UNIVERSITÀ DEGLI STUDI DI TRENTO

Facoltà di Giurisprudenza

STUDIES ON ARGUMENTATION & LEGAL PHILOSOPHY / 2

MULTIMODALITY AND REASONABLENESS IN JUDICIAL RHETORIC

MAURIZIO MANZIN
FEDERICO PUPPO
SERENA TOMASI
(eds.)

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PREFACE

Rhetoric is no doubt the point of convergence of different perspectives on legal argumentation. To some scholars rhetoric appears to be only a set of speech tools capable of giving the strength of persuasion to arguments otherwise destined to be restricted to a specific and learned audience. Others admit that rhetoric can extend its power to various (all?) fields of communication, such as figurative arts, shows, movies, advertising, music etc. – and, consequently, they cultivate a *multimodal* rhetoric. Scholars rooted in classical studies (standing especially upon Aristotle) prefer highlighting the connections between rhetoric and rationality rather than dividing the two, whereas analytical jurisprudence and legal hermeneutics generally consider rhetoric as a frame of reasoning consisting of a list of interpretative canons.

When arranging its annual meeting *Giornate Tridentine di Retorica / Trento Days on Rhetoric* in 2015 (GTR 15), our Research Centre on Legal Methodology (CERMEG) thought it should be challenging to make a call upon both the new trends on multimodality dealing with legal argumentation and the more 'traditional' views on judicial reasoning, in order to stress the quantity of issues and problems arising from the clash among some advanced studies on rhetorical communication and the more 'official' legal argumentative theory.

The conference, under the title of «Visual Argumentation & Reasonableness in Judicial Debate», was held on June, 17th-19th 2015. After a blind peer-reviewed process, many of the papers discussed in Trento were selected to be published in this volume which has to be intended as a continuation of the discourse we started last year with the publication of *Further Steps Towards a Pluralistic Approach* in this series[1].

In the first part of the volume, Leo Groarke (University of Trent, Canada), Gabrijela Kišiček (University of Zagreb, Croatia) and Paul

[1] M. MANZIN, F. PUPPO, S. TOMASI (eds.), *Studies on Argumentation and Legal Philosophy. Further Steps Towards a Pluralistic Approach*, Napoli, 2015. Available also on line at: *http://hdl.handle.net/11572/106571*.

van den Hoven (University of Utrecht, Netherlands) give a wide overview on "multimodal arguing", following the idea that, particularly in recent times and in a globalized world, communication is attained more rapidly and effectively by images and other non-verbal means than by words. According to Leo, Gabi and Paul the fact that in many occasions multimodal communication can achieve its goals with much more effectiveness than simple speeches, is not due to a sort of 'magical' emotional power competing with rationality, but rather to the better adequacy of non-verbal means in particular concrete situations (s.c. "real world arguing"). In other words, a *comprehensive* theory of argumentation, not limited only to 'ideal' communicative situations, should take into account the whole panoply of arguing methods provided by multimodality.

Although the Authors of the first part of the volume are not specifically jurists, they offer some very interesting examples in the domain of the law. One of them is the notorious "Big Eyes Controversy" which took place in the 60's between the painter Margaret Keane and her husband Walter (on this famous case Tim Burton has based his recent movie *Big Eyes*). Another example is given by the trials against John Demjanjuk (a naturalized US citizen supposed to have been a guard in German concentration camps during WW2), in which non-verbal pieces of evidence played a key role. Similar situations occurred also in the Nuremberg trials, in the Mai Lai case (during the Vietnam war) and in that of Abu Ghraib prison (in Iraq war). All these examples are discussed by Leo.

Gabi and Paul, for their part, focus especially on the Stanley Williams case (Williams was a gang-leader sentenced to death in 1979), analysing the videoclip which was broadcast in order to persuade the California governor Arnold Schwarzenegger to grant clemency. In this case too, multimodality gave the opportunity to build relevant legal arguments in a unique way, since monomodal semiotic resources would have been far less effective in achieving their communicative goal (which were basically an appeal to reason).

In the second part of the volume, the Authors (who are all scholars in law) deepen issues dealing with that peculiar kind of debate which is developed in the legal decision-making process. Christian Dahlman

(University of Lund, Sweden) writes on the assessment of legal evidence in criminal trials and explores the use of generalizations; such rhetorical figures are typical in legal reasoning about facts, and operate as warrants to toughen the hypothesis at stake (let think, for instance, to a generalization like: ‘a witness who is habitually addicted to alcohol is not reliable’). Of course, generalizations can be attacked in the judicial debate, and their capability to resist the attack depends on the inherent strength of their structure: for this reason, Christian conceives a ranking of unacceptability of the generalizations.

Marko Novak (European Faculty of Law in Nova Gorica, Slovenia) underlines the role of the argument of majority in providing transparency to legal decisions, since the practice of distinguishing different opinions in the judgements of higher courts is still unfamiliar to tribunals in Civil law systems.

Pedro Parini (Federal University of Paraíba, Brasil) addresses the topic of irony which is intended by him not only as a rhetorical tool, but more substantively as one of the features of law in itself. Pedro proposes an “ironic reading” of law in the post-modern age (an age characterized, in his opinion, by a specific kind of irony), providing also some insights about the role of the ironic in legal understanding.

Serena Tomasi (CERMEG, University of Trento, Italy) focuses on rhetorical strategies in legal language, by analysing the recurring formulas used by judges in legal opinions. She points out that legal documents contain expressions which have not only an institutional function but are often used also as “dressed” arguments.

The closure of this collection of essays is entrusted to Miguel Á. León Untiveros (National Major University “San Marcos” of Lima, Peru), who rejects some consequences of the second horn of Jørgensen’s Dilemma (s.c. “prohibitive” thesis) about the possibility of a logic for normative statements. The Author’s aim is eminently semantic: normative statements, as expressed by legal language, cannot be recognized as true or false, and therefore the Tarski’s “T-scheme” is not applicable to them.

The richness of proposals characterizing this second volume on legal argumentation is a distinctive sign of the efforts made by our Research Centre on Legal Methodology in order to enforce collaboration

between scholars in rhetoric and argumentative theory with different outlooks and, even, from different fields of investigation. Our hope is that they could be useful for further studies in both theoretical and practical (mostly judicial) approaches.

As it is written in the CERMEG on line manifesto, we are strongly convinced that a good job on legal argumentation can be done only when starting from the real world of lawyers and of all other legal practitioners and when finishing in the same world.

Finally, I want to express my personal gratitude to Serena and Federico whose generous engagement in scientific as well as organizational issues has never failed in all the initiatives of the Centre.

Maurizio Manzin
Chairman of CERMEG

MULTIMODALITY AND THE LAW

Leo Groarke

Abstract

According to the classical account of arguing, an argument is a set of sentences (or the "propositions" they refer to). This view takes acts of arguing to be linguistic acts, making words and sentences the building blocks of argument. One might contrast this perspective with that of recent commentators who propose theories of argument that make room for modes of arguing that employ non-verbal phenomena like pictures, diagrams, computer projections, virtual reality, scientific images, non-verbal sounds, as well as smells, tastes, and other experiences. The divergent modes of arguing the latter view implies have affinities to accounts of intelligence that distinguish between different kinds of intelligence – linguistic, emotional, logic-mathematical, musical, spatial, kinesthetic, and so on (see Gardner 2011).

Those commentators who propose modes of arguing that transcend words and language still recognize verbal arguments as a remarkably powerful and important form of arguing. One might describe arguing in words as the historically most significant mode of arguing; as the basis of knowledge and explanation as we know and understand it; and as the foundation of our established practices in law, science, politics, and medicine. One notable defense of such arguing is found in Plato's Phaedo, a dialogue which purports to recount Socrates' philosophical reflections on his last day alive, the day of his execution.

At one point in the discussion, Socrates responds to perplexity about contrary arguments, by exhorting his listeners not to succumb to misologia: the hatred of words as they are used in arguing. According to his account, this "worst" of all conditions results when people hate all arguments because of their experiences with difficult and confusing

arguments, much as misanthropes hate all people because of their negative experiences with some.

In contemporary discussions of modes of arguing one might contrast the ailment which is misologia with its opposite, a condition I shall call logophilia: the love of words as they are used in arguing. Whereas misologia exaggerates the issues raised by verbal argument, logophilia exaggerates its efficacy. In defense of the idea that logophilia is a problem, one might point to trends in ancient, medieval and contemporary philosophy which suggest that traditional accounts of arguing overestimate the power of words and language. In the context of Plato's account of misologia, it is notable that the history of his own Academy includes a long period in which he is interpreted as someone who is profoundly skeptical of logos. I argue in favour of a broad account of argument that makes room for modes of arguing that employ non-verbal elements that transcend words and language. In doing so, I will argue against traditional accounts of arguing, charging them with a logophilia that exaggerates the power of words and language and greatly underestimates their limits.

1. Introduction

Conventional views of argument understand arguing as an activity which is carried out with words. Today, this assumption is less secure than it once was because we increasingly communicate in other ways. Following Kjeldsen 2015, I understand "multimodal arguing" as arguing that depends on non-verbal elements like photographs, videos, audio recordings, maps, diagrams, charts, computer models, virtual realities, etc. The most obvious examples of multimodal argument are "visual arguments" that employ non-verbal visuals of some sort. One simple example is the use of a photograph to identify a criminal. Other instances of multimodal argument employ modes of arguing that depend on music, natural sounds, smells, tastes and other non-verbal elements. The present essay argues that a comprehensive theory of legal argumentation must be multimodal, and must recognize the role that non-

verbal elements – in particular, non-verbal visual elements – play in legal reasoning.

My arguments have some affinities to the work of other scholars who have studied visuals in a legal context. Heritier (2014a, 2014b) has demonstrated how the study of art can illuminate the foundations of law. Other authors have addressed issues raised by the various roles that visuals can play in the courts (see, e.g., Robinson 2007; Schwartz 2009; Torresi 2014). One might compare my perspective to that of other commentators who have tried to place legal reasoning and jurisprudence within a broader theory of argument. The theory of syllogisms, rhetoric, deontic logic and other theoretical accounts of arguing have all been featured in such discussions (see, e.g., Sarat and Kearns 1996, and Huhn 2002).

In my own case, I propose a theoretical view of argument which is rooted in discussions of multimodal arguing that have taken place in "argumentation theory" – an interdisciplinary field devoted to the study of real world arguing (see Kjeldsen 2015). I argue that multimodal theories demonstrate the limits of verbal arguing, suggesting that there are many circumstances in which visual arguing (or some other form of multimodal argument) is a more credible and more important mode of argument. I illustrate this point with many examples of legal argument. The critique of verbal arguing that results has much in common with philosophical trends that doubt the adequacy of arguing couched in words.

2. For and Against Words

The most famous defense of arguing is found in Plato's Phaedo, a dialogue which claims to recount Socrates' reflections on the day of his execution. At a key point in the discussion, he responds to some of the confusion and perplexity his own arguments produce by warning his listeners not to succumb to misologia: the hatred of arguing (89b-91c). Here and elsewhere he understands argument as arguing in words. A hatred of such arguing is, he declares, the greatest evil that can befall a human. According to the diagnosis he provides, misologia is rooted in

the consternation people experience when they set out to argue in order to discover what is true and are exasperated by their inability to choose between the contrary arguments that result. Socrates compares the "misologues" this produces to misanthropes who conclude that all people are bad when they come to blows with a few of their friends.

Two and a half millennia later, Socrates' concerns about misologia remain a frequent topic of discussion (see Jacquette 2014; Miller 2015). In this essay I want to contrast Plato's account of misologia with an opposite affliction I shall call logophilia: the love of arguing in words. According to Plato, misologia mistakenly rejects argumentative discourse. In sharp contrast, I shall argue that the logophilia that characterizes traditional views of argument – in law, and much more broadly, in conventional accounts of arguing – moves too far in the opposite direction, placing too much faith in the efficacy of words. Recognizing logophilia as an ailment can help us better understand the fundamental issues raised by contemporary discussions multimodal arguing, issues which are evident when one considers legal reasoning.

Before we turn to theories of argument, it is worth noting that the suggestion that logophilia is an ailment has affinities to many intellectual currents which question the assumption that words are a reliable guide to truth. In ancient times, such leanings are already evident in the Presocratics – in, for example, Parmenides, whose famous poem proposes a way of truth which leaves no room for the distinctions made by language. Sophists like Gorgias and Protagoras demonstrate the arbitrary nature of language in a different way, claiming that they can use it to argue for any point of view, and on one either side of any question. Though Plato's complaints about misologia are directed at the sceptical leanings of the sophists, his own protagonist, Socrates, is an avowed sceptic who seems able to refute all claims. After Plato's death, his own Academy becomes a major school which claims that logos cannot establish what is true. For centuries, Academic and Pyrrhonean sceptics argue, in sharp contrast with the Phaedo, that arguing in words is an endeavor which is futile.

In Eastern philosophical traditions one finds other trends which maintain that arguing in words is misleading or inadequate. Taoism as a good example. It is a Chinese tradition which ultimately rejects lan-

guage as a guide to the Tao ("the way") that it promotes, claiming that the tao is eternally nameless (Lao Tzu, 1.32); that those who talk do not know (1.56,81); and that the wise guide by closing their mouths and teaching without words (2.52). In a number of ways, the arguments I develop in this essay echo consequent attempts to convey the tao, not in words, but in actions and artistic endeavours like literature, painting, calligraphy and metaphor.

In contemporary philosophy one finds another critique of words in Wittgenstein's philosophy, in its recurring interest in the limits of language. According to the Tractatus Logico-Philosophicus:

> My propositions are elucidatory in this way: he who understands me finally recognizes them as senseless, when he has climbed out through them, on them, over them. (He must so to speak throw away the ladder, after he has climbed up on it). He must transcend these propositions, and then he will see the world aright (6.54).

Wittgenstein's later work develops a more expansive view of language, but his philosophy is still characterized by a persistent interest in what we cannot say. His 1929 "Lecture on Ethics" suggests that ethics and claims about the good lies beyond the limits of language.

> My whole tendency and I believe the tendency of all men who ever tried to write or talk Ethics or Religion was to run against the boundaries of language. This running against the walls of our cage is perfectly absolutely hopeless (44).

These doubts about the usefulness of words and limits of language are very much in keeping with the present essay's claim that conventional accounts of arguing are characterized by a logophilia which exaggerates the power of words and underestimates their limits. The remedy I propose is a theory of argument that recognizes modes of arguing that utilizes non-verbal elements. My examples emphasize the use of visuals (photographs, video, diagrams, etc.), though other kinds of nonverbal elements (smells, music, tactile sensations, etc.) may also function as argument components. The theory I advocate is rooted in discussions of multimodal arguing. They recognize arguing with words as an important way to argue, but make it one aspect of multimodal discourse

and broaden argumentation in a way that challenges the preferred place that words occupy in conventional accounts of arguing.

When questioned about the limits of language, Wittgenstein famously responded by whistling, employing a prodigious ability to whistle the classical repertoire (including entire symphonies). This practice prompted Ramsey's famous quip that "what we can't say, we can't say, and we can't whistle it either" (1931, 238). This exchange has generated some intense exegetical debates over the question whether Wittgenstein tried to whistle what can't be said (see Black 1964, Hacker 2000, Diamond 2011). In the present context, it is worth noting that the defense of non-verbal modes of arguing this essay proposes makes sense of Wittgenstein's whistling. For the theory of arguing it proposes suggests and that there are many circumstances in which musical performances, photographs, and other non-verbal phenomena are the best way to express what it is impossible to say in words. It is this recognition that motivates a broader view of arguing which makes room for the non-verbal, and it is this broader view of arguing which I will apply in my discussion of arguing in law.

3. What is an argument?

Arguing is an attempt to convince or persuade an audience of some point of view. In his classic Introduction to Logic, Copi defines an argument as "any group of propositions of which one is claimed to follow from the others" (8). The proposition that is claimed to follow from the others is the argument's conclusion. The proposition(s) that support it are its premises, which "are regarded as providing evidence for the truth of" the conclusion. According to conventional accounts of arguing, an argument's premises and conclusions are expressed as sentences. It is this that makes arguments verbal. Theoretical accounts of argument have, in keeping with this, tried to understand argument in terms of the words and sentences they employ. Sometimes these accounts analyze arguments formally (via propositional logic, the predicate calculus, modal logic, etc.) and sometimes informally (via discourse theory, rhetoric, informal logic, etc.).

It goes without saying that verbal argument is a tremendously important mode of arguing. But it is a mistake to think that it is the only way to argue. The exclusive emphasis on verbal arguing that has characterized traditional theories of argument overlooks the reality that adept arguers often (and increasingly) build arguments that depend on non-verbal elements. In trying to convince or persuade an audience of a particular point of view, one may, for example, present photographs, show a video, use virtual reality or in some way employ non-verbal components like graphs, charts, maps, tastes, smells, gestures, sounds of various sorts, clothes, computer models, virtual reality, or three dimensional arrangements of data.

Following Groarke 2015, I will say that an arguer who uses words to construct an argument employs a verbal mode of arguing; that an arguer who employs visual premises employs a visual mode of arguing (or a more specific version of this mode, like a photographic or a video mode of arguing); that an arguer who uses an experience of taste to justify a conclusion ("that this is a good Barolo", for example) uses a mode of arguing we can call "arguing by taste"; and so on and so forth. Kjeldsen 2015 provides a comprehensive overview of the development of this "multimodal" conception of arguing within contemporary theories of argument. It is significant that the move toward a multimodal theory of argument has notable (though as yet unexplored) affinities to contemporary theories of intelligence that distinguish between different modes of intelligence – linguistic, emotional, logic-mathematical, musical, spatial, kinesthetic, and so on (see Gardner 2011).

Accounts of multimodal arguing recognize verbal arguing as a powerful tool that is in many ways the basis of knowledge and explanation as we know and understand it. But real life arguers are usually pragmatic, using whatever available modes of arguing can help them make their case effectively. In particular instances of arguing, this means that they frequently combine different modes of arguing, for example words and photographs. A dramatic increase in the use of multimodal argument that mixes different modes of arguing has been spurred by technological developments which have made it easier to produce and convey video, virtual realities, and other non-verbal elements.

One (in)famous instance of multimodal arguing in law was the trial of American police officers accused of excessive force in the beating of Rodney King in Los Angeles in 1991. The decision that the officers were not guilty precipitated riots which caused 54 deaths and 7,000 arrests, and led to a sequence of other trails, all the way to the United States Supreme Court (to Koon v. United States in 1996). The evidence the prosecution used in arguing for a guilty finding was a bystander video of three officers assaulting King, kicking him, "stomping" on him, and hitting him with metal batons. This is a paradigm example of visual arguing, the video – rather than a verbal description of the altercation – functioning in the role of evidence (premises) in an argument that concludes that the officers were guilty of the use of excessive force.

In the initial trial the defense replied to the prosecution's visual argument with a multimodal argument of their own. It dissected the video of the altercation, breaking it into a series of segments which could, the lawyers argued, be interpreted as acts of self-defense on the part of the police officers. When King seems to fend off a blow from an officer, for example, the defense argued that this could be seen as an attempt to strike the officer. When the officer hits his arm, it was said that the officer was defending himself. When King tries to roll away from the officers' blows, the lawyers claimed that he was trying to get up to launch an attack on the officers. As Van den Hoven (2015, 67-71) and Nichols 1995 have pointed out, this combination of the video and verbal claims about it were the essential evidence in an argument for the conclusion that the police officers were acting to defend themselves, and were not guilty of excessive force. It is an example of multimodal arguing which fuses two different modes – verbal and visual – to produce an argument which depends on both.

Other examples of multimodal arguing – in and outside of law – are easy to find. My aim in this paper is not an in depth analysis of specific arguments but a consideration of the broader questions raised by the increasing use of multimodal arguing. In the rest of this paper I defend the thesis that multimodal arguing as an integral element of legal reasoning that must be recognized and accepted – not simply as an adjunct to verbal arguing, but as a form of arguing which is in many cases supe-

rior to the purely verbal arguing the law has traditionally assumed to be a paradigm. The crux of my argument is a series of reasons for thinking that we must make room for multimodal arguing in any satisfactory account of arguing in law.

4. Legal arguing is multimodal

Plato's commitment to a verbal account of arguing is reflected in his Apology, which recounts Socrates's speech in the trial that condemns him to death. At one point in the speech he complains about others who defend themselves in court by means of emotional displays rather than sound arguing in the conventional sense. As he puts it:

> Perhaps someone among you may be indignant when he recalls how he himself, in contesting a trial less serious than this one, begged and supplicated the judges with many tears, bringing forward his own children and many others of his family and friends, so as to be pitied as much as possible; while I will do none of these things, although I am risking my life… I do have a family, [but] I will bring none of them forward here in order to beg you to acquit me… For those men of Athens of great repute should not do these things; nor should you allow it. Instead, you should show that you would much rather vote to convict the one who brings in these piteous dramas and makes the city ridiculous than the one who keeps quiet. Apart from reputation, to me it does not seem just to beg the judge, nor to be acquitted by begging, but rather to inform and convince. For the judge is not seated to give away things because it makes them feel better, but to … give judgement according to the laws (Apology, 34b-35b).

The court behaviors that Socrates here rejects are multimodal appeals to pity. They are multimodal because what is said in such situations is only one element of these attempts to convince a jury to show pity. Tears, gestures, cries of anguish, pleading looks, and facial expressions are equally important (and often more powerful) components of these displays.

Socrates refuses to appeal to the court in this way, but Plato's account shows that this was expected, and reluctantly suggests that he might have been more successful if he had. At the very least this shows

that multimodal appeals of this sort could have a powerful influence on the jury. This highlights one multimodal aspect of legal arguing which has always played an important role in courtroom arguing, even though it is ignored by traditional theories of legal arguing. As Levenson writes of courts today:

> One view of the courtroom is that … [a] trial is simply the sum of the parties' formal evidence: eyewitness testimony, exhibits, and stipulations. Neither the words of counsel, nor the mannerisms of the defendant off the stand, nor the reaction of the gallery affects the outcome of a case. Yet, as any experienced trial lawyer knows, this sanitized venue for trials is a fantasy…

While a defendant sits in court, exercising his Sixth Amendment right to confront the witnesses against him, he is at center stage and on display for the jury. Jurors scrutinize his every move, attaching deep importance to a quick glance or a passing remark – details a non-juror might consider insignificant… As a society, we are "hard-wired" to judge people based on their appearances; the same holds true in the courtroom. Consequently, defense lawyers try to use appearances to their advantage. They adjust their own language, dress, and overall courtroom style to please the jury, and attempt to change their clients' looks as well. Criminal defense guides encourage client makeovers – each defendant needs the right outfit, a perfect hairstyle, and lessons on appropriate courtroom behavior (614-15).

The traditional view of legal argument considers such matters extraneous to the arguing at a trial. In doing so, it ignores a key component of the arguing that can have a profound effect on the outcome. Levenson demonstrates this in the case of a number of famous criminal trials – among them, the cases of Lorena Bobbitt (a Virginia woman charged with maliciously wounding her sleeping husband by cutting off his penis); Erik and Lyle Menendez (two brothers convicted of murdering their parents); and Timothy McVeigh (the bomber of the Alfred P. Murrah Federal Building in Oklahoma City, who was tried for the murder of 168 men, women, and children).

The power of visual evidence at trials is well established by social science research which shows that jurors react differently to evidence

presented verbally and visually. Kassin and Garfield (1991) studied the effect of video evidence in a mock trial in which some jurors, but not others, viewed a crime scene video with close-ups of a bloodied young man who was stabbed to death and left lying in the street. Those jurors who viewed the videotape set a lower threshold when considering the evidence for conviction. Douglas et. al. 1997 had one hundred and twenty mock jurors read a detailed transcript of an actual murder trial and judge whether the defendant was guilty. One group of jurors read a exclusively verbal account of the trial. Another group looked at transcripts supplemented with photographs of the victim. The latter group was twice as likely to reach a guilty verdict. Bright & Goodman-Delahunty 2006 concluded that gruesome verbal evidence did not have any added influence on mock jurors but that gruesome photographs did, angering them in a way that made them more likely to convict.

Such considerations show that multimodal influences do play a role in legal proceedings. The extent to which humans are powerfully influenced by non-verbal elements of arguing makes this inevitable. It goes without saying that there are cases in which visual and other multimodal influences may be rightly criticized. They may, for example, distort our view of a situation in a way that purposefully fosters gratuitous pity or anger. But it is equally true there are many situations in which it is clear that multimodal evidence has a legitimate role to play in legal reasoning – in proving what happened in a particular situation; in showing that a crime is heinous; in judging its impact on a victim; in demonstrating the attitude of the accused; and so on. The issues that this raises are complicated by the practical reality that multimodal evidence is not a simple and straightforward representation of reality. The challenging questions that result are clearly evident in the history of photography, and in the evolving rules and practices governing the legal status of photographic evidence (see Carter, 2010; Torresi 2014).

One of the reasons we need a multimodal theory of legal argument is to ensure that we pay due attention to the non-verbal elements of arguing in law, and develop a framework that can distinguish between appropriate and inappropriate multimodal appeals. Conventional theories of arguing cannot provide the principles this requires because they ignore multimodal elements, excluding them from the realm of argu-

ment. So long as we continue to understand legal arguing in this narrow way, this means that our theory of argument will be incomplete and unable to account for what really happens in the course of arguing in law.

5. Words are clumsy instruments

In many ways, the very nature of language makes it implausible to always favour logos, understood as verbal statement, in arguing. A verbal description of something depends on descriptive words which refer to physical properties and relations – "crimson" names a particular colour; "tall" means "of more than average height", and so on. Such naming has its place but it is necessarily general, conglomerating similar cases under a shared label. In contrast, most visual and multimodal representations are particular, in some way reproducing what they present. The claim that Madame Bleu has a long face, blonde hair and a large bulbous nose provides us with a description that is helpful when we try to find her, but it doesn't provide the kind of detailed information that is provided by a good photograph. Plato criticizes visual depictions because they imitate reality, but this is exactly their strength, allowing them to provide us with a much more detailed and precise account of what they represent than is possible with words (words are even more clumsy when it comes to sounds, smells and other non-verbal properties).

Kjeldsen (2015) describes this difference between pictures and words as a difference between "thick" and "thin" forms of representation. Consider his example:

> When we read the sentence "Peter is reading a book", we will respond in a conceptual, general and abstract way… We do this without knowing what Peter looks like, what type of book he is reading, whether he is sitting or standing, if the book is big or small, what it looks like or what the book is even called. The sentence provides no information about any of this…
>
> With pictures such as photographs, this is different. A picture of Peter reading shows us not only what Peter looks like, but also what he is wearing, whether he is sitting or standing, what the book looks like,

> what's behind or in front of him… These almost innumerable visual details provide a thick and rich representation of the situation. They provide the picture with plentitude… (200).

