in scheme 1B.
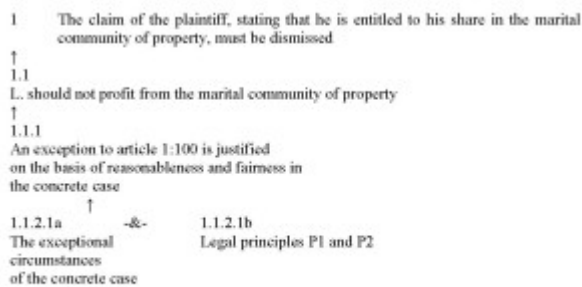
As is indicated in scheme IB, in support of this main argument (1.1.1), the Supreme Court mentions the two legal principles in 1.1.2.1b in combination with the exceptional circumstances of this case. In doing so, the Supreme Court departs from the way in which the argument of reasonableness and fairness was presented by the Court of Appeal, i.e. as an obiter dictum (argument 1.1.2), while the two legal principles were presented by the Court of Appeal as the independent main argument 1.1.1.

As is mentioned by the annotator, from the perspective of legal certainty the Supreme Court wants to give a signal to the legal community that general legal principles cannot constitute a reason for making an exception to a legal rule that forms one of the cornerstones of Dutch family law. For this reason the Supreme Court chooses for the 'safe' option of restricting the exception to the concrete case by using the derogating function of reasonableness and fairness (which will be introduced in the new article 6:2 of the Civil Code) as the *main argumentation* 1.1.1 and the legal principles as *supporting coordinative argumentation* (1.1.2.1b) in combination with the exceptional circumstances (1.1.2.1a).

In this paper I will answer the question what the discussion strategy of the Supreme Court in rejecting the cassation grounds and in changing the argumentative role of the legal principles exactly amounts to from the perspective of the space he has to manoeuvre strategically as a court of cassation. In my analysis of the argumentation strategy of the Supreme Court I use the concept of *strategic manoeuvring* developed by van Eemeren (2010) and van Eemeren and Houtlosser (2006, 2007). In their approach strategic manoeuvring is conceived as an attempt to reconcile the dialectical goal of resolving a difference of opinion in a reasonable way with the rhetorical goal of steering the resolution in a particular direction.

Van Eemeren and Houtlosser describe a *discussion strategy* as a methodical

design of discussion moves aimed at influencing the result of a particular discussion stage, and the discussion as a whole, in the desired direction. A discussion strategy consists of a systematic, co-ordinated and simultaneous exploitation of the options available in a particular stage of the discussion.

Starting from this conception I shall show that the discussion strategy of the Supreme Court can be described as a consistent effort in the different stages of a critical discussion to steer the discussion in the desired direction.**[iii]** I characterize the choices the Supreme Court makes in the different stages as a methodical design to steer the outcome of the discussion in the preferred direction, within the boundaries created by the institutional conventions for the discussion in cassation.

2. Analysis of the discussion strategy of the Supreme Court in the case of the 'Unworthy Spouse'
The aim of the procedure in cassation in the Netherlands is to establish what the law in a particular case should be and how the law should be applied in that case. To this end, in this case the Supreme Court must decide whether the decision of the Court of Appeal is in accordance with the law. For this case this implies that the Supreme Court must investigate whether the rules of law that are applied by the Court of Appeal have been applied correctly.

From this perspective, the dialectical goal of the discussion is to establish whether the protagonist in the case in cassation, the Court of Appeal, has defended its decision successfully against the attacks of the antagonist, the plaintiff in cassation, in light of the common starting points, the rules of law, so that the Court of Appeal can maintain his standpoint, or whether it has been attacked successfully. In this case the Supreme Court tries to reconcile this dialectical goal with the rhetorical goal to steer the discussion in the desired direction, i.e. to convince the audience that application of the rule without making an exception for the concrete case would be unacceptable from the perspective of justice.**[iv]** To attain this rhetorical goal, the Supreme Court gives a particular interpretation of the system of the law of inheritance by attaching a particular argumentative role to the general legal principles as a legal ground for making an exception to article 1:100 clause 1 of the Civil Code.

To be able to decide that the decision of the Court of Appeal can be maintained, the Supreme Court adopts a particular discussion strategy that consists of a

combination of two 'moves'. First, the Supreme Court wants to be able to decide in the concluding stage of the discussion that the attacks of the plaintiff in cassation L have failed. To realize this aim, in the argumentation stage the Supreme Court must decide that the argumentation of the Court of Appeal is in accordance with the common starting points. To be able to decide this, in the opening stage the Supreme Court must select those starting points that make this evaluation of the argumentation of the Court of Appeal possible.

Second, the Supreme Court wants to give a decision that makes clear that an exception to the rules of family law and the law of inheritance can only be made in very special circumstances. For this reason the Supreme Court must select those starting points that are desirable in light of this view on the development of these branches of law. For this reason, in the opening stage the Supreme Court does not only decide about the role of reasonableness and fairness and certain legal principles as starting points, but also about their argumentative role.

In my analysis I shall explain how this discussion strategy manifests itself in the justification of the decision of the Supreme Court as given in scheme 1B.**[v]** I shall do this on the basis of the statements of the Supreme Court in the legal considerations 3.2-3.5 (see F at the end of this contribution) that I shall analyse in terms of certain moves in a critical discussion.

The confrontation stage
In this case, the *confrontation stage* that is intended at realizing the dialectical goal of establishing the difference of opinion, is represented by the cassation grounds formulated by the plaintiff in which he formulates his objections against the decision of the Court of Appeal.**[vi]** The plaintiff is of the opinion that the Court of Appeal has made a mistake in applying the law by deciding erroneously that certain legal principles apply and by deciding erroneously that it is justified to make an exception to article 1:100 clause 1 of the Civil Code on the basis of reasonableness and fairness. Because the plaintiff determines the content and scope of the difference of opinion, the Supreme Court has no space to manoeuvre strategically in this discussion stage.

The opening stage
In the *opening stage* the discussion strategy consists of a methodical design of discussion moves aimed at reconciling the dialectical goal of establishing the common starting points with the rhetorical goal of establishing those starting

points that are advantageous in view of his final goal of dismissing the appeal in cassation so that the decision of the Court of Appeal can be maintained as well as a particular development of law. The Supreme Court exploits the space he has on the basis of his dialectical role to establish the common legal starting points in a specific way.

In civil procedure in the Netherlands the latitude to establish common legal starting points is specified in article 48 of the Code of Civil Procedure that gives the judge, in this case the Supreme Court, the authority to formulate the legal grounds. In this case it uses this latitude to formulate the legal grounds on the basis of which the exception to article 1:100 clause of the Civil Code can be justified.

The discussion strategy in the opening stage amounts to the following. The Supreme Court chooses those starting points from the topical potential that it needs to steer the result of the opening stage in the desired direction: it chooses those starting points that it needs in the argumentation stage to be able to evaluate the attack of the plaintiff as a failed attack on the argumentation of the Court of Appeal. In doing so the Supreme Court tries to adapt to the preferences of the legal community by taking into account that acknowledging the claim of the plaintiff would be 'unacceptable for the sense of justice', as is also stressed by the Advocate-General Langemeijer.

In the old matrimonial property law there was not a rule specifying when someone is unworthy to inherit. To avoid a result that would be unacceptable to the sense of justice therefore the Supreme Court must create a possibility to make an exception to article 1:100 clause 1 of the Civil Code on the basis of certain common legal starting points. The Supreme Court establishes the common starting points by acknowledging that it is possible to make an exception to article 1:100 and it establishes that this exception can be justified on the basis of reasonableness and fairness and on the basis of certain legal principles. In doing so the Supreme Court rebuts the statement of the plaintiff that the exception can not be justified in this way.

Apart from this decision about the status of reasonableness and fairness and the legal principles as common legal starting points, the Supreme Court also decides about the *argumentative function* of these common starting points. The Supreme Court does this in an implicit way with the following statement in consideration in

which it rejects the statements in the cassation grounds of the plaintiff:

'As appears from the cited formulation, in this context the legal principles only play the role that they have contributed to the decision of the court that the requirements of reasonableness and fairness make the exertion of his right to his share in the inheritance inadmissible. As far as the parts A and B read in legal consideration 5.18 that the court has used these principles as a direct legal ground for denying this right, they lack a factual basis'.**[vii]** As is shown in the analysis of the argumentation of the Court of Appeal in scheme 1A and the analysis of the argumentation of the Supreme Court in scheme 1B, the Supreme Court gives an interpretation of the argumentation of the Court of Appeal that departs from the way in which the court has intended it. The Supreme Court gives the legal principles the function of subordinate argumentation and does not consider them as independent argumentation as they were presented by the Court of Appeal.

The argumentation stage
In the *argumentation stage* the discussion strategy consists of a methodical design of discussion moves aimed at giving a positive evaluation of the argumentation of the Court of Appeal in light of the attacks by the plaintiff. In the argumentation stage the Supreme Court tries to reconcile the dialectical goal of establishing the acceptability of the argumentation of the Court of Appeal on the basis of common testing methods in light of the attacks of the plaintiff with the rhetorical goal of evaluating the attacks of the plaintiff in such a way that these attacks fail. To attain this, the Supreme Court uses the common starting points formulated in the opening stage. In doing so, the Supreme Court exploits the space it has within his dialectical task and the authority it has on the basis of the legal rules to evaluate the argumentation in a special way.

The discussion strategy manifests itself first in the statements in the decision in which the Supreme Court decides in legal consideration 3.2 that the grounds of cassation A and B 'cannot lead to cassation' because they 'lack interest', 'lack a factual basis' and 'depart from a wrong conception of the law'. The strategy manifests itself second in the decision in legal consideration 3.3 cited above that the statement about the exception on the basis of reasonableness and fairness from part C is wrong.

These decisions imply that the attack of the plaintiff (in cassation grounds A and

B) on argumentation line 1.1 of the Court of Appeal has failed because the legal principles do exist. The attack (in cassation ground C) on argumentation line 1.2 also fails because the Supreme Court decides that the possibility to make an exception is possible, but only in very special circumstances.

To be able to make the choice from the topical potential that is most suitable to reach the desired result of the argumentation stage, the Supreme Court has prepared these choices in the opening stage. The Supreme Court chooses to present part C of the cassation grounds as a failing attempt to attack the decision by using the formulation that says that C 'contests in vain' part 5.18 of the argumentation. The Supreme Court presents the attacks in the cassation grounds A and B as failing attacks and characterizes them in legal terms as attacks that cannot lead to cassation 'because of lack of interest'.

The concluding stage
Finally, in the *concluding stage*, the Supreme Court decides on the basis of this evaluation of the grounds of cassation in the argumentation stage that the appeal in cassation must be dismissed, which implies that the decision of the Court of Appeal can remain intact. The Supreme Court uses the space he has within his dialectical tasks and the authority he has on the basis of the applicable legal rules to present the choices he has made in the previous stages as a justification of his final decision.

The discussion strategy of the Supreme Court implies that it does two things at the same time. First it decides that the attacks by the plaintiff on the argumentation of the Court of Appeal have failed so that the decision can remain intact. Second, the Supreme Court gives an implicit interpretation of the argumentation of the Court of Appeal that departs from the way in which the argumentation was intended. This discussion move is not necessary to accomplish the dialectical goal of establishing the acceptability of the argumentation of the Court of Appeal because the Supreme Court can dismiss the appeal without this interpretation. The differing interpretation can be considered as an implicit 'obiter dictum' that the Supreme Court gives as a signal to the legal community in his capacity as judge of cassation to point out how the law should be developed. By choosing an interpretation in which the Supreme Court justifies the exception to article 1.100 clause 1 of the Civil Code on the basis of reasonableness and fairness that is supported by an appeal to the legal principles instead of a direct appeal to the legal principles, the Supreme Court makes indirectly clear that it

does not want to consider the legal principles as the main argument and therefore as the main reason to make an exception.

3. Conclusion

With this analysis of the discussion strategy of the Supreme Court to establish the legal and argumentative function of certain legal principles in a concrete case as a systematic effort in the various discussion stages I have clarified how the Supreme Court combines a rational resolution of legal disputes and a rhetorical choice and presentation of discussion moves. The Supreme Court uses the space it has within the boundaries of his dialectical role and the applicable institutional rules to manoeuvre strategically to resolve the difference of opinion and at the same time establish the argumentative role of the applicable legal principles. In the opening stage the Supreme Court uses the space it has within the institutional boundaries to establish the common legal starting points. It establishes the content of the common legal starting points in such a way that it is able to give a negative evaluation of the attacks of the plaintiff in the argumentation stage. On the basis of this negative evaluation it can finally dismiss the appeal in the concluding stage. At the same time, the Supreme Court also uses the space it has within the institutional boundaries to establish the argumentative role of the common legal starting points. The Supreme Court decides that in making an exception to rule 1:100 of the law of inheritance, this exception must be restricted to the concrete case.

NOTES
[i] See the decisions published in NJ 1988/992, 8-4-1987, NJ 1989/369, 24-11-1988, NJ 1991/593, 7-12-1990.
[ii] Cf. the case of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) mentioned by Dworkin (1986, pp. 15-20) as an example of a systematic interpretation of the law of inheritance with the aim of clarifying the underlying principles.
[iii] For other analyses of the strategic manoeuvring in legal decisions see Feteris (2008, 2009a and 2009b).
[iv] In the case of legal justification the audience of the Dutch Supreme Court is a composite audience consisting of various 'groups'. Firstly the audience consists of the parties in dispute. Secondly, in cases of appeal and cassation, the audience also consists of the judges that have taken prior decisions. Thirdly, the audience consists of members of the legal community of legal practitioners such as other judges and lawyers for whom the justification provides information about the way

in which the law needs to be applied according to the Supreme Court. Although the decisions do not have the status of precedents, other judges and lawyers take into account the opinions of the Supreme Court in similar cases.

[v] See for a more extended analysis of the decision of the Supreme Court analysis D at the end of this contribution.

[vi] For the relevant parts of the decision of the Court of Appeal see E at the end of this contribution. For a more extended analysis of the argumentation of the Court of Appeal see B at the end of this contribution. For an analysis of the argumentation of the plaintiff see C at the end of this contribution)

[vii] See for the complete text of the justification of the Supreme Court F at the end of this contribution.

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Appendix
A. Legal rules applied in the case of the Unworty Spouse
Article 1:100 of the Old Dutch Civil Code

1. The spouses have an equal share in this divided community of property, unless a different division is established by means of a marriage settlement (…).

Article 4.3 of the New Dutch Civil Code

1.Legally unworthy to profit from an inheritance are: He who has been condemned irrevocably because he has killed the deceased, he who has tried to kill the deceased or he who has prepared to kill the deceased or has participated in preparing to kill the deceased.

Article 6:248, 2 of the Dutch Civil Code

An arrangement that is valid between the creditor and the debtor on the basis of the law, a custom or a legal act, does not apply if this is unacceptable from the perspective of the standards of reasonableness and fairness

Article 3:12 of the Dutch Civil Code

When establishing what reasonableness and fairness require, generally accepted legal principles, legal convictions that are generally accepted in the Netherlands, and social and personal interests in a particular case, should be taken into account.