Kjørup (1978, 63) makes essentially the same point when he contrasts pictures and sentences, suggesting "that a picture may be construed as a heap of adjectives and other characterizing or predicating verbal phrases: …is a man …is middle aged…wears a tie, etc.". The key point is that a picture conveys more details than a verbal description and often in a more precise way. In a colour photograph something is not presented merely as "red" or "crimson", but as a specific shade of red or crimson, which can be compared to other colours on the object or the photograph. As Kjeldsen (2015) puts it,

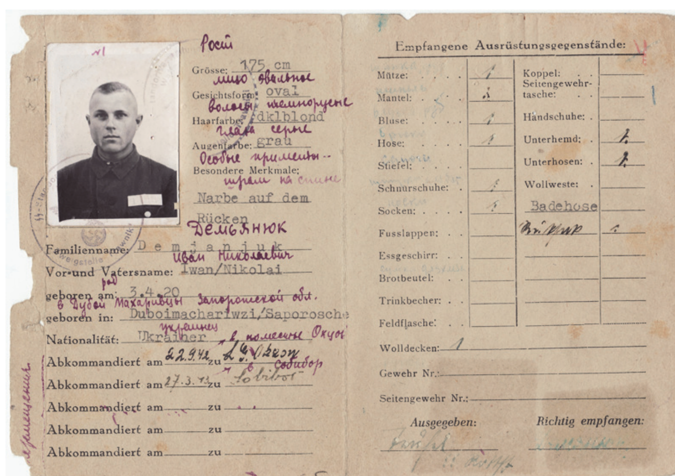
> The semiotic richness of pictures is … so great that verbal description is literally impossible. There are so many details in a photograph that it would require a lengthy book to try to describe them, and still you would not succeed… (201).

Insofar as multimodal representations attempt to reproduce something visual, they may imitate it well or not and can be judged accordingly. At one end of the spectrum, multimodal presentation is not mere imitation. If I wish to convince you that an Inuit stone carving is remarkably detailed, I may do so by handing you the carving. In this and similar cases whatever is in question is not copied, but presented. One legal example is associated with the "Keane controversy", a dispute which revolved around the question whether Walter or Margaret Keane was the American artist who painted "big eyed" paintings of children, women and animals that were popular in the United States in the 1960s. Though the paintings were originally attributed to Walter, Margaret claimed that she was the real artist in 1970, initiating a long dispute. When she sued Walter for $3 million in 1986, the case was tried in federal court in Honolulu. In an attempt to determine who the real artist was, Judge Harold M. Fong asked Margaret and Walter to paint a big eyed child before the court. While Walter claimed he had a sore shoulder and couldn't paint, Margaret painted a young boy in the manner of the well-established paintings. The painting became Exhibit 224 and it

and other considerations produced a judgment that awarded Margaret $4 million in damages.

Margaret's act of painting was submitted as evidence for the conclusion that she was the artist who painted the well-known big eyed paintings. At the very least it proved that she could paint in their established style. Here we have a case of multimodal arguing in which a performance, not words, provides evidence for a conclusion. It is watching the performance which is supposed to convince the audience of the truth of the conclusion. One could argue for the same conclusion in a wholly verbal way (by bringing in witness that attest that Margaret was the artist who painted the paintings), but this verbal argument which raises different questions than the argument in the court room. In the case of verbal testimony, the key question is whether we should trust the claims of those testifying. In the case of the multimodal argument, the question is whether Margaret has painted a big eyed painting.

It is not difficult to find other legal cases in which visuals convey evidence in ways that are superior to words. Ivan Demjanjuk was an American citizen accused of being a Nazi collaborator who worked at concentration camps in World War II (first it was claimed that he was 'Ivan the Terrible,' an infamous guard who worked at Treblinka, then in a different set of trials, of working at Sobibor in Poland). Demjanjuk's vehement claims to the contrary precipitated lengthy legal battles in the United States, Israel, and Germany. One of the key pieces of evidence was a Treblinka identity card with a photograph of a younger Demjanjuk (reproduced below). This is a case of multimodal arguing in which the evidence provided in support of the conclusion that Demjanjuk worked at Treblinka was not a set of sentences, but a physical artifact submitted for visual examination. The card could be described in a variety of ways, but it is not these descriptions (which are invariably incomplete and open to dispute) which are the basis of the argument. Much more directly, it is the examination (the viewing) of the card which was proposed as a basis of an argument.



Grösse: 175 cm
Gesichtsform: oval
Haarfarbe: dklblond
Augenfarbe: grau
Besondere Merkmale: Narbe auf dem Rücken
Familienname: Demjanjuk
Vor- und Vatersname: Iwan/Nikolai
geboren am: 3.4.20
geboren in: Duboimachariwzi/Saporosche
Nationalität: Ukrainer
Abkommandiert am 22.9.42 zu L.G. Okszow
Abkommandiert am 27.3.43 zu Sobibor
Abkommandiert am zu
Abkommandiert am zu
Abkommandiert am zu

Empfangene Ausrüstungsgegenstände:

Mütze:	1	Koppel:	
Mantel:	1	Seitengewehr-tasche:	
Bluse:	1	Handschuhe:	
Hose:	1	Unterhemd:	2
Stiefel:		Unterhosen:	2
Schnürschuhe:	1	Wollweste:	
Socken:	1	Badehose	
Fusslappen:			
Essgeschirr:			
Brotbeutel:			
Trinkbecher:			
Feldflasche:			

Wolldecken: 1
Gewehr Nr.:
Seitengewehr Nr.:
Ausgegeben: Richtig empfangen:

Did this evidence prove that Demjanjuk was guilty? In their assessment of verbal arguments, one of the questions asked by traditional theories of argument is whether an argument's (verbal) premises are true or likely true. In this case, we cannot judge the seeing of the identity card by asking whether it is true or false in the way a sentence is. But a multimodal theory of arguing can ask something similar – i.e. whether we can trust what we see (a question which can be put as the question whether it is a "true" Treblinka card). This is precisely the question which was raised by Demjanjuk's lawyers, who argued that it was a fake card produced by the KGB in order to incriminate their defendant. In arguing that the card was a fake, they claimed, among other things: that the card was, unlike true Treblinka cards, stamped with two official stamps (rather than one); that the stamps and the Demjanjuk signature looked like they had been altered; that one of the stamps on the card was bogus; and that two holes on the right side of the photograph could be seen to be holes from a staple that was removed when the photo was illicitly taken from a different document[1].

In the case of the last claim, the judges were able to inspect what we see in the detail I have reproduced below. In this case, the argument

[1] For a very detailed discussion of the card, and the various evidence used in the Demjanjuk trials, see the John Demjanjuk Index at: *http://www.xoxol.org/dem/dem.html*.

that this is a photograph which was once stapled to another document is supported by the observation that the two holes we see in the Demjanjuk photograph look like the holes that are made when we remove a staple from a document. A purely verbal description of these holes is hopeless. It would have to convey their shape, their size, their contours, their colour, their relative position, etc. in a way that allows us to accurately assess the claim that they are staple holes. In sharp contrast, this information is conveyed immediately when we look at the photograph and the holes (even more so when we look at the actual card, which is three dimensional). This is another demonstration of the superior ability of visuals to convey information that it is difficult to convey in words.

There were many other instances of visual arguing in the Demjanjuk proceedings. On examination, a scar under the defendant's armpit was inspected by medical officials who concluded that it was a Waffen-SS tattoo removed after the war. When American courts tried to deport Demjanjuk to Germany in 1999, his attorneys argued that he suffered from serious medical problems. Evidence for this claim included his listless appearance in the court and a photograph of him leaving his house "slack-jawed and unmoving" in a wheelchair. Federal prosecutors countered the latter visual evidence with visual evidence of their own, submitting a surveillance video which displayed Demjanjuk alert and in conversation, walking with no assistance to a parking lot. The

prosecutors supported the claim that Demjanjuk was fit to travel with a medical report made by a surgeon who physically examined him, concluding – on the basis of what he observed – that Demjanjuk moved with ease.

The different kinds of arguments that are used when visual evidence is the basis of a conclusion can be distinguished by developing a typology of arguments which might be compared to standard typologies of verbal argument (which distinguish between modus ponens, argument by analogy, appeal to authority, etc.). While the development of such a typology is in its early stages, it is significant that Dove 2016 has defined an argument scheme "from fit" which is a visual rather than a verbal scheme. His discussion is rooted in an initial example he gives is from a murder trial in Lancaster, England in 1784 – where John Toms was tried and convicted for murdering Edward Culshaw with a pistol. The key evidence in the trial was a pistol wad – a crushed piece of paper used to secure powder and balls in the muzzle of the pistol – which was found lodged in the victim's head. When recovered, its contours were found to match (to "fit") perfectly with those of a torn newspaper found in Toms' pocket. Dove gives a series of other examples from law and science which are similar – in which our seeing of the fit between two things (two pieces of paper, two bits of metal, two continents, two archaeological fragments, etc.) provides evidence for the conclusion that they are (or were, in some original state) parts of the same whole. The identification of other multimodal schemes will play a key role in a comprehensive theory of multimodal argument.

6. Saying vs. showing

Examples like the ones that I have noted illustrate the point that multimodal modes of expression convey multimodal information better than words do. Their multimodal nature allows them to both convey more information than words, and convey it in a way that is more detailed and precise. In the case of visuals, the reason is because visuals convey visual information visually: as visual information. In contrast, the attempt to convey visual information in words is an attempt to con-

vey it indirectly. When I try to describe what someone I saw committing a crime looks like, I must select some of their defining features and look for ways to verbally convey them. I might say that they are obese, walk with a slouch, have bushy eyebrows and a hawk nose. This is a relatively full description, highlighting four distinctive aspects of their looks. But it is still limited. It is necessarily so given that the construction of the description requires that I convert what is inherently visual into a complex code made up of something that is not visual: i.e. the spoken sounds and written symbols that are words.

This conversion from one mode to another is not required when I use a video to show you what the person committing the crime looks like. In this case I convey the visual visually. This does not require some attempt to select their defining features and convert lines, shapes, actions, facial expressions, etc. into words. The limits (one might say the poverty) of verbal descriptions in such situations is immediately be evident if one tries to convert a verbal description of the culprit into an accurate visual depiction – into a drawing or a painting, for example. There are innumerable ways to picture someone who is obese, walks with a slouch, and has bushy eyebrows and a hawk nose. An exact likeness of such an individual is impossible because verbal descriptions always focus on limited aspects of what one sees, providing descriptions of those features which are themselves generic and open to different interpretations.

The general nature of words is an essential component of language. Verbal labels that we affix to things in the world (shapes, actions, events, comparisons, etc.) are necessarily approximate. This is what allows them to function as part of a standard vocabulary that is manageable. Visually we can distinguish hundreds of different shades of red, but unique terms for each of them have too little use to be recognized in established language. The select number of terms it has room for means that verbal descriptions of things translate reality into a verbal code which is necessarily approximate and imprecise. In contrast, multimodal representations of the world attempt to present reality a way which is particular rather than generic, reproducing those aspects of reality visually, and in ways that may engage hearing, touch, and tactile sensations. In the process, multimodal presentations often pro-

vide a more credible and precise account of whatever is in question. When used as evidence, this can make multimodal representation a more credible form evidence than words.

We can understand these differences in terms of Wittgenstein's distinction between saying and showing. In describing an action, an event or a thing verbally, we look for words that will allow us to say what it is like. In the examples I have noted this is a task that language accomplishes in a way that is inevitably approximate and vague. These limits are eliminated (or at least minimized) when we convey multimodal information in a multimodal way, because doing so obviates the need for an attempt to convert what we convey into a verbal code which is by its nature limited in its power of expression. This is because multimodal representations don't attempt to say what they convey, but attempt to show it – i.e. to display it, to exhibit it in a way that presents its essential character.

This distinction between saying and showing is readily applicable to many instances of non-verbal representation which are not visual. Imagine that we have made a $1,000 bet about the swans that live on the river beside my home. I bet that they are trumpeter swans; you bet that they are "mute" swans, a related species. A judge who has to decide who wins the bet must identify the swans. One of the standard ways to do so is by identifying their call. Any attempt to do so through a verbal description is at best clumsy. Such attempts inevitably depend on crude comparisons that are easily debated. A more satisfactory to identify the swans is by recording their songs and comparing them to the recordings of trumpeter and mute swans available in standard ornithological libraries. Instead of trying to say what the swans sound like, this is a way of proceeding which attempts to show it. As in the case of visuals, this multimodal approach is more precise and more definitive. Such considerations favour Wittgenstein over Ramsey in their dispute over the former's whistling. If I want to argue that the theme of the fourth movement of Beethoven's Seventh Symphony resembles his arrangement of the Irish folk-song "Save me from the grave and wise", this is something it is difficult, perhaps impossible, to do with only words. Instead of trying to say how they are similar, I will do better to show that this is so, something that can be done by playing their melodies with an in-

strument or on recordings that allow others to carefully compare. If I was the accomplished whistler that Wittgenstein was, the same thing could be accomplished by whistling. In this way, Ramsey is mistaken when he quips that one cannot whistle what one cannot say. Much more generally, whistling is an example of multimodal showing – of exhibiting – which proves how multimodal forms of expression can present many aspects of music (of non-verbal sound) that cannot be adequately expressed in words.

7. There is the ineffable

Wittgenstein emphasizes his distinction between saying and showing in comments about ethics, aesthetics, and "the mystical", which appears to encompass all that is most important in life. One can see why one might think such topics are in some way ineffable by comparing accounts of them to empirical claims about physical objects and properties. In the latter case, the meaning of words seems relatively straightforward, given that it is anchored in publicly shared references to physical objects which all of us observe. When we turn to the realm of values, the situation is radically different and theoretically uncertain and unclear, forcing us to rely on language in a way which is connected to human experience in a notoriously vague way. In talking about things which are so elusive when we try to express them in words, there are many situations in which multimodal expression may be able to show cannot adequately be said.

Consider an example. Beethoven's symphonies are amongst the greatest artistic achievements of the western world. How can than their greatness be argued for in words? When commentators have tried to explain the significance of his Seventh Symphony, they have often resorted to analogies. Different commentators have compared it to a procession in an old cathedral, a love dream, a tale of Moorish knighthood, a masquerade, autumnal merry-makings, a peasant wedding, a political revolt and an "apotheosis of the dance". In Beethoven's own time, one critic compared it to the trial of an innocent man –

> an innocent man, or party, is surrounded, overpowered after a struggle and hauled before a legal tribunal. Innocency weeps; the judge pronounces a harsh sentence; sympathetic voices mingle in laments and denunciations. … The magistrates are now scarcely able to quiet the wild tumult. The uprising is suppressed, but the people are not quieted; hope smiles cheeringly and suddenly the voice of the people pronounces the decision in harmonious agreement (Gutmann 2013).

Formalist critics dismiss these kinds of analogies out of hand, refusing to describe the symphony in non-musical terms. William Mann compares it to abstract art, calling it

> an argument in terms of music. … It is about melodic shapes, tunes and vestiges of tunes, about harmony and the effect that a new chord can make and build up, about keys and the effect one key can have on another, about the relationship of wind to string to brass instruments (Gutmann 2013).

Formalist accounts of this sort successfully avoid extravagant comparisons that are difficult to judge, but it is hard to see how they explain the greatness of the Symphony and the reasons why it moves us. To a great extent, they simply narrow the scope of what words can say about the Seventh, abandoning the attempt to explain how and why it is a great aesthetic achievement. Instead of trying to say why, this is a circumstance in which one might instead attempt to show it – by performing the symphony rather than talking about it. Here we have another context in which Wittgensteinian showing may be a better alternative than saying.

In the case of legal reasoning the complications that arise for language in the realm of value further limits the adequacy of language, for legal reasoning is inherently tied to values, often in very complex and difficult circumstances. What is right and wrong, admirable and detestable, and excusable and inexcusable as it is reflected in love, war, beauty, victory, defeat, tragedy, art, spirituality, etc.is difficult to express in words. But it is still relevant to matters that come before the courts, and especially relevant to the most serious issues with which it deals. Given the limits of language's ability to convey what is important in such con-

texts, visual and multimodal presentation can be a way to show what can’t be said.

When the prosecutors at the Nuremberg trials were faced with the task of demonstrating the enormity of the wrongs committed by the Nazis, one the things they did so was by assembling an enormous collection of visual evidence. It included film and photographic records of atrocities that the Nazis compiled for their own uses, to record what they had accomplished. An example was the “Stroop Report”, an album of photographs taken on the orders of SS and Police Leader Jürgen Stroop, who ordered his officers to document the murder of thousands of Jews in the suppression of the Warsaw ghetto uprising. Other visual documentation was compiled by the US Army Signal Corps, which documented Nazi atrocities and the realities of the Holocaust. A turning point in the trials occurred when the International Military Tribunal prosecution presented such material in an hour-long film they titled “The Nazi Concentration Camps”. When the lights went on at the end of the official showing of the film during the Nuremberg proceedings the audience at the Justizpalast sat still in stunned silence.

One might cite many other cases in which visual images capture human situations in ways that words are unable to. The photographs that win Pulitzer prizes and World Press Photo awards are notable for the gripping ways in which they capture circumstances that are difficult to describe in words (because of the good, the evil, the joy, the tragedy, etc. they convey). In the trials of American military personnel carried out after the My Lai massacre in Vietnam and the torture and mistreatment of prisoners in Abu Ghraib prison in Iraq, visual evidence played a key role in convincing courts (and the world) of the reprehensible nature of their actions. In less extreme circumstances, in dealing with matters that relate to nuisance, civic law, obscenity and the environment, legal arguments may depend on aesthetic judgments which are inherently visual (Coletta 1987; Butler 2003). In contemporary lands claims cases in Australia, indigenous sand paintings, maps, songs and dances have been successfully used as evidence for connection to the land that can establish title (Schreiner 2013).

The inherently multimodal nature of key judgments of value can be seen in legal cases over political cartoons, which themselves function as

a multimodal way to publicly convey moral and political disdain. The images they employ are an essential – often, the most essential – component of their message. A full understanding of this message is rarely possible if one restricts one's attention to the words that they contain. The now infamous Nazi newspaper Der Stürmer was famous for its anti-Semitic cartoons, which visually assigned Jews atrocious stereotypes (as short, fat, and ugly, with big hook noses, unshaven, drooling, and sexually perverted). Stürmer's cartoonist, Fips (Philipp Rupprecht), was sentenced to six years of hard labour at the end of the war for anti-Semitic propaganda and his editor, Julius Streicher, was hanged for crimes against humanity.

Recent debates over the question when cartoon images are instances of hate speech have been fueled by the Jyllands-Posten Muhammad cartoons controversy in Denmark, and the anti-Islamic cartoons published by the now famous French satirical newspaper, Charlie Hebdo. The latter ultimately precipitated an attack against the newspaper's offices that resulted in the murder of 11 people working for the paper in 2015. The essential role that visual depictions play in such controversies illustrate the point that issues of expression must increasingly be understand as multimodal issues that apply to all forms of multimodal meaning.

A final example of that illustrates the ineffable nature of the world of value is found in one of the most famous murder cases of all times. In 1966, Ian Brady and Myra Hindley were prosecuted for the moor murders – a series of murders they committed in Manchester, England. In his closing remarks at the trial, Mr Justice Atkinson described the murders as a "truly horrible case" and condemned the accused as "two sadistic killers of the utmost depravity" (Carmichael 2003, p. 2). Many aspects of the evidence given at the trial led to this conclusion, but one stood out. It was a 13 minute tape recording the accused made of one of their murder victims screaming and crying as they tortured her. The tape was a disturbing multimodal exhibit with screams, gurgles (from the choking), cries and pleas for help. Even when it recorded the 10 year old girl saying something, it was the sound of the voice, not the words she spoke, that most clearly expressed the horror of what was

happening. It is these sounds, not words, that most clearly communicated the horror and the wrongness of what was happening to her.

8. Conclusion

At the beginning of this essay I defined arguing as an attempt to convince an audience of some conclusion by providing evidence that supports it. In the real world of arguing, arguers pursue such attempts by presenting non-verbal as well as verbal evidence. This is a problem for traditional theories of argument, which have failed to recognize multimodal means of expression, resolutely assuming that words are the only proper vehicle for arguing. In the case of legal reasoning, the emphasis on verbal reasoning has been similarly pronounced. In view of it, the courts have struggled to find ways to accommodate and evaluate visual and multimodal evidence.

In earlier centuries, technological factors like the invention and development of the printing press reinforced the focus on words. As we enter a very different world in which our ability to produce images and other non-verbal representations has fundamentally altered the ways that we communicate, multimodal arguing is ascendant. Argumentation theory has begun to deal with this reality by developing a multimodal theory. In the case of reasoning in law, it is time to recognize something similar – that the theory of arguing that should inform our understanding and analysis of legal reasoning must be multimodal. By moving in this direction, we can overcome the shortcomings that accompany language and words – shortcomings that have been too often overlooked within the realm of argument.

A fully satisfactory multimodal theory of argument is not yet available. It will require much more study which will provide a much more detailed account of the best ways to analyse and assessment multimodal reasoning. We are fortunate to be living at a time when this project is well underway. Though they remain controversial in some quarters, the first promising steps in the development of a multimodal theory of argument arguing have already been taken. In Plato's time, it was his worry that sophistry would undermine our confidence in arguing with

words that led him to warn us of *misologia*. In our own time, in circumstances in which non-verbal modes of arguing are increasingly important in the real world of arguing, we need to move beyond the constraints that he himself imposed on arguing. It is time to move in the opposite direction and recognize the importance of multimodal arguing that is not constrained by the limits of language. In law and more broadly, it is a time to be wary of the prejudices that are *logophilia*.

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PROCESSING MULTIMODAL LEGAL DISCOURSE; THE CASE OF STANLEY ‘TOOKIE’ WILLIAMS

Paul van den Hoven & Gabrijela Kišiček

Abstract

We focus on a striking difference between this prototypical legal discourse format and a complex multimodal discourse format: the role of the mediating narrator. In prototypical verbal legal discourse, the narrator concurs with one clearly identifiable top-voice. The narration is close to ‘monotone’; the top-voice organizes the polyphony. The sources of information are limited and rather conventionally related, in case of an oral presentation and even more in case of written discourse. This is essentially different in multimodal formats. The ‘narrator’, defined as the organizing principle, can be highly abstract, not concurring with one specific discourse voice. Obviously, the agent who presents the discourse has to take responsibility for the way the discourse is narrated, but this responsibility is not ‘embodied’ in this agent acting. The sources of information that are organized by the narrator are many, divers, and relate to each other in complex ways.

1. Introduction

To analyze the impact of legal arguments presented by means of multimodal discourse, one needs to understand the semiotics of these discourse formats (Bateman & Wildfeuer 2014; Van den Hoven 2015). Scholars claim that multimodal discourse as a means to argue in a legal discussion functions differently from mono-modal verbal argumentative discourse, due to differences in semiotic structure (Bateman & Wildfeuer 2014; Birdsell & Groarke 2007; Blair 1986, 2015; Dove 2012, 2013; Gilbert 1994, 1997; Groarke 2009, 2015; Kišiček 2015;

Kjeldsen 2012, 2015; Roque 2012; Van den Hoven 2012, 2015; Van den Hoven & Yang 2013). In this paper, we investigate a stronger claim, namely whether one can identify argumentatively relevant information that is uniquely conveyed by means of multimodal discourse. Our research question is:

What opportunities, if any, do multimodal discourse formats offer to discussants to defend a standpoint on reasonable grounds that a mono-modal written verbal format cannot offer?

We consider argumentatively relevant information all information that must be considered in a serious and deliberate assessment of the reasonableness of a standpoint.

Theoretically, multimodal semiotic resources may not offer any unique opportunities to convey argumentatively relevant information (compared to discourse that solely employs written verbal semiotics resources). In that case, from an argumentative perspective, a multimodal discourse format should be considered a mere presentational choice. That choice may be rhetorically relevant in terms of strategic maneuvering (Van Eemeren 2010), in terms of efficiency (for example, graphics efficiently summarize lengthy verbal enumerations). But from the argumentative perspective, it is a mere presentational choice as long as mono-verbal written formats can convey an equivalent appeal to reason.

Dove (2013) has convincingly refuted that opting for multimodal formats is always a presentational variation. He showed for example how some graphic-based arguments seem irreplaceable by verbal counterparts (unless on a meta-level on which a precise description is given of how to produce these graphics). In this paper we take a more assailable approach. Instead of searching for specific discourses that serve as examples of multimodal argumentative discourse for which there are hardly, if any, equivalent verbal formats, we analyze the semiotics of multimodal legal discourse that has actually been presented; this enables us to investigate whether we can identify non-verbal semiotics resources conveying argumentatively relevant information that have no equivalent verbal counterpart. Is the choice for multimodality justified

by the fact that this discourse actually includes an appeal to reason that cannot be conveyed by mono-modal, top-voice dominated verbal discourse?

Prototypically legal discourse is still verbally conveyed; multimodal formats are sometimes under suspicion for trying to appeal to irrational, non-argumentative forces. However, the core of legal discourse being argumentative, it may very well be so that multimodality offers opportunities to convey relevant information that verbal resources lack (Van den Hoven 2013). A detailed account of the argumentative relevance of the multiple semiotics resources helps to further the discussion on (legal) argumentation and multimodality.

2. Method

To investigate whether multimodal discourse formats can offer legal discussants unique opportunities to defend a standpoint on reasonable grounds, we perform three steps. First, we identify chunks of information that are predominantly conveyed by non-verbal signs. These include: prosody, gesture and appearance of speaking characters; graphic designs of written text; images of specific situations; camera-movement in registering some materials; editing/montage. Second, we determine the argumentative relevancy of this information for the acceptability of the (sub)standpoint presented in the information. If the information is found relevant, as a third step of the analysis, we determine which verbal expressions might convey functionally equivalent information, if any. We then evaluate similarities and differences between the modes.

To discover information we refer to accepted theories about specific types of signs, such as prosodic features of speech, editing, and camera-movement. To articulate the function of the information, we depart from the unitary source assumption (Jiang & Van den Hoven 2011). The interpreter of multimodal inputs makes an early assessment of the degree to which the total input agrees. The modes are interpreted as congruent by default; one organizing principle (we call the narrator) deliberately organizes all modalities into a unity. Therefore we assume

principles of immediate relevance and continuously hypothesizing coherence, accepting the interpretation that is maximally relevant for the issue at hand on the moment of the presentation (immediate relevance) and maximally coherent with the information thus far (continuous coherence) (compare also Bateman & Wildfeuer 2014).

To determine the argumentative relevancy of the information, we depart from a maximal argumentative analysis (Van Eemeren, 1987; Van Eemeren & Grootendorst 2004). Even though chunks of information may serve other functions, in legal contexts, it is justified to assume that the addressee will assess the standpoint on reasonable grounds. Therefore he or she will first assess information with respect to its argumentative relevance, if any. This assumption is even more justified because we interpret an example of a discourse that is addressed to a professional decision-maker. Our rhetor knows and will anticipate that this decision-maker gets information from different participants in a thorough discussion. The decision-maker has sufficient time and motivation to consider the issue in great detail. This is the standard situation in a legal debate. Conceivably, it is difficult to determine in any intersubjective way which information is not argumentatively relevant. It is hard, if not impossible, to draw a line between information that is argumentatively relevant yet unpersuasive or even fallacious, and information that is argumentatively irrelevant yet convincing beyond mere appeal to reason.

The most assailable task is to determine which verbal expressions might convey functionally equivalent information. To develop a clearer view on what the semiotics of multimodality mean for the argumentative possibilities of multimodal discourse, one can try to contrast multimodal formats with an imaginary mono-modal, top-voice dominated verbal counterpart (Van den Hoven 2012). Although the number of legal arguments presented by means of multimodal discourse increases, a prototypical legal argumentation still generally consists of sets of verbal expressions that employ an explicit quasi-logical structure. Most argument theories also consider this verbal format prototypical to perform the speech-act argumentation. Admittedly, in practice, argumentative discourse often deviates from this prototypical format. However, it is assumed that the actual argumentative appeal to reason can be – and

according to normative approaches, should be (Van Eemeren & Grootendorst 2004, Govier 2010) – reconstructed in a format that meets the verbal prototype. From this it follows that these theories assume that a mono-modal verbal presentation of the argumentation is always an option, roughly resembling the verbal paraphrase in this reconstruction. According to these theories, multimodal formats are therefore considered a presentational choice. The verbal equivalent will not account for all information in the multimodal format (compare Bateman & Wildfeuer 2014: 192), but is supposed to cover all argumentatively relevant information.