B. Decision of the Court of appeal

1. The claim of L, stating that he is entitled to his share in the marital community of property, must be dismissed

1.1 L. should not profit from the marital community of property (5.17, 5.18)

1.1.1 In the special circumstances of the concrete case an exception to the legal division on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of the following two legal principles:

1.1.1.1a He, who deliberately causes the death of someone else, who has benefited favoured him, should not profit from this favour (5.13) (*legal principle P1*)

1.1.1.1a.1 Article 3:959 of the Dutch Civil Code and article 4:1725 sub 2e of the Dutch Civil Code (5.14)

1.1.1.1b One should not profit from the deliberately caused death of someone else (*legal principle P2*)

1.1.1.1b.1 Article 3:885 sub 1e of the Dutch Civil Code

1.1.2 In the concrete case an exception to the legal division of the marital community of property on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of reasonableness and fairness as specified in article 6:2 section 2 of the New Dutch Civil Code

1.1.2.1a The exceptional circumstances of the concrete case

1.1.2.1b He, who deliberately causes the death of someone else, who has favoured him, should not profit from this favour (5.13) **(***legal principle P1***)**

1.1.2.1b.1 Article 3:959 of the Dutch Civil Code and section 4:1725 sub 2e of the Dutch Civil Code (5.14)

1.1.2.1c One should not profit from the deliberately caused death of someone else (*legal principle P2***)**

1.1.2.1c.1 Article 3:885 sub 1e of the Dutch Civil Code

C. Argumentation of the plaintiff in cassation

1. The decision by the court in which it denies my claim that I am entitled to my share in the marital community of property must be nullified because the court has made mistakes in the application of the law

1.1a The court erroneously has based its decision on the two general *legal principles P1 and P 2* (grounds of cassation A and B attacking argument 1.1.1)

1.1a.1a These principles do not exist

1.1a.1b These principles do not apply because I am not favoured by the marriage

1.1a.1b.1 The marital community op property is not a favour and I have not profited from the death of mrs. Van Wylick because I had already become the owner of half of the marital community on the basis of my marriage with her

1.1b On the basis of article 11 AB the judge is not allowed to make an *exception to a clear legal rule on the basis of reasonableness and fairness* (ground of cassation C attacking argument 1.1.2)

D. Decision of the Supreme Court

1 The claim of L, stating that he is entitled to his share the marital community of property, must be dismissed

1.1.1 In the concrete case an exception to the legal division of the marital community of property on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of reasonableness and fairness as specified in clause 6:2 section 2 of the New Dutch Civil Code

1.1.1.1a The exceptional circumstances of the concrete case

1.1.1.1b In the concrete case an exception to the legal division on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of the following two legal principles:

1.1.1.1b.1a He, who deliberately causes the death of someone else, who has favoured him, should not profit from this favour (5.13) **(***legal principle P1***)**

1.1.1.1b.1a.1 Article 3:959 of the Dutch Civil Code and article 4:1725 sub 2e of the Dutch Civil Code (5.14)
1.1.1.1b.1b One should not profit from the deliberately caused death of someone else (*legal principle P2*)
1.1.1.1b.1b.1 Article 3:885 sub 1e of the Dutch Civil Code

E. Text of the decision of the court of appeal NJ 1989/369, 24-11-1988
5.13 Since the district court has assumed that Mrs. Van Wylick intended with the marriage – that also according to L was a marriage of convenience- a financial benefit for L, the district court has rightly stressed that to the factual situation described in the foregoing the general legal principle is applicable that he, who has deliberately caused the death of someone else, who has favoured him, should not profit from the this favour.
(…)
5.16 In this context it is also important to mention that the aforementioned legal principle is closely related to another legal principle, i.e. that one should not profit form the deliberately caused death of someone else, which principle has among others been expressed in article 885 under 1 book 3 CC.
(…)
5.17 Application of the mentioned legal principles leads under the aforementioned facts and circumstances to the conclusion that L is not entitled to the benefit that is the consequence of the community of property created by the marriage without a marriage settlement ('huwelijkse voorwaarden') with mrs. van Wylick.
5.18 Also an examination of the claims of L in light of the requirements of reasonableness and fairness according to which he is supposed to behave in the community of property that is created by the marriage, as is stated by Brouwers c.s., leads to the conclusion that L should not profit from the marital community of property. In this case the court applies a strict standard because the appeal to reasonableness and fairness is aimed at preventing the claims of L completely. Also when applying such a strict standard the court is of the opinion that the claims of L must be considered as so unreasonable and unfair, in the aforementioned special circumstances of this case and also considered in light of the mentioned general legal principles, that the exertion of the claimed rights must be denied to him completely.

F. Text of the decision of the supreme court NJ 1991/593 07-12-1990
Supreme Court:

(...)

3. Evaluation of the means of cassation

3.1.1 In cassation the following must be taken as a starting point:

L who is born in 1944, has taken care of the 72-year old van Wylick from January 1983 receiving payment in compensation for the care, initially several days per week and in a later stage on a daily basis. On September 29, 1983 L has married mrs. Van Wylick without making a marriage settlement. The marriage took place in another place than where the future spouses lived and no publicity was given to the marriage.

L owned practically nothing while mrs. Van Wylick brought in a considerable fortune. Both knew that the marriage would cause a considerable shift of property.

Since 1976 L had a relation with another man, which relation has not been broken.

Five weeks after the marriage L has killed van Wylick in a sophisticated way and with a gross breach of the trust that had been put in him. L has been condemned to a long term imprisonment for murder.

3.1.2 Furthermore, on the basis of these circumstances, in particular the short time between the marriage and the murder of mrs. Van Wylick, in the absence of any offer of proof to the contrary, the court has taken as a starting point that the sole reason for L to marry mrs. van Wylick was that he intended to appropriate her property and that already during the wedding, and in any case almost immediately after, L had the intention to kill mrs. van Wylick if she would not die in a natural way.

3.1.3 The court of appeal has, in a similar way as the district court, ruled that the question whether L has a right to half of the property belonging to the community property in the context of the partitioning and division of the community property, as far as this is brought in by mrs. van Wylick, must be answered negatively. This decision is contested by the means of cassation.

3.2 In the legal consideration 5.10 the Court of Appeal has taken as a starting point in answering the aforementioned question that in the light of the 'exceptional circumstances of this case' on the one hand consideration must be given to the general legal principles and on the other hand to the requirements of reasonableness and fairness according to which L is supposed to behave in the community property.

Furthermore the court has stated in legal consideration 5.13-5.17 that in this case two general legal principles apply and that on the basis of these principles L is

not entitled to the benefits that originate from the community property. Against these two considerations the parts A and B of the means of cassation are aimed in vain.

As far as these parts are based on the statement that the general legal principles formulated by the court do not exist at all, this statement, that has not been substantiated, must be rejected as incorrect.

As far as these parts A and B are intended as an argument in support of the statement that these legal principles do not apply in a case as the case at hand because, briefly stated, the nature of the acquisition resulting from the community of property impedes that this acquisition can be considered as something that is equal to a 'favour' or an ' advantage' as mentioned in these principles, they cannot lead to cassation because of a lack of interest. For the decision of the court is supported by the independent judgement formulated in consideration 5.18 that is, as will be explained below, contested in vain.

3.3 In legal consideration 5.18 the court has ruled that in the exceptional circumstances of this case 'and also considered in light of the mentioned general legal principles' the claims of L are so unreasonable and unfair that he must be denied the exertion of these rights completely. *As appears from the cited formulation, in this context the legal principles play only the role that they have contributed to the decision of the court that the requirements of reasonableness and fairness make the exertion of the right to his share in the inheritance inadmissible. As far as the parts A and B read in legal consideration 5.18 that the court has used these principles as a direct legal ground for denying this right, they lack a factual basis.* As far as they express the complaint that those principles cannot contribute to the decision of the court, they depart from a wrong conception of the law.

Part C attacks legal consideration 5.18 with the statement that the judge is not allowed to make an exception to 1:100, 1 of the Civil Code on the basis of reasonableness and fairness. This statement is wrong in its generality. For an exception is not completely excluded. The court has correctly stated that such an exception can only be made in very special circumstances, where the court speaks of ' a very strict standard' . In the circumstances that the court has taken as a starting point, the court has correctly decided that the unimpaired application of the equal division of the community of property based on the rule of article 1:100 clause 1 of the Civil Code between spouses in a dissolved matrimonial community, would, in the wording of article 6:2 clause 2 of the new Civil Code , be

unacceptable according to standards of reasonableness and fairness.
On this ground the court has concluded that in the division of this community L is not entitled to the share in the community of property that has been brought in by van Wylick.
(…)

3.5 Since, as has been stated above, none of the parts succeed ('treffen doel'), the appeal in cassation must be dismissed.

4. Decision
The Supreme Court:
dismisses the appeal;

ISSA Proceedings 2010 – Argumentative Valences Of The Key-Phrase Value Creation In Corporate Reporting

« Qui donc crée de la valeur, à part les dieux? »
Édouard Tétreau*, Analyste. Au cœur de la folie financière* (2005, p. 62)

The present paper proposes an analysis of the argumentative use of the key-phrase *value creation* in corporate reporting discourse, in line with Rigotti and Rocci's theoretical model of keywords as lexical pointers to unexpressed *endoxa* (2005). By means of a brief quantitative analysis of concordances conducted on a corpus of full-text reports, and a detailed argumentative analysis of a relevant sample of letters to shareholders (and stakeholders), the study attempts to grasp the main patterns of pragmatic meaning and argumentative moves prompted by

value creation (as one single unit of meaning) in both annual reports and corporate social responsibility reports**[i]**. This twofold methodological approach will enable a concomitant focus on the two main *keyness* criteria envisaged by Stubbs' generic definition of keywords as "words with a special status, either because they express important evaluative social meanings, or because they play a special role in a text or text-type" (in press, p.1).

1. Value creation *in economic-financial discourse*
In everyday language, *value* is an abstract notion that denotes the degree of worth and appreciation of a certain object, depending on its desirability or utility. The relative worth of an object can also be evaluated by the amount of things (e.g. goods or money) for which it can be exchanged, and this could be considered the departure point of the conceptual journey of *value* in the economic and financial fields.

From a strategic management perspective (Becerra 2009), the fundamental value created by a firm is the one created for its *customers* through the products and services that result from the judicious management of the available resources. This value is then (at least in part) appropriated by the firm through sales revenues, entering in the process of *shareholder value creation.* This process is aimed to increase the wealth of the owners of the company either directly, by dividends, or indirectly, by influencing, one way or another, the price of the shares – a price that reflects the *perceived* value of the company on the financial market, based on all its *expected* future cash flows (Schauten 2010).

From a business ethics point of view, there is, however, an ongoing debate on the type of value creation that should guide the managerial decisions in corporations (Smith 2003). On the one hand, the *shareholder theory* considers that the main duty of the managers is to maximize shareholders' returns, and to spend the resources of the corporation only in ways that have been authorized by the shareholders. On the other hand, the *stakeholder theory* stresses that "a manager's duty is to balance the shareholders' financial interest against the interest of other stakeholders such as employees, customers and the local community, even if it reduces shareholder returns" (p.85).

An interesting instantiation of this debate can be observed in the way in which *value creation* is conceived and argumentatively exploited in corporate reporting. The (financial-economic) annual reports and the corporate social responsibility

reports are publications by means of which listed corporations account for their activity in front of shareholders (and stakeholders at large), in order to build trustful relationships with current and potential investors, and to legitimate themselves as responsible citizens of the world, able to "meet the needs of the present without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development 1987, p. 43, in Global Reporting Initiative 2000-2006, p.2). Therefore, the present study will pay a special attention to the way in which *value creation* is reflected in these two types of reports, in particular in their most visible and influential narrative parts (Clarke & Murray 2000) – the introductory letters to shareholders and/or stakeholders.

2. Corpus description and methodological approach
The first phase of the study consisted of a brief computer-based analysis of a corpus of 26 financial-economic annual reports and 46 corporate social responsibility (sustainability) reports belonging to 22 listed multinational corporations. All reports referred to the financial year 2007 and were published on Internet on the websites of the respective companies**[ii]**. The purpose of this phase was to identify the generic pattern of pragmatic meaning of *value creation* in each category of reports, by means of Wordsmith Tools' Concord analysis (considering *value* as search-word and *creat** as context-word).

The second phase consisted of selecting from the above mentioned corpus of full-text reports, only those introductory letters (and in a limited number of cases, equivalent introductory interviews with CEOs or Presidents) that contained the key-phrase *value creation*. The selected documents (9 letters and 3 interviews from annual reports, and 7 letters, one introduction and 3 interviews from sustainability reports) were then argumentatively reconstructed in line with the pragma-dialectical principles (van Eemeren & Grootendorst 1999; Snoeck Henkemans 1997), in order to identify the main strategic moves in which *value creation* appeared. Next, a limited number of single argumentative moves were evaluated from the perspective of the *Argumentum Model of Topics*, in particular the taxonomy of *loci* (Rigotti 2008, 2006; Rigotti & Greco Morasso 2006-2010), in order to highlight the key-role of *value creatio*n (considered as one single unit of meaning) in line with Rigotti & Rocci's model of argumentative cultural keywords (2005).

According to this model, culturally loaded words present in explicit minor

premises may function, in virtue of their logical role of *termini medii,* as lexical pointers to shared values and beliefs (*endoxa*) that act as (implicit) major premises in support of certain claims. Paraphrasing Aristotle's definition of *endoxa* as "opinions that are accepted by everyone or by the majority, or by the wise men (all of them or the majority, or by the most notable and illustrious of them)" (*Topica* 100b.21, in Rigotti 2006, p.527), Rigotti (2006) re-defines the *endoxon* as "an opinion that is accepted by the relevant public or by the opinion leaders of the relevant public" (p.527). Thus, a second characteristic of argumentative keywords consists in their persuasive potential – the capacity to evoke, from an (appropriately) assumed common ground, *endoxa* with different degrees of acceptability within certain communities.

3. Value creation *in the introductory letters of the annual reports*
The basic pattern of pragmatic meaning outlined by the most frequent concordances of *value* and *creat** in the corpus of full-text annual reports shows that *"Every company's aim is to create value. To achieve this aim, decisions are taken and activities developed"*. The value can be created *"for the Company, for customers, and for the owners of the Company"*, or *"for* [company's] *employees"*, and generally speaking, *"for all* [company's] *stakeholders"*. For instance *"Heineken creates value and enjoyment for millions of people around the world* [...] *through brewing"*. The most frequently mentioned beneficiaries of the process of value creation are the shareholders, because *"true value creation does translate into stock price appreciation"*. Therefore, the possession of *"a strong ability to create value in the different stages of the real estate market"*, and promises such as "[our company] *will create significant value from our assets in the years to come"* are frequent arguments in this type of discourse aimed to win investor's trust. As expected, various corporate resources are mentioned as material or operational base for value creation. For instance, a company may *"create significant value from* [its] *assets"*, *"from eco-efficient solutions"*, or *"by earning higher margins" "through industry-leading performance",* and could do this *"jointly with retail customers"*.