To determine which verbal expressions might convey functionally equivalent information, we test this theoretical assumption. We search for 'as good as it gets' equivalent verbal expression(s), to be uttered by a top-most-voice of a mono-modal verbal written discourse. We evaluate similarities and differences between the modes, the most extreme difference being that we are not able to propose any equivalent verbal expression with the same appeal to reason. In that case, the multimodal format offers a unique opportunity to convey argumentatively relevant information.

3. Materials

In this paper we analyze one example of multimodal discourse that is meant to be predominantly argumentative. It addresses a legal issue, in which the authority has to make a legal decision. We will analyze a video clip that is said to be produced as part of a 2005 campaign to urge governor Arnold Schwarzenegger to grant clemency to Stanley Williams. This video can be found on the Internet: *https://www.youtube.com/watch?v=KhFoeJPP6HE*.

Stanley Williams was a former gang-leader, sentenced to death in 1979. The standpoint defended in this discourse is clear: Williams should not be executed. The campaign failed, however, and Williams was executed by the State of California on December 13, 2005. We have chosen this example because it presents a complexity of embedded voices, incorporates many materials, and shows elaborate editing.

In other words, its semiotic structure, compared to monomodal verbal discourse conveyed by one voice, is significantly different. Still, the discourse is recognizable as legally contextualized, showing awareness of the prototypical format as a reference point. In prototypical verbal legal discourse, the narrator concurs with one clearly identifiable topvoice, to be identified with the agent who presents the discourse; the narration is close to 'monotone'; the top-voice organizes and controls polyphony.

Our example opens with a voice-over who, at least for a while, coincides with the (personified) narrator organizing the discourse, orally (though invisibly) delivering an argumentation that can be understood independently from any information from other modalities. As we will see later, prosodically this voice-over also intends to fulfill the role of a detached, almost unaffected presenter of the argument. This helps to identify the argumentative relevance of other information as we have a structure to depart from.

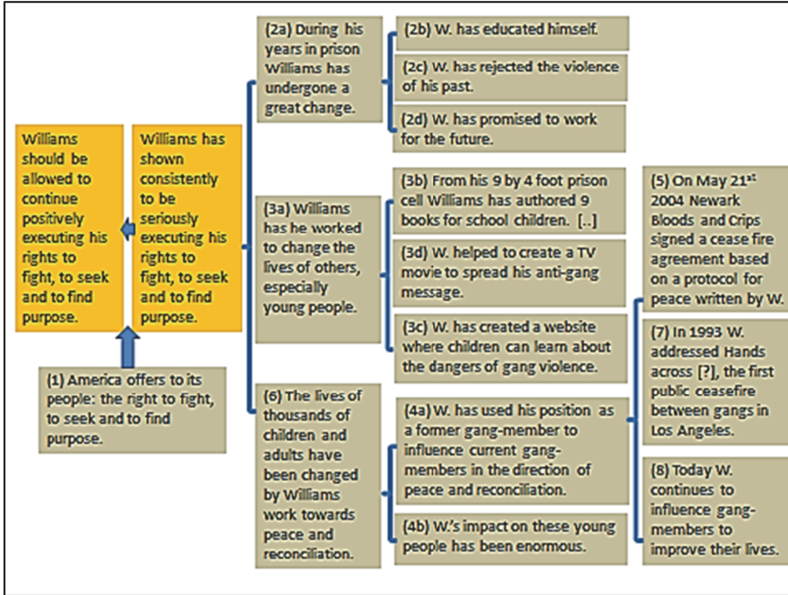
We transcribe the text of the voice-over. We use a new number if the voice-over has been silent for a while, the discourse developing in other modes. Behind brackets we indicate where the utterances occur in the 10.30 minutes clip.

1. This petition is in a way about what America is and what it offers to its people: the right to fight, to seek and to find purpose. [0.09-0.18]
2. (a) During his years in prison Williams has undergone a great change. (b) He has educated himself, (c) he has rejected the violence of his past and (d) he has promised to work for the future. [0.36-0.47]
3. (a) As Williams' life has changed, so has he worked to change the lives of others, especially young people. (b) From his 9 by 4 foot prison cell, Williams has authored 9 books for school children. They warn about the perils of gangs and violence, gangs and drugs, gangs and self-esteem and about the harsh realities of life in prison. (c) He has created a website where children can learn about the dangers of gang violence and (d) he helped to create a TV movie to spread his anti-gang message. [0.56-1.30]
4. (a) Williams has used his position as a former gang-member to influence current gang-members in the direction of peace and reconciliation. (b) His impact on these young people has been enormous. [1.34-1.44]

5. On May 21st 2004 Newark Bloods and Crips signed a cease fire agreement based on a protocol for peace written by Williams. [2.41-2.48]
6. The lives of thousands of children and adults have been changed by Williams work towards peace and reconciliation.[4.05-4.12]
7. In 1993 Williams addressed Hands across [?], the first public cease-fire between gangs in Los Angeles. [4.32-4.39]
8. And today Williams continues to influence gang-members to improve their lives. [4.56-5.01]
9. Williams' dedication has been recognized internationally in the form of nominations for the Nobel prizes in literature and peace. [6.07-6.16]
10. Educators and parents seek out Williams' advice about how to keep their children safe from gangs. [6.30-6.37]
11. Everyday students and young people across the nation look to Williams for inspiration. [7.15-7.20]

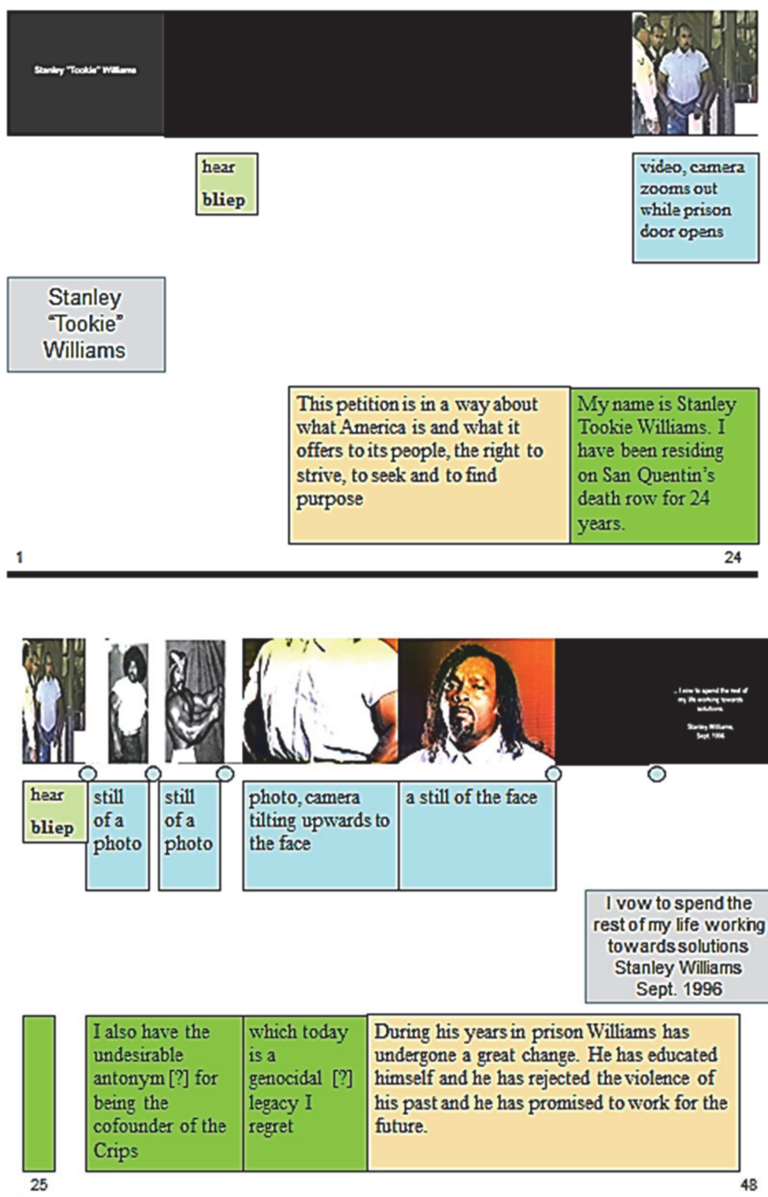
We then make an argumentative reconstruction of this argumentation. To connect expression (1) with the other expressions, we had to add two expressions (see Figure 1). The actual standpoint is not formulated by the voice-over. From about 9.05 minutes on this is done and repeated several times by high school children in a project writing letters to the governor. Finally, in a peroration, the standpoint is repeated by Kevin Tate, a gang member telling us to be inspired by Williams to work against gang violence.

Figure 1: the verbal argumentation of the voice-over



A 'score' of the first 1,5 minutes gives an impression of the large amount of information conveyed in the complex multimodal format (Figure 2). In the top row we show stills from each shot (sometimes distorted to fit them on the timeline); second row indicates the kind of materials; third row presents the transcript of projected text; fourth row displays the spoken text; fifth row shows the timeline.

Figure 2: score of the first 90 seconds



still of a photo

photo, camera tilts slowly upwards

still of a photo

still of a photo

I vow that as long as I have the fortitude, the breath, and my timeless faith, I will work with you and others to reverse this cycle of madness
Stanley Williams June,12005

As Williams his life has changed, so has he worked to change the lives of others, especially young people

From his 9 by 5 foot prison cell

Williams has authored 9 books for schoolchildren that warn about the perils of gangs and violence

49

72

still of a photo

still of a photo

still of a photo

website, camera slowly zooms in

video, cuffed hands through bars

video, close up, Jamie Fox talking to camera

establishing shot, moving 1 sec, frozen 2 sec

About Tookie

the beginning ...
growth ....

gangs and drugs, gangs and self esteem and about the harsh

reality of life in prison. He has created

a website where children can learn about the dangers of violence

and he helped to create a TV movie to spread his anti gang message

I used to be the king of the Crips.

Look at my king dom now.

Williams has used his position as a former

73

96

At 1.36, the voice-over starts sequence (4) that lasts until 1.44, while the screen remains black. Then we get a long sequence of Kevin Tate, telling how Williams influenced his life. Tate speaks into the camera. Written text on the black screen informs the audience about his credentials. When he tells how he lost a close friend, we see a medical personnel of an ambulance declare a person dead. “So I decided to go another way”. While Tate speaks about Williams, we see images of Williams’ website and a book. Talking about a peace agreement, we see the text that Williams has drafted.

The voice-over starts sequence (5) [2.41-2.48], immediately followed by a historical registration of the signing of a cease-fire between gangs in which we see and hear Tate again, together with someone representing the other gang, on a stage, in front of an audience. With image, Tate’s contemporary voice takes over again: “We saved a lot of lives”. He is briefly visible in front of the camera; then we cut to the historical signing with the applaud of an audience, and back to Tate speaking in front of the camera. While he is speaking, three newspaper pages are displayed to tell about the agreement. Returning to Tate, he says: “If he can do it, I can do it”. He speaks further as we see once more a photo of the gang leaders with the signed treaty.

The voice-over starts sequence (6) [4.05-4.12] while we see children read in Williams’ books. Before the voice-over starts sequence (7) [4.32-4.39], we see and hear two male school-children in a class tell about the importance of Williams in their eyes. During sequence (7) we see images of another meeting going on; in the frame is inserted: 1993. Then we hear and see part of Williams’ address to the LA summit (15 seconds), in full-color middle shot, the credentials inserted in the frame, and as Williams looks into the camera. Halfway his talking, this image is replaced by a black-and-white photo of Williams in 1993, and then by a color photo of Williams in 2004, grey-haired and with glasses. The photo stays visible during sequence (8) [4.56-5.01]. Credentials appear under the photo: “Williams’ message to San Quentin inmates, 2005”. This is the longest sequence spoken by Williams (25 seconds), clearly through a pay-phone.

Without any announcement, we return to the a person signing the first peace agreement, giving his opinion about its importance. In the

frame, we get his name and the name of his gang. We see the (ethnically-mixed) audience and hear the applaud again. While still seeing him, we hear a female voice we hear a female voice expressing gratitude After 2 seconds, we see her, Sr. Helen Prejean, speaking to an interviewer who stays out of frame, with a lot of background noise. During the last 2 seconds of her 10 seconds turn, we see the subheading of a newspaper that reads, "He is proof that someone can change the direction of his life"; the paper then introduces the next issue: the Nobel prize nominations. The voice-over, after having been silent for more than one minute, starts sequence (9) [6.07-6.16] in which we see two other newspaper pages. A Belgian professor named Gasper Ph.D., in middle shot, explains Williams' nomination for the Nobel prize. During the last 4 seconds of his 13 seconds turn, we see another newspaper page with the announcement of the nomination.

During sequence (10) [6.30-6.37], we see a gathering of principals. Inserted text tells they have a conference call with Williams. We hear a question posed and an answer given by Williams, while we see the audience's positive responses.

Sequence (11) [7.15-7.20] is spoken while the screen is black. Then we see a classroom, with the teacher directly addressing governor Schwarzenegger, announcing a project of writing letters. Subsequently, we see a number of these letters as a voice (possibly Williams) says that who wants can raise his voice. The screen turns black while another voice-over formally declares that all children made available their appearance on video. Then, from 8.04 on until 9.54, we see seven high school children – male and female, and with different ethnicities – speak to the camera, all but one speaking in brief turns in the same classroom; they all address the governor, giving a positive judgment about Williams' development, delivering a standpoint that his life should be spared.

At last, we see the photo of Williams in 2004 while we hear Tate in the background. After some seconds, we fade into the frame of Tate speaking into the camera, repeating some of the arguments made in favor of William's clemency. He ends with, "If he can do it, we can do it. We can change too." The photo of Williams appears again, then fades slowly to black.

4.1. Analysis step 1: Information added to the 'top' voice-over

We identify five types of information that supplement the verbal utterances of the voice-over by means of (predominantly) multimodal semiotic resources.

a. Embedded voices spoken while the speaker is visible including gesture, prosody and sometimes contextualization by means of mise-en-scene.
b. Voices that are audible only, once to assure the consent of the children to be shown on video, and another time, presumably by Williams, to encourage children to raise their voice, thus including prosody.
c. Materials in the frame when referred to by one of the voices (books, websites, newspapers, documents).
d. Registrations of events and meetings, including a scene from a TV movie and including contacts (telephone and/or video-conferencing) between Williams and specific groups, always combining visuals with diegetic sound, again including gesture, prosody and contextualization by means of mise-en-scene.
e. Information added by means of camera-positioning and movement, and information added by means of editing, exploiting the immediate relevance and continuous coherence.

4.2. Analysis step 2: Argumentative function of the multimodal information

First we discuss evidence added to the argument as presented by the voice-over (4.2.1). Then we focus on the multimodal presentation of the final standpoint (4.2.2). We discuss the function of prosodic features, illustrated with an analysis of the prosodic profile of Stanley Williams' voice and of the voice-over (4.2.3). Finally we look at information conveyed by means of editing, illustrated with an analysis of Williams' photos (4.2.4).

4.2.1. The argumentative function of additional 'evidence'

Even scholars who are sceptic about the possibility of nonverbal discourse to convey argumentation do admit that evidence supporting verbally-expressed truth claims is often multimodal. We consider information evidential if its function is to show the correctness of what is verbalized by the voice-over. Including this information resembles delivering exhibits during a court session. We consider the presentation of evidence as an important part of an appeal to reason and therefore as part of the argumentation.

Most information in category (c) and (d) is immediately connected to a reference in the verbal statement of the voice-over, to support its plausibility. Argument 3b, for example, refers to nine books for children; simultaneously we are shown, in the pictorial mode, covers of these books. The same happens while referring to a website and a TV movie. Argument 5 refers to a protocol; simultaneously we see images of this protocol and successively we see fragments of a video-registration of the reconciliation meeting.

Similar to the function of exhibits is the function of witnesses. Some of the information in category (a) is 'witnesses' speaking, although certainly many of them would not have been admitted to a real hearing. Still, Tate as well as Sr. Helen Prejean and professor Gasper Ph.D. directly support statements of the voice-over.

Other materials are included with little evidentiary power. This is the case with the images that illustrate Tate's story about his dying friend; they do not look authentic. Arguments 2c and 2d, which state that Williams has rejected the violence of his past and has promised to work for the future, are followed by 'evidence' supporting these arguments: printed statements of Williams, in quotation marks, with a date and place. This 'evidence' is constructed by the narrator and does not originate from the reality the discourse is about. The authentic documentary multimodal elements, however, are argumentatively relevant. Nonetheless, there are essential differences between real exhibits and those included in the multimodal discourse, and even more so between real witnesses and the shots of 'witnesses'. Exhibits cannot be examined directly and witnesses cannot be cross-examined. All information

remains entirely under control of the narrator. This feature is enhanced in the digital era as technology facilitates alteration, and in fact, production of any image. In other words, all information is 'narrator-mediated' discourse. A top-voice could therefore verbally describe the materials and could quote the 'witness'-statements as indirect speech.

Can such replacements be considered functionally equivalent, or do they alter the appeal to reason? To answer this question, two issues are relevant. The first is: does a verbal description necessarily lack relevant information that multimodal displays convey? We think it does, in particular, prosodic information (compare 4.2.3). The second is: does showing, mediated by a narrator, support rational assessment in a way that telling cannot? We think it does, though our ideas on this are nuanced and two-sided (compare 4.2.4).

4.2.2. The argumentative function of the children and Kevin Tate

Multimodal resources make it possible that the actual standpoint is not expressed by the top-voice but by children and by Kevin Tate, all speaking in front of the camera. This information could be replaced by the top-voice either formulating the final standpoint or reporting that the children as well as Kevin Tate hold this standpoint. To evaluate the equivalence of such replacements we again encounter the issues mentioned. The replacements delete all information included in gesture and prosody (4.2.3) and change the kind of narrator's mediation involved (4.2.4).

Kevin Tate, the gang leader, has the longest speaking time in the clip (2,5 minute). Most significant for building the argument is that he formulates the final standpoint in a peroration. During the clip Tate has been developed as a 'round' character with the specific identity of someone who claims (and in the discourse world, illustrates) that his life and future have been changed due to the efforts of Williams. The issue is whether the illustrated biography and personality of Tate as shown does contribute to the appeal of reasonableness. We think it does. Relevant construction of his ethos supports a rational assessment of the argumentation as far as elements of it are confirmed or supported by Tate.

4.2.3. The argumentative function of the prosodic features

Audible and visible voices embedded in the multimodal format can be replaced by (written) indirect speech expressed by the top-voice. However, one of the semiotic resources that is lost is the information conveyed by prosody. Unique information is in the prosodic features of the voices of coreagents in the discussion or in the topic the discussion is about. The literature on the communicative and persuasive relevance of this source of information is substantive. We need to determine whether this dimension also conveys argumentatively relevant information.

Prosodic features are pitch, pitch range, voice quality, intonation, tempo, loudness, emphasis, accentuation, and (non-)fluencies of the speaker. We are interested in determining whether they can be regarded as argumentatively relevant in the case of Stanley Williams clemency campaign. The role of prosodic features in the multimodal argumentative discourse has been of interest in recent research (Kišiček 2015) while their communicative role in general has been confirmed by empirical research in the field of nonverbal communication (Hickson, Stacks & Moore 2004; Knapp & Hall 2002), communication studies (Surawski & Ossoff 2006), psychology (Neumann & Strack 2000) and rhetoric (Fahenstock 2011).

The role of prosodic features is most readily associated with the expression of emotions (Davitz 1964; Neuman & Strack 2000; Scherer 1972; Vroomen, Collier & Mozziconacci 1993). Recent reviews have shown that vocal expressions of specific emotions (anger, fear, happiness, sadness) are generally recognized with above-chance-accuracy, cross-culturally, and with relatively distinct acoustic characteristics (Juslin & Laukka 2003; Laukka 2008). Besides the correlation between prosody and emotions, prosodic features are also connected to the perception of a speaker's personality, credibility, and ethos (Berry 1991, 1992; Hickson, Stacks & Moore 2004; Kimble & Seidel 1991; Kramer 1964, 1978; Zuckerman & Miyake 1993; Zuckerman & Sinicropi 2011). Past research has particularly highlighted that, among other elements of nonverbal behavior, prosodic features are associated with the

persuasiveness of the speaker and the audience's change of attitudes (Burgoon, Birk & Pfau 1990; Knapp 2002).

Prosodic features are also connected with the perception of the speaker`s personality in general. Attractive voices are generally more favorably perceived by others and research showed that the effects of vocal attractiveness are comparable to those of physical attractiveness (Berry 1991, 1992; Zuckerman, Hodgins & Miyake 1990). Face and voice are important because they represent two critical cues to form a first impression, and thus present a rich source of socially-relevant information. In addition, research shows that people believe vocalic characteristics convey information about the character of the speaker (Addington 1968).

In the field of rhetoric, prosodic features have been explored by Fahenstock as a part of rhetorical style and the delivery of speech:

> Certain features of oral communication have always been difficult to capture in writing, such as the changes in dynamics from loud to soft, the variations in pitch from high to deep, the manipulations in duration from prolonged to rushed, and the pauses of different lengths. Altogether, these features can be lumped together under the term prosody. Together with paralinguistic features like facial gestures and body language, these performance qualities were given the attention of an entire canon of rhetoric, that of delivery (2011: 255).

Further, Fahenstock (2011, p. 271) writes: "The ancients understood that the cadences produced by stress patterns and the variations in pitch, pace, and pauses across a passage create rhythms in sound that can support an argument".

Although prosody is important in speech delivery, we are specifically interested in determining how prosody contributes to an argumentative appeal to reason. Do prosodic features directly or indirectly support or elaborate argumentation presented in Figure 1? By 'indirect', we mean that prosodic features are important for the personality perception, emotional state and persuasiveness of the main characters in a way that is relevant for a reasonable assessment of the standpoint. In an attempt to answer this question we analyze the prosodic features of Williams' voice and of the voice-over.

Stanley 'Tookie' Williams'. The voice quality, tempo and intensity together with emphasis and intonation turn out to be highly informative. Williams' voice is significantly higher than average. His fundamental frequency is 149 Hz; according to Hollien (2002), male voices with frequency higher than 140 Hz are considered to be high-pitched voices. In addition, Williams speaks in slow tempo and low intensity, in other words, very quietly with a 'soft' voice. Studies on pitch, speech rate and volume confirm that these features have influence on the perception of the speaker's character.

Lippa (1998) suggests that high male voices correlate with the perception of gentleness, weakness, and even submissiveness, connected to a lack of masculinity. Kimble and Seidel (1991) show that people who speak faster and louder are perceived as more confident, while slower speech rate and lower volume contribute to the perception of low self-esteem, lack of determination and confidence. Lippa (1998) and Siegman (1987, conducted specifically on American speakers) show that William's prosodic profile suggests an introvert character type. Knapp and Hall (2002: 388) show that aggressive character is connected with fast speaking tempo, changes in tempo, staccato rhythm, and a loud voice, all prosodic features that are opposite to the profile of Williams.

Evidently, Williams is not trying to sound as a strong, confident, and determined person. By speaking slowly and quietly, with a high pitch voice and narrow pitch range, he presents himself (and is presented by the narrator to the audience) as a peaceful, calm, non-aggressive person who may even be submissive and humble.

The argumentative relevance of this information is first of all that it adds a subordinate argument to argument (2a): During his years in prison Williams has undergone a great change. As demonstrated in Figure 1, this argument is supported by (2b), (2c) and (2d), which provides historical facts about what Williams did. The argument scheme utilized is argumentation based on a sign. The prosodic information now adds an argument of the same type, but with very different data. This argument is not based on facts reported by the voice-over, but on an observable relation between the speech performance and the character of Williams: the aggressive gang leader has changed into a peaceful, calm, non-aggressive person. The data about his speech performance are reg-

istered on different moments, showing consistency. Replacement by a top-voice reporting verbal expressions implies a loss of this information.

As mentioned previously, it is hard if not impossible to draw a line between elements that are argumentatively relevant though weak or even fallacious and persuasive elements that are not to be considered part of the appeal to reason. Here, however, the prosodic profile clearly seems to be part of the argumentation. We admit though that compared to a real life hearing of Williams, his speech performance in the video may be considered a weak support. Indeed, Williams can fake this change in his personality. More important is that the information is mediated by the editing narrator. Perhaps there are numerous frames that show a very different Williams, losing his temper, speaking loudly and fast, but these frames are strategically excluded from the video. The semiotic resource of editing we discuss in section 4.2.4.

Besides the general prosodic profile of the elder Williams, the emphasis pattern in Williams' speech draws attention. Emphasis in spoken language (Fahenstock, 2011, p. 203) has a rhetorical function and is usually connected to the dramatic effect of speech. Speakers emphasize specific parts of the utterance to make a point, especially in combination with pauses. Speakers can pause before making a significant point, the length of which varies to suggest nuances of reluctance, doubt, anger, and so on. Williams says:

> Working together | | we can put an end | to this | psycho | that creates deep pain | in the hearts of our mothers, | | our fathers | | and our people | | who have lost | loved ones to this senseless violence.

He emphasizes words: together, end, psycho, deep pain. Word emphasis reinforces the verbal message: the need to stop the violence because it creates pain. In addition, speech pauses are important cues to understanding the main massage. Pause length has a stylistic function. The longer pause after "together" emphasizes that Williams does not represent himself as the one person who can make the change; he is just a person who gives his best to make a difference but that we need to

work together to stop the violence. This again characterizes him as a modest, unpretentious person.

Voice-over. In case of the voice-over the audience has only the content of his speech and the prosody. The voice-over can be identified as the creator of the video. He is not visible and his identity is unknown (unlike all the other participants in the argumentative discourse). While the information conveyed by the prosodic features of Stanley Williams demonstrate his change of personality, present him as a certain type of person (calm, tender, non-aggressive), which then supports the argument of his successful rehabilitation from a gang leader to a peaceful, law-abiding person, the information conveyed by the prosodic profile of the voice-over depicts an objective intermediary who presents a case without strong emotional involvement.

Prosodic features which influence perceived impartiality are: intonation, pitch range, rhythm, and tempo. Neutrality is connected with a lack of variation in prosodic features. Absence of variation in tempo, loudness, and pitch correlates with the neutral emotional state according to Scherer (1972). Rosenthal at al. (1979) conducted a research based on tests of Profile of Nonverbal Sensitivity to recognize emotions displayed through prosodic features. Results suggest that universally across cultures, pitch, tempo and loudness are most important for the perception and recognition of emotional states. Pitch range without variations is connected with neutrality and emotional disengagement. Lack of variations in tempo, loudness, and oxytone rhythm (emphasis on the last word in intonation phrase) is perceived as neutral. Similarly, lack of changes in frequency couture indicates neutral emotions.