Although *value creation* was present in almost all the annual reports of the corpus (in 22 out of 26 reports), the phrase appeared in the introductory letters of only half of them. The pattern of meaning observed in the full-text reports was also present in the letters, being included in a number of recurrent argumentative moves usually belonging to three main types of *loci*: the *locus from final cause,*

the *locus from efficient cause* and *the locus from instrumental cause.*

As the main purpose of the annual reports is to attract (or keep) investors for the company, the (often implicit) standpoint of the introductory letters has the generic form: *You should (continue to) invest in our company.* The principal modality to support this standpoint is to show that an investment in the company can help shareholders to achieve their own ultimate goal which is to obtain good revenues from their investment (better than from other similar investment alternatives). A typical move in this direction is to highlight the good results obtained in the reporting year and to announce a (justified) optimistic outlook for the coming year, and the value created for the shareholders is the most frequent argument in this respect:

(1) "I am delighted to be able to report to you on another year of delivery of the Nestlé Model, defined as the achievement of a high level of organic growth together with a sustainable improvement in EBIT**[iii]** margin. […] We continue to believe that our greatest opportunity to create value for our shareholders is through further transforming our Food and Beverages business into a Nutrition, Health and Wellness offering and by improving its performance further. [The major steps in this transformation have now been made.] […] This is not to say, however, that we are not looking for other opportunities for value creation. (p.2) […] The Nestlé Model, combined with our ongoing ambitious Share Buy-Back Programme, will deliver strong earnings per share growth [in the coming year], resulting in industry-outperforming, long-term shareholder value creation."(p. 5) (Letter to our shareholders. *Nestlé Management Report 2007: Life.*)

A simplified reconstruction of this sample of pragmatic argumentation could be:
(2) (SP) (You should invest in Nestlé.)
(1) (Your goal, as a shareholder, is to have a (good) return on your investment.)
(1') (Investing in Nestlé enables you to reach your financial goal.)
1'.1a We have created value for our shareholders in 2007.
1'.1b In 2008 we will create industry-outperforming, long-term shareholder value.

We recognize in this structure the *locus from final cause* (Rigotti 2008), that I represent below according to the Argumentum Model of Topics, and in which *value creation* has the role of *terminus medius* between the explicit *Datum* and the implicit *Endoxon* evoked from the context (on the left side of the *Y*-shaped structure):
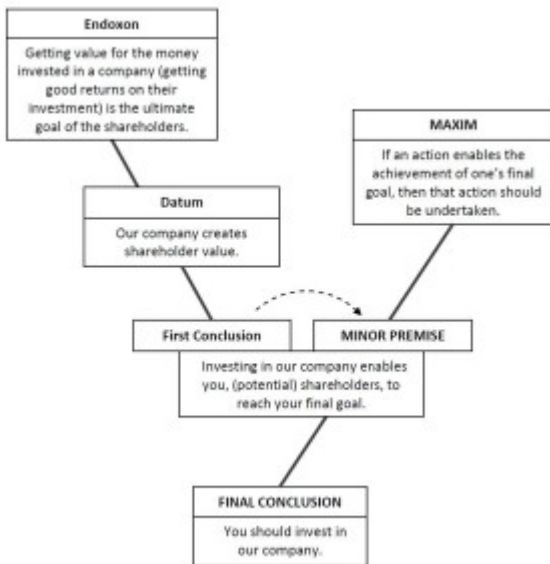
Two other types of moves are used in the letters to shareholders in annual reports, in order to support the claim that an investment in the company would help investors to achieve their own final goal. The first type of moves regards the agency relationship between the company and its shareholders, and it is based on the *locus from efficient cause*. The second emphasizes the quality of the means employed by the company in order to accomplish its task, and it makes use of the *locus from instrumental cause.*

For instance, if we add to the argumentative structure represented in the *Example no.2* the *endoxon (1'.1.1'(a-b))* evoked from the corporate context by the key-phrase *value creation*, we can underline the fact that the value created by the company for its shareholders is a proof of the reliability of the company in relation to its shareholders:

(3) (SP) (You should invest in Nestlé.)

(1) (Your goal, as shareholders, is to have a (good) return for your investment.)

(1') (You can rely on Nestlé in order to reach your financial goal.)

(1'.1) (We fulfil our mission towards our shareholders.)

1'.1.1a We have created value for our shareholders in 2007.

1'.1.1b In 2008 we will create industry-outperforming, long-term shareholder value.

(1'.1.1'(a-b)) (The mission of a company is to create value for its shareholders.)

(1'.1') (An agent that fulfils its mission towards its principal is reliable.)

Based on the same *locus from efficient cause*, the value created for the shareholders can be an argument in support of the unique managerial capabilities

of the company, given that in business, uniqueness is a source of competitive advantage:

(4) "Or, you could pick GE. (p.1) [...] GE is different because we invest in the future *and* deliver today. [...] We are a leadership company. We have built strong businesses that win in the market. (p.2)

[...] "We develop leadership businesses. [...] In 2007, we demonstrated the ability to create value for our investors through capital redeployment. We sold our Plastics business because of rampant inflation in raw material costs. With that capital we acquired Vetco Gray [...]. We significantly exceeded the earnings we lost from Plastics, increased our industrial growth rate, and launched new platforms for future expansion." (p.5)
(Letter to investors. *GE Annual Report 2007: Invest and Deliver Every Day.*)

Textual clues indicate that the two fragments extracted from different sections of the above introductory letter can be interpreted as parts of the same line of argumentation, as follows:

(5) SP You should pick (invest in) GE.
(1) (Your goal, as shareholders, is to have a (good) return for your investment.)
(1') (Investing in GE enables you to reach your financial goal.)
1'.1 GE is different.
1'.1.1 We invest in the future *and* deliver today.
1'.1.1.1 We develop leadership businesses.
1'.1.1.1.1 In 2007, we demonstrated the ability to create value for our investors through capital redeployment.
(1'.1') (Uniqueness is a source of competitive advantage.)

The value created for investors in the reporting year becomes an argument for the market leadership of GE's businesses, and further on, for the ability of the company to "invest in the future and deliver today". Creating value from capital redeployment signifies delivering results today (short-term value creation) from sound strategic choices of acquisitions and divestitures of businesses, *and* investing in the future of the company (preparing the portfolio for medium and long-term value creation).

The quality of the strategy that guides the managerial choices leads us to the second main category of argumentative moves used in support of the ability of companies to benefit shareholders: the possession of the "right" means (*locus*

from instrumental cause). As resulting from the corpus of letters, the main argument for the soundness of a strategy is its capacity to enable shareholder value creation. The emphasis can be placed either on the value creation potential of the business strategy as a whole, like in *Example no.6* below:

(6) "[...] our greatest opportunity to create value for our shareholders is through further transforming our [business] and by improving its performance further. We believe that we have the right strategy and initiatives in place to achieve this."
(Letter to our shareholders. *Nestlé Management Report 2007: Life*, p. 4)

or on the value creation potential of single strategic steps:

(7) "Through an on sale of certain ICI assets to Henkel AG, we expect the acquisition to be value enhancing within three years. This is fully in line with our strategic goal of medium-term value creation."
(Chairman's statement. *Akzo Nobel Annual Report 2007: Year of Transformation*, p. 12)

The value creation potential of the business strategy can also be strategically manoeuvred in order to defend the *status quo* of the strategy itself. In this final example extracted from the introductory letters of the annual reports, a CEO must face shareholders' (potential) critiques on the distribution of the profits:

(8) "[*Question*]: PepsiCo's businesses generate a lot of cash, and some people may believe the company's balance sheet is conservative. Will investors see any changes in capital structure, acquisition activity or increased share repurchases?

[*Answer*]: PepsiCo does generate considerable cash, and we are disciplined about how cash is reinvested in the business. Over the past three years, over $6 billion has been reinvested in the businesses through capital expenditures to fuel growth. All cash not reinvested in the business is returned to our shareholders. [...] We will generally use our borrowing capacity in order to fund acquisitions — which was the case in 2007, when we spent $1.3 billion in acquisitions to enhance our future growth and create value for our shareholders. Our current capital structure and debt ratings give us ready access to capital markets and keep our cost of borrowing down."
(Questions and Answers: A Perspective from Our Chairman and CEO. *PepsiCo 2007 Annual Report: Performance with Purpose. The Journey Continues...,* p. 9)

The CEO refutes the possible negative connotations of an unchanged financial

strategy (suggested in the question by the risk of being perceived as *conservative*) by highlighting the benefits of that strategy for the shareholders:

(9) SP We will not make changes in the current capital structure, acquisition activity or shares repurchase.
1 Our current strategy is valuable for the shareholders.
1.1a PepsiCo generates a lot of cash.
1.1b We are disciplined about how cash is reinvested in the business.
1.1b.1a All the money reinvested was used to fuel growth (i.e. for future value creation).
1.1b.1b All that remaining cash was returned to shareholders (it created value for the shareholders).
(1.1c) (The current financial strategy allows us to continue to create value for our shareholders in the future.)
1.1c.1a Our current capital structure gives us ready access to capital markets and keeps our cost of borrowing down.
1.1c.1b We use our borrowing capacity in order to fund acquisitions.
1.1c.1b' Acquisitions enhance our future growth and create value for our shareholders.
(1.1'(a-c)) (If a strategy produces valuable effects, then that strategy is valuable.)
(1') (If a strategy is valuable for the shareholders, then that strategy should not be changed.)

In order to prove that the current financial strategy is valuable, the CEO tactically chooses to underline not only the value created for the shareholders in the reporting year, but also the expected value that can be created in the future by following this strategy (*locus from the instrumental cause,* indicated by the premise *(1.1'(a-c))*. This topical choice is aimed to support the fact that a change of the financial strategy is not necessary, as it would be unreasonable for shareholders to ask for a change in a strategy that has already brought them benefits and it will also enable them to obtain future benefits (the *locus from termination and setting up,* indicated by the premise *(1')*). This could be an effective manoeuvre, unless shareholders have different expectations for the revenues they obtain from their investment (e.g. a preference for immediate short-term gains rather than medium or long-term gains).

As a final observation, I must add that manually checking a random sample of full-text annual reports, I have noticed that the phrase *value creation* appears only in

the narrative sections, and not in the proper financial sections of the reports. That suggests that although (*shareholder*) *value creation* is invoked in this category of letters as "the primary measure of business and financial performance" (*P&G Annual Report 2007*, p.5), the expression does not directly denote an objective financial indicator, its function being mainly rhetorical.

4. Value creation in the introductory letters of the corporate social responsibility reports

The same analytical steps have been followed in the study of the corporate social responsibility reports and the related letters to stakeholders. Like in the case of the annual reports, *value creation* appeared in 70% of the reports of the corpus, but only in half of their introductory letters.

The pattern of pragmatic meaning outlined by the main recurrent concordances of *value* and *creat** in the corpus of full-text reports shows that *value creation* maintains its strategic role in this new type of discourse: ("*Every company's aim is to create value. To achieve this aim, decisions are taken and activities developed*"). However, the scope of the phrase is extended in terms of presupposed activities, results and beneficiaries: "[we] *achieve optimal performance and create sustainable value for all* [our] *stakeholders*" (for employees, customers, communities, governments, society at large) and "*for the planet*" (the environment). The commitment to sustainability starts at the level of process ("[we] *create value by observing the business world from a new perspective*", "*through genuine partnership with stakeholders*" (customers, communities and governments), and continues up to the level of business effects: "[companies] *with distinctive capabilities to create eco-efficient sustainable value will be the winners in the more demanding global market place*", because "*developing a relationship with communities does not only create value for them but also contributes to the company's value*" and "*This is both a commercial and CR* [Corporate Responsibility] *win–win.*".

This pattern is confirmed by the way in which *value creation* is argumentatively employed in the sub-corpus of letters to stakeholders selected from this type of reports. Being representative of a reporting genre aimed at legitimizing corporations as responsible members of the society, the generic standpoint of the letters to stakeholders is a declaration or a reinforcement of the commitment of the corporations to social responsibility, to the fulfilment of their obligations towards society. Although the precise way in which these obligations are seen

may differ from one company to another, the main topics of social responsibility presented in the corpus of letters generally comply with the (deontological) norms of voluntary disclosures on sustainability recommended by the Global Reporting Initiative (2000-2006).

Value creation maintains the supremacy among the corporate goals mentioned in this type of letters, but the range of beneficiaries and constituent activities is significantly extended. An illustrative example is presented below:

(10) "Creating Shared Value: the role of the business in society. [...] the fundamental strategy of our Company has been to create value for society, and in doing so create value for our shareholders. [...] *Creating Shared Value* for society and investors means going beyond consumer benefit. [...] *Creating Shared Value* also means bringing value to the farmers who are our suppliers, to our employees, and to other parts of society. It means examining the multiple points where we touch society and making very long-term investments that both benefit the public and benefit our shareholders, who are primarily pension savers or retirees. [...] *Creating Shared Value* additionally means treating the environment in a way that preserves it as the basis of our business for decades, and centuries, to come. [...] *Creating Shared Value* means thinking long term, while at the same time delivering strong annual results. One of the fundamental Nestlé Corporate Business Principles is that 'we will not sacrifice long-term development for short-term gain'."
(Creating Shared Value: the role of business in society. *The Nestlé* Creating Shared Value *Report*, p. 2)

Basically, the argumentative structure of the *Example no.10* can be reconstructed as follows:
(11) (SP) (We are a socially responsible corporation.)
1 We accomplish our role in society.
1.1 We Create Shared Value for society and investors.
(1.1.1a) (Creating Shared Value means bringing benefits to consumers.)
1.1.1b Creating Shared Value means examining the multiple points where we touch society and making very long-term investments that both benefit the public and benefit our shareholders.
1.1.1c Creating Shared Value means bringing value to the farmers who are our suppliers, to our employees, and to other parts of society.
1.1.1d Creating Shared Value means treating the environment in a way that

preserves it as the basis of our business for decades, and centuries to come.

1.1.1e Creating Shared Value means thinking long term, while at the same time delivering strong annual results.

1.1.1f [We do all these things.]

(1.1.1f ') (An entity can be defined with a certain property, if it satisfies (all) the necessary conditions for that property.)

1.1' The role of the business in society is to Create Shared Value for society and investors.

(1') (If a company accomplishes its role in society, then that company is socially responsible.)

To prove that it is a socially responsible company, Nestlé shows that it accomplishes the main role of a business in society, i.e. its duty towards society (the *locus from efficient cause*). In order to do that, Nestlé presents its own vision of the role of the business in society (to Create *Shared Value)*, and strategically defines this new type of *value creation* by providing a number of necessary conditions related to sustainability that should be satisfied by any socially responsible business. Facts from the reality of the company are then provided in order to prove that all these conditions are satisfied – proofs generically marked in the structure above by the premise *1.1.1f*. Thus, in virtue of a complex *locus from definition and from the parts and the whole*, indicated by premise *(1.1.1f ')* – *maxim* adapted from Rigotti & Greco Morasso 2006-2010[iv] – the company proves that it creates *Shared Value*; hence, it can be considered socially responsible.