Analyzing the speech of the voice-over we can see that there are no changes in tempo, volume, or intonation couture. The voice-over is characterized with modal voice quality type and average pitch (fundamental frequency is 120 Hz). Based on these prosodic features, he is presented as neutral, in contrast to Williams, Kevin Tate, and all other participants in the video who are in one way or another affected by Williams and therefore subjective in their assessments of Williams. This contrasting impartiality of the voice-over should render him trustworthy.

Depending on the theoretical position, one may consider the effect of prosody a part of reasonable assessment of the standpoint and therefore as argumentatively relevant. Important to notice here is that this information is unique due to the multimodality. It cannot be replaced by a written verbal format.

This is the difference between spoken argumentative discourse and written argumentative discourse.

4.2.4. The argumentative function of information conveyed by means of editing

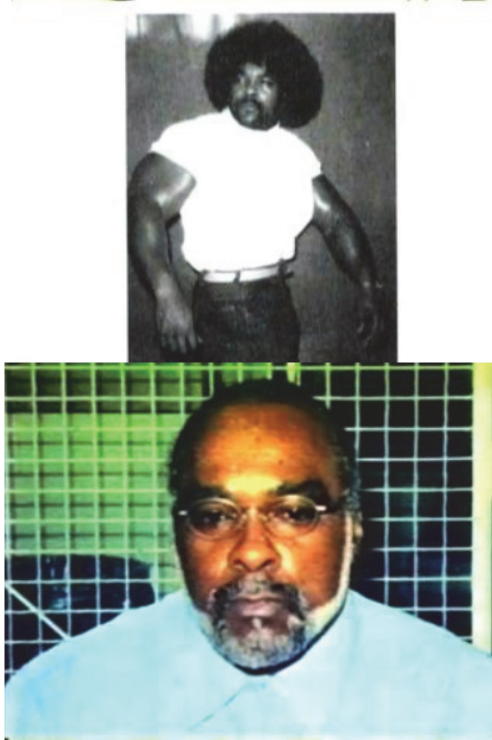
The mediating role of the narrator is a semiotic source that reduces the argumentative force of information conveyed by multimodality. A narrator can construct a discourse world, claiming that it correctly reflects elements of the reality the discourse is about, without this actually being the case. We need to relate discourse world to reality in a more complex way than simply in terms of true or false correspondence (Van den Hoven & Yang 2013; Van den Hoven 2015a). A mediating narrator is influential in particular visual and prosodic semiotic resources because these resources employ, in Peircean terms, not symbolic signs (as language predominantly does) but iconic signs and most often claim such signs to be indexical; an event is iconically represented and claims to indicate the existence of a direct equivalent event in reality. Taking the single shot as a unit, this indexical value is mediated by camera positioning and movement that determine the selectivity of the frame (what is visible in the frame and what is out of frame), how visible elements are put into perspective (choice of the focus length of the lens) and the fore or background elements (in or out of focus, camera zooming in, and so on). Editing has an even stronger influence. It is obvious that the narrator determines what is included in building the discourse world and what is not (Van den Hoven 2015a: 309-319). Together this makes a mediated multimodal format considerably weaker than a direct unmediated presentation.

At the same time camera movement and editing are semiotic sources that add new information. This is illustrated by the visual introduction of Williams in the first minute of the video clip (see Figure 2). Most

significant for the cross-modal integration is the temporal congruence constructed between the speech mode and the visual mode. The voice-over is silent – perhaps silenced – when the written statements of Williams are 'spoken' or when Williams speaks in a telephone statement. The obvious temporal cross-modal coordination during Williams's telephone statement seems out of hands of the anonymous voice-over. In addition, the camera movement is significant. The camera tilts in a way that is coordinated with the structure of the voices, strongly emphasizing the brutal face of the young Williams, thereby creating a maximum contrast with the statements of the elder Williams.

Even more informative is the editing in the first scene that the repeated image of the elder Williams appears. The unitary source assumption (Jiang & Van den Hoven 2011) licenses the assumption of immediate cross-modal pairing of the perceptions created by different modes, resulting in strong cross-modal connectivity in which the visual mode influences the verbal mode(s). Focusing on the speech mode only, the semantics of 'Williams' change' are restricted to a mental and social change. Integration with the visual mode however broadens the semantics in a spectacular way to his physical appearance (Figure 3).

Figure 3: two shots of Williams, connected by editing



Those that doubt whether such a drastic mental change as claimed is possible are confronted with an undeniable parallel in his physical change.

Although one can imagine that the information about Williams' physical change that is uniquely conveyed by visual means can be replaced by verbal descriptions of the topvoice, it is hard to imagine that the parallelism between information about this mental change and his physical change as conveyed using editorial semiotic resources has an adequate verbal counterpart. Is this specific supplement then relevant

for a rational assessment of the standpoint or, on the contrary, merely constitutive of a pathetic irrational persuasive device? We judge it unwise to try to decide this issue and take a more principled stand: the issue needs further elaboration in the context of multimodal argument theory. Take for example the multimodal presentation of an implicit dialogue, which responds to someone who denies the effects of global warming. The speaker presents this person's verbal statements alongside graphs of rising global mean surface temperature and increasing density of greenhouse gasses, in an attempt to contrast his or her statement and the evidence. In other words, he is using multimodality to overcome the enforced linearity of the verbal discourse format, intending to present information that need to be copresented in a rational assessment. This simultaneity has to be considered additionally relevant when it supports the assessment; but it has to be considered a presentational choice when it merely facilitates the assessment. It depends on a discourse information theory how this is to be conceptualized.

4.3. Analysis step 3: Verbal expressions conveying functionally equivalent information

We identified information that is conveyed by multimodal semiotic resources and which we consider argumentatively relevant. The last step in our method is to investigate whether equivalent information can be conveyed in a top-voice-dominated verbal format. We have partially answered this question above.

The first issue is: does telling necessarily lack relevant information that multimodal showing conveys? We think it sometimes does, in particular some evidential information, some prosodic information and some information conveyed by parallel presentation. That means much of the argumentatively relevant information can, in principle, also be conveyed verbally.

This leaves open to what extent such verbal equivalence is possible in practice. If we look at our example specifically, it would require lengthy descriptions of complicated nature. Theoretically this is interesting. We depart in our research from a very strict criterion: if multimodal semiotic resources do not offer any unique opportunities to con-

vey argumentatively relevant information, opting for a multimodal discourse format should be considered a mere presentational choice. It may be that this criterion is too strict if one takes practical circumstances in consideration. If our protagonist is granted 10.30 minutes time, an argumentation of the current complexity cannot be delivered verbally by one topvoice.

The second issue is: does showing, mediated by a narrator, support rational assessment in a way that telling cannot? This issue challenges the notion of equivalency. Clearly telling cannot replace the indexical value of showing. However, we argue that narratormediated showing cannot replace non-mediated showing. Here the weakness of our heuristic method becomes manifest: are the differences between verbal and multimodal format in this respect still meaningful in the light of the apparent differences between any form of mediated discourse and unmediated showing? Again, multimodal argumentation raises fundamental theoretical issues.

5. Conclusion

We selected one video clip that evidently intends to appeal to reason. We approached this clip with the question: what opportunities, if any, does a multimodal discourse format offer to defend a standpoint on reasonable grounds that a mono-modal written verbal format does not offer? In trying to find an answer, we encountered two major methodological problems.

- We consider argumentatively relevant information all information that needs to be taken into consideration in a serious and deliberate assessment of the reasonableness of a standpoint. This raises the problem as to how to draw a line between information that is argumentatively relevant though possibly fallacious, and information that is argumentatively irrelevant yet convincing beyond mere appeal to reason
- Contrasting multimodal formats with an imaginary mono-modal verbal counterpart raises the problem of how to determine which verbal expressions might convey functionally equivalent information, if

any, and how to determine to what extend such equivalency renders the modal choice indeed a mere presentational choice?

These problems expectedly arise when analyzing multimodal discourse. In this study, we dealt with them in a very pragmatic way. We used the principle of maximal argumentativeness (Van Eemeren 1987) to deal with the first problem and an interpretative approach to determine functional equivalency as good as it gets (Van den Hoven 2012). However, these problems indicate the need for argument theory to develop articulated ideas about the relations between multimodality and argumentativeness as pursued in this study. This also implies that argument theory needs to 'incorporate' elements of multimodal semiotics, as well as elements of theories on prosody and on for example relations between embodiment, narrativity, emotion and reasonableness.

We conclude that indeed our case shows a number of moves in a reasonable discussion that depend uniquely on semiotic resources that: 1) combine modalities other than verbal modes; and 2) that cannot be replaced by functionally equivalent verbal utterances of the top-voice. Our discussion centers on the standpoint that "Williams should be allowed to continue positively executing his rights to fight, to seek and to find purpose" = Williams should not be executed. The author of the discourse presents a protagonist's position. Connected to statements of a voice-over, supporting 'evidence' and 'statements of evidence' are presented. These elements cannot always be replaced by verbal utterances. However, the top-voice can describe the materials or quote the witnesses. We have analyzed what is lost in doing so in terms of an appeal to reason by focusing on prosodic elements. Information such as prosodic information cannot be replaced and is partially argumentatively relevant. Also, some relevant information conveyed by editing cannot be replaced. However, the argumentative strength of such information is limited (compared to a direct and unmediated way of presenting) simply by the fact that it is mediated by a narrator. This raises an issue that may turn out to be even more important for argument theory than the differences between verbal and multimodal argumentation, namely, the apparent differences between any form of mediated discourse as an appeal to reason and combinations of mediated discourse and unmediated showing as practiced in courtroom discussions.

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UNACCEPTABLE GENERALIZATIONS IN ARGUMENTS ON LEGAL EVIDENCE

Christian Dahlman

Abstract

Every argument on legal evidence relies on a generalization that links a certain piece of evidence to a certain hypothesis. The evidence puts the case at hand in a specific reference class and the generalization says that membership in this reference class increases the probability of the hypothesis. As an example, the fact that a woman has lied to the social services about her income can be used as evidence for the hypothesis that she is unreliable as a witness in an argument based on the generalization that "lying under oath is more common among people who have previously lied to the authorities".

Many of the generalizations that are used in arguments on legal evidence are unproblematic, but some are controversial, and some generalizations are unacceptable. This raises several important questions. Which generalizations are acceptable and which are unacceptable? What determines whether a generalization is acceptable or unacceptable? I will argue that a generalization can be classified as unacceptable on, at least, four different grounds: 1) a false generalization is unacceptable because membership in the reference class does not increase the probability of the hypothesis, 2) a non-robust generalization is unacceptable because it uses a reference class that is too heterogeneous, 3) a hazardous generalization is unacceptable because decision makers are inclined to overestimate its evidentiary value, and 4) a discriminating generalization is unacceptable because it puts members in the reference class at an unfair disadvantage.

1. Introduction

The issues that are addressed in a court of law are traditionally divided into "issues of law" and "issues of fact". Legal argumentation can therefore be divided into arguments on issues of law and arguments on issues of fact. Arguments of the first kind are concerned with legal interpretation. A legal argument on an issue of law provides a reason for a certain interpretation of the law. Arguments of the second kind are concerned with the assessment of legal evidence. A legal argument on an issue of fact provides a reason for a certain assessment of evidence. Most studies on legal argumentation are concerned with arguments of the first kind. This article is concerned with arguments of the second kind. It investigates arguments on legal evidence in criminal trials.

An argument on legal evidence points to a certain piece of evidence and claims that it increases the probability of a certain hypothesis. It should be noted that there are many different kinds of hypotheses that can figure in a criminal trial. The hypothesis could, for example, be that the defendant was at the crime scene around a certain time, that the defendant had knowledge about some crucial circumstance, or that the defendant had a certain motive. The hypothesis could also regard some person other than the defendant. The hypothesis could, for example, be that someone who has testified as a witness is unreliable.

Terence Anderson, David Schum and William Twining have demonstrated that arguments on legal evidence rely on generalizations (Anderson, Schum & Twining 2005: 60-63). Every argument that points to a certain piece of evidence, and claims that it increases the probability of a certain hypothesis, relies on some kind of generalization that links the evidence to the hypothesis, and justifies the claim that the evidence makes the hypothesis more probable. The generalization is a warrant that justifies the conclusion about the hypothesis. In some arguments, the generalization is stated explicitly as a premise in the argument. In other cases, the generalization is a tacit premise that is logically necessary for the argument to be valid. As an example of a tacit premise, the defense attorney in a murder trial could direct the attention of the judge/jury to the fact that the crime scene was very dark, and claim that this increases the probability that the observation of a

certain eye witness was mistaken. This argument relies on tacit premise: the generalization that observations in the dark are more likely to be mistaken.

As we shall see, a generalization connects two classes to each other. I will refer to these classes as the “reference class” and the “target class”. When an argument on legal evidence points to a certain piece of evidence, it classifies the case at hand as belonging to the reference class of cases where this kind of evidence is present, and when the argument claims that the evidence increases the probability of a certain hypothesis, it claims that membership in the reference class increases the probability that the case belongs to the target class of cases where the hypothesis is true. The generalization that observations in the dark are more likely to be mistaken links the reference class “observations in the dark” to the target class “incorrect observations”, and claims that membership in the former increases membership in the latter.

The use of generalizations has been studied in argumentation theory. Henry Prakken, Floris Bex, Chris Reed and Doug Walton have identified and modeled different ways in which an interlocutor in a debate can attack a generalization (Prakken, Reed & Walton 2003: 39; Bex, Prakken, Reed and Walton 2003: 141-2). One way to attack a generalization is to attack its source. An argument claiming that it is “general knowledge” that observations made in the dark are more likely to be mistaken can, accordingly, be attacked by questioning general knowledge as a reliable source of information. A different way to attack a generalization is to attack the generalization itself. An attack of this kind could, for example, dispute the generalization that observations made in the dark are more likely to be mistaken, by claiming that this is empirically false. A third way to attack a generalization is to say that the generalization is correct as a generalization, but leads to a false conclusion when applied to the specific case at hand, due to special circumstances in this case. An attack of this kind could, for example, admit that observations in the dark are generally more likely to be mistaken, but claim that the particular observation made by the eye witness is not likely to be mistaken, since the witness was using night goggles. These distinctions map out different strategies that a trial lawyer could

use in argumentation in front of the judge/jury to attack arguments from the opposing side.

In this paper, I will investigate attacks of the second kind. I will investigate attacks on the generalization itself, as a generalization. As I intend to demonstrate, such attacks can attack the generalization on different grounds that should be distinguished from each other. In the example above, the interlocutor launches an attack on the generalization itself, by claiming that it is a false generalization. This is one ground for attack. As I intend to show, there are at least four different grounds on which a generalization can be attacked, as a generalization, that should be distinguish from each other.

Argumentation can be analyzed from different perspectives. In this paper, I will investigate arguments that rely on generalizations from the perspective of a decision maker who is presented with arguments, and has to assess to what extent they are sound. This is the situation that faces a judge or jury with regard to legal evidence. The prosecution and the defense make arguments on the interpretation and evaluation of the evidence, and the judge/jury has to assess to what extent the arguments that are advanced in favor of a certain decision actually provide justification for that decision. The judge/jury has to scrutinize if the arguments are logically valid and rely on premises that are acceptable. A premise can be unacceptable in different ways. A descriptive premises is unacceptable if it is epistemically incorrect. A normative premises is unacceptable to the decision maker if he or she finds it morally incorrect. With regard to generalizations, this means that the judge/jury has to assess if the generalizations that are used in the arguments that are presented to them are epistemically and morally acceptable.

Twining says that generalizations are “necessary but dangerous” (Twining 1999: 357). In this article, I will show that generalizations can be unacceptable on different grounds that should be distinguished from each other. I will show that there are at least four distinctly different grounds for judging a generalization unacceptable. I will distinguish between false generalizations (section 5), non-robust generalizations (section 6), bias-triggering generalizations (section 7) and discriminating generalizations (section 8). The first three are unacceptable on epistemic or cognitive grounds, while the fourth is unacceptable on moral

grounds. A false generalization is unacceptable because membership in the reference class does not increase the probability of membership in the target class, a non-robust generalization is unacceptable because it uses a reference class that is too heterogeneous, a bias-triggering generalization is unacceptable because decision makers are inclined to overestimate the probability of membership in the target class, and a discriminating generalization is unacceptable because it puts members in the reference class at a morally unacceptable disadvantage. In this paper I will investigate each of them in turn, and analyze the grounds for judging them unacceptable.

The purpose of this analysis is to facilitate the assessment of generalizations in argument about legal evidence by providing some theoretical distinctions. I hope that the distinctions that I propose can help judges and juries think in a clear and structured way about generalizations that they find problematic. At the end of my investigation, I will offer a check list of critical questions that can be used by legal decision makers when they assess arguments about legal evidence.

It is not the aim of this study to describe how legal decision makers actually assess arguments on legal evidence. I will not investigate which generalizations are accepted by judges and juries, and which are not. Neither is the purpose of this study to argue which generalizations ought to be accepted, and which ought not to be accepted, in my view. The purpose is merely to provide some theoretical distinctions that I hope will be helpful for a legal decision maker. The distinctions that I make in this investigation provide a vocabulary for identifying and separating different grounds for classifying a generalization as acceptable or unacceptable in arguments on legal evidence. This is important for the assessment of legal evidence by legal decision makers. I hope that it will enhance the clarity of such assessments and make them more reasoned.

2. Acceptable and Unacceptable Generalizations

As we have seen, all arguments on legal evidence rely on generalizations. Some generalizations are so trivial and uncontroversial that

judges and jurors do not even think about them as premises in the argument. Other generalizations are problematic, and there are some arguments that trade on generalizations that are unacceptable. Generalizations where membership in a certain social group is connected with a certain feature and generalizations where a claim about a person's character based on past behavior are examples of generalizations that can be problematic and judged unacceptable. These generalizations are used in ad hominem arguments, for example in arguments that attack the credibility of a witness (Macagno & Walton 2012: 20).

The following list provides five examples of arguments on legal evidence. It starts with an argument that relies on the familiar generalization that observations in the dark are more likely to be mistaken, and proceeds with arguments that are more problematic.

(A1) WZ testifies as a witness for the prosecution in a burglary case, and says that he drove passed the crime scene and saw a man loading some boxes into a van. WZ says it was too dark to see what the man looked like, but the van appeared to be blue. The defense attorney comments on WZ's testimony in his closing statement, and makes the following argument:

> It is common knowledge that colors are harder to distinguish in the dark. In places with low illumination, blue can be mistaken for green and vice versa. WZ testified that the car was blue, but this observation could be mistaken. The crime scene was very dark, and this circumstance increases the probability that his observation was incorrect.

(A2) YP testifies as a witness for the defense in a burglary trial. YP is the defendant's mother, and provides the defendant with an alibi. According to YP, the defendant was watching TV at her house when the burglary took place. The prosecutor questions the credibility of YP's alibi in his cross examination and closing argument. According to the prosecutor:

> We must consider the possibility that YP was lying when she gave her testimony. It is common knowledge that a mother would do anything to protect her child. The fact that YP is the defendant's mother therefore increases the probability that she was lying when she gave him an alibi for the evening of the burglary.

(A3) FD is standing trial for murder. According to the prosecution, FD killed his neighbor MM with a shotgun. FD's wife ND testifies for the prosecution and says that FD shot MM. FD claims that he is innocent and that it was ND who killed MM. The forensic investigation found FD's fingerprints as well as ND's fingerprints on the shotgun. The prosecutor uses crime statistics as an argument against FD: "Only 8 % of homicide offenders are women. It is therefore highly probable that it was FD rather than ND who shot MM".

(A4) HK is standing trial for shoplifting. HK is born in Somalia, and the prosecutor submits crime statistics as evidence to show that people of Somali origin are overrepresented by a factor of 7 among convicted shoplifters. According to prosecutor, these statistics strengthen the case against HK: "The fact that shoplifting is more common among people of Somali origin does not necessarily mean that HK committed this particular offense, but it does increase the probability".

(A5) TL is standing trial for drug dealing. TL has three previous convictions for the same offense, and the prosecutor argues that this increases the probability that TL is guilty in the present case: "Previous convictions for the same offense show that TL is disposed to commit this kind crime. They make it substantially more probable that he is guilty".

Some of these arguments are more problematic than others. In my experience most judges find (A1) and (A2) acceptable, and assess (A3) and (A4) as unacceptable. (A5) seems to be the most controversial argument on the list. In some legal systems prior conviction is admissible as evidence for guilt, in others it is inadmissible. The Swedish legal system is an example of the former. In a survey that I conducted on 261 Swedish judges 61 % accepted the generalization that prior conviction for the same offense increases the probability that the defendant is guilty, and 39 % found this generalization unacceptable (Dahlman 2015: 11).

The notion that some generalizations are acceptable while others are unacceptable raises several questions. Fundamentally, it raises the question, on what ground a generalization is judged as unacceptable. What, exactly, is wrong with the generalizations that are unacceptable that is

not the case with acceptable generalizations? In the following, I will discuss different grounds for judging a generalization unacceptable.

3. Unacceptable Categorically and Non-Categorically

When we talk about generalizations that are unacceptable an important distinction should be made between claims of two different kinds: the claim that it is always unacceptable to use a certain circumstance as evidence for a certain hypothesis, and the claim that a certain argument that uses the circumstance as evidence is unacceptable. In the former case, the generalization is categorically unacceptable. In the latter case, it is unacceptable but the unacceptability is not categorical. The generalization is non-categorically unacceptable. The claim that a certain generalization is categorically unacceptable says that all arguments that use the circumstance as evidence for the hypothesis are unacceptable. The non-categorical claim only says that a certain argument uses the circumstance in an unacceptable way, and does not rule out that there could be other arguments that use the circumstance as evidence in an acceptable way. This distinction is related to the distinction introduced by Prakken, Bex, Reed and Walton (see section one above) between "attacks on the generalization itself" and "attacks on a specific application of a generalization". It is also similar to Terence Anderson's distinction between "synthetic-intuitive generalizations" and "context-specific" generalizations (Anderson 1999: 459-460).

The difference between the judgment that a generalization is categorically unacceptable and the judgment that it is non-categorically unacceptable can be illustrated with argument (A5). According to the prosecutor, the defendant's prior convictions for the same offense make it substantially more probable that he is guilty. A legal decision maker could find this argument unacceptable in two different ways.

1) The decision maker says that the use of prior convictions as evidence for guilt is categorically unacceptable. Prior conviction should be inadmissible as evidence for guilt.
2) The decision maker says that arguments that use prior conviction as evidence for guilt are not necessarily unacceptable, but claim that

this particular argument is unacceptable as it exaggerates the evidentiary value of the prior conviction. It might be true that prior conviction for the same offense makes it slightly more probable that the defendant is guilty, but it does make it "substantially more probable".

As we shall see, some grounds for classifying a generalization as unacceptable render the generalization unacceptable categorically and others non-categorically. The primary focus of this investigation is to identify different grounds for saying that a generalization is categorically unacceptable.

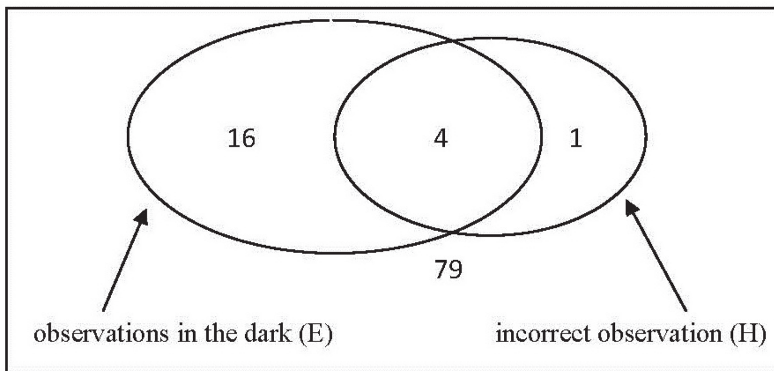
4. True Generalizations

A generalization points to a certain piece of evidence and classifies the case at hand as belonging to the reference class (E) of cases where this kind of evidence is present, and claims that this is evidence for a certain hypothesis, in the sense that membership in the reference class increases the probability that the case belongs to the target class (H) of cases where the hypothesis is true. The generalization says that knowledge that a certain observation belongs to the reference class makes it more probable ceteris paribus that it belongs to the target class. The probability that a case belongs to the target class (H), given that the case belongs to the reference class (E), is higher than the probability that the case belongs to the target class (H), when it is not given whether the case belongs to the reference class or not, $P(H|E) > P(H)$. As an example, the generalization in (A1) says that the probability that an observation is mistaken, given the information that it was made in the dark, is higher than the probability that it is mistaken, given that we are ignorant about the light conditions when the observation was made. For this to be true membership in the target class must be more likely in the reference class than in cases in general. Incorrect observations must be more common among observations in the dark than among observations in general, $P(H\&E) / P(E) > P(H)$.

Let us assume that there are 100 cases, and in each case an eyewitness testifies about the color of a van. In 20 cases it was dark when the

witness observed the van, and in 80 cases the witness observed the van in good light. Among the 20 cases where the witness observed the van in the dark, the observation was correct (the van actually had the color that the witness named) in 16 cases and incorrect in 4 cases. Among the 80 cases where the witness observed the van in good light, the observation was correct in 79 cases and incorrect in 1 case. See figure 1.

Figure 1. "observation in the dark" as evidence for "incorrect observation"



If we pick a case at random among these 100 cases, the probability that the observation is incorrect, if we do not know whether the witness observed the van in the dark or in good light, P(H), is 5/100 = 0.05. The probability that the observation is incorrect, given that the observation was made in the dark, P(H&E) / P(E), is (4/100) / (20/100) = 0.20. This means that the circumstance that the observation was made in the dark increases the probability of the hypothesis that the observation is incorrect. If we learn that the observation was made in the dark, the probability that the testimony is incorrect increases from 5 % to 20 %. This assumes, of course, that there is no other evidence. If there is another circumstance that increases the probability that the observation is incorrect, independently of the evidence that the observation was made in the dark, e.g. that the witness has bad eye sight, the combined probability that the observation is incorrect will, of course, be higher than 20 %, and, if there is another circumstance that decreases the probability that

the observation is incorrect, the combined probability will be lower than 20 %. In any case, the circumstance that it was dark when the witness observed the van makes it more probable that the observation is incorrect, as incorrect observations are more frequent among cases where the observation was made in the dark than among cases in general. The effect that E has on the probability of H depends on the value of other evidence. Let us, for example, assume that, due to other circumstances, the probability of the testimony being incorrect is 60 % before we receive the information that the observation was made in the dark. In this situation the probability that the observation is incorrect increases from 60 % to 88 % when we take into account that the observation was made in the dark[1].

5. False Generalizations

The circumstance that a case belongs to a certain reference class makes it more probable that the case belongs to a certain target class, if and only if membership in the target class is more common among cases in the reference class than among cases in general. Notice that it is not sufficient that membership in the target class is common in the ref-

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[1] The probability can be calculated with Bayes' theorem: $P(H|E)/P(-H|E) = P(H)/P(-H) \times P(E|H)/P(E|-H)$.

In the given example, there is a 60 % probability that the observation is incorrect before we take account of the evidence that it was dark when the witness observed the van, i.e. $P(H) = 0.60$. The probability that the observation is correct, $P(-H)$, is $1 - P(H)$, and this means that $P(-H) = 1 - 0.60 = 0.40$, and that $P(H)/P(-H) = 0.60 / 0.40 = 1.5$.