The whole construction of the concept of *Shared Value Creation* could be considered a *persuasive definition* (Stevenson 1938; Macagno & Walton 2010) aimed to introduce Nestlé's vision of the role of the business in society (premise *1.1'*) as an already accepted *endoxon*, without necessarily defending it. The persuasive mechanism of this definition would consist in the transfer of the strong positive connotations acquired by *(shareholder) value creation* in financial-economic discourse (generally accepted as the aim of a corporation, rigorously implemented and highly appreciated by the target-beneficiaries), to the different, far less regulated domain of sustainability that presupposes different types of activities (some of them still based on voluntarism), and that envisages a wide range of results (not all clearly measurable) and a heterogeneous set of beneficiaries (and expectations). The substitution of the qualifier *shareholder* with

s*hared* in the definition of the new concept of *value creation*, could also have a peripheral effect of reinforcement of the positive emotions elicited by *value creation* in this new context. But the true meaning of *shared* is further (indirectly) indicated in the text by the arguments that prove that the company *Creates Shared Value* through the activities described in premises *1.1.1a – 1.1.1e*. In fact, the social and environmental effects of these activities would eventually benefit the company itself. Two conclusions can be drawn from this aspect. Firstly, the concept of *Creating Shared Value,* as operationalized in the text, may be a good definition of the role of Nestlé in society, but not of the role of business in general, in which case the premise *1.1'* from *Example no. 11* cannot be used as an *endoxon.* Secondly, even if the premise *1.1'* refers to a general principle that connects social value with corporate performance in terms of moral duty or in terms of business opportunity, the argumentation provided in the text is insufficient in order to consider this premise an *endoxon* (a generally accepted opinion on the role of business in society) in either way.

As resulting from the sub-corpus of letters to stakeholders, there is however a tendency to use the shareholder value creation potential of sustainability as an argument of socially responsible corporate behaviour, like in *Example no.12*:
(12) "[Sustainability] is at the center of our strategy and rightfully so. […] [It] contributes to growth and value creation. Initially people thought of it as a cost factor, which indeed it is when you treat it as an add-on. However, if it's designed into the way you do things from the beginning as it is here at Philips, it saves you money because you're operating more effectively. So today we recognize that sustainability offers significant business opportunities."
(Interview with the president. *Philips Sustainability Report 2007: Simpler, stronger, greener*, p. 8)

In this example, Philips' president highlights the value-creation opportunities offered by sustainability if it is approached with the "right" managerial attitude (e.g. taking sustainability as the departure point for the production of goods), as opposed to the "wrong" managerial attitude (e.g. superficially implementing it, considering it an *add-on*):
(13) (SP) (We (will) behave sustainably.)
1 Sustainability contributes to growth and value creation.
1.1a Sustainability offers significant business opportunities.
1.1b Sustainability is not a cost factor.

1.1b.1 Sustainability saves us money.

(1') (Every company's aim is to create value.)

(1'') (If an action contributes to the achievement of a desired goal, then that action should be undertaken.) [*Pragmatic argumentation – locus from final cause*]

Or, alternatively:

(1''') (An agent's commitment is reliable if it is bound to its strongest interest.) [*Locus from efficient cause*] (*maxim* quoted from Rigotti, Greco Morasso, C. Palmieri & R. Palmieri 2007**[v]**)

I will represent the latter alternative by means of the Argumentum Model of Topics. As in *Example no.2*, the premise *(1')* is an implicit *endoxon* evoked from the context by the key-phrase *value creation:*
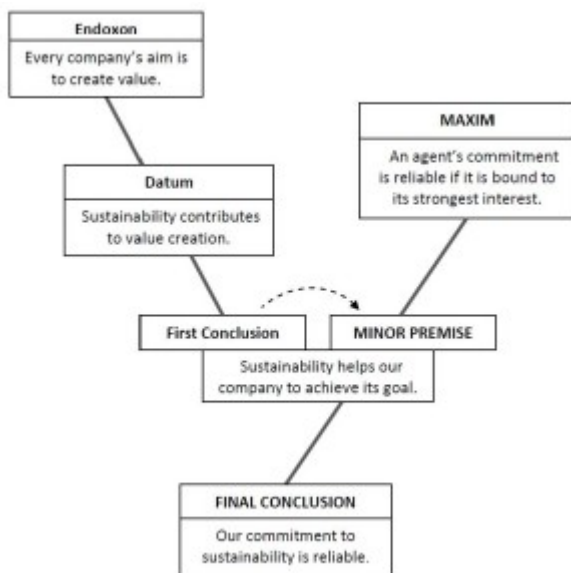
On the other hand, shareholder value creation, as ultimate corporate aim, can be used as an excuse for not meeting the (excessive) expectations of the stakeholders towards the company, as in the next example:

(14) "Businesses have to be honest about what they are and what they can do. Our goal is to create sustainable shareholder value. Businesses can't assume the role of governments, charities, political parties, action groups or the many other bodies that make up society."

(Chief Executive's Overview. *British American Tobacco Sustainability Report 2007*, p. 3)

Example no.14 can be interpreted as follows, by means of the *locus from final*

cause – indicated by premise *(1.1')* below, and the *locus from the parts and the whole* – indicated by premise *(1')*:

(15) (SP) (We cannot resolve (alone) all the sustainability issues of the society.)
1 We cannot assume the role of governments, charities, political parties, action groups or the many other bodies that make up society.
1.1 Our goal is to create sustainable shareholder value.
(1.1') (A company cannot (be reasonably expected to) assume roles that are not related to its final goal.)
(1') In order to resolve all the sustainability issues of the society, all social partners must assume their role.

British American Tobacco continues, however, its discourse by constructing a "business case for sustainability" based on the contribution of sustainability to corporate performance, similar to the "win-win" move presented in *Example no.13*.

5. Conclusions
The purpose of this corpus-based study was to observe the argumentative use of the key-phrase *value creation* in corporate reporting, by a comparison between the letters to shareholders from the annual reports, and the letters to stakeholders from the corporate social responsibility reports. The analytical tools employed in the study confirmed the status of key-phrase for *value creation* (as one single unit of meaning), in line with Stubbs' generic definition of keywords as "words with a special status, either because they express important evaluative social meanings, or because they play a special role in a text or text-type" (in press, p.1). A frequent occurrence in the corpus, *value creation* was proven to have genre-specific denotative and evaluative meanings, illustrative for the corporate goals, activities and relationships with the stakeholders, thus complying with Williams' idea of cultural keywords as "[...] significant, binding words in certain activities and their interpretation" (1976, p.13, in Bigi 2006, p.163).

Defining the essence of the agency relationship between corporation and different categories of stakeholders (especially with the shareholders), *value creation* was frequently used as an argument in both types of letters, usually in close proximity to the principal standpoint of the letter. Complying with Rigotti and Rocci's model of argumentative keyword, *value creation* evoked two main *goal*-related categories of *endoxa*. The first category stressed the final goal of the shareholders

(or stakeholders at large): to obtain what they want (request) from a corporation; the second category stressed the final goal of the corporations: to fulfil their mission towards stakeholders, by providing what they have been asked to provide.

As expected, the ethical debate between the shareholder theory and the stakeholder theory (previously illustrated in Chapter 1) was evident in the argumentation of the two categories of introductory letters. In annual reports, the letters emphasized the ability of a corporation to create value for the shareholders (through unique management qualities or/and the right means) as main argument in order attract investors. Accordingly, the basic argumentative pattern prompted by *value creation* consisted of a principal move based on *the locus from final cause,* supported by *arguments from efficient cause* and *from instrumental cause*. Although *shareholder value creation* was considered the ultimate corporate aim in both types of reports, and shareholders were considered the most important stakeholders, a series of attempts to unify the two opposite ethical views (at least at the level of discourse) were observed in the corpus, especially in the letters to stakeholders from the corporate responsibility reports. A first category of attempts was based on the semantic shift of *value creation* from the financial domain to the domain of social responsibility, *Example no.10* being representative in this respect. The second category, most frequently encountered, was based on pragmatic argumentation, viewing sustainability as a potential source of shareholder value creation. Thus, corporations could reasonably be expected to behave sustainably as long as this is in their own best interest – a "win-win" strategy. In my opinion this move, that belongs to the *locus from efficient cause*, is the most representative for the letters to stakeholders in social corporate responsibility reports.

The intention of this study was not to question the conceptual and ethical approach to *value creation* of various theories of the firm, but to see how *value creation* is pragmatically reflected and argumentatively exploited in two sub-genres of persuasive business discourse: the introductory letters to shareholders and stakeholders, from the annual, respectively, corporate social responsibility reports. Although the examples presented in this paper did not exhaust all the argumentative instances of *value creation* in the corpus letters, I hope that they offered some useful insights on this topic.

NOTES
[i] This study was developed within the framework of the project *"Endoxa* and

keywords in the pragmatics of argumentative discourse. The pragmatic functioning and persuasive exploitation of keywords in corporate reporting", funded by the Swiss National Science Foundation (Grant SNSF PDFMP1_124845/1) and coordinated by Andrea Rocci at Università della Svizzera italiana in Lugano.

[ii] All the reports included in the corpus were published in .pdf format on the websites of the correspondent companies, being identical with the homonymous printed documents.

[iii] EBIT – earnings before interests and taxes.

[iv] The premise *(1.1.1f ')* from the argumentative reconstruction of *Example no.11* partially reproduces a *maxim* included in an example of *locus* from the *Argumentum eLearning Module* (Rigotti & Greco Morasso 2006-2010).

[v] The premise *(1''')* from the reconstruction of *Example no.13* integrally reproduces a *maxim* included in an example of *locus* from the e-course *Argumentation for Financial Communication*, the *Argumentum eLearning Module* (Rigotti, Greco Morasso, C. Palmieri. & R. Palmieri 2007).

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Dutch Project
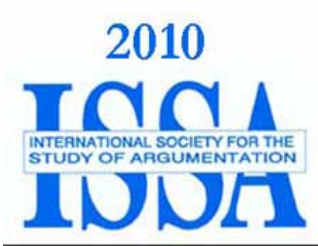
What I want to do in this essay is to discuss the notion of meta-argumentation by summarizing some past work and motivating a future investigation (which, for obvious reasons, I shall label the *"Dutch"* project). The discussion is meant to make a plea partly for the theoretical and methodological importance and fruitfulness of meta-argumentation in general, and partly for approaching from the viewpoint of meta-argumentation a particular (Dutch-related) topic that is especially relevant on the present occasion for reasons other than methodology and theory. I hope that the potential appeal of this aspect of the essay – combining methodological orientation and theoretical conceptualization with empirical and historical content – will make up for whatever shortcomings it may possess from the point of view of substantive detail about, and completed attainment of, the Dutch project.

1. Historical Context of William the Silent's Apologia (1581)
In May 1581, the States-General of the Low Countries met here**[i]** in Amsterdam to draft a declaration of independence from Philip II, King of Spain, who had ruled this region since 1555. In the course of the summer, this congress moved to The Hague, where the declaration was concluded at the end of July. This declaration is called the *"act of abjuration",* meaning that these provinces were thereby abjuring their allegiance to the King of Spain.**[ii]**

This act of abjuration was taking place in the midst of an armed conflict that had already lasted twenty-five years and was to continue for another quarter century. The conflict was partly a war of national independence for the modern Netherlands. However, the conflict was also a civil war within the Low Countries stemming from religious and ethnic differences: the main religious difference was between Catholics and Protestants, while the main ethnic difference was between Dutch-speaking northerners and French-speaking Walloons in the south; eventually this civil war was partially, although not completely, resolved by the split between Belgium and The Netherlands. Finally, the conflict was partly a democratic revolution, in which the people were objecting to taxation without representation and defending local rights vis-à-vis centralized government.

The act of abjuration was occasioned by a proclamation issued the previous year

by King Philip against the leader of the revolt, William of Nassau, Prince of Orange, now known as William the Silent. Philip's proclamation banned William from the Low Countries and called for his arrest or assassination, promising the assassin a large sum, a title of nobility, and a pardon for any previous crimes.

William was the most important leader of the revolt, popular among the nobility as well as common people, influential among Catholics as well as Protestants, and fluent in both French and Dutch. He was becoming increasingly effective in his leadership, especially in the provinces of Holland and Zealand, which were more independent-minded than the other fifteen. Although the difficulty of the struggle and his assassination four years later prevented him from seeing his efforts come to fruition, he paved the way for the later success. For even after his death his qualities could serve as a model: he was usually regarded as thoughtful, prudent, moderate, tolerant, and politically astute and skillful.

William had been the first-born, in 1533, to the Protestant Count of Nassau, in Germany. At age eleven, he inherited from a cousin vast possessions in the Low Countries and elsewhere, including the small principality of Orange in France and the title of Prince. This inheritance was approved on one condition by Charles V, Holy Roman Emperor, King of Spain, and father of Philip II: that William's parents relinquish their parental authority. Thus, he was thereafter educated as a French-speaking and Dutch-speaking Catholic in the Low Countries. Later, however, in 1573, he re-joined the Reformed Church, while continuing to uphold as supreme the right of freedom of conscience.

In response to Philip's proclamation, William produced a document entitled *Apologia* (William 1581; 1858; 1969). This was presented to the States-General in December 1580. The following year it was published as a booklet of one hundred pages in the original French version, as well as in English, Dutch, German, and Latin translations. Copies were sent to all rulers of Christendom.

Thus, in the years 1580-1581, in the context of the ongoing armed conflict in the Low Countries, the Netherlands revolt produced a remarkable triad of documents: a proclamation of proscription and assassination by King Philip II of Spain against William of Orange; a defense by William from Philip's accusations; and a declaration of independence from Philip's sovereignty by the States-General of the Low Countries. Of these documents, William's *Apologia* is the most informative, because it is the longest, because it summarizes Philip's charges, and

because it anticipates the declaration of independence. It is not surprising that the *Apologia* went through sixteen editions in the following two decades (Wansink 1969, p. vii).

William's *Apologia* is also a more argumentative text than the other two. It is an intense piece of argumentation, for it attempts to do several things: to refute Philip's accusations; to advance countercharges; to justify William's own behavior; and to justify the right of the Low Countries to independence.

This judgment about the argumentational import of William's *Apologia* is widely shared. For example, Voltaire described it as one of the most beautiful arguments in history.**[iii]** The nineteenth-century American historian John Motley expressed the following judgment: William "possessed a ready eloquence – sometimes impassioned, oftener argumentative, always rational. His influence over his audience was unexampled in the annals of that country or age, yet he never condescended to flatter the people" (Motley 1883, vol. 3, p. 621); and Motley was the author of a monumental history of the Netherlands revolt, in seven volumes, totaling 3400 pages (Motley 1856; 1860). Even a more critical historian, himself a Dutchman, who was the dean of twentieth-century scholars of Dutch history, Pieter Geyl, judged the following: William of "Orange's greatness as a leader of the Netherlands people lay precisely in his unsurpassed talent for co-operating with the States assemblies … Persuasion was what he excelled in" (Geyl 1958, p. 193). Finally, in the past decade William's *Apologia* has attracted the attention of Frans van Eemeren and Peter Houtlosser (1999; 2000; 2003), who have examined it from the point of view of the pragma-dialectical theory of argumentation. In fact, I can report that it was their articles that first awakened my interest in this text. Their judgment, added to that of Voltaire, Motley, and Geyl, and my earlier historical considerations, suggest that William's *Apologia* is a candidate for analysis on the present occasion.

2. Universal Cultural Significance of William's Apologia
Nevertheless, I hesitate to undertake an analysis of this work. For I am sensitive to the potential criticism that it is risky, rash, or arrogant for an outsider like myself who lives about 10,000 kilometers from The Netherlands to rummage through local history and expect to find anything new or insightful to tell locals (or other interested parties). It's as if a visitor were to lecture at my University of Nevada, Las Vegas, and pretend to give locals lessons about gambling, hotel administration, or popular entertainment.

On the other hand, an analysis of William's *Apologia* may be worthwhile for other reasons, above and beyond the *ad hoc*, localistic, or antiquarian considerations advanced so far. These additional reasons are philosophical or general-cultural, as well as methodological or epistemological.

The main cultural reason is that William's *Apologia*, and the Netherlands revolt which it epitomizes, are of universal significance, and not merely historical curiosities of interest to people who happen to descend from those protagonists. For example, I have already mentioned that a crucial issue over which William fought was freedom of religion and of individual conscience. Now, let me simply add the obvious, namely that this cluster of freedoms and individual rights is one of the great achievements of modernity, and that it certainly is not going to be superseded by anything which so-called post-modernists have proposed or are going to propose. To be sure, this freedom is subject to abuse, misuse, and atrophy from non-use, as well as perversion and subversion, and so it must be constantly safeguarded and requires eternal vigilance. But these caveats too are a lesson that can be learned from the Netherlands revolt. In fact, in that period, it often happened that, once the Calvinist Protestants got the upper hand in a town or province, they had the tendency to reserve that freedom only for themselves and deny it to the Catholics. However, in William we have someone who defended the legitimate rights of both sides, and opposed the abuses of both.

A second example is provided by the similarities between the 1581 act of abjuration and the American Declaration of Independence of 1776. The similarities center on the political right of the governed to give or withhold their consent to the governors. That is, the Netherlands declaration antedates by about two centuries the American declaration, and thus must be regarded as one of the founding documents in the history of political democracy. And again, needless to say, the same caveats apply to the democratic ideal that apply to the ideal of religion liberty.

Let me conclude these considerations on the universal significance of the Netherlands revolt and William's *Apologia* with some quotations from the works of John Motley, the nineteenth-century American mentioned earlier as the author of a monumental history of the revolt. For the eloquence and inspired zeal of this outsider are themselves eloquent and inspiring testimony of that universality.

Motley's book begins with these words: "The rise of the Dutch Republic must ever

be regarded as one of the leading events of modern times ... [It was] an organized protest against ecclesiastical tyranny and universal empire ... [For] the splendid empire of Charles the Fifth was erected upon the grave of liberty. It is a consolation to those who have hope in humanity to watch, under the reign of his successor, the gradual but triumphant resurrection of the spirit over which the sepulchre had so long been sealed" (Motley 1883, vol. 1, p. iii).

Here, Motley is attributing to the Netherlands revolt two merits, namely its contribution to the ideals of religious freedom and national liberation. But next he speaks of a third merit, which is an epoch-making contribution to the art of politics: "To the Dutch Republic ... is the world indebted for practical instruction in that great science of political equilibrium which must always become more and more important as the various states of the civilized world are pressed more closely together ... Courage and skill in political and military combinations enabled William the Silent to overcome the most powerful and unscrupulous monarch of his age" (Motley 1883, vol. 1, pp. iii-iv).

3. The Historical-Textual Approach to Argumentation
So much for the universal significance of William's *Apologia*, providing a cultural reason for undertaking an analysis of its argumentation. Now, I go on to the methodological considerations. These are really more pertinent, and it is they that have made me overcome my hesitation in tackling a subject that is apparently so distant from my scholarly concerns.

For a number of years, I have advocated an empirical approach to the study of argumentation which I call the historical-textual approach (Finocchiaro 1980, pp. 256-307; 2005, pp. 21-91). In this approach, the working definition – indeed almost an operational definition – of argumentation is that it occurs typically in written or oral discourse containing a high incidence of illative terms such as: therefore, so, thus, hence, consequently, because, and since.

Here, I contrast the empirical primarily to the apriorist approach, an example of the latter being formal deductive logic insofar as it is regarded as a theory of argument. On the other hand, I do not mean to contrast the empirical to the normative, for the aim of the historical-textual approach is the formulation of normative and evaluative principles besides descriptive, analytical, and explanatory ones. Another proviso is that my empirical approach ought not to be regarded as empiricist, namely as pretending that it can study argumentation with a *tabula rasa*.

This historical-textual approach is my own variation on the approaches advocated by several scholars. They have other labels, different nuances, and partly dissimilar motivations and aims. Nevertheless, my approach derives partly from that of Michael Scriven and his probative logic; Stephen Toulmin and his methodological approach, as distinct from his substantive model of argument; Henry Johnstone Jr. and his combination of philosophy and rhetoric; and Else Barth and her empirical logic.**[iv]** Moreover, my approach overlaps with that of Ralph Johnson, Tony Blair, and informal logic; Alec Fisher and his logic of real arguments; and Trudy Govier and her philosophy of argument, meaning real or realistic arguments.**[v]**

Typically, the historical-textual approach involves the selection of some important text of the past, containing a suitably wide range and intense degree of argumentation. Many of the classics fulfill this requirement, for example, Plato's *Republic*, Thomas Aquinas's *Summa Theologica*, *The Federalist Papers* by Alexander Hamilton, John Jay, and James Madison, and Charles Darwin's *Origin of Species*. Not all classics would be appropriate: some for lack of argumentation, some for insufficient intensity, and some for insufficient variety. In some cases works other than the classics would serve the purpose, for example collections of judicial opinions by the United States Supreme Court or the World Court in The Hague.

Given this sketch of the historical-textual approach, together with my earlier remarks about William's *Apologia*, now perhaps you can begin to see the connection, that is, a possible methodological motivation for undertaking an analysis of that work. But this is just the beginning, and I am not sure that what I have said so far would provide a sufficient motivation for me. So let me go on with my methodological justification.

Following such an historical-textual approach, many years ago I undertook a study of Galileo Galilei's book, *Dialogue on the Two Chief World Systems, Ptolemaic and Copernican*. This book is not only the mature synthesis of astronomy, physics, and methodology by the father of modern science, but also the work that triggered Galileo's Inquisition trial and condemnation as a suspected heretic in 1633; it is also full of arguments for and against the motion of the earth. My study led me to a number of theoretical claims (Finocchiaro 1980, pp. 311-431; 1997, pp. 309-72; 2005, pp. 34-91, 109-80).

For example, the so-called fallacies are typically either non-fallacious arguments, or non-arguments, or inaccurate reconstructions of the originals; but many arguments can be criticized as fallacious in various identifiable ways. There are important asymmetries between the positive and the negative evaluation of arguments, although one particular alleged asymmetry seems untenable, namely the allegation that it is possible to prove formal validity but not formal invalidity. One of the most effective ways of criticizing arguments is to engage in *ad hominem* argumentation in the seventeenth century meaning of this term, namely to derive a conclusion unacceptable to opponents from premises accepted by them (but not necessarily by the arguer). Finally, argumentation plays an important and still under-studied and unappreciated role in science.

4. The Meta-argumentation Project
All this may be new to some of you, familiar to a few others, but almost ancient history to me. For more recently, I have been focusing on meta-argumentation. It's not that I have abandoned my historical-textual approach, but that I have found it fruitful to apply it to a special class of arguments, called meta-arguments. On this subject, I want to acknowledge Erik Krabbe (1995; 2002; 2003) as a source of inspiration and encouragement. Paraphrasing his definition of metadialogue, I define a meta-argument as an argument about one or more arguments. A meta-argument is contrasted to a ground-level argument, which is typically about such topics as natural phenomena, human actions, or historical events.

Meta-arguments are special in at least two ways, in the sense of being crucially important to argumentation theory, and in the sense of being a particular case of argumentation. First, meta-arguments are crucially important because argumentation theory consists, or ought to consist, essentially of meta-argumentation; thus, studying the meta-arguments of argumentation theorists is a meta-theoretical exercise in the methodology of our discipline. Second, meta-arguments as just defined are a particular case of argument-tation, and so their study is or ought to be a particular branch of argumentation theory.

Consequently, my current project has two main parts. In both, because of the historical-textual approach, the meta-arguments under investigation are real, realistic, or actual instances of argumentation. But in the meta-theoretical part, the focus is on important arguments from recent argumentation theory. In the other part, the focus is on famous meta-arguments from the history of thought.

Before illustrating this project further, let me elaborate an immediate connection with William's *Apologia*. In fact, William's text is not just an intense and varied piece of argumentation, as mentioned before, but it is also a meta-argument since it is primarily a response to King Philip's proclamation. But Philip's proclamation gave reasons why William should be proscribed and assassinated, and however logically incoherent and mean-spirited those reasons may have been, they constitute an argument, at least for those of us who uphold the fundamental distinction between an argument and a good argument. On the other hand, Philip's proclamation is a ground-level argument, and the same is true of the States-General's act of abjuration. Thus, my motivation for undertaking an analysis of William's *Apologia* can now be fleshed out further. I can go beyond my earlier remark that it is a candidate for study by argumentation scholars because it is a famous example of intense and varied argumentation; now I can add that the text is a *good* candidate for analysis in a study of *meta-argumentation* conducted in accordance with the *historical-textual approach*.

However, how promising is such a project? I must confess that the stated motivation, even with the addition just made, would still be insufficient, at least for me, if this were my first study of a famous meta-argument in terms of the historical-textual approach; that is, if I had not already conducted some such studies and obtained some encouraging results. Moreover, it is important that this project plans to study famous meta-arguments in conjunction with currently important theoretical arguments because, as mentioned earlier, the hope is not merely to contribute to a particular branch of argumentation studies, however legitimate that may be, but also to address some key issues of argumentation theory in general. Thus, I need to at least summarize some of my previous meta-argumentative studies, in order to strengthen my methodological plea for an analysis of William's *Apologia*.

5. Meta-argumentation in the Subsequent Galileo Affair
Let me begin by saying a few words about one of my previous studies of meta-argumentation (Finocchiaro 2010) that is intermediate between my current project and my earlier study of the ground-level arguments in Galileo's *Dialogue*. At a subsequent stage of my research, I discovered a related set of significant arguments that are primarily meta-arguments. Their existence was not as easily detectable, because they are not found within the covers of a single book, and because initially they do not appear to focus on a single issue. This discovery

required a laborious work of historical interpretation, philosophical evaluation, and argument reconstruction.

I am referring to the arguments that make up the subsequent Galileo affair, as distinct from the original affair. By the original Galileo affair I mean the controversy over the earth's motion that climaxed with the Inquisition's condemnation of Galileo in 1633. By the subsequent affair I mean the ongoing controversy over the rightness of Galileo's condemnation that began then and continues to our own day. The arguments that define the original affair (and that are primarily ground-level) are relatively easy to find, the best place being, as mentioned, Galileo's own book. On the other hand, the arguments that make up the subsequent affair (and that are primarily meta-arguments) must be distilled out of the commentaries on the original trial produced in the past four centuries by all kinds of writers: astronomers, physicists, theologians, churchmen, historians, philosophers, cultural critics, playwrights, novelists, and journalists.

Let me give you some examples, both to give you an idea of the substantive issues of the subsequent affair and of the fact that it consists of meta-arguments. To justify the claim that the Inquisition was right to condemn Galileo, the following reasons, among others, have been given at various times by various authors (see Finocchiaro 2010, pp. xx-xxxvii, 155-228). (1) Galileo failed to conclusively prove the earth's motion, which was not accomplished until Newton's gravitation (1687), Bradley's stellar aberration (1729), Bessel's annual stellar parallax (1838), or Foucault's pendulum (1851). (2) Galileo was indeed right that the earth moves, but his supporting reasons, arguments, and evidence were wrong, ranging from the logically invalid and scientifically incorrect to the fallacious and sophistical; for example, his argument based on a geokinetic explanation of the tides is incorrect. (3) Galileo was indeed right to reject the scientific authority of Scripture, but his supporting reasoning was incoherent, and his interference into theology and scriptural interpretation was inappropriate. (4) Galileo may have been right scientifically (earth moves), theologically (Scripture is not a scientific authority), and logically (reasoning), but was wrong legally; that is, he was guilty of disobeying the Church's admonition not to defend earth's motion, namely not to engage in argumentation, or at least not to evaluate the arguments on the two sides of the controversy.

After such meta-arguments are found and reconstructed, one must evaluate them. In accordance with my historical-textual approach, part of the evaluation task

involves reconstructing how such arguments have been assessed in the past four centuries. But I also had another idea. One could try to identify the essential elements of the approach which Galileo himself followed in the original controversy over the earth's motion, and then adapt that approach to the subsequent controversy. This turned out to be a fruitful idea.

In particular, two principles preached and practiced by Galileo were especially relevant. Influenced by the literature on informal logic, I label them the principles of open-mindedness and fair-mindedness, but here I am essentially paraphrasing his formulations. Open-mindedness is the willingness and ability to know and understand the arguments against one's own claims. Fair-mindedness is the willingness and ability to appreciate and strengthen the opposing arguments before refuting them.

Thus, I was led to the following overarching thesis about the meta-arguments making up the subsequent Galileo affair: that is, the anti-Galilean arguments can and should be successfully criticized by following the approach which Galileo himself used in criticizing the anti-Copernican arguments, and this is an approach characterized by open-mindedness and fair-mindedness. In short, at the level of interpretation, I argue that the subsequent Galileo affair can be viewed as a series of meta-arguments about the pro- and anti-Copernican ground-level arguments of the original affair; at the level of evaluation, I argue that today, in the context of the Galileo affair and the controversies over the relationship between science and religion and between institutional authority and individual freedom, the proper defense of Galileo should have the reasoned, critical, open-minded, and fair-minded character which his own defense of Copernicanism had.

6. Theoretical Meta-arguments
Let us now go on to my current project studying meta-argumentation in an historical-textual manner. I begin with some examples of the meta-theoretical part of this project.**[vi]**
One of these meta-arguments is Ralph Johnson's justification of his dialectical definition of argument (cf. Finocchiaro 2005, pp. 292-328). I start with a contrast between the illative and the dialectical definitions, but distinguish three versions of the latter: a moderate conception for which the dialectical tier is sufficient but not necessary; a strong conception for which the dialectical tier is necessary but not sufficient; and an hyper conception for which the dialectical tier is necessary and sufficient. Johnson's conclusion is the strongly dialectical conception. His

argument contains an illative tier of three supporting reasons, and a dialectical tier consisting of four criticisms of the illative conception and replies to six objections. The result of my analysis is the conclusion that the moderate conception is correct, namely, that an argument is an attempt to justify a conclusion by *either* supporting it with reasons, *or* defending it from objections, *or both*. My argument contains supporting reasons appropriated from the acceptable parts of Johnson's argument, and criticism of his strong conception. I also defend my moderate conception from some objections.