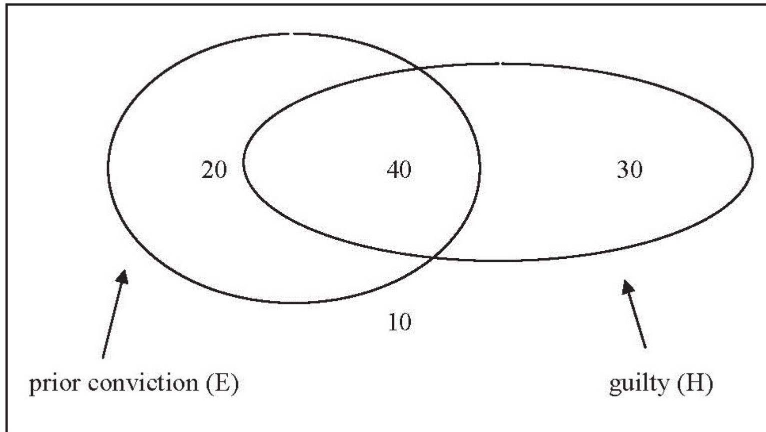
$P(E|H)/P(E|-H)$ is known as the likelihood ratio, and can be understood as the evidentiary force of the evidence vis-a-vis the hypothesis. Since $P(E|H) = P(E\&H) / P(H)$ and $P(E|-H) = P(E\&-H) / P(-H)$, the likelihood ratio can be calculated as $((4/100)/(5/100))/((16/100)/(95/100)) = 4.75$. If we put these numbers into Bayes' theorem we get $P(H|E)/P(-H|E) = 1.5 \times 4.75 = 7.125$. Since $P(H|E) = 1 - P(-H|E)$, we can find $P(H|E)$ by solving the equation $P(H|E) / (1 - P(H|E)) = 7.125$. Thus, $P(H|E) = 7.125 / 8.125 \approx 0.88$.

erence class[2]. It needs to be more common among cases in the reference class than among cases in general.

This principle can be illustrated with argument (A5) as an example. (A5) is based on the generalization that prior conviction for the same offense makes it more probable that the defendant is guilty. Is this generalization true or false? This depends on whether guilty defendants are more common among defendants with a prior conviction for the same offense than among defendants in general. Let us assume that there are 100 cases, and in 60 of these cases the defendant has been previously convicted for the same offense. Out of the 100 cases, there are 70 cases where the defendant is guilty and 30 cases where the defendant is actually innocent. Among the 70 defendants that are guilty most defendants have a prior conviction for the same offense. 40 of the guilty defendants have been previously convicted for the same offense and 30 guilty defendants have not. If we look at the 30 defendants who are innocent it is also the case that most defendants have a prior conviction for the same offense, since the police have a selection bias towards people with a prior conviction for the same offense when they pick suspects, and this increases the risk for convicted felons to be wrongfully prosecuted for crimes they did not commit. 20 of the innocent defendants have been previously convicted for the same offense, and 10 innocent defendants have not. See figure 2.

[2] There is an article by David Wasserman where he makes this error (Wasserman 1991: 944).

Figure 2. “prior conviction” as evidence for “guilty”



This means that membership in the target class is common in the reference class. Being guilty is common among defendants with a prior conviction for the same offense. As a matter of fact 67 % of the defendants with a prior conviction for the same offense are guilty, $P(H\&E)/P(E) = (40/100)\ (60/100) \approx 0.67$, but this does not mean that membership in the reference class (prior conviction for the same offense) makes it more probable that a person is a member of the target class (guilty), since membership in the target class is not more common in the reference class than among the general population. On the contrary, the probability that a randomly picked defendant is guilty is 70 %, $P(H) = 0.70$. This means that the probability that the defendant is guilty decreases from 70 % to 67 %, when we are informed that the defendant has been previously convicted for the same offense. Given the numbers in figure 2, the generalization that “prior conviction for the same offense makes it more probable that the defendant is guilty” is a false generalization.

It is important to distinguish between true generalizations and false generalizations. In a true generalization the claim that membership in the reference class makes it more probable that the case belongs to the target class is empirically correct. In a false generalization, this claim is empirically incorrect. The distinction has been stressed by Frederick

Schauer as the distinction between "spurious generalizations" and "non-spurious generalizations" (Schauer 2003: 7).

Let us examine arguments (A1), (A2), (A3), (A4) and (A5) to see if they are based on true generalizations or false generalizations. As we have seen, it must be the case that membership in the target class is more common among cases in the reference class than among cases in general. If this is not the case, the generalization is false.

(A1) depends on the empirical correctness of the following claim:

Observations where a green car is mistakenly perceived as blue are more common among observations that are made in the dark than among observations in general.

This is true. Blue and green are more difficult to distinguish from each other in the dark. In low illumination the sensitivity of the human eye shifts towards the blue end of the color spectrum, and this can make green or black objects appear blue.

(A2) depends on the empirical correctness of the following claim:

Testimony that provides a false alibi is more common among testimony given by the defendant's mother than among testimony in general.

This is probably true. All mothers are not prepared to lie under oath to protect their children, but it seems reasonable to assume that false alibis are more common among mothers than among witnesses in general.

(A3) depends on the empirical correctness of the following claim:

In murder cases, guilty defendants are more common among male defendants.

This seems to be true. There is a wide agreement among criminologists that more than 90 % of all murders are committed by men. We can therefore assume that roughly the same proportion of guilty defendants are men. The proportion of men among innocent defendants, on the other hand, ought to be lower, since men only make up 50 % of the total population of innocents. This means that the generalization is correct. Guilty defendants are more common among male defendants than among defendants in general.

(A4) depends on the empirical correctness of the following claim:

In shoplifting cases, guilty defendants are more common among defendants of Somali origin than among defendants in general.

It is uncertain if this is true or false. It is supported by recent Danish statistics, showing that convictions for shoplifting are 7.3 times more frequent among people of Somali origin living in Denmark than among the Danish population in general[3]. It should be pointed out that this statistic does not necessarily mean that people of Somali origin are overrepresented among guilty defendants. That they are overrepresented with regard to conviction could be caused by bias towards people from Somalia in the Danish legal system.

(A5) depends on the empirical correctness of the following claim:

Guilty defendants are more common among defendants who have been previously convicted for the same offense than among defendants in general.

This is probably incorrect for reasons that I have presented in a previous study (Dahlman 2015). The police have a strong selection bias towards people with a prior conviction for the same offense, when they pick possible suspects, and this leads to a situation where ex convicts are more likely to be prosecuted for a crime they did not commit than people in general. Research shows that the number one cause of wrongful prosecution is mistaken photo identification, where an eyewitness is presented with pictures of people with a prior conviction for the same offense, and picks an innocent person that resembles the real perpetrator (McConville, Sanders & Lang 1991: 23-24; Martin 2002: 856; Huff 2003: 16; Fitzgerald 2009: 5). This suggests that innocent defendants are more common among defendants who have been previously convicted for the same offense than among defendants in general, and that means that (A5) relies on a false generalization. Prior conviction for the same offense does not make it more probable that the defendant is guilty. On the contrary, it makes it less probable that the defendant is guilty.

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[3] Spørgsmål nr. 89 (Alm. del) fra Folketingets Udvalg for Udlaendinge- og Integrationspolitik 2013-14, p. 2f. *http://www.ft.dk/samling/20131/almdel/uui/spm/89/svar/1098720/1313962.pdf*.

6. Non-Robust Generalizations

Argument (A3) relies on the generalization that it is more probable that the defendant is guilty if he is a man. As we have seen, this is empirically correct, but there is something deeply problematic with this generalization even if it is true. A generalization makes a claim about a class of cases but an argument on legal evidence makes a claim about a specific case. Men as a group commit murder more often than women as a group, but the defendant is a specific man, and it could be the case that he is a peaceful man who would never hurt anyone. Is it really acceptable to judge him on the actions of other men? The philosophical position known as particularism responds to this problem by saying that a case shall be judged on its particular circumstances, not on generalizations (Schauer 2003: 19-20). A person shall be judged on his or her individual merits and flaws, not on the characteristics of some group that he or she happens to belong to (Lippert-Rasmussen 2011: 48). As David Wasserman puts it, inferences about the guilt of a defendant that are based on group generalizations “are inconsistent with the law’s commitment to treat the defendant as an autonomous individual” (Wasserman 1991: 943).

Particularism may have some intuitive appeal, but is, actually, an impossible idea, as all evidence relies on generalizations, in one way or the other. If we dismiss every piece of evidence that relies on a generalization, we will have no evidence left to judge the case. The impossibility of particularism has been demonstrated by Frederick Schauer, Peter Tillers and Alex Stein (Schauer 2003: 75; Tillers 2005: 44; Stein 2005:65). Schauer shows that every attempt to move beyond a certain generalization will only substitute the generalization for another generalization (Schauer 2003: 67). This can be illustrated with argument (A3). According to prosecutor, the fact that FD is a man makes it highly probable that he, rather than his wife ND, fired the shotgun that killed the neighbor MM. Let us assume that FD’s defense attorney objects to this line of reasoning, and argues that it is unacceptable that FD shall be judged on the behavior of men in general. FD’s defense attorney claims that FD is a peaceful and law abiding man, and submits evidence on FD’s past behavior. According to the defense attorney, FD should be

judged on the basis of this character evidence. The defense attorney may very well be right, but the approach that he suggests does not mean that the case is assessed on particular circumstances instead of generalizations. It only means that one generalization is substituted for another generalization. Instead of judging FD on a generalization about men in general, FD will be judged on a generalization about men with a track record of good behavior.

The right approach to the problematic nature of generalizations is not to reject all generalizations, but to recognize that some generalizations are more problematic than others. It is, for example, more problematic to judge FD on the behavior of all men than to judge him on the behavior of men with a track record of good behavior. This is due to the fact that "male" is a more heterogeneous reference class than "male with a track record of good behavior" (Colyvan, Regan & Ferson 2001: 172). The probability that a man is different from other men is higher than the probability that a man with a track record of good behavior is different from other men with a track record of good behavior. This can be described in terms of robustness. A judgment that is based on a less heterogeneous reference class is more robust than a judgment based on more heterogeneous reference class (Dahlman, Wahlberg & Sarwar 2015: 17-20). Robustness measures sensitivity to additional information. That a judgment is more robust means that it is less likely that it will be changed by additional information.

A generalization can be transformed into a more robust generalization by making the reference class more specific. This transforms the reference class into a less heterogeneous reference class. The reference class of cases where circumstance A is present can be transformed into the more specific reference class of cases where "A and B" are present, or the even more specific reference class "A and B and C". The reference class "male" can, for example, be transformed into the more specific reference class "male with a track record of good behavior" or the even more specific "male over 65 with a track record of good behavior".

The prosecutor's argument in (A3) can, therefore, be criticized with regard to robustness. The objection against the prosecutor's argument would go as follows (Colyvan, Regan & Ferson 2001: 173):

> It is true that FD is a man, and it is true that this circumstance increases the probability that he is guilty, but I am not prepared to settle with this. I want to place FD in a more specific reference class. I want to know more about FD, to see if this changes the probability that he is guilty.

A problem with this kind objection is that it can be raised against every argument that relies on a generalization. It is always possible that a more specific reference class would change the probability of H. This dilemma is known in probability theory as the reference class problem (Reichenbach 1949: 374).

With regard to arguments on legal evidence the reference class problem can be resolved by the principle that a generalization should not be accepted if the reference class can be specified in a way that typically changes the probability of H. If we know, for example, that considering track record typically changes the probability of H, we have reason to classify a generalization that does not consider track record as unacceptably non-robust. If an argument that relies on such a generalization is presented, the lack of robustness is a ground for the judge/jury to disregard it. According to this line of reasoning, generalizations that rely on oversimplified statistics are unacceptable in argumentation on legal evidence (Stein 2005: 70). (A3) as well as (A4) "Somali origin", can be judged as unacceptable on this ground.

It should be noticed, however, that the lack of robustness in (A3) and (A4) only renders these generalizations unacceptable in the non-categorical sense. It does not make them categorically unacceptable. That (A3) is unacceptable because "male" is a too heterogeneous reference class does not mean that "male" as a circumstance should never be used as evidence for guilt. It does not rule out that a more specific reference class that uses "male" as a circumstance in conjunction with other circumstances, e.g. "male under twenty with a history of violent behavior", could be sufficiently robust to be acceptable. And the same goes for (A4). That "Somali origin" is insufficiently robust as a reference class does not mean that "Somali origin" is unacceptable as one of the circumstances in a reference class. The view that "Somali origin" is categorically unacceptable as evidence for guilt needs to be justified by something more than lack of robustness.

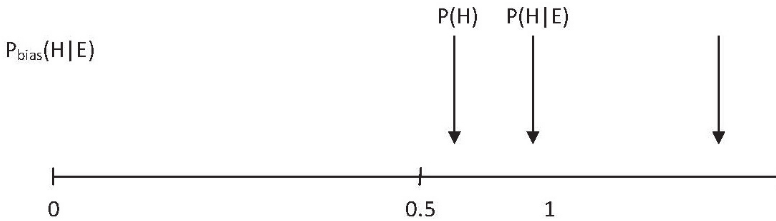
7. Bias-Triggering Generalizations

There are situations where a decision maker believes that there is some truth to a certain generalization, but is hesitant to accept the generalization, as it may trigger bias. The decision maker fears that the generalization, if accepted, will be overestimated and overused. Argument (A4) can serve as an example. Let us assume that the generalization used in argument is true. Somali origin increases the probability that the defendant is guilty, $P(H|E) > P(H)$. It only makes it slightly more probable that the defendant is guilty, but it does increase the probability. A decision maker may still be hesitant towards the acceptance of (A4), fearing that such acceptance would lead to an exaggerated bias against people of Somali origin. This could be a ground for a judge to decide that (A4) is unacceptable in arguments about legal evidence.

The suspicion that the generalization will be overestimated and overused can be related to a number of different agents. First of all, the judge may fear that the acceptance of (A4) in a court of law may legitimize racism among the general population (Schauer 2003: 35). Secondly, the judge may fear that it will encourage bias among other judges. And, thirdly, the judge may doubt his own ability to handle the generalization correctly, preferring to refrain from using it, to avoid the risk of overestimating its evidentiary force. In the last case, the judge is tying himself to the mast, like Ulysses, to avoid irrational judgment.

In legal systems where the evidence is assessed by a jury, the judge may fear that the jurors will overestimate a certain generalization, and the judge will sometimes prevent this from happening by declaring a certain piece of evidence inadmissible, or instructing the jury to disregard it. According to the Federal Rules of Evidence 403, a judge can exclude relevant evidence if the judge finds that the probative value is substantially outweighed by the jury's prejudice about the evidence (Allen, Kuhns, Swift, Schwartz & Pardo 2011: 140-142). The situation is illustrated in figure 3.

Figure 3. Overestimation of evidence



P(H) is the probability that the defendant is guilty when the jury does not take into account that he is of Somali origin. P(H|E) is the probability that the defendant is guilty, given that he is of Somali origin, according to a non-biased juror who makes a correct assessment. Pbias(H|E) is the probability that the defendant is guilty, given that he is of Somali origin, according to the biased juror who overestimates the evidentiary value of Somali origin. If the judge finds that the jurors are biased it becomes problematic to accept that the jury uses this generalization.

It should be noticed that in such situations the jury will never get the probability right. If the jury takes account of E the probability of H will be overestimated. If the jury does not take account of E the probability of H will be underestimated. A solution to this dilemma is to minimize the error. This means that the judge should look at the difference between the correct probability and the assessed probability when the jury does not take the evidence into account, P(H|E) - P(H), in comparison to the difference between the correct probability and the assessed probability when the jury takes the evidence into account, Pbias(H|E) - P(H|E). If the latter exceeds the former, Pbias(H|E) - P(H|E) > P(H|E) - P(H), the error is minimized if the judge instructs the jury that it is unacceptable to use Somali origin as evidence of guilt. This is the solution provided in the Federal Rules of Evidence 403.

The idea that dilemmas of this nature shall be resolved by minimizing the error is not without objection. The solution rests on the assumption that all errors are equally undesirable, but this is not the case. Some errors are more undesirable than others. The conviction of an innocent defendant is, for example, more undesirable than setting a guilty de-

fendant free. A judge should take this into account, when he or she decides whether a certain circumstance should be admitted as evidence. In our example above it lends further support to the conclusion that Somali origin should not be accepted as evidence for guilt, but there are other situations where the effect could go in the opposite direction, e.g. when we are dealing with character evidence in favor of the defendant. Jeremy Bentham proposed that the dilemma should be settled on the basis of a utilitarian calculus. Evidence should be dismissed from consideration if the harm of this exclusion is smaller than the harm that would ensue if the evidence were considered (Bentham 1962: 88). This means that it makes a difference if we are dealing with an argument advanced by the prosecution, where the generalization hurts the defendant, or an argument advanced by the defense, where the generalization favors the defendant. Since the harm of a wrongful conviction is greater than the harm of a wrongful acquittal, it takes less of a bias for a generalization that hurts the defendant to be unacceptable.

8. Discriminating Generalizations

So far we have identified three different grounds for saying that a generalization is unacceptable in arguments on legal evidence: false generalizations, non-robust generalizations and bias-triggering generalizations. The first two are epistemic grounds, and the third is cognitive. I will now investigate a fourth ground that is moral in nature – the notion that a generalization can be unacceptable categorically because it discriminates people that belong to the reference class in an unfair way. This would justify why the generalization in argument (A4) "Somali origin as evidence for guilt" should be classified as unacceptable. It is important to notice that we are now talking about acceptability in the categorical sense. We have seen above that (A4) can be classified as unacceptable non-categorically due to lack of robustness. We can now move one step further and classify (A4) as categorically unacceptable on the grounds of discrimination.

The idea that (A4) is unacceptable because it discriminates people from Somalia in an unfair way is appealing, but it needs to explain why

"Somali origin" is unacceptable, when other circumstances that also discriminate are acceptable. Why is argument (A4) unacceptable, but argument (A2) acceptable? Why is it acceptable to discriminate a mother who is giving her son an alibi? Does not fairness require that she has the same possibility as other people to give the defendant an alibi? At the end of the day, could we not say that every generalization that makes an inference from a social group to an individual is discriminatory and unfair? As you can see, this argument leads to particularism: every person has the right to be judged on individual circumstances only, everything else is unfair discrimination. To avoid this pitfall into particularism we need to distinguish between acceptable discrimination and unacceptable discrimination, and we need a moral ground for the distinction.

An important difference between the generalization that false alibis are especially common among testimony given by the defendant's mother and the generalization that stealing is especially common among people of Somali origin is that the negative impact for people of Somali origin from the latter generalization is much greater than the negative impact for mothers from the former generalization (Hellman 2008: 23). Consider the situation where the generalization that stealing is especially common among people of Somali origin is generally used against people from Somalia by legal decision makers. The cumulative effect of such a practice puts people of Somali origin in a systematic disadvantage. A similar effect does not ensue by the general use of the generalization that mothers will lie to protect their children. This generalization does not make mothers systematically disadvantaged in an unacceptable way. An assessment where (A2) is found to be acceptable while (A4) is classified as categorically unacceptable can be justified on this ground.

That some generalizations have a greater cumulative effect than others can be explained by several factors. First of all, some generalizations are applicable to more situations than others. They can be used by decision makers in many different contexts. Furthermore, some generalizations have a greater cumulative effect because they are more available than others, in the sense that they require less effort on the decision maker's part. Generalizations that require little effort will be used more

often, and will, therefore, have greater cumulative impact. Research in cognitive psychology has demonstrated that some generalizations are more available to decision makers, as they come to mind more easily (Tversky & Kahneman 1973: 207). Racial generalizations that play a considerable role in the society where the decision maker is situated are more available to the decision maker. It should also be remembered, that an argument is more available when it is effortless for the decision maker to determine that the case belongs to the reference class (Segall 2012: 96). This is, for example, the case with reference classes that relate to physical appearance, such as skin color.

9. Check List with Critical Questions

As we have seen, the judgment that a certain generalization is unacceptable in arguments on legal evidence can be made on at least for different grounds that should be separated from each other. I have distinguished between false generalizations, non-robust generalizations, bias-triggering generalizations and discriminating generalizations.

Judges and juries are presented with evidence and listen to arguments about the evidence. It is important that they assess these arguments critically. A legal decision maker must always question if the generalization that an argument relies on is problematic, and, if it is problematic, specify on what ground, exactly. Argumentation theory can help a decision maker in this task, by setting up a check list of critical questions that reminds the decision maker of important issues and separate the issues from each other. This methodology has been used successfully by Doug Walton, and others (e.g. Walton 1997: 199-229). The following check list of critical questions sums up the main results of my analysis in this article.

- Is the generalization empirically true or false, as a generalization?
  Is membership in the target class more common in the reference class than among cases in general?
- Is the generalization sufficiently robust?
  Is the reference class homogenous or heterogeneous?

- Does the generalization trigger bias?
  Is there a risk that the generalization, if accepted, will be overused or overestimated?
- Is the generalization discriminating?
  Does the generalization put people in the reference class at an unfair disadvantage?

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FOR A TRANSPARENT MAJORITY IN COURT, AND BEYOND

Marko Novak

Abstract

In formal logic arguments from majority are fallacious, however, in informal logic such as applying to reasonableness in judicial decision-making they seem to be acceptable. However, they certainly differ in terms of the strength of their persuasion. Concerning that there are two types of problems: (1) the lack of seriatim opinions in the civil law tradition of panel members of higher ordinary courts. How the fact that the audience is unable to examine from the reasoning the manner in which a majority decision overcame potential dissents undermine the strength of persuasion in a court decision? (2) But then in constitutional-court cases where normally do exist separate opinions, how a thin majority (e.g. 5-4) can at all justify the principle of reasonableness of a judicial decision?

1. Introduction

A traditional difference between the legal families of common law and civil law has been the lack of separate opinions by judges of appellate and supreme courts in the latter, unlike the former. Recently this traditional difference has, however, been blurred as the possibility of separate opinions for judges of constitutional courts and supreme courts within the civil-law family has been introduced. Still there are quite a few civil-law systems in which such possibility of separate opinions has not yet been provided or has been introduced only to a certain extent (perhaps only for constitutional courts). Moreover, in the midst of this legal family, at least as the European Union is concerned, there is one

of the most important supranational courts, namely the Court of Justice of the European Union (hereinafter the CJEU), which still does not provide for the same.

Accordingly, despite the partial introduction of separate opinions for judges of highest national courts it follows that many civil-law systems still lag behind the common-law systems concerning the transparency of judicial decision-making. The same applies to situations in which a difference in opinion between judges on a panel is not disclosed to the public, and in connection with such the judicial argument from majority failing to be fully fledged. Due to that fact there are ample possibilities for reform towards more transparency, to bridge the gap between the regulation of the possibility of majority voting and the prohibition of disclosing the results of the voting and potential minority reasons stemming from such voting.

Below I firstly present a difference between how the argument of majority appears in two different but to some extent related contexts, such as politics and law, concerning which I also point to a crucial difference as to how the argument from majority appears in the two systems.

Secondly, I turn to the argument from majority as a judicial argument to present various types of such arguments applied in different judicial situations. The first type of the judicial majority argument that I deal with is the so-called "suppressed" majority argument, which is a typical version of majority arguments that had been historically applied in the civil law legal family. The next version of the judicial majority argument is the "silent" majority argument, which is already more transparent type of the majority argument. The third majority argument is the bare majority argument that is already a transparent argument but in the context of which a prevailing majority seems to be quite weak to win full legitimacy concerning its decision. The final argument from majority in the judicial context is the so-called supermajority argument, which is an ideal type of majority arguments even in the institutional milieu of common law judiciary.

I conclude the paper with a short analysis of the above-mentioned majority arguments with respect to their relation concerning the trans-

parency of judicial decision-making as an important constitutional value, and some recommendations for the future.

2. Majority as a Political or Judicial Argument, and (Minority) Reasons

In democracy it is entirely legitimate that political decisions are reached by a majority of votes of those participating in such decision-making process[1]. A prototype of such a political decision-making process could be parliamentary procedure but deciding by majority is also a standard of voting at various forms of direct democracy, e.g. referendum. Similarly the decision-making by a majority of votes is also a commonplace in judicial proceedings within a democratic form of government, where there is a panel of judges or a mixed panel of judges and lay persons in civil law systems, who decide together on the questions of both guilt/fault and sanctions[2]. Thus when it comes to the general legitimacy of deciding by means of majority within democratic political systems there seems to be no difference between the political and the judicial contexts[3]. This is a general rule in democracy no matter whether it applies to civil law or common law legal families[4]. Moreover, when it comes to the dilemma between supermajority (e.g. two-thirds) and bare (e.g. simple) majority there is no difference between political and judicial procedures as both types of them provide for such kinds of majorities depending on the importance of a decision to be

[1] Majority had ruled even in the first democracies such as the Athenian democracy in Ancient Greece.

[2] In the ‘real’ jury systems of common law unanimity had originally been required to find a defendant guilty, but then gradually a supermajority (never simple majority!) of votes in favor of the conviction (e.g. 10-2) was required.

[3] Compare with Dworkin, who asserted otherwise that the judicial context is different from the political in that it is a «forum of principle». Dworkin, A Matter of Principle, p. 33.

[4] Taking into consideration a traditional difference in that common law systems have more or less openly recognized dissenting opinions whereas in civil law systems disagreements between the judges have been hidden behind the facade of a unanimous decision.

made in such a manner, with a slight difference considering that super-majority is not so frequently accepted in courts than in political bodies[5].

In everyday democratic political debates the argument from majority is not only a commonplace but also an inevitable component for making virtually any political decision given the fact that decisions by consensus are quite rare in this kind of procedures[6]. Another important characteristic of political debates that usually differ from judicial proceedings[7] is also that their decisions, be it in the form of mere resolutions or statutes, are not supported by reasons[8], or at least the "political" reasons are very different from the judicial ones[9]. Although the proportion of votes in favor to those against a certain political decision is normally known right immediately after the voting, the statutory text composed of abstract and general legal norms begins its own life as *ratio legis*[10] without any kind of reasoning or explanation attached to the text[11].

The above-described solution, based on the principle of no separate reasons attached to a final decision in a typical political procedure such

[5] A reason for that could already be a practical one: it is much easier to deal with numbers and ratios when there is a larger number of members of a body.

[6] In the era of democratic pluralism, consensus in a political body could in everyday situations even be perceived as "dangerous" perhaps being a consequence of certain (secret) totalitarian pressures on the members of the political body.

[7] The arguments in favor of majority decision in courts "is usually defended on one of three grounds: (i) as a decision-procedure that is efficient; (ii) as a way of reaching the objectively best decision; or (iii) as a way of respecting the principle of political equality". Waldron, Five to Four: Why Do Bare Majorities Rule on Courts?

[8] Posner opines that «political issues by definition cannot be referred to a neutral expert for resolution». A dispute over them is a test of strength to be «resolved only by force or one of its civilized substitutes, such as voting». Posner, How Judges Think, 272.

[9] I agree with Waldron (supra, note 3) that legislatures also give reasons to their decisions in one way or another but their reasons are different from judicial ones, which are usually legally more «sophisticated».

[10] The text of the statute is supposed to explain itself.

[11] We only find «reasons» for particular statutory articles in the (legally non-binding) travaux préparatoires but these «reasons» could refer to particular stages of parliamentary debates and may not in every situation refer to the last version of the statute finally enacted.

as the parliamentary procedure of enacting a statute, seems to be practically reasonable. The greater the number of members of a deciding body the more severe the problem to provide reasons for such a collective decision. Parliaments usually include several hundreds of people whose potentially very different reasons for particular decisions are very hard to harmonize with other reasons to be included in a uniform and joint reasoning after the voting for a specific statute takes place. Even if there is a common position of the deputy group of a specific political party concerning a certain decision to be voted on, individual deputies might still have their additional and particular reasons when voting. Furthermore, statutory texts are usually much longer than judgments' operative parts so they are expected to be more explanatory in nature.

Would that be any different, in terms of courts providing reasons for their decisions, if we had a court panel composed of several hundreds of judges? Probably not as it would be very hard to join all their particular reasons into a uniform reasoning.

Even if we have reasons for court decisions published together with the decisions, the problem does not stop here, as even in such a manner the requirement of transparency of judicial decision- making[12] is not fully ensured if there is no publication of minority reasons or reasons of those on the judicial panel who disagreed with the majority decision. That is still all too frequent in civil law jurisdictions although certain changes have already taken place. Yet if the judicial audience is unable to examine from the reasoning of a court decision the manner in which the majority overcame potential dissenters, this seems to undermine not only the strength of persuasion in that decision but also the constitutional values of authority, transparency, and democratic legitimacy of court decisions.

There are several manners in which judicial majorities express their opinions that in one way or another take into consideration minority

[12] In my opinion the principle of transparency of judicial deciding stems from two important constitutional principles: (a) the rule of law ensuring that judges follow the law in their decision-making; and hand in hand with this principle also the (b) principle of democracy making sure that judges adjudicate on behalf of the people who have the right to find out about that through the public activity of courts.

views. These will be presented below as types of judicial majority arguments.

3. Types of 'Judicial' Majority Arguments

3.1. The "Suppressed" Majority Argument

In his most famous book from 1748 Montesquieu wrote:

> In monarchies the judges assume the manner of arbiters; they deliberate together, they share their thoughts, they come to an agreement; one modifies his opinion to make it like another's; opinions with the least support are incorporated into the two most widely held. This is not in the nature of a republic[13].

From the above-cited passage from Montesquieu's book it follows that he ascribed the situation in which dissenting opinions of judges were suppressed and eventually eliminated from the majority opinion to the courts operating in the situation of a monarchy, not republic. This could well be typical of old European monarchies, most notably medieval France, before the bourgeois revolutions. My claim is that today, at least in the Western hemisphere, the situation with judges' independence is far different from Montesquieu's times when the judges could be reasonably afraid of the executive branch. Nowadays they need not be afraid of politics either since they have been constitutionally recognized life tenure. This necessarily makes the regulation in those countries that still prohibit the publication of minority votes obsolete[14].

All judicial arguments from majority normally concern decision-making in judicial panels. The situation described above refers to the possibility of a panel member to dissent from a majority decision that is

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[13] Montesquieu, The Spirit of the Laws, p. 76.

[14] The situation in which only the opinion of a court, as if necessarily unanimous, is published, not of individual judges, seems to be more appropriate for absolute monarchies in order for "unpleasant" opinions of individual judges to be protected from the Crown. David, Grasmann, Einführung in die großen Rechtssysteme der Gegenwart, p. 128.

regulated in the procedural law[15], but the fact that he or she actually voted against the majority decision appears nowhere in the reasoning of the decision, nor is there the possibility for such a judge to write a dissenting (separate) opinion. The name of this panel member only appears in the heading of the judgment while at the end of the same only the president of the panel is signed[16].

I call this argument from majority "suppressed" since there is the formal legal possibility of majority decision-making that includes the possibility of dissenting from the majority. Still formally it is recognized only in a half-way, and quite contradicting manner: we know from the procedural regulation that a dissent is possible to happen but from the reasoning it was eliminated since we are supposed not to know that it actually did happen.

As already mentioned this type of argument used to be a classical and far prevailing argument from majority in the legal family of civil law. Today, however, the lack of separate opinions of judges in the minority is no longer a typical difference between common law and civil law courts since many judges of constitutional courts and supreme courts of European countries (or at least those within the EU) were subsequently given the opportunity to publish their separate opinions along with the majority opinion[17]. Still there remain quite a few examples of the use of the suppressed argument from majority. The most notable example is the Court of Justice of the European Union, and in Slovenia all the courts[18] save the Constitutional Court[19].

[15] See, infra, where I discuss the regulation of the Slovene Criminal Procedure Act.

[16] We have the same situation when a case is decided by a judge accompanied with two assessors the names of whom are only mentioned in the heading of the judgment irrespective of the fact that they could have even outvoted the judge in that case.

[17] Only 7 countries never allow judges to publish individual opinions, in 20 the publication of separate opinions is allowed at least at the level of constitutional courts. In Ireland dissents may be published in ordinary cases but not in constitutional cases. Rosa Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States, European Parliament, 2012, p. 7 accessed 27.01.2016 from: *http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf*.

[18] For example, the most typical provisions in this regard are: Art. 113 of the Criminal Procedure Act, which provide that: "A panel of judges shall pass decisions after oral consultation and voting. A decision shall be considered adopted if carried by the

Arguments against the introduction of separate opinions are usually the following: (i) to preserve the authority of the courts and of their judgement; (ii) to protect the independence of judges against undue political pressure; (iii) to ensure that the final decision adopted by the tribunal is clear and unambiguous; and (iv) to preserve collegiality among judges[20]. In my opinion all of the just mentioned arguments are no longer suitable for contemporary conditions in which the EU judiciary operates, and seem to be rather pre-modern. Thus I much more support those opposing arguments in favor of separate opinions: (a) to preserve the judges' integrity and moral independence and their freedom of speech; (b) to improve the quality of judgements and their persuasiveness; (c) to promote transparency; and (c) to improve dialogue with future and lower courts.

My general conclusion concerning this suppressed argument from majority is that it only provisionally "protects" the authority of majority decisions, however, substantially only a disclosure of dissenting reasons can enhance the general level of courts' argumentation. If opinions dissenting from a majority decision existed at the level of appellate courts[21], the parties who are not satisfied with the majority decision, if decided to appeal to the Supreme Court, would certainly take the ad-

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majority of panel members"; and Art. 115 of the same act, determining: "(2) Consultations and voting shall take place in camera (secret)". This last provision has been challenged before the Constitutional Court by a Supreme Court judge as having been allegedly inconsistent with the principle of independence of judges, and the case is still pending before the Court. A similar provision is also contained in the Civil Procedure Act.

[19] However, it has just appeared in the daily media that the Slovene Ministry of Justice was considering a major reform in this field of introducing separate opinions at the Supreme Court but only in criminal cases although, in a longer run, they also considered the possibility of introducing them for other departments of the Supreme Court (also in civil, commercial, labor and social, as well as administrative cases).

[20] Raffaelli, note 18, p. 7.

[21] The last argument would be even more important for the CJEU in order to enhance dialogue with national courts and ensure higher clarity of judgements. However, there are certain views that instead of the possibility of separate opinions it is important to stress the role of the Advocate General being considered as a substitute for individual opinions while with no separate opinions judges' independence and collegiality and the Court's authority will remain preserved. *Ibid*.

vantage of the dissenting opinions in order to be better "equipped" with additional arguments when appealing to the Supreme Court[22]. Consequently the majority opinion of the appellate court would need to be even more persuasive in order to "survive" the appeal at the Supreme Court. Generally, in a shorter run dissenting opinions that are published together with majority opinions make on one hand the work for parties easier and perhaps more successful and, on the other hand, cause the work of courts to become more demanding. In a longer run, however, they would produce many benefits such as: (a) necessarily increase the level and quality of courts' legal argumentation; (b) increase transparency of judges' deliberations and deciding; and (c) all together contribute to greater trust in judges and courts.

3.2. The "Silent" Majority Argument

The next version of the argument from majority is a bit more transparent but still far from ideal. It concerns a situation in which it is legally possible, according to procedural law, for a dissenter from the majority opinion that his or her vote against the majority is mentioned at the end of the judgment. However, his or her separate reasons are not published along with the majority decision which essentially reduces the impact of the dissenting reasons for any further deliberations.

An example of such is when judges of the Slovene Constitutional Court vote against the majority decision but do not decide to write a separate (concurring or dissenting) opinion. In such a case the result of the voting appears at the end of the judgment with no reasons to be disclosed from the side of the dissenting (or concurring) judge[23].

Theoretically in such a case there could be either a bare majority (5-4) or even a supermajority (6-3, 7-2 or 8-1) of the Constitutional Court,

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[22] A similar relation as to the strength of argumentation will be established between the Supreme Court and the Constitutional Court where there is the possibility to complain against a Supreme Court decision to the Constitutional Court.

[23] Article 40.3 of the Constitutional Court Act provides: "A judge who does not agree with a decision or with the reasoning of a decision may declare that he will write a separate opinion, which must be submitted within the period of time determined by the Rules of Procedure of the Constitutional Court".

but what is the point of knowing who has voted how if no separate reasons are published? It is the reasons that count to evaluate the quality of argumentation; merely disclosing who of the judges voted in favor and who against seem to contribute only to political impression that the judges want to make on the public.

More precisely, the possibility that a result of voting is disclosed to the legal audience to some minimal extent contributes to more transparency of the deliberation and decision-making and that is positive, however, it still leaves in doubt and even puzzles more the audience about the substance (reasons) of the possible dissenting voices, which can be perceived as negative. We could then ask ourselves what purpose the "silent" majority argument serves since what is initially built by disclosing the existence of opposing votes is subsequently destroyed by the fact that the reasons for such dissents remain hidden.

My general attitude towards this kind of argument is for the abovementioned reasons negative. I would even insist on establishing a practice that all judges of the Constitutional Court who vote against the majority opinion would need to reason their separate opinions, which is not required now as already mentioned.

3.3. The Bare Majority Argument

When it comes to the transparency of the argument from majority we may proceed further. In case of the next argument reasons for dissenting from a majority opinion are actually revealed but the problem is that the majority votes only slightly overcome the minority votes. There could be even just one vote difference so the legitimacy of such a majority could be lower than in the case of a stronger majority. What remains after such a decision is an impression in the public that it could have been very easily decided in the other way since only one vote made the difference, which makes such a decision publicly controversial.

Here we could return to the initial discussion about the argument from majority in the situations of politics and judiciary respectively. Unlike the important difference between the political decision having no separate reasons, although politicians are allowed to explain their

votes before the voting takes place, and the judicial decision with reasons, the issue concerning the difference between simple and qualified majority seems to have the same relevance for both the contexts. It has been well established that simple majority is more appropriate for less important decisions and qualified majority for more important ones[24].

This argument refers to a decision of, let say, a constitutional court that is not based on consensus but rather on a bare majority of votes (e.g. 5-4 if the full number of judges is nine, or 4-3… if some of the judges are missing from deliberation and voting for whatever reasons), but we do have the judges' separate opinions. The fact that separate opinions are published enhances the transparency of decision-making, which might increase or decrease the (practical) reasonableness of the majority reasons when juxtaposed with the minority reasons. In a shorter run this possibly might even jeopardize the persuasiveness of the majority reasoning, but in a longer run it definitely contributes to increasing the quality of argumentation.

In bare majority decisions (e.g. 5-4), where perhaps an entire statute is struck down, the pragmatic value of a single vote deciding the outcome of the voting overshadows other important values such as legitimacy, persuasiveness, and epistemic strength that would be met through a supermajority reached in such a decision. Concerning the following type of the argument from majority, which presents an ideal version of this type of argument, we will have the opposite situation: all the just mentioned values met to a great extent but a pragmatic and practical problem existing of how to achieve such a thick majority.

3.4. A Supermajority Argument

Taking into account that, in the topic discussed here, consensus would be ideal but this would no longer be an argument from majority so in the case of, e.g., nine judges, the ideal or the strongest argument from majority would be 8-1. This could be called a "very" supermajori-

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[24] In the frame of this article this refers to the difference between bare and super majorities.

ty with 6-3 still being (just) a supermajority, the first step on a stairway upwards from the 5-4 bare majority.

Thus when deciding in a nine judges court is concerned it seems that a 6-3 ratio to constitute a majority would increase the legitimacy, strength, and persuasiveness of majority decisions.

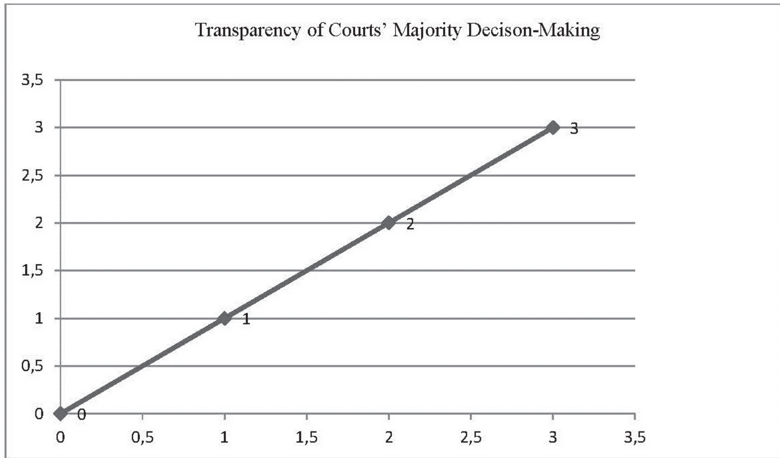
One of examples of requiring qualified majority for a judicial decision to be adopted is from Germany when the Federal Constitutional Court must secure a two-thirds majority in order to declare the unconstitutionality of a political party. It follows that such a supermajority is reserved for the most important decisions. It is not difficult to agree that legitimacy of such decisions is beyond dispute and very much welcome but the crucial problem is that it is practically quite difficult to secure such a majority in judicial proceedings.

According to Waldron, «one might imagine a supermajority rule for constitutional review especially. Actually, imagination is not necessary: the Nebraska Constitution ordains that the state's "Supreme Court shall consist of seven judges" and that "[a] majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges"». The North Dakota Constitution is even more stringent: it requires four out of five justices to strike down legislation. These seem like good rules, embodying as they do a sort of presumption in favour of the constitutionality of legislation[25].

4. In Lieu of Conclusion: A Short Analysis of (Non)Transparency of Majority Arguments

What follows below is a short diagram demonstrating how transparency of majority decision-making in court panels progress with specific types of majority arguments as applied in different courts and different legal systems, and different legal contexts.

[25] Waldron, supra note 2, ibid.



0 – “Supressed” Majority
1 – “Silent” Majority
2 – Bare Majority
3 – Super Majority

Number 0 is allocated to the “suppressed” majority argument which means absolutely no transparency for the public concerning the possibility of knowing different views in a court panel. From the introductory part of a judgment the public can learn that a panel of different judges was deciding on a certain matter, but what follows at the end of the judgement is a unanimous decision of the court with no traces of possible dissents. Even if there actually were judges who voted against the majority opinion, these were finally suppressed by the unanimous decision by the court. Due to the no-transparency of the argument it received the value 0.

Number 1 is used for the “silent” majority argument, which is already transparent to a certain extent, which is why it has a positive value 1. In the case of such we know from the judgement that there were judges who did not share the majority’s view, but the problem is that we do not have their separate opinions to learn about their particular for such views.

Number 2 was allocated to the bare majority argument, in the context of which we do have both elements: the voting disclosed as well as the separate opinions published. The only problem compared with a

more ideal situation is that the majority argument which won the voting only slightly prevailed over the minority views, the problem of which might be legitimacy of such majority (perhaps of only one vote difference). This is why this argument received the value 2.

Finally, number 3 is utilized for the ideal argument of majority, which is the supermajority argument. This kind of argument is a proof that a decision was reached by a more substantial majority that it would be a bare majority. For example, if we take the number of nine (constitutional-court) judges, supermajority could stretch from 6 to 8 votes, meaning that the 6-3 majority would have the value of -3, the 7-2 majority the value of 3, and the 8-1 majority the value of +3, which would also be the most ideal version of the majority argument, taking into consideration that the ratio of 9-0 would already be unanimity and as such out of my interest here.

Accordingly, from the above-mentioned it seems that the more the actual deliberation and decision-making is disclosed the more transparency concerning the work of judiciary is ensured. At least in a majority of modern national constitutions the public character of activities of the judiciary is an important value. As a rule trials are public and only exceptionally are they closed. Why also different opinions of judgments should not be made public? Today judges are protected against possible "revenge" from politics and the public by their life tenure. The historical fear from the King is thus obsolete. This appeal is normally directed towards those systems which are quite hesitant to allow separate opinions in their high courts, as well as towards the lack of such separate opinions at the CJEU, whose legal regulation has a very important symbolic value for European legal cultures in general.

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IRONY AND THE IRONICAL IN LAW

Pedro Parini

Abstract

In order to deal with legal conceptions, not only poietic skill and creativity are demanded, but also, as I try to evince, it is required to be somehow ironic. This is the astute or artful way of dealing with law's paradoxes and contradictions, i.e., by hiding and revealing meanings and purposes in a complex game of simulation/dissimulation. Legal ironies can be traced by the deconstruction of the metaphorical meanings hidden in legal discourses, especially when assumed that the speeches, which produce legal phenomena, are presented by jurists as literal-conceptual and referential, although they are metaphorically structured. While literalness is taken by traditional dogmatics as an unquestionable fact, it is in the extra-literalness provided by the deployment of powerful legal metaphors and different kinds of irony that legal thinking effectively operates. The rhetoric of lawyers is thus ironically reversed: "justice" meaning "revenge"; "knowing" instead of "wanting"; "rationality" rather than "regularity".

1. Introduction

In this paper, I try to present, from the point of view of an ironist, the ironic side of law and legal reasoning. I argue that irony is essential for the understanding and manipulation of legal elements and that without irony it is not possible to take law seriously. I mean that irony is a sort of reading-key for the law. The issues discussed in this paper are a part of a much broader research on the rhetorical features of law and legal reasoning.

Evidently irony has assumed many different meanings in its history and in the history of its concept. Several phenomena – from the ancient Greek comedies' notion of eironéia to the post-modern irony – are considered to be ironical even when they differ in many characteristics. For example, not all ironical phenomena presuppose intentionality or comic effects on an audience as essential elements. What may be considered essential to all sorts of irony is the verification of paradoxes, contradictions or oppositions between the surface and the underground of meaning and action. Every kind of irony has something to do with a clash of what is shown or revealed and what is hidden and actually intended.

Different authors in different traditions understand irony from distinct perspectives. We can categorize those perspectives in between two opposite poles: on the one side, there is the metaphysical approach and, on the other side, the rhetorical perspective. The metaphysical approach is preoccupied with the definition of the essence of irony, while the rhetorical view is concerned with the persuasive effects of the ironical attitude. Every sort of irony can be somehow categorized in between those two extreme philosophical positions. Therefore, we can speak of verbal irony, instrumental irony, irony of events, situational irony, irony of fate, tragic irony, comic irony, irony of the world, cosmic irony among many other variations of the concept, not to mention all the rhetorical figures related to irony such as antiphrasis, paralipsis, proslepsis, cataphasis, epitrope, sarcasmus, auxesis, hyperbole etc. We may say that every kind of irony serves a different purpose either strategically argumentative or philosophically speculative.

I understand that our time is a time of irony. This relatively short period we call post-modernity – which, if effectively existed as something different from modernity, is over – gave us the so called post-modern irony. The ironical behavior of this era resides in that concepts such as truth, certainty and determinacy were effusively criticized. In this ironical age, intelligence can be compared to cleverness, success becomes a matter of wit, and the ability to handle double meaning, contradictions and paradoxes is defined as an essential virtue. Law in its post-modern version has an important role in the shaping of this ironical new society. A society in which being ironic is a necessary condition of living together.

In order to accomplish this task of an ironic reading of the law, I will introduce the subject by pointing out the insights and assumptions that led me to develop an ironical rhetoric of law. Then, I will try to present some definitions of what the concept of irony represents to our rhetorical tradition. As a conclusion, I will try to demonstrate how irony works as a reading key in legal understanding, and how ironical elements can be found in our conceptions of law.

2. Three levels of legal rhetoricity: material rhetoric, practical (strategic) rhetoric and analytical rhetoric

So, to begin with, for the purpose of clarification, I assume that rhetoric is here understood within a philosophical perspective. Therefore, I see rhetoric not only as a strategic tool or technical discipline that teaches us how to make beautiful, eloquent and persuasive speeches, but as a philosophical enterprise.

This means that, philosophically speaking, we can see rhetoric from at least three different angles, what a former student of Theodor Viehweg, Ottmar Ballweg (1989, p. 230) defined as "analytical rhetoric", "practical rhetoric", and "material rhetoric". Even though Ballweg (1982, p. 28) did not consider his analytical approach as a philosophical one, we understand that this methodological subdivision is useful for a much broader and reflexive – or zetetic – perspective on rhetoric.

As "material rhetoric" we understand the very words, concepts, metaphors, statements, speeches and, as Richard Rorty (2007) says, all the "final vocabulary" we are inexorably tied to. Different philosophers used different ways to portray this material rhetoric that, from the standpoint of a constructivist theory, characterizes the world in which we live: the human world.

George Lakoff and Mark Johnson (1980), for example, speak of "metaphors we live by" or how figurative speech shapes our conceptions and govern our thought. They say that "our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature" and that it "plays a central role in defining our everyday language" (Lakoff; Johnson, 1980, p. 3). Hans Blumenberg

(1986), in a different manner, theorizes on how human language creates the “Wirklichkeiten, in denen wir leben” or the “realities in which we live”. According to Blumenberg (1986, p. 115) human contact with reality is always indirect, complex, selective, delayed and metaphoric. We could also give other examples and speak, for instance, of the “narrative construction of reality” (Bruner, 1991) and even of the “narrative construction of legal reality” (Sherwin, 2009). Actually, we can trace back examples, in the history of philosophy, of thinkers and theories that intended to define human language from the perspective of its immanence, but that would probably lead us too far, maybe to Gorgias and Protagoras at the origin of this debate. Unfortunately, that is not the purpose of this paper.

So, from an existential rhetorical standpoint, the first level of reality is constituted by its material rhetoric (Adeodato, 2014, p. 47). In a legal sense, we can say that concepts such as “crime”, “tax”, “goods”, “intent”, “due care” etc. and the sets of texts and speeches that form statutes, codes, constitutions, contracts and judicial debates represent the material rhetoric of law.

The “practical rhetoric” by its turn, or, as João Maurício Adeodato (2009, p. 37) prefers, the “strategic rhetoric”, represents the techniques and strategies that enable us to manipulate all linguistic elements that constitute what we just defined as material rhetoric. This is probably what the traditional conception of rhetoric, that is, the art (or téchne) of discourse means. In other words, the practical rhetoric is represented by the topic method, the argumentation procedures, the study of figures or tropes and so on. In a legal sense, every dogmatic discipline can be defined as a set of strategies that constitutes the practical rhetoric of law. For instance, civil law, criminal law, tax law, constitutional law etc. are, therefore, sets of technical tools, models and methods that allow us to interpret normative texts, to sustain an argument and, of course, to decide.

Lastly, the “analytical rhetoric” is the most abstract level of rhetoricity by which we try to understand not only the elements that constitute the persuasive character of language and communication, but also the reason why the rhetorical strategies effectively work. This analytical rhetorical approach does not represent an actual innovation in the study

of rhetoric. In fact, Aristotle can be considered the first one to develop an analytical rhetoric (Schlieffen, 2006, p. 48) when he came up with the study of the enthymeme and paradigm, and the philosophical analysis of éthos, páthos and lógos.

Those ideas were outlined by Friedrich Nietzsche in his Vorlesungen of the 1874 Summer in Basel. In this text, Nietzsche (1922, p. 291) defines rhetoric in three different ways: as dýnamis (δύναμις), as téchne (τέχνη) and as epistéme (ἐπιστήμη). Nietzsche says that those meanings were already in Aristotle (1996, p. 10 [I, 1355b]) when he wrote in his Rhetorik: "ésto dè he rhetorikè dýnamis perì hékaston tôu theorêsai tò endechómenon pithanón" ("ἔστω δὴ ἡ ῥητορικὴ δύναμις περὶ ἕκαστον τοῦ θεωρῆσαι τὸ ἐνδεχόμενον πιθανόν") or "rhetoric may be defined as the faculty of observing in any given case the available means of persuasion".

Possibly this tripartite division inspired Ballweg in shaping the three different levels of rhetoricity: material rhetoric, in a first level, as some sort of human dýnamis; practical rhetoric understood as téchne, and, in a most abstract level, analytical rhetoric as epistéme. According to Nietzsche, "language itself is rhetorical, as it wants to convey only a dóxa and not an epistéme" (Nietzsche, 1922, p. 298). We can go further and say that, from an analytical perspective, there is not such a thing as "rhetorical questions", for example, as something opposed to actual or authentic questions, for all questions are rhetorical in some sense. In a philosophical sense, there is no such thing as a non-rhetorical nature of language, for every language is rhetorical. In the same sense, the modern prejudices that "empty" speeches are rhetorical, and that only "substantial" speeches are rhetoric-free represents a fallacy, for every sort of speech is rhetorical.

The fundamental question for this analytical rhetorical approach is the inquiry into the "nature" of persuasion "itself". A "rhetorical philosophy" works in this analytical level assuming that inevitably some persuasive element will always be present in all kinds of human communication. Thus, the rhetorical analysis works by establishing differences or approximations between the idea of persuasion and notions such as violence, authority, convincement, belief, faith, truth, knowledge, opinion, demonstration, wisdom etc.

Anthropologically speaking, persuasion is consequently assumed as a central element in human beings. It means that if there is to be any kind of human ontology it shall be a rhetorical one. A rhetorical philosophy of law that seeks, from this point of view, the understanding of legal phenomena and dogmatic theories is thus concerned with the persuasive features of law and legal performances.

So, from this rhetorical analytical perspective, there is not a "non-rhetorical nature of law". Every word, concept, or statement used in legal speeches is rhetorical in a "material" sense; every interpretive, argumentative or decisional strategy in a dogmatic domain is rhetorical in a "practical" sense; and every legal theory or philosophical speculation is rhetorical in an "analytical" sense.

3. The surface and the underground in the ironical reasoning

Now, what I try to understand with my investigation on the ironical nature of legal reasoning has to do with the strategies of rhetoric suppression that can be found in many legal theories. I try to realize what makes legal thinkers deny or hide the rhetorical features of law, that is, its metaphorical character and controversial nature; the absence of complete objectivity; the impossibility of literalness; and the impertinence of absolute rational inference in legal reasoning.

The "rhetoric suppression of rhetoric" in law (Sherwin, 2009, p. 88) can be seen not only as an instrumental irony for the development of legal dogmatic schemes, but also as an observable or situational irony of fact, or as an irony of events that represent law itself as an ironic phenomenon, or even as a tragic or dramatic irony of fate if we think of the crooked relations between law and justice.

As I said above in the introduction, there are indeed many different conceptions of irony and several phenomena which are considered ironical in distinct ways. Soren Kierkegaard (2006, p. 213) assumed that the concept of irony "has a very curious history, or maybe no history at all". The harshness of his statement is due to the lack of completeness and coherence in the historical development of the concept. Even when the romantics took the concept of irony as a central notion for their lit-

erary and philosophical movement, its definition was never made explicit. Claire Colebrook (2006, p. 80) says that, since the time of Socrates, it is impossible to have an actual theory of irony because of its resistance against any determination or fixation of a standpoint. In fact, according to Ernst Behler (1998, p. 599), we could define irony not only as a mere figure of speech, or as a literary way of expression and structural device for poetic composition; but also as a tool for linguistic deconstruction, and even as a kind of philosophical and theoretical argumentation.