Another example involves the justification of the hyper dialectical definition of argument advanced by Frans van Eemeren and the pragma-dialectical school (cf. Finocchiaro 2006). The hyper dialectical definition of argument claims that an argument is simply a defense of a claim from objections. Their meta-argument is difficult to identify, but it can be reconstructed. Before criticizing it, I defend it from one possible criticism, but later I argue that it faces the insuperable objection that the various analyses which pragma-dialectical theorists advance to support their definition do not show it is preferable to all alternatives. Then I advance an alternative general argument for the unique superiority of the hyper definition over the others, but apparently it fails because of the symmetry between supporting reasons and replies to objections. My conclusion is that the moderately dialectical conception is also preferable to the hyper dialectical definition.

Next, I have examined the arguments for various methods of formal criticism by Erik Krabbe, Trudy Govier, and John Woods (cf. Finocchiaro 2007a). This turned out to be primarily a constructive, analytical, or reconstructive exercise, rather than critical or negative. Krabbe (1995) had shown that formal-fallacy criticism (and more generally, fallacy criticism) consists of metadialogues, and that such metadialogues can be profiled in ways that lead to their proper termination or resolution. I reconstruct Krabbe's metadialogical account into monolectical, meta-argumentative terminology by describing three-types of meta-arguments corresponding to the three ways of proving formal invalidity which he studied: the trivial logic-indifferent method, the method of counterexample situation, and the method of formal paraphrase. A fourth type of meta-argument corresponds to what Govier (1985) calls refutation by logical analogy. A fifth type of meta-argument represents my reconstruction of arguments by parity of reasoning studied by Woods and Hudak (1989).

Another example is provided by the meta-arguments about deep disagreements. Here, I examine the arguments advanced by such scholars as Robert Fogelin, John Woods, and Henry Johnstone, Jr., about what they variously call deep disagreements, intractable quarrels, standoffs of force five, and fundamental philosophical controversies (see Fogelin 1985, 2005; Woods 1992, 1996; Johnstone 1959, 1978). As much as possible their views, and the critiques of them advanced by other scholars, are reconstructed as meta-arguments. From my analysis, it emerges that deep disagreements are rationally resolvable to a greater degree than usually believed, but that this can be done only by the use of such principles and practices as the following: the art of moderation and compromise (codified as Ramsey's Maxim); open-mindedness; fair-mindedness; complex argumentation; meta-argumentation; and *ad hominem* argumentation in a sense elaborated by Johnstone and corresponding to the seventeenth-century meaning, mentioned earlier.

Finally, another fruitful case study has dealt with conductive meta-arguments. The term "conductive" argument was introduced by Carl Wellman (1971), as a third type of argumentation besides deduction and induction. In this context, a conductive argument is primarily one in which the conclusion is reached nonconclusively based on more than one separately relevant supporting reason in favor and with an awareness of at least one reason against it. Conductive arguments are more commonly labeled pro-and-con arguments, or balance-of-considerations arguments. They are ubiquitous, especially when one is justifying evaluations, recommendations, interpretations, or classifications. Here I reconstruct Wellman's original argument, the constructive follow-up arguments by Govier (1980; 1987, pp. 55-80; 1999, pp. 155-80) and David Hitchcock (1980; 1981; 1983, pp. 50-53, 130-34; 1994), and the critical arguments by Derek Allen (1990; 1993) and Robert Ennis (2001; 2004). My own conclusion from this analysis is that so-called conductive arguments are good examples of meta-arguments; for a crucial premise of such arguments is a balance-of-considerations claim to the effect that the reasons in favor of the conclusion outweigh the reasons against it; such a claim can be implicit or explicit; but to justify it one needs a subargument which is a meta-argument; hence, while the conclusion of a conductive argument is apparently a ground-level proposition, a crucial part of the argument is a meta-argument.

7. Famous Meta-arguments

These examples should suffice as a summary of the meta-theoretical part of my study of meta-argumentation in accordance with the historical-textual approach. The other part was a study of famous meta-arguments that are important for historical or cultural reasons. Obviously, the meta-arguments in William's *Apologia* are of the latter sort. So it will be useful to look at what some of these previous studies have revealed.

A striking example is provided by chapter 2 of John Stuart Mill's essay *On Liberty* (cf. Finocchiaro 2007c). It can be reconstructed as a long and complex argument for freedom of discussion. The argument consists of three subarguments, each possessing illative and dialectical components. The illative component is this. Freedom of discussion is desirable because, first, it enables us to determine whether an opinion is true; second, it improves our understanding and appreciation of the supporting reasons of true opinions, and of their practical or emotional meaning; and third, it enables us to understand and appreciate every side of the truth, given that opinions tend to be partly true and partly false and people tend to be one-sided. The dialectical component consists of replies to ten objections, five in the first subargument, three in the second, one in the third, and one general.

So reconstructed, Mill's argument is a meta-argument, indeed it happens to be also a contribution to argumentation theory. For its main conclusion can be rephrased as the theoretical claim that freedom of argument is desirable. A key premise, which Mill assumes but does not support, turns out to be the moderately dialectical conception of argument. And one of his principal claims is the thesis that argumentation is a key method in the search for truth.

Another famous meta-argument occurs in Mill's book on *The Subjection of Women* (cf. Finocchiaro 2007b). The whole book is a ground-level argument for the thesis that the subjection of women is wrong and should be replaced by liberation and equality. The meta-argument is found in the first part of chapter 1. Then in the rest of that chapter, he replies to a key objection to his own thesis. Finally, in the other three chapters he articulates three reasons supporting that thesis. Mill begins by formulating the problem that the subjection of women is apparently a topic where argumentation is counterproductive or superfluous. He replies by rejecting the principle of argumentation that generates this problem and replacing it by a more nuanced principle. However, this principle places on him the burden of causally undermining the universal belief in the subjection of

women, to pave the way for argumentation on the merits of the issue. Accordingly, he argues that the subjection of women derives from the law of the strongest, but that this law is logically unsound and morally questionable, and hence that custom and feeling provide no presumption in favor of the subjection of women. Additionally, Mill thinks that in this case he can make a predictive extrapolation; accordingly, he argues that there is a presumption against subjection based on the principle of individual freedom. This predictive extrapolation and the causal undermining are complementary meta-arguments.

Now, these two meta-arguments may also be viewed, respectively, as the criticism of an objection, and the statement of a supporting reason, and hence as elements of the dialectical and illative tiers, rather than as a distinct meta-argumentative part of the overall argument. This possibility raises the theoretical issue that there may be a symmetry between meta and ground levels analogous to the symmetry between illative and dialectical tiers; if so, then meta-argumentation would be not only an explicit special type of argument, but also an implicit aspect of all argumentation,**[vii]** distinct from but related to the illative and dialectical components.

A third example of famous meta-argumentation is the critique of the theological design argument found in David Hume's *Dialogues concerning Natural Religion* (cf. Finocchiaro 2009). Hume's critique is a complex meta-argument, consisting of two main parts, one interpretive, the other critical. His interpretive meta-argument claims that the design argument is an inductive ground-level argument, with a complex structure, consisting of three premises and two sub-arguments, one of which sub-arguments is an inductive generalization, while the other is a statistical syllogism. Hume's critical meta-argument argues that the design argument is weak because two of its three premises are justified by inadequate sub-arguments; because its main inference embodies four flaws; and because the conclusion is in itself problematic for four reasons. Finally, he also argues that the design argument is indirectly undermined by two powerful ground-level arguments, involving the problem of evil; they justify conclusions that are in presumptive tension with the conclusion of the design argument, while admittedly not in strict contradiction with it.

Here, the main theoretical implication is along the following lines. Hume's critique embodies considerable complexity, so much so that it could be confusing. However, such complexity becomes quite manageable in a meta-argumentation

approach; this means that the concept of meta-argument can serve as a principle of simplification, enhancing intelligibility, but without lapsing into over-simplification.

8. Conclusion

In summary, (F) the analysis of William the Silent's *Apologia* is a very promising project in argumentation studies, for two reasons, a general one involving my historical-textual approach, and a more specific and important one involving my meta-argumentation project.

First, generally speaking, (Fa11) this work contains argumentation that is intense and varied, as revealed by (Fa111) even a cursory reading, as well as (Fa112) the considered judgment of many authorities. Moreover, (Fa12) the issues it discusses are universally significant because they involve (Fa121) freedom of religion, (Fa122) the right to national independence, (Fa123) the ideal of democratic consent, and (Fa124) the art of political equilibrium. Thus, (Fa1) this text is susceptible of being analyzed in accordance with the historical-textual approach to argumentation in general. But we have seen that (Fa2) the historical-textual approach is fruitful; for example, (Fa21) it has yielded interesting results by studying the arguments about the motion of the earth in Galileo's *Dialogue*.

More specifically and more importantly, (Fb1) William's *Apologia* is a piece of meta-argumentation since (Fb11) it is a response to a proclamation that is itself an argument. But we have seen that (Fb2) the historical-textual study of meta-arguments is proving to be a fruitful project. For example, (Fb21) it has already yielded some results with regard to the meta-arguments that constitute the subsequent Galileo affair. More to the point, (Fb22) it is yielding interesting results with regard to the meta-arguments of leading argumentation theorists, dealing with topics such as (Fb221) the strongly dialectical concept of argument, (Fb222) the hyper dialectical concept of argument, (Fb223) methods of formal criticism, (Fb224) deep disagreements, and (Fb225) conductive arguments; and (Fb23) it is also yielding interesting results with regard to famous meta-arguments, such as Mill on (Fb231) liberty of argument and on (Fb232) women's liberation, and (Fb233) Hume on the theological design argument.

What I have just summarized is (dare I say it?) my argument, such as it is, in this address here today; that is, the reasons why I think it would be fruitful to analyze William's *Apologia* from the point of view of meta-argumentation and the

historical-textual approach; that is, my prolegomena to a future meta-argumentative and historical-textual study of this Dutch classic.

If I had more time, I might discuss the details of the propositional macrostructure of my argument, as you can visualize in the following diagram:**[viii]**
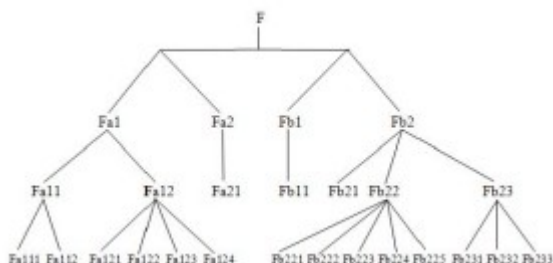
This would reinforce the fact that, after all, I have been arguing for the past hour, however modestly in intention, execution, and results. Could I have done anything less? Or different? I suppose I could have described the details of William's meta-argumentation, which of course I am now committed to doing sooner or later. But this description, even without motivation or justification, would have taken the whole hour. Moreover, my describing by itself would not have been an actual instantiation of argumentation, let alone meta-argumentation. On the contrary, in this address I wanted, among other things, to practice what I preached.

NOTES
[i] A slightly shorter version of this paper was delivered as a keynote address to the Seventh Conference of the International Society for the Study of Argumentation at the University of Amsterdam, on 30 June 2010. This venue accounts for my choice of this word here, as well as for the similar self-referential remarks in the last two paragraphs in section 8 below.
[ii] This episode is discussed in Motley 1883, vol. 3, pp. 507-9; Wedgwood 1944, p. 222; Geyl 1958, pp. 183-84; and Swart 1978, p. 35. My account in the rest of this paper is also based on these works, but from here on no specific references will usually be given, except for quotations and a few other specific items.
[iii] Quoted in Eemeren and Houtlosser 2003, p. 178. I am paraphrasing, for

Voltaire said *monument,* which I am reading as *argument* because the "monument" we are dealing with is linguistic rather than physical. Motley (1883, vol. 3, p. 493) paraphrases *monument* as *document.*

[iv] See Scriven (1976; 1987) and cf. Finocchiaro 2005, pp. 5-7; see Toulmin 1958 and cf. Finocchiaro (1980, pp. 303-305; 2005, pp. 6-7); see Johnstone (1959; 1978) and cf. Finocchiaro (2005, pp. 277-91, 329-39); see Barth 1985, Barth and Krabbe 1992, Barth and Martens 1982, Krabbe et al. 1993, and cf. Finocchiaro (2005, pp. 46-64, 207-10).

[v] See Blair and Johnson 1980, Johnson 1987, Johnson and Blair 1994, and cf. Finocchiaro (2005, pp. 21-33); and see Fisher (1988; 2004) and Govier (1987; 1999; 2000, pp. 289-90), and cf. Finocchiaro (2005, pp. 1-105, 329-429).

[vi] One of the referees raised an objection to this part of the project along the following lines: in order to assess the arguments that make up a given argumentation theory, one has to use either the evaluation criteria of the same theory or those of another theory; but if one uses the same criteria, it is not obvious that such self-reflective exercise is possible or fair (the latter because it might automatically yield a favorable assessment); on the other hand, if one uses the evaluation criteria of another theory, then it is also not obvious that such an external evaluation is possible or fair (the latter because it might automatically yield an unfavorable assessment); therefore, this meta-theoretical project is doomed from the start since it may very well be impossible or unfair.

My reply is that this objection seems to assume uncritically a relationship between the theory and the practice of argumentation that may be the reverse of the right one. My inclination is practically oriented, in the sense of giving primacy to the *practice* of meta-argumentation. That is: let us try to do the meta-theoretical exercise; if it can be done, that shows that it is possible; moreover, let us try to be fair-mined in doing it; if we succeed in doing it fairly, that shows that the meta-theoretical evaluation can be fair; thus, let us postpone questions of possibility and fairness until afterwards. Moreover, the objection perhaps proves too much, in the sense that if what it says about evaluation or assessment were correct, then it would be likely to apply also to interpretation or reconstruction, in which case it would be suggesting that theoretical meta-arguments perhaps cannot even be understood, at least not from an external point of view; and such a parallel objection strikes me as being a *reductio ad absurdum* of its own assumptions.

[vii] As one of the referees pointed out, this hypothesis may be viewed as a special case of a thesis widely held in communication studies. For example,

Bateson (1972, pp. 177-78) has claimed that "human verbal communication can operate and always does operate at many contrasting levels of abstraction. These range in two different directions ... metalinguistic ... [and] metacommunicative." Similarly, Verschueren (1999, p. 195) has maintained that "all verbal communication is self-referential to a certain degree ... all language use involves a constant interplay between pragmatic and metapragmatic functioning ... reflexive awareness is at the very core of what happens when people use language."

I take this coincidence or correspondence as an encouraging sign, but I think it would be a mistake to exploit it for confirmatory purposes. In particular, such general theses cannot be used to justify my particular hypothesis about meta-argumentation because they are formulated and defended in a context and with evidence that does not involve the phenomenon of argumentation, but rather other linguistic and communicative practices. For example, Bateson (1972, pp. 177-93) is dealing with such phenomena as playing, threats, histrionics, rituals, psychotherapy, and schizophrenia; and of Verschueren's (1999, pp. 179-97) fifty-four examples of metapragmatic use of language, only two involve (simple, ground-level) arguments. Thus I feel they have not established that their generalizations apply to argumentative communication, and the question whether this particular application holds is the same question whether my meta-argumentation hypothesis is correct. Moreover, I would stress that both authors (Bateson 1972, p. 178; Verschueren 1999, pp. 183-87) are keen to point out that the metalevel aspect of the phenomena they study is a matter of degree and is usually implicit; on the other hand, my own meta-argumentation project focuses on very explicit cases.

The same referee also pointed out the other side of the coin of this potential confirmation of my hypothesis by the widely held generalization from communication studies. That is, perhaps my distinction between ground-level and meta-argumentation, together with my hypothesis about the implicitly meta-argumentative aspect of all argumentation, is afflicted by the difficulties stemming from the self-referential paradoxes such as Russell's and the liar's paradox. For example, Bateson (1972, pp. 179-80) is worried that when two humans or animals are playing by simulating a physical combat, the meta-communicative "message 'This is play' ... contains those elements which necessarily generate a paradox of the Russellian or Epimenides type – a negative statement containing an implicit negative metastatement. Expanded, the statement 'This is play' looks something like this: ... 'These actions in which we

now engage, do not denote what would be denoted by those actions which these actions denote'." Recall that Russell's paradox exposes the self-contradiction of the notion of a set of all sets that are not members of themselves, and that the liar's paradox is the self-contradiction of the statement that this statement is false.

However, my reply to this potentially negative criticism is analogous to my reply to the earlier potentially strengthening confirmation. I see the difficulty with the Russellian set and with the liar's sentence, and I see some similarity between them and Bateson's meta-communicative message that "this fighting is play"; but I see no similarity with my notion of a meta-argument, its distinction from a ground-level argument, and their relationship; and until and unless a similar paradox is specifically derived regarding meta-argumentation, I shall not worry.

[viii] For an explanation of such diagrams, which are now common in the literature and come in various slightly different versions, see, for example, Scriven (1976, pp. 41-43) and Finocchiaro (1980, pp. 311-31; 1997, pp. 309-35; 2005, pp. 39-41).

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ISSA Proceedings 2010 – Wellman And Govier On Weighing Considerations In Conductive Pro And Contra Arguments

1. Introduction

The concept of conductive argument remains unsettled and controversial in theory of argument. Carl Wellman (1971, p. 52) defined conduction as follows:

Conduction can best be defined as that sort of reasoning in which 1) a reason about some individual case 2) is drawn non-conclusively 3) from one or more premises about the same case 4) without appeal to other cases.

Wellman identified three types of conductive argument: *Type One* with a single pro reason, *Type Two* with multiple pro reasons, and T*ype Three* with one or more pro reasons and one or more con reasons. Arguments of the conductive type are clearly non-deductive and, most theorists would argue, non-inductive as well. The term "conductive" indicates a 'bringing together' of independent reasons, much like an orchestra conductor brings together many instruments and musicians into a single performance.

The theoretical issues surrounding the concept of conductive argument are almost too numerous to even list in a paper focused on a particular issue. Are all conductive arguments case-based? Should we be talking of conductive *evaluations* rather than of *arguments*? Are deductive, inductive, and conductive argument (or evaluation) types an exhaustive and mutually exclusive list? If all conductive arguments are diagrammed as convergent, do we want to say that all convergent arguments are conductive? Even more fundamentally, why should we model various pro and con arguments on a single issue as *one* conductive argument? There are many other basic questions and issues that could be listed as well.

The focus of the present paper is on the concept of premise weight in Type Three conductive pro and con arguments. Some theorists want to restrict the concept of 'conductive' to Type Three pro and con arguments (or evaluations). The present paper tables that proposal and proceeds on a working hypothesis that understanding the more complex Type Three conductive arguments is a useful pathway for achieving a better understanding of the less complex Types One and Two.

2. Wellman's 'Heft' and Premise Weight

Talk of 'weighing' reasons pro and contra is a common manner of speaking. "Premise weight" is an obviously metaphorical expression which some theorists view as an over-stretched and faulty metaphor with respect to its application in theory of argument. For example, Harald Wohlrapp wrote in his *Der Begriff des Arguments* (2008):

The upshot of the discussion of conductive argument is the following: The conclusion reached with arguments presented is not the result of a weighing, whatever that may be. (p. 333; trans. p. 21)

Trudy Govier is perhaps the only widely known theorist of argument who, in multiple publications, has endorsed and expanded upon Wellman's concept of premise weight. For Govier, premise weight is not literally measurable, which implies that premise weight must be non-numerical in some sense.

It is important to note that "outweighing" is a metaphorical expression at this point. We cannot literally measure the strength of supporting reasons, the countervailing strength of opposing reasons, and subtract the one factor from the other. (1999, p. 171)

Carl Wellman, the originator of the concept of conductive argument, also seems to have understood premise weight to be non-numerical, as indicated in the following passage from his *Challenge and Response* (1971):

Nor should we think of the weighing [of reasons] as being done on a balance scale in which one pan is filled with the pros and the other with cons. This suggests too mechanical a process as well as the possibility of everyone reading off the same result in the same way. Rather one should think of weighing in terms of the model of determining the weight of objects by hefting them in one's hands. This way of thinking about weighing brings out the comparative aspect and the conclusion that one is more than the other without suggesting any automatic procedure that

would dispense with individual judgment or any introduction of units of weight. (1971, pp. 57-58)

In this passage, Wellman distinguishes two concepts of weight which might we might conveniently call *scale-weight* and *heft-weight*. Scale-weight involves machinery, even if only a simple balance type of scale. The output of the scale-weight process is numerical. Even on a simple balance scale, the use of standard weights can provide numerical weight outcomes. Scale-weight outcomes, being numerical, are precise and absolute rather than non-numerically comparative. Scale-weight is probably the current default meaning of "weight" in both theory of argument and in everyday contexts.

As Wellman, Govier and others have noted, scale-weight is not suitable as the literal basis for the premise weight metaphor. Per Wellman, heft-weight is the correct literal basis for this metaphor, and Govier would likely agree. To my knowledge, heft-weight has not received very much analytical attention in the literature on conductive argument, perhaps because heft-weight is viewed as uselessly vague and subjective. If this characterization is indeed suitable, then the concept of premise weight in theory of argument falls prey to a destructive dilemma. If scale-weight is the literal basis of the premise weight metaphor, then the metaphor is faulty and over-stretched. If heft-weight is the literal basis of the metaphor, then the metaphor is suitable, but premise weight is thereby uselessly vague and subjective. Perhaps the only way to save the concept of premise weight is to further recharacterize heft-weight. But what would that be like?

In contemplating heft-weight, we can imagine a person lifting several items one at a time and making a verbal pronouncement on each one. Initially the pronouncements will be comparative in nature, such as: *much heavier than, heavier than, same weight as, lighter than,* or *much lighter than*. A set of comparative, ranked weight categories is thus progressively created. The objects ranked by comparative weight could then be divided into perhaps five or so categories of non-numerical, verbal weight quantities such as: *very heavy, heavy, medium, light,* and *very light*. We need not think of the objects as *individually* ranked *within* each weight category, however. The individual human being is here functioning as a comparative weighing machine. Due to the lack of precision of heft-weight, there would be blurred boundaries between categories, and some items would have disputable weight categories, even with just one individual doing the hefting.

The outcome of this individual weighing process is a series of judgments that is objective in the sense that the human body is typically a good, if only approximate, weighing machine that provides a non-numerical, comparative, quantitative output. If one object had a lot more heft than another but a mechanical scale reported the reverse, we would properly believe we had a broken scale. This individual judgment of heft-weight is thus not subjective in the sense of individual personal preferences such as 'chocolate tastes much better than vanilla'. But is heft-weight valid only for each individual weigher and thus non-objective in the sense of not intersubjective?

It seems to me that heft-weight should be understood as potentially intersubjective and thus objective, despite being non-numerical. As Aristotle noted, the solitary human being is either a beast or a God; so the standard case of Wellman's 'hefting' individual is that he is a member of a group. Let's say this group has about forty or so people, like the pre-Neolithic human bands, and that there is a mixture of the young and the old, and the frail and the robust. While Wellman's individual lifter is doing his or her thing, the others are also picking up the same objects in the same way and classifying them into ranked weight categories.

It would soon be found that the mid-range of people in terms of physical ability generally find a group of objects heavy and another group of objects light in weight, approximately speaking. These objects would then become *intersubjectively* heavy, light, etc. The fact that the Milo's of this group, the athletically trained weight lifters, found most of the common objects to be light in weight, and the small or frail of the group found most objects to be heavy would all be understood and adjusted for by members of the little group in the usual way. In effect, the mid-range of human strength becomes a kind of standard, much as color words are defined in the standard context of normal daylight. We do not think that red things turn black on a dark night, and we do not think that heavy things literally become light in Milo's hands.

According to the above account, heft-weight, properly understood is non-numerical, approximate, comparative, and objective (intersubjective). On this characterization, heft-weight has many of the virtues of scale-weight, the major exceptions being lack of numerical output and consequent precision. Instead of numerical output, heft-weight provides non-numerical, comparative quantity categories of an approximate nature. Understood in this way, heft-weight is a very

plausible literal basis for the metaphor of premise weight.

It might be objected that approximate, non-numerical quantities are not really quantities at all because quantities are *by definition* expressed as *symbolic* numbers. Although such a stance may have numerous defenders, the science of cognitive psychology has recently produced some interesting, and I think relevant, findings about what has been called the *approximate number sense*. Perhaps the term "quantitative capacity" would have been a better choice here than "number sense", but the latter wording has taken hold. The distinction between two different quantitative 'senses' is more than just a conceptual one. While the *symbolic number sense* is processed in a spread-out fashion in the prefrontal cortex, the approximate number sense is embodied in another part of the brain called the *intraparietal sulcus* (Cantlon, et al, 2009) The two number senses seem to be connected in interesting ways. Current research provides preliminary indications that math education can benefit by co-developing the approximate sense and the symbolic number sense. (Halberda et al, 2008) Professional mathematicians are known to exercise their approximate number capacities when socializing at conferences. Classifying the approximate number sense as 'mere intuition' is likely an inappropriate over-simplification, given recent findings in cognitive psychology.

A commonly used example of the approximate number sense is when someone views several supermarket lines and classifies them as 'shortest, short, medium, long, and longest'. Quantities are involved in this process, but typically no counting or symbols. Interestingly, other higher animals have this same ability, which provides obvious evolutionary advantages. The predator needs to choose which group of fleeing herbivores to chase; the fruit-eating animals need to pick which tree will provide the most fruit at the time. It seems quite plausible that this approximate number sense is involved in the process that produces heft-weight. The approximate number sense is comparative, non-numerical, and the product of individual judgment; and heft-weight is all of these things.

Unlike the other higher animals, humans in the process of discriminating quantities obviously verbally characterize the discriminated categories with comparative terms such as *'much more, more, about the same, less,* and *much less.'* In fact, we do this for a great many types of categories. A very common number of categories in such quantitative verbal hierarchies is three to five to perhaps seven. Seven items apparently are a common maximum quantity for

simultaneous cognitive focus in humans. Examples of such additional categories include 'rich/middle class/poor', or super rich/rich/upper-middle-class/lower-middle-class/poor' – and so on. In premise strength, we have 'strong/moderate/weak', or perhaps 'very strong/strong/moderate/weak/very weak', as categories of discriminated support quantities. Non-numerical quantity categories seem to be essential in human cognition and communication.

In correspondence, Trudy Govier has remarked to me that if the judgment is made to not use "weight" in theory of argument, then "one would have to figure out some other way of speaking. One might speak of deliberating, or comparatively considering, or making judgments of comparative significance." (1/31/10) I think, and Govier might agree, that these potential substitutions for talk of premise weight would do less work overall than the premise weight concept, understood as heft-weight. We use comparative, non-numerical quantity categories in our reasoning all the time; so dismissing such reasoning as inherently faulty requires a high burden of proof which has not been met.

Non-numerical, comparative quantitative categories are frequently applied by speaking of *degrees of* this and that. For example, there are degrees of argument strength, degrees of importance, and so on in a great many areas of discourse. In her (2009), Govier has herself puzzled over the so-called 'degrees' of argument strength: "What are these degrees anyway? There is no answer." It seems to me that the principal point of confusion here has to do with "degrees" bringing in symbolic numbers – or not.

Of course, some decision theorists do apply numbers to verbal premise weight categories, e.g. "5" for "very strong", etc. This approach in my view is best regarded as a 'game technology'; there are some useful applications for it in contexts of decision making. This 'invented' numerical premise weight has no rational basis for conductive argument evaluation for at least one major reason: The exact selection of the number scheme can actually *determine the evaluation* for some arguments.

To provide just one example, choosing a number scheme of 3-2-1 vs. one of 10-5-2 for the three 'strong/medium/weak' verbal categories *determines* the evaluation of an argument with the following premise weight classifications: four strong pro reasons, five moderate contra reasons, and five weak contra reasons. This type of argument supports its conclusion on a 3-2-1 assignment but not on a 10-5-2

assignment. There is seemingly no way to argue for the rational basis of one number scheme over another for labeling the commonly used verbal categories. Even the total number of quantitative categories is largely contextually determined rather than rule-based. For various reasons, applying numbers to verbal categories has limited theoretical use, if any.

If premise weight determination does not normatively involve the application of symbolic numbers, what positive account of premise weight emerges from the above account? I would argue that premise weight determination involves a classification of each individual premise into one of a small number of non-numerical quantitative categories. With the literal basis of Wellman's premise weight metaphor, the verbal quantitative categories could be named: *'very heavy', 'somewhat heavy', 'medium', 'light'* and *'very light*; the corresponding theory of argument categories would be similarly *'very strong', 'somewhat strong', 'medium strength', ''somewhat weak',* and *'very weak.*

These non-numerical, quantitative categories of premise weight categories are, to be sure, highly familiar ones. The intent of the above account is to provide them with a clearer grounding than they have previously received, to my knowledge. The fact that the exact names and even total number of such categories is variable and contextually determined is not in my view problematic.

The presumptive weight of an individual premise would in context be based on background knowledge and social values of the individuals and groups involved in argumentation. If a given premise weight is not agreed to, then it can argued for using some version of the scheme for argument to a classification. Premise weights can thus be seen as intersubjectively determinable, contextually and within limits. The contextual reality of deep disagreements is not an effective objection to premise weight as a key term in theory of argument, contrary for instance to Harald Wohlrapp's critique of Govier on conductive argument.

We shall now apply the above account to some of Govier's critics on the concept of premise weight and conductive argument, particularly those criticisms focused on quantitative issues. The interpretation of Govier is my own and is of course quite arguable; hopefully it has some measure of accuracy and value.

3. Govier's 'Exceptions' and Issues of Quantification
Govier's detailed account of weighing reasons is put forward in Chapter 10 of her

Philosophy of Argument (1999) and in Chapter 12 of her textbook, *A Practical Study of Argument*, the current edition being the 7th (2010). In the first paragraph of her text's section on conductive argument evaluation, she writes of premises' "significance or weight for supporting the conclusion." (p. 359) She soon introduces the specifics of her concept of premise weight, as follows:

While acknowledging that we are dealing here with judgment rather than demonstration, we will suggest a strategy for evaluating reasons put forward in conductive arguments. The premises state reasons put forward as separately relevant to the conclusion, and reasons have an element of generality. That generality provides opportunities for some degree of detachment in assessing the conclusion. Since this is the case, we can reflect on further cases when seeking to evaluate the argument. (2010, p. 361)

Govier's explication of premise weight uses as its principal example an argument for the legalization of voluntary euthanasia; several of her major critics, including Harald Wohlrapp, have responded to her with further analyses of the same argument, so it is worth stating completely here:

(1) Voluntary euthanasia, in which a terminally ill patient consciously chooses to die, should be made legal.