However, against what Kierkegaard asserted, historically speaking, we may conceive an initial moment in the evolution of the concept of irony in the Greek notion of eironéia. In Aristophanes' plays, eironéia was not the same thing we nowadays call irony, it was actually a concept related to a kind of lie or plain simulation. But, just some time later, already in the platonic Socrates, eironéia became much more than simple falsehood, being defined as a very complex and controlled dissimulation which is not deceitful, fraudulent or dishonest, but clearly recognizable, and intended to be recognized (Colebrook 2006, p. 1). As we all know, the Socratic eironéia based itself in the affirmation of Socrates' ignorance and in the reduction of his own faculties. Initially, the platonic Socrates, i.e. the character of the dialogues, used eironéia as an ability to handle double meaning. By being ironic, Socrates was able to point out incompleteness and contradiction in common sense. His irony was capable of questioning common conceptions that were broadly accepted and continuously reaffirmed by recurrent use.

Many centuries later, we already find several other types of irony. Nowadays, we can speak of irony of fate (a kind of observable, situational or existential and unintentional irony), tragic irony (the contradiction between human intentions and unexpected results that produce a sympathetic feeling), verbal irony (a kind of semantic reversal), instrumental irony (differently from the observable irony, it presupposes intentionality and the relation between the ironist and his victim), cosmic irony (a sort of observable irony that has little to do with language games or figurative speech), irony of the world (which assumes some kind of hostile mystic agent or supernatural force), observable irony (as opposed to instrumental irony), romantic irony (the philosophical irony

for the romantic thought), post-modern irony (the idea that human comprehension and reality itself are contingent and unstable), among so many different nuances of the idea. Also other figures which are related to irony shall be mentioned: auxesis (a figure of speech in which something is referred to in terms disproportionately large), litotes (a kind of deliberate understatement), paralipsis (stating and drawing attention to something in the very act of pretending to pass it over), proslepsis (when paralipsis is taken to an extreme), epitrope (a figure in which one turns things over to one's hearers, either pathetically, ironically, or in such a way as to suggest a proof of something without having to state it) etc. In our present time, in what regards irony, we notice a saturation of the concept and a hypertrophy of its meaning, as if every contradiction could be seen as being ironic in some sense.

However, despite these semantic issues, we can actually observe some common feature in every ironic situation: every kind of irony is related to a statement or fact that reveals a meaning on the surface and hides a different meaning in the underground, not necessarily an opposite meaning, but a contradictory or paradoxical one. Kierkegaard (2006, p. 276) refers to the contradiction between "appearance" and "essence", or in other words, a paradox between some literal meaning that represents the explicit phenomenon (what is shown) and something that represents the substance (what is really meant).

Wayne Booth (1974), by his turn, proposes a different way to comprehend irony. With a rhetorical approach, he tries to avoid any kind of metaphysics or ontological determination on the subject. Thereby, he develops a method to detect the presence of stable ironies in a given context. Stable ironies, for Booth (1974, p. 6) are those kinds of irony that are intended or deliberately created by human beings to be understood with some precision by other human beings. Every stable irony is covert and intended to be reconstructed with meanings different from those on the surface. They are stable because once the reconstruction is made it is not possible to undermine the reconstructed meaning. In that sense, a stable irony is finite in application, and its reconstructed meaning is always local and limited. Even when it is not possible to catch all the meaning in a non-ironic paraphrase, for all kinds of irony are richer than their translation into a non-ironic language.

The method to detect stable ironies is a four-step procedure: the first step consists of rejecting any literal meaning in a statement, speech, text etc. It should be recognizable that there is something incongruous between the words expressed, or between the words and knowledge. Booth (1974, p. 10) says that "the route to new meanings passes through an unspoken conviction that cannot be reconciled with the literal meaning". The second step has to do with the production of potential alternative non-literal interpretations (here, we could say, in an abductive inferential fashion). The alternative interpretations will always be incongruous with what the literal statement seems to say. The third step is the selection of one of the possible alternative interpretations. The reader's interpretation must work by rejecting the same literal meaning that is rejected by the author. It is only possible when the reader finds out the author's knowledge or beliefs. The fourth and last step is the conclusion by asserting that this alternative interpretation is the ironic one (Booth, 1974, p. 12). Unlike the original proposition, the reconstructed meanings will necessarily be in harmony with the unspoken beliefs that the reader has decided to attribute to the author. For Booth's irony detection procedure, it is important to know the author's values and beliefs and confronting them with what is said. It is also important to know if the author or the text itself wanted to be ironic in a verbal or an instrumental way.

This reading method shows how to deal with the contradictions between the literal and the ironic meaning, assuming that there is always some kind of paradox between something that is revealed on the surface and something that is hidden in the underground of communication.

4. A classification of irony

4.1. The classification criteria problem

Faced with the enormous variety of nuances of the very notion of irony, a classification of all kinds of singular phenomena that are considered to be ironic becomes an almost impossible task. Sometimes two or more variations of irony are so similar that it is difficult to distin-

guish them as different concepts. For example, there is no essential difference between the irony of events and the observable irony, for both are unintentional situational ironies that are interpreted as being objectively ironical in their nature despite the absence of an author, i.e., the ironist. The difference between the two concepts is based just in the ways they are described. The first one is understood as being an event of the world, and the second one is taken as something that can be observed. Shortly: the one is eventual and the other is observable; the first one can be objectively described, while the latter is described from the point of view of the subject that observes. This situation has to do with the problem of the criteria selection which is always topic-rhetorically determined. What the criteria of classification should be is probably the biggest problem of the very work of classifying different phenomena that appeared in different contexts and are interpreted as various things with distinct meanings.

Although every classification seems to be problematic, a historical and rhetorical analysis of the concept was proved to be practicable. A good example of the accomplishment of this task is the work of Ernst Behler (1998) on the history of irony in the Historisches Wörterbuch der Rhetorik. The work does not represent an actual classification of all kinds of irony, but can be comprehended as a rhetorical history of the concept. Therefore, taking in consideration the results from this rhetorical-historical investigation, we can notice how the concept evolved since the first record of the notion of eironéia in the ancient Greek civilization, passing through the romantic philosophy of irony, up to the post-modern version of the idea. So, even if the classification of ironies is not completely possible or maybe not desirable at all, we can observe a historical variation of the uses of ironical devices and strategies.

Another way of dealing with the problem of classification is the arrangement of ironies from the less complex to the more complex ones. According to their complexity we can organize the different kinds of ironical devices in verbal ironies, instrumental ironies, observable ironies and existential ironies. But, of course, the criteria problem remains the same.

4.2. Verbal ironies in legal speech

Probably the most paradigmatic kind of irony is the verbal one. When dictionaries define irony as “saying the opposite of what is meant in a verbal contradiction” they refer to verbal irony. In its verbal variation the contradiction between two words or expressions is highlighted.

We already said that there are also nonverbal forms of irony, at least in the primary experience of an observable or situational irony. But that is not what a lexical definition of irony usually states.

Verbal ironies are human creations that presuppose a speech and its author. The shortest version of verbal irony is the antiphrasis, or the irony of one word, often derisively through patent contradiction. Antíphrasis comes from the Greek verb antiphrazéin or “to express by antithesis”. Usually this is considered to be the simplest example of irony that happens when there is just a plain semantic inversion.

A verbal irony is always created by someone with the purpose of communication. It means that the irony has to be revealed in a text or oral speech. As we saw, an ironic statement must be interpreted as being ironic, otherwise is will sound like nonsense, plain falsehood or stupidity.

In political and legal speeches, we can always find ironic constructions that show the ability of manipulating and arranging words. In rhetoric that is called eloquence and is related to the canon of elocutio or léxis. Not only lawyers or politicians use verbal ironies in their speeches to attack some adversary or diminish the enemy, but also legal philosophers and theorists in general are ironical in their texts. For me, the most significant example of an ironical work in legal philosophy is Rudolf von Jhering’s book from 1884 “Scherz und Ernst in der Jurisprudenz: eine Weihnachtsgabe für die juristische Publikum”. In this book, Jehring writes in an ironical, satirical and sometimes sarcastic manner. He uses his ability as a writer to attack the Begriffsjurisprudenz doctrine. Unfortunately, this is no place to analyze Jhering’s book. Nonetheless we can say that irony becomes a powerful weapon in his hands as it is used to criticize several absurdities in legal thinking that are propagated by tradition.

Verbal irony can be recognized as a technique of using incongruity to suggest a distinction between reality and expectation, which presupposes that speakers and listeners share the same beliefs and knowledge (Gibbs Jr., 2002, p. 362). So, to produce ironies, an agreement between speaker and listener is essential. It is by the agreement that they negotiate their ethical and cognitive distances. In this sense, verbal ironies can also be used in a strategic way.

4.3. Instrumental ironies in legal reasoning

Legal reasoning is strategic. It is also rational, but its rationality is subdued to the development of dogmatic strategies of neutralizing human dissent and absorbing social complexity. Persuasion is what guides these strategies, for the rationality of legal procedures depends on the level of convincement that is argumentatively produced. Therefore, we can conclude that, in what matters legal reasoning, persuasion overcomes rationality.

A good example of this situation is the role that a theory of interpretation has in developing methods of legal interpretation. Differently from literary interpretation, legal interpretation serves a specific goal, i.e. the production of decisions. The work of legal (dogmatic) interpretation serves the purpose of producing a decision which is capable of absorbing social complexity by neutralizing dissent.

From a rhetorical perspective, there is a big difference between being clever or astute and being a liar, as there is a difference between simulation and dissimulation. When I affirm that legal reasoning is ironical in its rhetorical nature, I mean that strategically speaking lawyers tend to dissimulate their intentions instead of simply lying. Thus irony (dissimulatio) characterizes several dogmatic strategies. In this sense irony teaches us how to deal with ambiguity, contradictions and paradoxes that can be found in every legal system in a way that what is ambiguous is shown as certain, what is contradictory is presented as being uniform, and what is paradoxical is described as unquestionable. The dissimulatio strategy teaches us how to handle double meaning and how to see both sides of a controversy at the same time in the middle of explicit contradictions. It shows us how to not only criticize current

schemas and reaffirmed common sense, but also how to subvert what is taken as obviously natural or is considered to be normal. That is what I understand as critique and transformation of law's reality by irony.

Traditionally the legal dogmatic way of thinking and discursively acting works by repetition, reproduction, mimics and simulation of some models that are considered to be perfectly done in the past and just given in the present. In this sense the jurist is a sort of éiron (a character) who, by dissimulation, is able to paraphrase and propagate a tradition and emulate a set of values by not only making reference, but also reverence to them, without true attachment to their meanings.

The common appeal to formulas such as legal principles, for example, of reasonableness, proportionality, benevolence, justice etc. works as an emulation of calculation, logic and rationalization that do not have any actual meaning. The goal is just to reproduce a rigmarole and to give continuity to a discursive tradition without really highlighting its meaning. As Nietzsche says,

> The rights go back to a tradition, and the tradition, to an old agreement. In some moment, it happens that one is satisfied with the consequences of the fulfilled agreement, and notwithstanding too lazy to formally renew it; so one lives on as if it had been always renewed and, as the oblivion spread its mist above this origin, one believes that it had a sacred and unchanging state, on which each generation should keep building. The tradition was then forced, even if it no longer brought the benefits for whom the agreement was initially established. The weak find there their stronghold of all times: they tend to perpetuate the agreement that was accepted just once, the grace that was given to them (Nietzsche, 1988, p. 570).

In a modern society – and probably even more in a post-modern one – values and assumptions are seldom shared, due to the high degree of social complexity. Therefore, we hardly believe in some ultimate truth or reason that justifies these values and assumptions. We express ourselves only provisionally due to the difficulty of compromising to what we write or say.

The post-modern irony (Colebrook, 2006, p. 18) is directly related to this social conjuncture. And it is precisely this kind of irony that allows an inherently liberating political attitude. As no common ground

or foundation is presupposed anymore, a life characterized by irony remains open and undetermined. Indeed, irony liberates us as it allows language to be freed from any fixed or stable context (Colebrook, 2006, p. 20). With irony, the continuous process of creation and destruction, of connection and rupture, of semantic construction and deconstruction becomes the center of attention. Thereby irony opens the possibility of moral autonomy (Colebrook, 2006, p. 35). In other words, with irony it is possible not to receive complete definitions of what moral concepts mean, for we must understand them ourselves by an intentional and creative effort.

Irony reveals the weight of freedom. The liberal and optimistic conception of the world, whose doctrine goes back to the Enlightenment philosophy and the French Revolution, characterizes our modern conceptions of law. The rationalist optimism that tried to illuminate by simplifying and publicizing the law, rationalizing its ways of production, only ironically can be still kept as valid.

4.4. Observable ironies in legal "artificial realities"

While verbal and instrumental ironies imply that someone consciously and intentionally employs a technique, observable ironies reveal worldly events that are ironic "by nature". Observable ironies can be understood as situational ironies, ironies of events, ironies of fate, tragic ironies and so on. An observable irony is something that just happens to be noticed as ironic.

Concerning observable ironies, the presence of the ironist is not relevant. Generally, the emphasis is on the irony's victim.

When I think of the ironical features in law and legal reasoning, I see that irony appears not only in an instrumental or strategic sense. I mean that we can also speak of unintentional ironies in law. Although, in a subjective sense, legal reasoning is ironic in an instrumental manner, in an objective sense, there are many observable ironies in the very idea of law. Of course, "subject" and "object", in our analytical perspective, are just rhetorical constructions that form the vocabulary of modern thought.

So, in the first objective sense, when we speak of observable ironies in law, it would be as if law itself were somehow ironic. It means that the contradictions and paradoxes between what is shown on the surface and what is (hypothetically) hidden in the underground are in themselves ironic; the irony lies in the contradiction between what seems to be and what effectively is.

On the other hand, in a subjective sense, ironical reasoning would be the astute way of dealing with these contradictions. In fact, in legal reasoning so many things cannot be revealed on the surface. This is one of the reasons why legal argumentation has an enthymematic structure: not all premises can be made explicit (Sobota, 1991). We cannot reveal, for example, that the metaphor "an eye for an eye and a tooth for a tooth" is still hidden in the concept of law. We cannot explicitly say, as Nietzsche (1988b, p. 89)[1] did, that justice means originally vengeance, even when it does.

When I refer to legal "artificial realities" I think of dogmatic models and schemas that do not care about reality, but the appearance of reality.

What appears to be real is enough for legal-dogmatic purposes (Artosi, 2016). Jurists do not care about reality, but they also do not care about appearance. They care about the appearance of reality, or what makes something apparently real. Learning how to reason in an ironic fashion teaches us how to strategically deal with it, as all ironies carry a contradiction between reality and appearance.

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[1] Wo es keine deutlich erkennbare Uebergewalt giebt und ein Kampf zum erfolglosen, gegenseitigen Schädigen würde, da entsteht der Gedanke sich zu verständigen und über die beiderseitigen Ansprüche zu verhandeln: der Charakter des Tausches ist der anfängliche Charakter der Gerechtigkeit. Jeder stellt den Andern zufrieden, indem Jeder bekommt, was er mehr schätzt als der Andere. Man giebt Jedem, was er haben will als das nunmehr Seinige, und empfängt dagegen das Gewünschte. Gerechtigkeit ist also Vergeltung und Austausch unter der Voraussetzung einer ungefähr gleichen Machtstellung: so gehört ursprünglich die Rache in den Bereich der Gerechtigkeit, sie ist ein Austausch.

4.5. Existential ironies in the jurist's éthos

When Richard Rorty (2007, p. 134-139) defined the ironist as a skeptic person, he was describing someone who does not trust theoretical postulates, assumptions, dogmas, axioms, models and everything that is affirmed with conviction. In fact, the ironist is never satisfied with any representation of the truth and what is considered to be true. But precisely for being an ironist he is capable of using – ironically – a vocabulary that comprehends metaphysical notions of truth, nature, essence and so on. He just does not believe that any of them have a final or ultimate meaning. So he is free to use them with no attachment to any ontology.

As an ironist, the jurist must reason, dogmatically, as a believer, but always in awareness of the lack of final objective truth in what is affirmed as being true. It should be clear that the ironist is not a liar.

Indeed, instead of simple simulation, irony implies complex dissimulation. Pierre Bourdieu (1991), for example, says that jurists are hypocritical guardians of collective hypocrisy that characterizes all legal community. But where he sees hypocrisy, I see irony. In the middle of an eternal controversial context, such as the legal one, jurists are always constrained to have a point of view, to defend some set of values, but with the conviction that it should never be absolutely taken as something completely determined.

In a rhetorical sense, truth can be considered just a strategic topos used to affirm a certain point of view that operates in the context of a plurality of ideologies, vocabularies and different modes of reality perception. From a constructivist point of view of a rhetorical philosophy, reality can be understood as a product of linguistic constructions that operates amidst different narratives in a continuous dispute for discursive authenticity. Adeodato (2010, p. 39) says that "rhetorical philosophy considers that eventual agreements on empirical phenomena are not ontologically determined, but constructed by material rhetoric", which, by its turn, is manufactured or manipulated by the strategic tools that form the practical rhetoric.

As I said, in modern times, when we cannot assure anything with complete certainty, irony seems to be a central notion for our compre-

hension of values, institutions, beliefs etc. If modernity is characterized by the necessity of change, Post-modernity represents the increasing of this changeability. Thus, everything seems to be fluid, temporary and contextual. And when nothing is certain, we cannot attach ourselves to any definition, value or postulate.

But this lack of objectiveness is unbearable. Hegel (2000, p. 89), for example, criticizes the absolute conception of the ironic "self" developed by the romantics when they affirm that nothing is determined in itself because everything is created and destroyed by the subject.

The situation is even more complex because the ironic subjectivity is not immovable. The ironist, after all, recognizes that he is an active living individual who affirms his own individuality in a continuous and unfinished fulfillness process. Irony transforms subjectiveness in a way that the subject cannot be understood as an a priori basis for every judgment. Thus, subjectiveness for the ironist is an ongoing construction process of an éthos. And, according to Aristotle (1996, p. 13 [1356a]), the rhetorical éthos is determined and revealed only by the logos.

In my view, an ironical lógos. And for this reason nothing can be taken seriously, but as mere resemblance on the surface. That is the reason why irony represents the climax of subjectivity.

For Hegel, this romantic idea of irony is characterized by an absolute negativeness. If nothing can be taken seriously because of the ironical negativeness – because of the nullity of everything which is objective or has an inherent value – what remains is just emptiness and isolation.

However, the ironist, dissatisfied with self-enjoyment, might find himself incomplete and unable to resort to anything essential or firm from a substantial point of view. This unfortunate and helpless pursuing of truth and objectivity is what Hegel (2000a, p. 91) calls "nostalgia for the real and for the absolute" that "forces you to feel the emptiness and unreality".

Therefore, understood as absolute negativity, without allowing anything to be taken seriously, irony would determine the complete disappearance of any sense or meaning. Indeed, the ironic temperament is able to dissolve anything in "an endless chain of solvents" (BOOTH,

1974, p. 59). The desire to understand irony, however, takes this chain to an end. And, precisely for this reason, a rhetoric of irony becomes crucial, in that it prevents the return to an infinite regress of denials.

We are forced to recognize that we will never be able to overcome singular points of view and reach a divine perspective. Ironically, however, we see ourselves subjected to a sort of "cosmic joke" when we build our ontologies and general statements, as when we speak, for example, that "law is such and such…", that "rhetoric is this and that…", that "mankind seeks some purpose", that "the common good can be defined as general happiness", and "the public interest aims to the common good" etc. But the ironist finds himself in his own finitude unable to cling to anything in an absolute manner.

5. Conclusion

For being a modern invention, dogmatic law is characterized by the institution of its mutability. And, precisely for this reason, with every new context we perceive a situation of change or disruption. We abandon what was once valuable and build a significant new reality, that, because of previous dropouts, cannot be taken seriously.

As good ironists, we shall understand this ironical situation. In fact, we lawyers know how to strategically manipulate concepts such as justice, freedom, or equality, even when we do not know what they really mean. In fact, for more than two thousand years we have been struggling with the problem of how to define these words.

Maybe we are successful in our argumentation precisely because we ironically dissimulate that, as a matter of fact, we respect those words more than their meaning.

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DRESSING ARGUMENTS: THE FORMULAS IN THE LEGAL OPINION

Serena Tomasi

Abstract

The aim of this paper is to investigate the relation between the rule of law and the formalities of judgment, drawing attention to the recurring formulas used by judges in legal opinions and detecting their argumentative value. In this view, such expressions have an institutional function and are, often, "dressed" arguments to be analyzed.

1. Introduction

The aim of this paper is to explore the relation between Rule of Law and legal reasoning, the relevance and the way of application of this conception in the legal decision-making and in the application of legal rules. I assume from judicial practice that in legal decisions there are some recurring formulas, which are signposts to help people to identify the legal determination and the reasons in support of it. The use of such formulas (in the header, central and final part of legal opinions) has become a tendency that plays a persuasive role on both our understanding of law and our demand of certainty in the practical administration of justice. The analysis of some paradigmatic formulations, taken from civil law legal systems, promotes a critical examination through the instruments developed by argumentation theorists.

In the first part of my paper I will provide some insights about the concept of rule of law; in the second part I will give an analysis of the exemplary structure of the legal opinion drawing my attention to its formalities in light of the rule of law; in the third part I will take into account some recurring formulations and evaluate them within argu-

mentation theory; in the final part I will try to demonstrate the key role of this instrument in order to "undress" arguments and acquire a clear-minded attitude to judgment.

2. The Rule of Law Framework

Aristotle developed important ideas of the character of the good governance, giving ex exemplary account of the rule of law. Now the rule of law has become a general concept and an influential principle of Western modern constitutional thinking. It is a bedrock principle of modern legal systems, usually expressed in terms of multiple key procedural concepts.

The constitutive instruments of international institutions refer to this principle of governance, providing activities in support of its development and implementation in legal norms and practical social programmes. Likewise, European Union regularly addresses rule of law issues. At the national level, the Constitutions (the highest source of law) promote a rule of law framework.

As a matter of fact, the rule of law regards each aspect of public file, including policymaking, human rights protections, judicial systems, civil society, both in the national and international field.

Actually, there are many competitive definitions of the rule of law: it is difficult to come up to a simple definition. To my purpose (as declared, judicially-oriented), I will identify three essential components of it.

a) Due process of law. The rule of law regards judicial mechanisms and implies a formal process of law enforcement and adjudication. The modern legal systems requires a government of law, not of men, in order to secure equal rights to citizens. According to the rule of law, the judicial system provides a fair and prompt trial, through procedural protections.

b) Protection of human rights. The contents of the rule of law shape the conduct of people (both the government and the governed), which are subject to the law. Before the law, all persons are equal and deserve equal application of equal laws.

c) Importance of law-making. The Rule of law is based on the centrality of the lawmaking. At the core of the principle is the centrality of legal ruling. The legislative branch of government is predominant, in the sense that every citizen is subject to the law, including lawmakers. The supremacy of the positive law is connected to the principle of legality and the principle of legal certainty.

3. Exploring the context: the legal opinion template

About the foundations of the rule of law, certainty as the guiding ideal is largely unquestioned.

The importance of the quest for certainty (in law, judicial mechanisms and social life) seems to be a self-evident principle.

According to the dominant strain of thinking in the modern legal thought, the ideal of certainty of law goes hand in hand with the propensity for a formalistic approach, according to which law must be interpreted as a formally closed system, governed by strict rules of inference which allows the judge to be a voice of the law. The supremacy of law leads to model the system of law on mathematics and consider legal reasoning as a form of deductive syllogism. In a deductivist framework, a legal provision plays the role of a major premise, a statement of fact is the minor premise and the conclusion is an individualized norm inferred by law. In order for a deductivist model to work, it is necessary that both the relevant legal rules and the facts are undisputed, without problems of interpretation or proofs. The emphasis on syllogistic reason has produced a damaging effect, generating the myth that legal reasoning could be completely understood by applying deductive formal logic.

The point is that it is not possible to contain a legal decision in a legal deductive syllogism. In contrast to the formalist belief, legal premises are arguable, addressing, for instance, the questions: what is the law? What is a fair interpretation in the specific case? What are the facts?

Any legal system always contains indeterminacy; moreover, legal and extra-legal expectations shape the legal decision.

With the crisis of the formalistic approach and the abandonment of the syllogistic model in legal theory, the need of certainty does not disappear. It expresses a general need for transparent legal reasoning and creates the space for new approaches to law.

From the argumentative turn of the Fifties, law is approached from a particular perspective, that of argumentation theory. The argumentative interest in the legal field arises from an awareness of the significance of the dialogical/dialectical structure in court trial. In this view, the decision-making is a critical exchange of views and moves, which takes place in the judicial context. Trial is a context of argumentative interactions: before an impartial judge, parties must set their positions, demonstrate the soundness and the coherence, resist to objections, persuade each others.

As van Eemeren and Grootendorst put it (van Eemeren & Grootendorst, 2004, p. 12), specific knowledge of context is relevant to the analytical reconstruction of argumentation.

The context, in terms of institutional and personal relations (Rigotti & Rocci, 2006), becomes a source for the study of the judicial discourse. This approach accounts for the institutionalized and formal factors, bringing to light the constitutive nature of the context where the interaction is set.

Focusing on the institutional aspects of the context of judicial communication, it is worth illustrating the major form of communication of judges and identifying its institutional limits. Judicial opinions are written discourses, authored by judges, explaining how they resolve a particular legal dispute and their reasoning. Legal opinions follow always a regular formula. As far civil law legal systems, statute law provides formal requirements for the validity of judicial opinions. In light of rule of law, legal opinions have formal constraints, duly constituted, which ensure the same standards of formalities for each case-law. There are "frozen" and "free" parts of the legal texts.

Synthetically, the template consists in the following "frozen" components:

- the heading, which recalls the constitutional principles concerning the Judiciary, so Justice is administered in the name of the people and Judges are subject only to the law;

- about the preliminary stuff, it is required to identify the court, its composition, the parties involved in the case and their lawyers;
- the body of the opinion consists in the motivation about the fact and the law of the case: all judicial decisions shall include a statement of reasons;
- the disposition: it usually appears at the end of the opinion and tells what action the court is taking with the case;
- the next information regards when and where the opinion was delivered and his author.

As shown in the scheme, legal opinions are subject to certain constraints, both with respect to content and form. These sections represent the institutional frame for legal reasoning in order to secure the jurisdiction by law. The law regulates the cases and forms of the enforcement of justice.

The proceedings, including the provisions on the necessary formalities for judicial opinions, define the institutional and public features of judicial context (Manzin, 2014).

4. Recurring formulas and dressed arguments

The scheme of the legal opinion can be implemented by infinite ways, because infinite communicative interactions take place in reality. At the core of the scheme lies the section devoted to motivation (argumentative justification).

The duty of motivation has two characteristic functions (Taruffo, 1975): an internal function and an external one. Starting with the former, it regards the coherence between the internal sections of the opinion, in the sense that the disposition and its grounds are mutual dependant and the disposition has to be based on reasonable grounds. Illustrating the complex argumentation is also functional to the parties to detect the points of the opinion on which appeal for revision. It is functional to the court of appeal to understand the grounds of the inferior court and, finally, it is functional to the highest level of jurisdiction in order to ensure the uniform interpretation of the law. Referring to the external function, it is embedded in due process law, according to which all

court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. Such assumption carries important consequences at the level of the social acceptance of the judge: the point is that who has the power to decide, has the duty to give reasons for it.