(2) Responsible adult people should be able to choose whether to live or die.

Also, (3) voluntary euthanasia would save many patients from unbearable pain.

(4) It would cut social costs.

(5) It would save relatives the agony of watching people they die an intolerable and undignified death.

Even though (6) there is some danger of abuse, and

despite the fact that (7) we do not know for certain that a cure for the patient's disease will not be found,

(1) Voluntary euthanasia should be a legal option for the terminally ill patient.

Govier identifies the associated generalizations for the pro reasons as follows, each with its *ceteris paribus* clause:

2a. Other things being equal, if a practice consists of *chosen* actions, it should be legalized.

3a. Other things being equal, if a practice would *save people from great pain*, it should be legalized.

4a. Other things being equal, if a practice would *cut social costs*, it should be legalized.

5a. Other things being equal, if a practice would *avoid suffering*, it should be legalized.

Each generalization is seen to have exceptions, which are the subject matter of the *ceteris paribus* clause.

For example, you could imagine social practices that would deny medical treatment to medically handicapped children, abolish schools for the blind, or eliminate pension benefits for all citizens over eighty. Such practices would save money, so in that sense they would cut social costs. But few would want to support such actions. Other things are not equal in such cases; the human lives of other people who are aided are regarded as having dignity and value, and the aid is seen as morally appropriate or required. (2010, p. 361)

The principle of cutting social costs has, in Govier's terms, a wide range of exceptions.
Perhaps Govier's most succinct statement about premise strength is in her (1999, p. 171):
A strong reason is one where the range of exceptions is narrow. A weak reason is one where the range of exceptions is large.

For Govier, and within the present paper, the following are treated as roughly synonymous expressions because all are quantitative in a similar way: premise *significance, weight, strength, and force*. At issue here is the quantitative force of reasons in the broadest sense, as least for Wellmanian 'type 3' conductive pros and cons arguments.

Harald Wohlrapp challenges and rejects Govier's account of a quantifiable range of *ceteris paribus* exceptions:
But why should the argument be weaker, because the associated if-then sentence has 'more exceptions'? Can I really compare the number of exceptions through enumeration? Must we not bear in mind that the general principles are situation-abstract and that, depending on how they are being situated, they can have arbitrarily many exceptions? Is there anything countable here? (2008, pp. 323-324; trans. p. 10)

I would like to address this important critique in two respects: (1) issues regarding the nature of these exceptions and in particular their quantifiability; and (2) the general role of the 'normal situation' and *ceteris paribus* in everyday

argumentation vs. in scientific contexts. This second issue area will be addressed in Section III of the present paper. What sort of things are these so-called exceptions?

As quoted above, Govier states that the point of framing the generalization associated with a conductive argument consideration is to identify additional *cases* falling within that generalization. According to Govier, these cases are then to be *reflected on* in the appropriate process of evaluating premise weight in conductive arguments. Such cases would seemingly be of two kinds, (1) actual cases past or present, and (2) fictional *a priori,* 'what if' cases, including potential future cases. It seems to me that the quantity of exceptions concerns not the number of items on a *list* of exception categories, which can be almost arbitrarily long. Rather, the quantity of exceptions must involve *cases*, actual or a priori as described above.

An illuminating question to ask at this point may be as follows: How does Govier come to reasonably believe that there are a great many exceptions to the generalization of cutting social costs? She obviously knows this from her experience living in a wide, but imprecisely delineated, moral community that one might call the developed democracies. She learned about the social values and behavior that create this 'wide range of exceptions' by experiencing multiple cases of a normative nature. Two critical questions for Govier's account are: (1) How and in one sense are such cases counted or numerically assessed, and (2) How and in what sense are such cases relevant to the concerns of normative logic?

Any individual's knowledge of how many exceptions there are to the principle of reducing social costs is imprecise, which suggests the involvement of the approximate number capacity described above. Explicitly counting exceptions to the principle of reducing social costs is not commonly done. We simply do not go around stating, for example, that there were 794 exceptions to the principle of cutting social costs in the U.S. Congress from 2005 to 2009. Instead, we learn in living which types of cases are very common and which are rare in our moral, legal, and social communities. We do not have in mind the details of most cases and we do not typically count them. We know of a great many cases in which social costs are borne so that other objectives can be attained. We know of comparatively few cases in which unbearable human pain is knowingly tolerated in favor of controlling social costs. Comparative, non-numerical, and individual

judgment is being exercised, and that judgment has some objective basis in the quantity of cases comprising the relevant evidence. We acquire knowledge of actual social values by experiencing a great many cases, both legal cases and cases the everyday sense or situations and decisions made. But how are these relevant cases evaluated and processed as evidence, and what concepts and issues within normative logic are involved?

A very fruitful distinction to employ here might be that between case-based legal argument, emphasized in common law-oriented legal cultures, and rule-based legal argument found in civil-law-oriented legal cultures. If I am correct in interpreting Govier's exceptions-based understanding of conductive argument as a matter of supporting cases in the widest sense of "case", then the legal model of processing cases, rules and social values may provide insight into the normative aspects of everyday conductive reasoning.

A particularly interesting account of case-based and value-based legal reasoning has been provided Trevor Bench-Capon and George Christie. A legal argument is a paradigm of an argued case. Of course legal arguments and reasoning have been foundational for normative logic since Toulmin. In comparing case-based common law legal argument with rule-based civil law legal argument, George Christie very effectively highlighted the distinctive role of cases in the former:

Under the approach to legal reasoning now to be described [case-based, common law], so-called rules or principles are merely rubrics that serve as the headings for classifying and grouping together the cases that constitute the body of the law in a case-law system. In such a system even statutes are no more than a set of cases, if any, that have construed the statute together with the set of what might be called the paradigm cases that are, in any point in time, believed to express the meaning of the statute. (2000, p. 147)

Arguing from a few precedent cases is of course a standard argument by analogy using the 'argument from precedent' scheme. But the picture becomes more complex, and more interesting, once social values are brought in, as theorized by Bench-Capon.

For Bench-Capon, a given case in law is appropriately decided within a key context of often many other cases, past, present and future:
A given case is decided in the context both of relevant past cases, which can

supply precedents which will inform the decision, and in the context of future cases to which it will be relevant and possibly act as a precedent. A case is thus supposed to cohere with both past decisions and future decisions. This context is largely lost if we state the question as being whether one bundle of factors is more similar to the factors of a current case than another bundle, as in HYPO, or whether one rule is preferred to another, as in logical reconstructions of such systems. (2000, pp. 73-74)

The context of cases is key because, according to Bench-Capon, "we see a case-based argument as being a complete theory, intended to explain a set of past cases in a way which is helpful in the current case, and intended to be applicable to future cases also. The two goals are closely linked. Values form an important part of our theories and they play a crucial rule in the explanations provided by our theories." (2000, p. 74)

Bench-Capon believes that "the 'meaning' of a case is often not apparent at the time the decision is made, and is often not fixed in terms of its impact on values and rules. Rather, the interpretation of the case evolves and depends in part on how the case is used in subsequent cases." (2000, p. 74). Thus case-based argument in law it is commonly not about a small number or cases implying a value scheme but is rather about potentially many relevant cases that modify value schemes in ways not always understood until later interpretations. There is a 'theory of cases' that new cases are constantly modifying.

What is the theoretical relevance of these legal arguments, understood as above, to conductive argument evaluation? The *factors* of legal argument analysis seem to me to be fundamentally the same as the *considerations* of general pro and con conductive arguments concerned with evaluative issues:
"The picture we see is roughly as follows: factors provide a way of describing cases. A factor can be seen as grounding a defeasible rule. Preferences between factors are expressed in past decisions, which thus indicate priorities between these rules. From these priorities we can adduce certain preferences between values. Thus the body of case law as a whole can be seen as revealing an ordering on values." (2000, p. 76)

And further:
"In regard to legal theories cases play a role which is similar to the role of observations in scientific theories: they have a positive acceptability value, which

they transfer to the theories which succeed in explaining them, or which can include them in their explanatory arguments." (2000, p. 76)

Cases both express and develop value schemes, which consist of both lists of values and their prioritization in contexts of conflict. Henry Prakken has endorsed this approach as well: "As Bench-Capon [2] observes, many cases are not decided on the basis of already known values and value orderings, but instead the values and their ordering are revealed by the decisions. Thus one of the skills in arguing for a decision in a new case is to provide a convincing explanation for the decisions in the precedents." (Prakken, 2000, pp. 8-9)

It seems very plausible to me that these points are applicable well beyond legal argumentation. Perhaps weight in conductive arguments, at least those focused on evaluational issues, might best be understood on the model of the above approach to legal case-based arguments. Our daily experience and decisions, both collective and individual, form a kind of case history which both expresses and continually forms and re-forms our values. Philosophers in recent decades have tended to understand moral issues (and sometimes practical issues) in terms of *rule-based models* rather than in terms of *case-based* models, but this long-term emphasis may have been overdone. It seems to me quite plausible that the case-based reasoning model would readily apply to non-moral, evaluative, conductive reasoning as well.

The idea of value schemes evolving with case decisions is entirely consonant with Stephen Toulmin's remarks in *The Abuse of Casuistry*: "Historically the moral understanding of peoples grows out of reflections on practical experience very like those that shape common law. Our present readings of past moral issues help us to resolve conflicts and ambiguities today". (1988, p. 316) It seems to me that taking the case-based understanding of legal reasoning, together with modeling much everyday evaluative reasoning on legal argument interpreted as value-centric, is a very promising direction.

Perhaps a very broad characterization of the type of reasoning in question might be what Robert C. Pinto and others have called "*support by logical analogy*". In his (2001, p. 123), Robert C. Pinto describes the method of logical analogy as "pre-eminently important." Pinto further notes: "Though it [argument from logical analogy] is fairly widely recognized as a method for justifying negative evaluation of arguments and inference, in my view it can also provide grounds for

positive evaluations as well." Govier addresses refutation by logical analogy in her textbook's chapter on analogical reasoning. I am not aware of her addressing support by logical analogy elsewhere. David Hitchcock has written a very interesting paper (1994) on conductive argument validity which utilizes, according to my understanding of it, refutation by logical analogy; I believe he does not address "premise weight" here specifically. The point I would like to add is that support by logical analogy would seemingly involve analogous cases that might be argumentatively addressed in the mass, rather than in the substantial detail of a standard two-case argument by analogy.

It might be objected that in focusing on Govier's talk of further cases to reflect on, I am hopelessly blurring the distinction between conductive and analogical argument. The claim that premise weight is commonly supported by, broadly speaking, analogical types of arguments does not imply that conductive arguments are types of analogical arguments. The main argument, the first tier of reasons above the conclusion (the main conclusion being at the bottom of the argument diagram), may be convergent but have analogical *subargument*s either in the dialectical tier or in corresponding evaluation arguments. It is interesting to note that analogical and conductive arguments are typologically 'cousins' in a sense in that both are inherently *comparative* in nature.

Not all conductive arguments are about valuational matters. Some theorists' efforts regarding the 'quantity of evidence' in conductive argument might best be seen as regarding conductive arguments with non-valuational conclusions rather than conductive arguments in general. For instance, in his *Cognitive Carpentry*, John L. Pollock proposed numerical quantitative assignments to premises for arguments that can be interpreted as statistical syllogisms. In his (2002), Alexander V. Tyaglo has applied probability theory to separate reasons in convergent arguments. The epistemic status of the probability numbers themselves makes this approach one of limited scope and value.

Ideas from Pollock and from Tyaglo may be applicable to *predictive* (or dispositional) conductive arguments that seem to be arguments from sign. An example of such an argument appears early in Govier's textbook chapter on conductive argument: "She must be angry with John because she persistently refuses to talk to him and she goes out of her way to avoid him. Even though she used to be his best friend, and even though she still spends a lot of time with his mother, I think she is really annoyed with him right now." (2010, p. 366) Whether

it is useful to identify two (or more?), subtypes of conductive argument, the empirical and the valuational, is an interesting question worth pursuing. The argument of the present paper concerns principally 'valuational' conductive arguments.

4. Cumulating Independent Reason Strands

The above account characterizes premise weight determination as normatively involving a scheme of argument to classification among a small number of non-numerical but quantitatively ranked categories, i.e. 'very strong', 'strong', etc. This claim is of course not at all novel. The present intent is to provide additional conceptual support and clarity for the concept of degrees of premise weight and argument strength. What is excluded for those who accept the above account is the view that premise weight is either entirely subjective or entirely objective, as would be implied by accepting the scale-weight model of premise weight or by rejecting the concept of premise weight altogether. The above account thus supports a middle ground of intersubjectivity.

Most of the above account has to do with the concept of individual premise weights. But, how are the various reason strands of a given argument to be normatively 'conducted' together into an evaluation of their net collective support, or lack thereof, for an argument's stated conclusion? More 'dustbin empiricism" might be helpful here in order to better develop what Robert C. Pinto calls *critical practice*, an aspect of which would here be a checklist of questions as a guideline to good conductive argument evaluation.

It seems to me that, descriptively, people commonly begin a conductive argument evaluation by viewing the whole argument and classifying considerations as major or minor. Ben Franklin famously crossed out opposing, equally (heft-) weighted considerations. Descriptively, it seems to me that we seem to hold those considerations identified as "minor" in reserve, in case there is a perceived 'tie' between the major considerations on each side. Arguments with, for instance, two strong pro premises, one weak pro premise, and two strong con premises may just be unresolvable, unless more considerations can be added or individual premise evaluation differences resolved by the arguers. But such common-sense observations and guidelines hardly constitute an example of adequate theory of argument.

It may very well turn out that normative logic has rather little to offer in terms of

addressing premise cumulation in conductive argument. Harald Wohlrapp famously argues exactly this point and offers his dialectical frame-integration account of resolution. But it seems to me that his approach rings true because it brings in values; a *frame* for Wohlrapp is a valuational perspective on a set of characterized (or recharacterized) facts. Addressing values directly is, as previously mentioned, also a feature of legal case-based, value-based reasoning. Values are commonly brought into contexts of everyday conductive argument as well.

5. Conclusion

A longer paper would have been able to further address a number of issues regarding premise weight. For example, the concept of *ceteris paribus* and the 'normal situation' highlighted in Govier's account deserves more extensive treatment. Also deserving of attention is Frank Zenker's interesting proposal that (1) deductive, inductive and conductive arguments all have premise weights, but that (2) the premise weights in deductive and inductive arguments are 'equal' and thus in a sense tacit. (Zenker, 2010) Perhaps the concept of premise weight could be useful in clarifying evaluation typologies along the following lines: (a) deductive evaluation is *structural* with equal-weight reasons; (b) inductive evaluation is *additive (or cumulative)* with equal-weight reasons; and (c) conductive evaluation is *comparative with,* unequal-weight reasons.

Overall, the logic of conductive argument remains somewhat obscure, but perhaps we are collectively making some small progress. A main take-away from the present paper, in my view, is that the concept of premise weight is a fruitful one that is entirely worthy of contemporary interest and further investigation in theory of argument.

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