In fact, such formal scheme for legal decisions responds to the rule of law principle and turns to produce a pervading effect even on its "free" component.

In legal practice, judges traditionally make extensive use of expressions, which, for their recurring in judicial language, have become common formulas in decision-making.

In a broader sense, the formulas belong to the legal culture, representing common and shared expressions in judicial discourses.

As Rigotti and Rocci observe in speaking of the institutional dimension of the context (Rigotti & Rocci, 2006), such established expressions can be understood as a common communicative practice in legal context, inhering the role of judge.

From the empirical analysis of a sample of legal opinions by the Italian Supreme Court, my claim is to show that such formulas can be seen as lexical items, apparently conforming to the Rule of Law judicial procedure, actually concealing unexpressed and unjustified arguments.

More specifically, going through the communicative judicial practices, this study shows that besides commonly recognized hallmarks of legal discourse, there are "dressed" arguments (Groarke & Tindale, 2013, pp. 81-106). What seems to be a rhetorical linguistic choice, in compliance with the Rule of Law, turns to be a violation of it, breaking the duty of motivation. Groarke and Tindale, in their teaching book, recalling John Woods, introduce the distinction between "dressed arguments" and "arguments on the hoof" (Groarke & Tindale, 2013, p. 81). On the one hand, arguments on the hoof are arguments as they actually appear in the exchange of arguments; on the other hand, dressed arguments are arguments as they appear after we have analyzed their structure, identifying premises and conclusion. Learning to "undress" arguments is a key part of critical thinking to sink below the surface, understand and evaluate arguments. In fact, discovering dressed arguments can be a difficult task and requires critical skills.

In more detail, some examples in which emerge that the formulas are dressed arguments are the following:

I. Considered art. 133 of Criminal Code, the final punishment can not exceed 10 years of imprisonment

II. Even according to the most authoritative jurists interpretation

III. Judicial costs will be balanced considering the originality of the issue at dispute.

All these forms can be considered as reflecting a common stylistic judicial practice, which covers arguments to undress.

In the first example, it is noteworthy that the Italian Criminal Code provides for maximum and minimum of imprisonment. Article n. 132 provides that judicial discretion must be exercised within the legally established penalty ranges. Article n. 133 defines the criteria that should guide the judge in exercising the discretionary poker under 132. These criteria concern the type of offense but also the offender (the previous conduct, the criminal record, the family status). The proper meaning of the recurring legal formula is undiscovered, even if it lies on law and on the adherence of legal provision. It is a dressed argument whose premises are all implicit.

Considering the second example, this formula is frequently used in motivation. In Italian legal system, according to article n. 118 disp. att., in deciding a case, the judge may make a reference to corresponding precedents in the opinion that justify the decision. About legal sources in deciding the case, the provision specifies that no direct authority can be cited from books. This statutory provision in Italian Legislation forbids a judge to quote the opinions of jurists. But what appears in text is different. The stylistic formula reveals the awareness that a judge does not decide based exclusively on statutory law. This formula is compatible with the statutory provision but covers a pattern of argument from authority. Who is the doctrine? Is that doctrine all about the issue?

Finally, the third example, even more clearly, shows the camouflage. In Italian legislation the costs of a case depend on its final outcome. According the statutory provision (Art. 93 Civil Code Procedure), the losing party is supposed to pay the courts feed, the feed charged by the lawyers of the parties and the other costs (expert costs, witness costs) must generally be borne by the losing party. If there are

exceptional reasons, the costs may be compensated by the parties. But the judges should explain the reasons of exceptions. The recurring formula of justification is limited to "considering the novelty, originality of the issue". It is a presumptive argument. What is new? New regarding what (facts/law)? New to what extent?

5. Some conclusions

Briefly, I will try to sum-up some final observations.

From the analysis of the concept of the rule of law, certainty emerges as its pervading character.

As remarked in section number three, if certainty is the core of the rule of law, it cannot be reduced to a formal way of reasoning. The very structure of the Rule of Law ensures that the resolution of the conflict must emerge from the due process of law, that is to say from the reasonable discussion rather than from a solution imposed by authority. In this sense, rule of law is based on an argumentative view.

On the basis of an argumentative approach, the study of the context of communication has a constitutive dimension. In the legal field, a series of contextual requirements are institutionalized and established according to law. For example, the template for judicial decisions is given by statutory norms. By law, the central part of the scheme for composing a legal opinion must consist in giving reasons in support of the claim.

Furthermore, the argumentative approach promotes a critical approach in order to "sink blow the surface". Taking into account a sample of legal opinions, by Italian Court of Cassation, emerges that besides "institutionalized" expressions there are "dressed" arguments and arguable opinions. Even if at the first sight, such formulas could be seen as a stylistic/rhetorical choice belonging to the communicative practices, they often reveal unexpressed arguments. Beside the formal adherence to statute law, these recurring expressions are linguistic hallmarks of a bad use of it.

This study is particularly suited for legal education, exploring the communicative context in law, the linguistic habits and promoting the use of critical skills in professional activities.

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JØRGENSEN'S DILEMMA: THE QUEST FOR SEMANTIC FOUNDATIONS OF IMPERATIVES

Miguel Á. León Untiveros

Abstract

According to Donald Davidson (1967, 1969, 1973) Tarski's T scheme is applicable not only to formalized languages but also to natural language (i.e. to descriptive and evaluative terms). On this basis, some legal scholars (e.g. Taruffo, 2005 [1992], Ferrer Beltrán, 2005) claim that T scheme is also applicable to legal language. In this paper we attack this claim, by counterclaiming that there are mistakes in the reception on the concept of semantic truth and we show that some features of legal language, i.e., context-dependency of meaning, lack of formality, imperative expressions, presumptive expressions, vagueness, non-bivalence, and universality, do not allow the application of T scheme. As a consequence, we claim that one cannot say if a legal sentence is true or false from a semantic point of view.

1. Jørgensen's dilemma

In 1938, the positivist philosopher, Jørgen Jørgensen, proposed a dilemma about the logic for imperatives[1], despite Poincaré's claim who considered it possible (Poincaré, 1913). This dilemma has two horns: one, is, according to Poincaré, that there is a logic of imperative reasoning, where the major premise is in imperative mood and the minor premise is in indicative mood (we call it Horn 1, also permissive thesis). On the other hand, the second horn (Horn 2, also prohibitive the-

[1] The sense of imperative is not uniform, in this work we understand it in the way used by (Rescher, 1966), i.e., as a command.

sis) says that because of imperative sentences lack of truth value and logic only deals with propositions (which have truth value), there is no a logic for imperatives.

Jørgensen's dilemma has received a lot of attention especially in the question of truth value of imperatives. And probably the most reasonable answer is the (almost obvious) lack of truth value of imperatives[2].

We think that even the lack of truth value of imperative, the reasons by which Jørgensen formulate horn 2 are not tenable anymore, in the light of the current situation of modern logic.

2. Reasons for Horn 2

In (1938) and (1999 [1938]), Jørgensen presents the reasons by which he accepts Horn 2. First, only sentences which are capable of being true or false can function as premises or conclusions in an inference, and second, according to the logical positivist testability criterion of meaning, imperative sentences must be considered meaningless. These reasons presuppose a state of logic which were current for logical empiricism. Theses presuppositions are:

- Unity of logic.
- The hegemony of classical logic.
- Classical logical consequence.
- The only logic to give an account of reason is classical logic.
- The relation between logic and reason is unilateral in favor of logic.

[2] Some scholars claim that imperative has truth value, if we formulate it in terms of deontic possible worlds, v.g., (Hintikka, 1971), but this is not the place where to analyze it. However, we must say that using this modal approach of imperatives, we change the pragmatic sense of imperative sentences. If we accept that an imperative sentence has a truth value function, then we have to admit that this imperative sentence is describing some deontic (ideal) state of affairs, and this is contrary to the original pragmatic sense of an imperative sentence, by which the agent pretends to promote a change in the world, from the current one to another one (a potential and ideal one). Uttering an imperative sentence is a specific kind of act of speech and it is different from uttering an indicative sentence, by which the agent describes her current world.

Our aim is to attack these presuppositions and weaken Horn 2, such that the feasibility of Horn 1 will increase.

2.1. A plurality of logics

In the current situation of logic, the real realm is given by the classical and non-classical logics, especially deviant logics. To explicate the diversity in logic let us give the following and provisional definition of classical logic:

> A logical system is a ordered pair $\langle L, Q \rangle$, where
> L: is the language which has a vocabulary, rules for well-formed formulae and semantics, and,
> Q: is the rules of inference.

Thus, a system of classic logic is a structure $\langle L, Q \rangle$, with the following properties

$p \vee \neg p$ [excluded middle].
$p \equiv p$ [identity].
$\neg(p \wedge \neg p)$ [non contradiction].
$((\Sigma \subseteq \Delta) \wedge (\Sigma \quad \Gamma)) \Rightarrow (\Delta \quad \Gamma)$ [monotony].

Naively, monotony says that no matter what else we learn, we must conclude the same proposition.

A non-classical system of logic (i.e., deviant logics) is one that violates, at least, one of these properties (even partially)[3].

Some logical systems deviate from excluded middle, and thus they form the family of polyvalent (also, multivalent) logics (which include fuzzy logics). In this kind of logics, a proposition could not be only either true or false, in a trivalent semantics, this could be neither true nor false. In a general way, the semantics of this kind of logics can be n-valent where n is a natural real number ($n \in \mathbb{R}$) and n is a number in the

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[3] There are other definitions of non-classical logic but, ours is focused on deviant logic, namely, in this work non-classical logic and deviant logic are the same, and extensions of classical logic (v.g., standard deontic logic) are just classical logic. For a distinct view see (Palau, 2002).

interval [0, 1], therefore, a proposition can take infinitely many values, between truth (1) and false (0).

Other deviant logical systems arise from violation of non-contradiction principle: this family is called paraconsistent logics. In this logic also fails the principle of explosion: P, ¬P ⊢ Q (ex falso quodlibet sequitur). If a logical system $\mathcal{L}$ distinguishes between two types of negation, say, ¬, ~, then $\mathcal{L}$ can be paraconsistent for one of these negations, for example, ¬, and not so for the other one, ~.

The next family of deviant logics is non-reflexive logics, recently proposed by Newton da Costa and his collaborators[4]. This logic violates identity principle and belongs to the larger family of quantum logics, which try to account the interpretation of quantum mechanics, where there are subatomic particles for which do not correspond to the idea of identity (da Costa, Krause, Becker Arenhart, & Schinaider, 2012, pp. 85-88).

There is another family of logics called non-monotonic logics. In this systems fails monotonicity, namely, there is no guarantee for the conclusion, which can be changed if we add some other different premises.

There are other families of logics (v.g., intuitionistic logics, etc.), but the indicated ones are enough to show that logics is not a unique notion, and by no formal means we are able to give an account of its unity (Gabbay D.M., 2014) without metaphysic commitments (León Untiveros, 2014).

Another remark: logics does not work anymore only with the Aristotelian bivalent truth value. As we see above, for example, multivalent logics deals with propositions which are neither true nor false. And, ironically, this is the case of imperatives. Therefore, their lack of bivalent truth value is not a real reason to reject a logic for imperatives.

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[4] Cf. (da Costa & Bueno, 2009) (da Costa, Krause, Becker Arenhart, & Schinaider, 2012).

2.2. *Hegemony of classical logic?*

As we said before there are two Jørgensen's papers with the same subject: one in English entitled "Imperatives and Logic" and the other in Danish "Imperativer og Logik", which means the same in English, even though both of them were issued in the same year, 1938, however, they are different by their content[5]. In his Danish paper, Jørgensen mentions modal logic only to discard it (Jørgensen, 1999 [1938], p. 211), this strategy is fundamental for his argumentation in favor of Horn 2. This implicates hegemony of classical logic over non-classical logic. Is this Jørgensen's content tenable nowadays? By 1938, C.I. Lewis and C.H. Langford (1932) have proposed a system of modal logic, and since the end of the nineteenth century many-valued (or, multivalued) logics has been proposed by the Scotsman High McColl (1837-1909), the American Charles Sanders Peirce (1839-1914), the Russian Nicolai A. Vasil'év (1880-1940) and the Polish Jan Łukasiewicz (1878-1956)[6].

However, empiricist positivists were very influenced by David Hilbert's metamathematics (Milkov, 2013, pp. 20-24), which can be summarized by Hilbert's dictum: "in mathematical matters there should be in principle no doubt; it should not be possible for half-truths or truths of fundamentally different sorts to exist". (Hilbert, 1996 [1922], p. 1117). For Hilbert, the axiomatic method does not need other laws of logic apart of Aristotelian ones (Hilbert, 1967 [1925]).

In the current situation of logic, there is no serious way to claim the hegemony of classical logic against deviant logics. The recent proposal, like Graham Priest's ones, (2003), (2006, pp. 194-209), fails, as showed by (Estrada-González, 2009) and (León Untiveros, 2014). As we said in our indicated paper, the geometric analogy as an argument in favor of the unity of logic is not tenable, because of in logic it does not occur as in geometry in which the formal relationship between geometries (Euclidean and non-Euclidean) is ontologically neutral. On the contrary, in logic there is an ontological commitment. The idea of a syntactic inter-

[5] We took notice of this very important information from (Alarcón Cabrera, 1999), the Danish paper is partially translated into Spanish by Erling Strudsholm, Amedeo G. Conte and Carlos Alarcón Cabrera (Jørgensen, 1999 [1938]).

[6] For a beautiful history of many-valued logic see (Rescher, 1969).

section of Priest or the a priori common elements idea, are not effective arguments in favor of geometric analogy.

On the other hand, it can be seen that multivalent logics is a generalization of classical logic (especially, in its semantics, because it goes from a bivalency to an n-valency, where $n \geq 2$). And, the same can be said of modal logic, where modal logic is a generalization of classical logic. Despite of these facts, we do not mean that we must give up classical logic, mostly because it is the logic for mathematics, even though not for ordinary language.

2.3. A non-classical concept of logical consequence

Jørgensen says that the relation between the premises and the conclusion of an argument is a logical consequence one, by which he understand "the conclusion follows logically from the premises (that is, it is logical consequence of premises) if and only if it is excluded the possibility that the premises are true and the conclusion is false" (Jørgensen, 1999 [1938], p. 211). This is the classical concept of logical consequence developed by Tarski (1983 [1935]).

However, since the works of Dov M. Gabbay (1985) and on, the concept of logical consequence has changed, in order to give a proper account of the use of arguments in Artificial Intelligence and Computer Science. Thus, it has appeared a new property for logical consequence, and this is known by non-monotonicity. This name is not much appropriate because it could give the misleading idea of a mere lack of monotonicity[7], but this is not the case. In the logical literature, there are, at least, two non-classical notions of monotonicity[8]. Let us see,

Classical logic Classical Monotony $((\Sigma \subseteq \Delta) \wedge (\Sigma \vdash \Gamma)) \Rightarrow (\Delta \vdash \Gamma)$
Non-monotonic logics Rational Monotony[9] $((\Delta \nvdash \neg\varphi) \wedge (\Delta \vdash \psi)) \Rightarrow ((\Delta \wedge \varphi) \vdash \psi)$
Cautious Monotony $((\Delta \vdash \varphi) \wedge (\Delta \vdash \psi)) \Rightarrow (\Delta \wedge \varphi) \vdash \psi)$

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[7] See (Antonelli, 2005) among others.

[8] This remark was noted by professor Dr. Marino Llanos in personal conversation.

[9] Rational monotony is not accepted for a suitable non-classical relation of logical consequence, because it has a counter example, for a brief explanation see (Antonelli, 2005, pp. 7-9) and (León Untiveros, 2015, numeral 2.3.

Roughly, classical monotony says that no matter what else we learn, we must conclude the same proposition. Therefore, the conclusion is guaranteed. This warrant only needs that the original set of premises Σ is included in another set Δ, and nothing else matters.

On the contrary, for example, with a cautious monotony, the conclusion ψ is guaranteed if and only if from the set of premises Δ follows logically φ and ψ, independently.

For example, let us consider a set of premises, say, Σ, from which follows a conclusion ψ. Then, we learn something else different, say φ. If we work with classical monotony, we must conclude that from Σ and φ follows ψ, that is,

$$((\Sigma \vdash \psi) \wedge \Sigma \subseteq \{\Sigma, \varphi\}) \Rightarrow \{\Sigma, \varphi\} \vdash \psi$$

In classical logic, it does not matter the content of the new information, φ. Even, this could be contrary to ψ, i.e., $\neg\psi$, and from a classical logical point of view the conclusion ψ follows correctly from the premises. This is because classical monotony requires only one condition: that the original set of premises should be a subset of the new one, i.e., $\Sigma \subseteq \{\Sigma, \varphi\}$.

In the case of cautious monotony, there is a more restricted condition, which requires that the new premise φ should be the logical consequence from the original set of premises Σ, i.e., $\Sigma \vdash \varphi$.

2.4. The fluid relationship between reason and logic

In textbooks, the defined aim of logic is to evaluate correctness of any argument, and it is done, mostly, by classical or mathematical logic and chapters about analogy and induction are considered as a kind of argument which validity cannot be settled by logical means.

Once we accept this conception of logic, we must content that any argument (or reasoning) which do not fulfill this restriction, is not logical or at most it is just a fallacy, despite its plausible appearance.

Underlying this conception of the task of logic, there is the idea that logic has a prior status against reason, this tradition or paradigm can be traced back to Kant. In the preface of the second edition of Critique of

Pure Reason, the German philosopher says: “But I can think whatever I like, as long as I do not contradict myself, i.e., as long as my concept is a possible thought”, (Kant, 1998 (1789), pp. 115, Bxxvi). However, this is no more tenable in the light of current logic (especially, because of the case of paraconsistent logics).

Nowadays the relation between reason and logic is fluid, a kind of mutual and progressive adjustment[10]. That is the lesson caused by the discovery of deviant logics. So, when we have to evaluate the correctness of a reasoning, classical logic is not the only option, there are a bunch of logical alternatives, each one with a set of special features that must be evaluated according to our goals, that is, the features of the specific reason we want to emphasize, idealize, and analyze.

Therefore, is not tenable anymore the thesis that logic is prior before which a reasoning must be judge, logic is not a tribunal for reason. That means the relation between them are bilateral, logic and reason interact mutually, without priority. This situation arises the question about reason and its relation to logic, however, this is not the place to try this very interesting subject. Following Miró Quesada Cantuarias, we only can say that logic is like reins which prevent reason unbolts itself (Miró Quesada Cantuarias, 1963).

3. Features of imperative reasoning

Legal and moral reasoning have specific features which make them different from mathematical reasoning. The most important are: graduality, inconsistency, and defeasibility. Graduality is given by the notions like light, moderate and serious interference with rights[11]. Inconsistency is given by conflict of moral duties[12]. And, defeasibility is giv-

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[10] (Bôcher, 1905, pp. 119-120) (Gabbay & Woods, 2008), among others.

[11] This feature can be dealt by fuzzy logic (Mazzarese, 1993), (Miró Quesada Cantuarias, 2000), among others.

[12] Thus, the famous Sartre’s example: a French student during the Second World War who felt for reasons of patriotism and vengeance (his brother had been killed by the Germans) that he ought to leave home in order to join the Free French, but who felt also, for reasons of sympathy and personal devotion, that he ought to stay at home in

en by legal prescription of extinction of legal action because the occurrence of a lapse of time, such that before that, it could be drawn as the conclusion that someone is guilty, but this could be not the case anymore after the occurrence of a lapse of time.

This three features of legal and moral reasoning are very important, and sadly, classical logic could not provide an adequate answer (Horty, 1997), (Ausín, 2005).

Defeasibility is better dealt by non-monotonic logic. Contrary to what some important legal scholars claim, for example (Alexy, 2000), classical logic is not a suitable alternative for legal reasoning. We will see closely the example given by Alexy to show that classical logic is adequate to modelling legal reasoning:

Let propositions p, q, r be:

p: Bob kills Peter,
q: Bob goes to jail,
r: Bob acts in self-defence.

The premises are:

1. $p \Rightarrow q$
2. $p \wedge r \Rightarrow \neg q$
3. $p \wedge r$

From here, by classical laws of logic, we derive the following, as Alexy does (Alexy, 2000).

4. $q \Rightarrow \neg(p \wedge r)$ 2, Law of Contraposition
5. $\neg q$ 3, 4, Modus tollens

Here is where Alexy stops. He believes it is enough and he gets what we consider just a correct conclusion, That is, ¬q, which means "Bob does not go to jail". However, from a logical point of view, the set of consequences (Cn) from a set of premises (A) are the whole con-

order to care for his mother. Horty proposes a non-monotonic solution for this case (Horty, 1997).

clusions (or propositions, x) which logically follows from the premises, that is, $Cn(A) = \{x \mid A \vdash x\}$[13]. Thus, we can obtain

6.	p	3, Simplification
7.	q	1, 6 Modus Ponens
8.	$q \wedge \neg q$	5, 6 Adjunction. [ABSURD]

Line 8 is an absurd (i.e., a contradiction). And, this contradiction is necessarily obtained because of the use of classical logic. However, contradictions could be dealt if we use nonmonotonic logics. Let us see this very roughly:

The premises are:

1. $p \Rightarrow q$
2. $p \wedge r \Rightarrow \neg q$
3. $p \wedge r$

We introduce here the revision operator *

At first, we have an initial set of set of premises

$K = \{1, 2\}$

But then, it happens 3, the question is to avoid contradiction if we add 3 to K. This operation of revision is formulated as

$K*3$

By definition

$K*3 \coloneqq (K \div \neg q)+3$[14]

The result is

$*K*3 = \{2, 3\}$

---

[13] Cf. (Makinson, 2005, p. 4).

[14] "÷" means the operation of contraction, and "+" means the operation of expansion. For details see (Hansson, 1999).

Then, we infer

4. $\neg q$ 2, 3 MP.

Thus, we do avoid contradiction and we have used correctly a non-classical concept of logical consequence.

4. A mere syntactical solution?

In his Danish paper, Jørgensen just mentions a possible syntactic solution. But, is standard deontic logic an adequate syntactical solution? Roughly, its axiomatization looks like the following[15]:

Deontic operators: $\bigcirc$ (obligated), P (permitted), F (forbidden).
We take as the primitive concept: $\bigcirc$.
The other deontic operators are defined in the following way:
$Pp := \neg\bigcirc\neg p$
$Fp := \bigcirc\neg p$

Thus, the axiom schemes are:

(A0) All tautologies from propositional calculus.
(A1) $\bigcirc p \Rightarrow Pp$ [Bentham's o Leibniz's Law]
(A2) $\bigcirc(p \Rightarrow q) \Rightarrow (\bigcirc p \Rightarrow \bigcirc q)$ [K-deontic axiom]

And the inference rules are:

(MP) $p \Rightarrow q, p / q$
(DNR[16]) $p / \bigcirc p$ ($\bigcirc$-necessitation)

Standard deontic logics has a formal semantics, but here we focus only on its syntactic side[17].

[15] We follow (Ausín, 2005, pp. 40-41).

[16] Deontic necessitation rule.

[17] As we said before, the semantics for standard deontic logic is the so-called "possible worlds" semantics. The model for this case is the triple

The underlying logic beyond this axiomatization is the so-called Dubislav convention[18], which states

> (DC) An imperative F is called derivable from an imperative E if the descriptive sentence belonging to F is derivable with the usual methods from the descriptive sentence belonging to E, whereby identity of the commanding authority is assumed (Dubislav, 1938).

Let !A, !B be imperatives, its corresponding descriptive sentences are A, B. Dubislav convention has the following graphical shape (Hansen, 2008, p. 9):

> The transformation !A $\rightsquigarrow$ A reflects the analogy between norms and norm-propositions in order to use classical logic. This is presupposed in standard deontic logic, and it caused many shortcomings like the contrary-to-duty paradox[19], Ross' paradox[20], among others[21].
> The relation between A, B, is of logical consequence, $A \vdash B$, i.e., there is a finite sequence of statements where each statement in the list is either an axiom or the result of applying a rule of inference to one or more preceding statements. The final statement is the conclusion of the proof.

$\mathcal{M} = \langle W, R, V \rangle$

Where

(i) W is a non-empty set (heuristically, of 'possible worlds' or 'possible situations').

(ii) $R \subseteq W \times W$ (a binary relation on W, heuristically, of "deontic alternativeness" or "copermissibility").

(iii) V is an assignment, which associates a truth-value 1 or 0 with each ordered pair (p, x) where p is a proposition letter and x is an element of W; that is, V: Prop x $W \rightarrow \{1,0\}$.

[18] After the German logician, philosopher of science, logical empiricist, Walter Dubislav (1895 – 1937).

[19] This paradox states:

1. It ought to be that a certain man goes to assistance of his neighbors.
2. It ought to be that if he does go, he tells them he is coming.
3. If he does no go, then he ought not to tell them he is coming.
4. He does not go.

Therefore, he ought to come and he ought not to come.

[20] This paradox states: take the imperative 'Post the letter!' then use this method to derive the imperative 'Post the letter or burn it!'.

[21] For a comprehensive list of problems in deontic logic see (León Untiveros, 2015).

The transformation !A ⇝ A is a subject of the deontic necessitation rule, which states by decree the transformation of a descriptive sentence into an imperative sentence.

The trick question is the notion transforming a descriptive sentence from an imperative F. DC does not explain how we can proceed formally. Thus, the notion of transforming is not clear.

Besides, DC does not explain how we can derive (transform) an imperative E from a descriptive sentence. This question is the famous is-ought problem, raised by David Hume, and standard deontic logic solves it by decree.

On the other hand, as we saw before, Jørgensen considers "the conclusion follows logically from the premises (that is, it is logical consequence of premises) if and only if it is excluded the possibility that the premises are true and the conclusion is false" (Jørgensen, 1999 [1938], p. 211). This is the semantic conception of logical consequence (also called model-theoretic), but there is another account of logical consequence, a syntactical one (also called proof-theoretic) which was first proposed by Gerhard Gentzen in 1935, according to which the meaning of a logical connective is defined by its introduction rules (while the elimination rules are justified by respecting stipulation made by the introduction rules). Thus, a formula B is a consequence of another A by virtue of the inferential meaning of logical connectives (Caret & Hjortland, 2015, p. 8). So, we do not need any valuation of truth. Some scholars, like (Read, 2015), even claim that analytically valid arguments may yet fail to be truth preserving[22].

Therefore, the syntactical line opened by the proof-theoretic conception of logical consequence represents an alternative possibility for a (maybe) suitable account of imperative reasoning. Thus, we think Horn 2 is not tenable anymore, at least, it is not as strong as it was in 1938.

[22] Nowadays, there is an intense revision of the task of logical consequence because: (i) model-theoretic consequence preserves truth-in-a-model, but this a theoretic construct that is not necessarily a good model of truth simpliciter; (ii) with the popularity of many-valued logic it is commonplace to talk about preservation of designed values rather than just the truth value true; and (iii) it is not clear that consequence is best understood in terms of preservation of truth values, or at least not as preservation of truth values alone. Perhaps, consequence requires preservation of warrant, or a relevance relation between the content of the premises and the content of the conclusion, such as variable sharing (Read, 1988), (Restall, 2009), (Caret & Hjortland, 2015, pp. 15-16).

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